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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMADOR COUNTY, CALIFORNIA Plaintiff, vs. **DIRK A. KEMPTHORNE**, et al., Defendants.	) CIVIL ACTION NO.: 1:05-cv-658 (RWR)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNITED STATES' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, defendants Dirk A. Kempthorne, in his official capacity as Secretary of the Interior Department ("Secretary"), Carl J. Artman, in his official capacity as Assistant Secretary-Indian Affairs, and the United States Department of the Interior (collectively, "United States"), respectfully submit this memorandum of points and authorities in support of their motion to dismiss plaintiff Amador County's ("County") first amended complaint. The amended complaint contains

additional factual allegations and two additional Counts (Counts VII and VIII) that do nothing to cure the defects of the County's original complaint. Count VIII is identically worded to Count VI and is, thus, redundant to the County's original assertion that the Buena Vista Rancheria does not qualify as "Indian lands" under the Indian Gaming Regulatory Act ("IGRA"). Accordingly, Count VIII does not set forth any new basis for relief and must be dismissed for the reasons presented in the United States' memorandum in support of its initial motion to dismiss and renewed herein. The new factual allegations, amended complaint ¶¶ 38-56, appear to relate to the County's contention in Count VII that there was no "historical tribal presence" at the Buena Vista Rancheria. Even assuming that these new allegations are accurate, which the United States does not concede, they are, in any event, legally irrelevant. As before, the County lacks standing and the claims it asserts are not subject to review under the Administrative Procedure Act ("APA"). In addition to these jurisdictional deficiencies, the amended complaint fails to state any claim upon which relief can be granted. The United States, therefore, requests that the County's amended complaint be dismissed.

Introduction

In the Fall of 2004, the Buena Vista Rancheria of the Me-Wuk Indian Tribe ("Tribe") – a federally recognized tribe – submitted an amended version of its original gaming compact with the State of California ("Amended Compact") to then Secretary Norton for her discretionary approval. Rather than act on the Amended Compact, the Secretary exercised her discretion to take no action, which resulted in the Amended Compact being deemed approved to the extent it is consistent with federal law. Under IGRA, 25 U.S.C. §§ 2701-2721, the Secretary has forty-five (45) days from the submission of a tribal-state compact, or compact amendment, to act

affirmatively. Absent secretarial approval or disapproval within the statutory time frame, IGRA provides that such compacts take effect by operation of law. 25 U.S.C. § 2710(d)(8)(C) (2000).

Amador County challenges the Secretary's inaction under the APA, 5 U.S.C. §§ 701-706, notwithstanding that the Secretary's decision to take no action on the Amended Compact is a matter committed to agency discretion by law. 5 U.S.C. § 701(a)(2) (2000). Moreover, the County lacks standing to sue. In addition to these jurisdictional flaws, the County advances claims upon which no relief can be granted. Specifically, the County argues that in allowing the Amended Compact to become federally effective, the Secretary violated IGRA's requirement that Class III Indian gaming take place on "Indian lands" as defined by the Act, as well as a state law timing technicality not encompassed by IGRA.

As the United States will demonstrate, the County's amended complaint rests on highly conjectural future injuries against which the County has protection through the Amended Compact itself. Moreover, the amended complaint misstates the Secretary's role under IGRA and misconstrues the Act's Indian lands definition in relation to the Buena Vista Rancheria. On the latter point the County patently ignores a final stipulated judgment entered by the district court for the Northern District of California, to which the County and the United States are bound. See Attachment A (Stipulation for Entry of Judgment (Amador County), Hardwick v. United States, No. C-79-1710 SW (N.D. Cal. filed 1979). The Hardwick Stipulation for Entry of Judgment concluded between Amador County and Indians of the Buena Vista Rancheria expressly acknowledges the Rancheria's status as "Indian Country," and that the Rancheria "shall be treated by the County of Amador and the United States of America, as any other federally recognized Indian reservation. Attachment A at 4 (emphasis added). Finally, the

County's attack on the Amended Compact's effectiveness is fundamentally at odds with the interests of the non-tribal party to the Compact, the State of California, of which the County is a political subdivision. See Amended Compl. ¶ 2. Notably, the State of California is not a party to this suit. The County's amended complaint must be rejected as contrary to Congress's policy to foster tribal economic development through federally-regulated and state-compacted Indian gaming, and Congress's intent to commit compact approval to the full discretion of the Secretary.

Statutory Background

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, was enacted in the wake of the Supreme Court's decision in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). In Cabazon the Court held that under Public Law 280, 18 U.S.C. § 1162 (2000), and 28 U.S.C. § 1360 (2000), a tribe could operate games that were not generally prohibited by the state where the tribe was located, but that state laws regulating gaming could not be enforced on Indian reservations without Congress's express consent. Cabazon, 480 U.S. at 207-10, 221-22. Because federal law at that time did not provide "clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3) (2000), Cabazon left Indian gaming free of federal or state regulatory involvement. In response, Congress enacted IGRA in an attempt to, *inter alia*, provide a regulatory structure for Indian gaming, promote tribal economic development, self-sufficiency and self-government, and protect Indian tribes from corrupting influences such as organized crime. 25 U.S.C. § 2702 (2000).

IGRA applies only to federally recognized tribes, 25 U.S.C. § 2703(5) (2000), and governs gaming on "Indian lands," which are defined as "all lands within the limits of any Indian

reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." § 2703(4).

IGRA divides gaming into three classes, each subject to differing levels of state, tribal and federal regulation. Class I consists of social games with prizes of minimal value and traditional Indian games that are part of tribal ceremonies or celebrations. § 2703(6). Indian tribes are granted the exclusive authority to regulate these activities. 25 U.S.C. § 2710(a)(1).

Class II gaming consists of two basic categories: (1) bingo and variants thereof, and (2) card games that are explicitly authorized by state law or are not explicitly prohibited by state law and are played in the state. § 2703(7). Tribes may conduct Class II gaming in any state that "permits such gaming for any purpose by any person, organization, or entity," so long as the particular gaming activity is not otherwise specifically prohibited on Indian lands by federal law. Id. § 2710(b)(1)(A). Class II gaming is subject to tribal regulation, § 2710(a)(2), and to federal oversight by the National Indian Gaming Commission ("NIGC").[1] § 2710(b), (c).

Class III gaming is any form of gaming that is not Class I or Class II. § 2703(8). Slot machines are Class III games, as are casino games (such as baccarat, blackjack, roulette, and craps) and sports betting, parimutuel wagering, and lotteries. 25 C.F.R. § 502.4 (2007). A tribe may engage in Class III gaming only if (1) it has a governing ordinance approved by the NIGC;

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[1] The NIGC was established by IGRA, 25 U.S.C. §§ 2702(3), 2704(a), and is composed of three full-time members, including a Chairman, appointed by the President with the advice and consent of the Senate, and two associate members, appointed by the Secretary of the Interior. Id. §§ 2704(b)(1)(A) & (B).

(2) the state "permits such gaming for any purpose by any person, organization, or entity;" and (3) the tribe and the state enter into a compact approved by the Secretary of the Interior to govern the conduct of such gaming. 25 U.S.C. § 2710(d). Class III gaming is regulated by the tribe, the state, and the federal government. Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 721-22 (9th Cir. 2003).

A tribe wishing to establish a Class III gaming operation may initiate the compacting process by requesting the state to enter into negotiations. § 2710(d)(3)(A). Thereafter, the state is to "negotiate with the Indian tribe in good faith to enter into such a compact." Id.[2] If a state and tribe reach agreement on a compact, the compact is submitted to the Secretary who must approve or disapprove the compact within 45 days, otherwise it is deemed approved "to the extent [it] is consistent" with IGRA. § 2710(d)(8)(C). The Secretary may disapprove a compact only if it violates IGRA, other provisions of federal law, or the United States' trust obligations to Indians. § 2710(d)(8)(B). A gaming compact, if approved or deemed approved, takes effect when notice is published in the Federal Register pursuant to § 2710(d)(3)(B) of IGRA.

Factual Background

In 1999, pursuant to IGRA, the Buena Vista Tribe sought a Class III tribal-state gaming compact with the State of California. In October of that year, the Governor of California approved the first Class III gaming compact between the Tribe and the State of California. The Secretary approved the compact effective May 15, 2000. 65 Fed. Reg. 31,189 (May 16, 2000).

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[2] IGRA's scheme originally provided for tribes to compel recalcitrant states to enter into compacts by bringing actions in federal district court. See, e.g., § 2710(d)(7)(A)(i). After the Supreme Court determined in Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996), that a state can assert its Eleventh Amendment immunity to avoid such a suit by a tribe, the process now takes place under 25 C.F.R. § 291 (2007).

Five years later, the Tribe and the State negotiated mutually beneficial amendments to their original compact.

The Amended Compact was signed by the Governor of California on August 23, 2004, and ratified by the California Legislature on August 27, 2004. Thereafter, the Tribe forwarded the fully executed and validly entered Amended Compact to the Secretary for approval. Secretary Norton exercised her statutory discretion to neither approve nor disapprove the Amended Compact within the 45-day statutory review period.[3] Therefore, the Amended Compact was deemed approved by operation of law upon expiration of the review period. As required by IGRA, Notice of Approval of the Amended Compact was published in the Federal Register.[4] See 69 Fed. Reg. 76,004 (Dec. 20, 2004).

The Amended Compact allows the Tribe to offer expanded gaming at a prospective casino, and contains provisions for increased revenue sharing with the State of California. The Amended Compact also requires that the Tribe identify all potential off-reservation impacts of its proposed gaming facility and then enter into negotiations with Amador County to mitigate these impacts to the extent practicable. The proposed gaming would occur solely within the boundaries of the Buena Vista Rancheria, which, the NIGC has opined, qualifies as "Indian lands" under IGRA. See Attachment B (Letter from Penny J. Coleman, NIGC Acting General Counsel, to Judith Kammins Albietz, Esq. (June 30, 2005)).

Review Standards

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for

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[3] See 25 U.S.C. § 2710 (d) (8) (C).

[4] See 25 U.S.C. § 2710 (d) (8) (D).

dismissal based upon the "lack of subject-matter jurisdiction," though the Court has an "independent duty to establish subject-matter jurisdiction." Simpson v. Socialist People's Libyan Arab Jamahiriya, 362 F. Supp. 2d 168, 175 n.3 (D.D.C. 2005), aff'd, 470 F.3d 356 (2006). In evaluating a motion to dismiss under Rule 12(b)(1), "a court must construe the allegations in the complaint in the light most favorable to the plaintiff." Scolaro v. D.C. Bd. of Elections & Ethics, 104 F. Supp. 2d 18, 22 (D.D.C. 2000), aff'd, 2001 WL 135857 (D.C. Cir. Jan. 18, 2001).

Rule 12(b)(6) provides that a dismissal motion may be based upon a failure "to state a claim upon which relief can be granted." Generally, a complaint should not be dismissed for failure to state a claim so long as claims are adequately stated and supported by facts consistent with the complaint's allegations. Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1968-69 (2007). Under this standard, the Court normally accepts the allegations of the complaint as true and resolves ambiguities in favor of the pleader. Scolaro, 104 F. Supp. 2d at 22; Dickson v. United States, 831 F. Supp. 893, 896 (D.D.C. 1993); Doe v. U.S. Dep't of Justice, 753 F.2d 1092, 1102 (D.C. Cir. 1985).

There are, however, several exceptions to the general rule of construing allegations as true and in a manner that favors the plaintiff. The Court is not required to draw argumentative inferences in favor of the pleader. Yamaha Motor Corp. v. United States, 779 F. Supp. 610, 611 (D.D.C. 1991). Moreover, only well-pleaded facts are required to be accepted as true. Blackburn v. Fisk Univ., 443 F.2d 121, 124 (6th Cir. 1971). Facts that are internally inconsistent within the pleadings, facts that run counter to facts of which the Court can take judicial notice, and conclusory allegations and unwarranted deductions of fact are not accepted as true. Gersten v. Rundle, 833 F. Supp. 906, 910 (S.D. Fla. 1993), aff'd, 56 F.3d 1389 (11th Cir. 1995), cert.

denied, 516 U.S. 1118 (1996); Associated Builders, Inc. v. Ala. Power Co., 505 F.2d 97, 100 (5th Cir. 1974); see also Emery v. United States, 920 F. Supp. 788, 790 (W.D. Mich. 1996) (holding court need not accept unwarranted factual inferences); Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987); Olpin v. Ideal Nat'l Ins. Co., 419 F.2d 1250, 1255 (10th Cir. 1969) (deciding court need not accept mere legal conclusions or factual claims at variance with express terms of instrument attached to complaint as exhibit and by reference made part thereof), cert. denied, 397 U.S. 1074 (1970);

Finally, while a court may convert a motion to dismiss into a motion for summary judgment if the court looks to matters outside the complaint, Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993), there are exceptions to this practice. When considering a motion to dismiss under Rule 12(b)(6), a court "may consider only the facts alleged in the complaint, any documents attached to or incorporated in the complaint and matters of which the [the Court] may take judicial notice." United States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251, 1257 (D.C. Cir. 2004) (citing EEOC v. St. Francis Xavier Parochial Sch., 117 F.3d 621, 624-25 (D.C. Cir. 1997)) (alteration in original). A court may take judicial notice of matters in the general public record, including records and reports of administrative agencies, without converting a motion to dismiss into one for summary judgment. Am. Farm Bureau v. EPA, 121 F. Supp. 2d 84, 106 (D.D.C. 2000) (citing Black v. Arthur, 18 F. Supp. 2d 1127, 1131 (D. Or. 1998)); see also Covad Commc'ns Co. v. Bell Atl. Corp., 407 F.3d 1220, 1222 (D.C. Cir. 2005) (taking "judicial notice of facts on the public record" in reaching its decision to deny petition for rehearing) (quoting Marshall County Health Care Auth., 988 F.2d at 1228).

The mere fact that a court is provided with materials outside of the complaint for consideration on a 12(b)(6) motion does not require its conversion into a motion for summary judgment. A court may exclude such materials from consideration when ruling on a dismissal motion, and no conversion would be required. Jane Lyons Adver., Inc. v. Cook, 1998 WL 164775, at *2 (D.D.C. March 31, 1998).[5]

ARGUMENT

I. THE COUNTY HAS NOT ESTABLISHED STANDING TO CHALLENGE THE IGRA § 2710(d)(8)(C) APPROVAL OF THE COMPACT AMENDMENT

The County's amended complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(1) for failure to establish standing to bring this challenge. A party invoking federal jurisdiction has the burden of demonstrating its standing which is a threshold jurisdictional prerequisite. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies. U.S. Const. art. III, § 2. To establish Article III standing, a plaintiff must satisfy each of three requirements:

> First, he must demonstrate "injury in fact" – a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical." Second, he must establish causation – a fairly . . . trace[able]" connection between the alleged injury in fact and the alleged conduct of the defendant. And third, he must demonstrate redressability – a "substantial likelihood"

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[5] A court is not required to convert a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction into a motion for summary judgment, as it might be in the context of a 12(b)(6) motion. Because the factual allegations surrounding the subject matter may require closer examination in order to determine if the court has subject matter jurisdiction, a court may consider material outside the pleadings without converting the motion to dismiss to one for summary judgment. See Pueblo of Sandia v. Babbitt, 1996 WL 808067, at *3 (D.D.C. Dec. 10, 1996); McGarry v. Sec'y of the Treasury, 656 F. Supp. 1034, 1037 (D.D.C. 1987).

> that the requested relief will remedy the alleged injury in fact. These requirements together constitute the "irreducible constitutional minimum" of standing, which is an "essential and unchanging part" of Article III's case-or-controversy requirement and a key factor in dividing the power of government between the courts and the two political branches . . . .

Vt. Agency of Natural Res. v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (citations omitted). The analysis of standing is "a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief." Nat'l Wildlife Fed'n v. Hodel, 839 F.2d 694, 703-04 (D.C. Cir. 1988). Further, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish." Lujan, 504 U.S. at 562 (citation omitted).

A. The County's allegations regarding possible adverse impacts from a proposed casino development do not constitute injury in fact.

The County alleges that "if constructed," the Tribe's casino project would have significant detrimental impacts on the County. Amended Compl. ¶ 26. There is presently no guarantee that the casino project will be built or that once built it will result in injury to the County. For example, the Tribe may lose funding, decide not to proceed with the project or construct a smaller project. Given the uncertainties and potential for changed circumstances, the County's assertion of injury is mere speculation rather than injury-in-fact. The Supreme Court has noted that "[a]llegations of possible future injury do not satisfy the requirements of Art. III. A threatened injury must be certainly impending to constitute injury in fact." Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (internal quotations omitted); accord Lujan, 504 U.S. at 560 (holding that Article III requires allegation of injury that is "actual or imminent, not conjectural or hypothetical") (internal quotations omitted).

The County has not stated injury in fact. Instead, it alleges speculative future injuries that are not certain to result from the approval, by operation of law, of the Amended Compact. Fear of future injury can only form a basis for standing where injury is "certain to ensue." See Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994). No injury advanced by the County is certain to ensue. Rather, the amended complaint describes in the conditional tense the impacts a casino "would have" on the County. Amended Compl. ¶¶ 26, 27. The County describes hypothetical impacts on public safety resources, public education, local infrastructure, the environment, traffic, and general quality of life in support of the requested relief. The Amended Compact specifically contemplates mitigation of adverse impacts.[6] As the County itself acknowledges, its alleged injuries would only occur "if [the casino project] is constructed and becomes operational." Amended Compl. ¶ 26. These impacts, however, are all contingent upon the construction and operation of a casino that does not include mitigation measures. Impacts that depend upon the occurrence of a future event that may not come to pass are conjectural at best and are certainly not "impending." This Court's jurisdiction cannot be sustained on the basis of allegations that plainly fall short of the "actual or imminent, not conjectural or hypothetical" harms required by standing case law. Lujan, 504 U.S. at 560.

The County's amended complaint completely ignores the protections afforded by the Amended Compact itself. Specifically, the new Compact contemplates that the County and Tribe will negotiate with each other regarding the nature and scope of the casino project. The revised Compact calls for the Tribe to identify all negative off-reservation impacts of a gambling

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[6] Section 10.8.8 of the Amended Compact. The Amended Compact is available at http://www.cgcc.ca.gov/compacts/buena_vista%20compact.pdf.

operation and to negotiate mitigation measures with the County. Section 10.8 of the Amended Compact requires that the Tribe draft a Tribal Environmental Impact Report ("TEIR") that lists all significant off-reservation impacts of the casino project, including all feasible mitigation measures. Pursuant to section 10.8.8, the Tribe must then offer to negotiate with the County, and upon the County's acceptance of the offer, the Tribe must enter into an enforceable written agreement respecting possible adverse impacts on the County. Impacts required to be resolved in the negotiations include the increased utilization of public safety resources, such as law enforcement, fire protection and emergency medical services, the increased need for public services such as education; heightened demand for infrastructure, environmental effects and traffic increases, and the increased frequency of gambling addiction.[7] Thus, the Amended Compact already adequately provides for thorough mitigation of the feared injuries advanced by the County. The requirement of, and the reality of, Tribe-County negotiations covering the scope and impacts of a future casino project completely contradict the County's contention of certain injury.

The County cannot rely on its request for declaratory relief to avoid establishing injury-in-fact or the other requisites of standing. To survive a motion to dismiss in a declaratory judgment action, which the instant action is in part, the complaint must identify a case or controversy under Article III of the Constitution involving the defendant. Pub. Serv. Comm'n v. Wycoff Co., 344 U.S. 237, 239-40 (1952). Courts must dismiss declaratory actions for failing to

[7] Pursuant to the mitigation and negotiation requirements of the Amended Compact, the County and Tribe have been engaged in comprehensive negotiations over the mitigation of potential off-reservation impacts. Not only have the County's feared injuries not yet materialized, the County's own role in shaping the direction of the project underscores the uncertainty and conjectural nature the alleged injuries.

state a case or controversy when the plaintiff presents no more than "[t]he mere possibility or even probability that a person may be adversely affected in the future by official acts." Dawson v. Dep't of Transp., 480 F. Supp. 351, 352 (W.D. Okla. 1979) (granting Rule 12(b)(6) dismissal of declaratory judgment action seeking to declare proposed landfill a hazard when no permit had yet been issued) (citing Garcia v. Brownell, 236 F.2d 356, 358 (9th Cir. 1956)); see also Norvell v. Sangre de Cristo Dev. Co., 519 F.2d 370, 375-78 (10th Cir. 1975) (finding trial court lacked jurisdiction over declaratory judgment action related to lease when status of lease was in "limbo"); Lippi v. Thomas, 298 F. Supp. 242, 245-56 (M.D. Pa. 1969) (granting 12(b)(6) dismissal of declaratory action when "no substantial controversy of sufficient immediacy and reality exist[ed]").

B. The County's alleged injury is not traceable to the Secretary's inaction within the statutory period.

An alleged injury satisfies the causation element of standing only if the plaintiff shows "a causal connection between the injury and the conduct complained of." Lujan, 504 U.S. at 560. This element is not satisfied when the asserted injury is the result of an independent action. Cf. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976). Here, the County cannot satisfy the causation element because its alleged future injuries are not fairly traceable to the Secretary's role in allowing the Amended Compact to be approved by operation of law.

C. The County's claims are not redressable.

Since the County's asserted injuries are conjectural and speculative rather than actual or imminent, they also are non-redressable. Redressability hinges on whether relief from the court "will likely alleviate the particularized injury alleged by the plaintiff." Fla. Audubon Soc'y v.

Bentsen, 94 F.3d 658, 663-64 (D.C. Cir. 1996). Moreover, here, the Secretary's inaction renders the County's claims nonredressable because there is nothing for the Court to review. As the district court of Wisconsin observed in deciding a similar case "[w]hen Congress says expressly that it wants [compact] amendments not approved within 45 days to be deemed approved, it has provided a remedy and left nothing for a court to review. The court cannot send the matter back to the agency for further consideration without interfering with the congressional scheme." Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton, 327 F. Supp. 2d 995, 999 (W.D. Wis. 2004) (dismissing claim because plaintiff lacked standing, APA did not afford judicial review of Secretary's failure to approve compact within 45 days, and plaintiff failed to join necessary and indispensable party), aff'd, 422 F.3d 490 (7th Cir. 2005) (explaining in dicta that plaintiff tribes had standing, but holding dismissal was correct because plaintiff tribes forfeited claim that APA affords judicial review of Secretary's decision).

The County would have this Court set aside the Secretary's inaction and ignore Congress's express determination that the Secretary has discretion to take no action on a tribal-state compact as well as Congress's provision for what is to happen in that circumstance. The Supreme Court in Seminole found that Congress had established an intricate scheme in IGRA that courts should avoid second-guessing. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 74-76 (1996); see also Block v. Cmty. Nutrition Inst., 467 U.S. 340, 348 (1984) (finding that allowance of consumer suits against the Secretary of Agriculture would severely disrupt "complex and delicate" administrative scheme at issue). This Court, therefore, should reject the County's effort to rewrite the manner in which Congress chose to address Secretarial inaction in the compact approval process.

II. THE COUNTY'S CLAIMS ARE NOT REVIEWABLE UNDER THE APA

Even assuming, *arguendo*, that the County could establish standing to maintain this suit, the determination to take no action on the Amended Compact was committed to the Secretary's discretion by law, and thus not subject to review under the APA.

It is well established that the United States is immune from suit except to the extent that it consents to be sued and that the terms of such consent define the scope of the court's jurisdiction. United States v. Mitchell, 445 U.S. 535, 538 (1980); United States v. Sherwood, 312 U.S. 584, 586 (1941); Tri-State Hosp. Supply Corp. v. United States, 341 F.3d 571, 575 (D.C. Cir. 2003). Thus, there can be no subject matter jurisdiction over the United States absent a specific statutory waiver of its sovereign immunity. Lehman v. Nakshian, 453 U.S. 156, 160 (1981). "The consent necessary to waive the traditional immunity must be express, and it must be strictly construed" in favor of the United States. Library of Congress v. Shaw, 478 U.S. 310, 318 (1986); see also Brown v. Sec'y of the Army, 78 F.3d 645, 649 (D.C. Cir. 1996) ("this rule of strict construction controls our analysis both in determining whether the United States has consented to be sued and in defining the scope of that consent"). The County cannot establish that its suit falls within the terms of the requisite waiver here.

The County invokes the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202 (2000), to seek relief against the Secretary in connection with the approval, by operation of law, of the Amended Compact between the Tribe and the State of California. Amended Compl. ¶¶ 1, 6. The Declaratory Judgment Act, however, does not waive the United States' sovereign immunity. Progressive Consumers Fed. Credit Union v. United States, 79 F.3d 1228, 1230 (1st Cir. 1996); Kennedy v. Rabinowitz, 318 F.2d 181, 186 (D.C. Cir. 1963) (Fahey, J., dissenting) (conceding

that Declaratory Judgment Act "is not a waiver of sovereign immunity"); Charles Alan Wright et al., Federal Practice and Procedure § 2766 (3d ed. 1988); see United States v. King, 395 U.S. 1, 5 (1969). Instead, that Act provides for remedies in cases "of actual controversy" (i.e. where plaintiff has established standing) otherwise within the court's jurisdiction. 28 U.S.C. § 2201(a); Schilling v. Rogers, 363 U.S. 666, 677 (1960); Morongo Band of Mission Indians v. California State Bd. of Equalization, 858 F.2d 1376, 1382 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989). Nor does the general federal question jurisdiction statute, 28 U.S.C. § 1331 (2000), which the County also relies on, provide a waiver of sovereign immunity. Swan v. Clinton, 100 F.3d 973, 981 (D.C. Cir. 1996); Fostvedt v. United States, 978 F.2d 1201, 1202-03 (10th Cir. 1992), cert. denied, 113 S.Ct. 1589 (1993).

Where no specific statute provides for review of an agency's actions, the APA authorizes review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704 (2000). Final agency action is not reviewable if "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); Heckler v. Chaney, 470 U.S. 821 (1985); Drake v. FAA, 291 F.3d 59, 70 (D.C. Cir. 2002). If a statute's delegation of decision-making authority to an agency is so complete that courts "have no legal norms pursuant to which to evaluate the challenged action, and thus no concrete limitations to impose on the agency's exercise of discretion," there is a lack of jurisdiction to review the agency's decision under the APA. Id. In such circumstances, §701(a)(2) of the APA "encodes the principle that an agency cannot abuse its discretion, and thus violate § 706(2)(A)," where the conferral of discretion is so broad "as to essentially rule out the possibility of abuse." Drake, 291 F.3d at 70. This Court looks to the nature of the agency action and the language and

structure of the statute to determine whether a matter has been committed solely to agency discretion. Id. (citing Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs, 104 F.3d 1349, 1353 (D.C.Cir. 1997)).[8]

Assuming, *arguendo*, that the decision to take no action on a gaming compact is "final agency action," it is committed to agency discretion by law and, therefore, is not reviewable under the APA. IGRA broadly authorizes the Secretary to approve gaming compacts, 25 U.S.C. § 2710(d)(8)(A) ("The Secretary is authorized to approve any Tribal-State gaming compact . . ."), and provides that the Secretary "may disapprove a compact" only if it violates IGRA, another federal law, or the United States' trust obligations to Indians. § 2710(d)(8)(B). However, the statute does not require the Secretary to approve or disapprove a compact. If, for example, the Secretary has policy or legal concerns with a compact that he wishes to reserve, or was too burdened to complete review and act within 45 days, IGRA provides that "the compact shall be considered to have been approved" to the extent it is consistent with IGRA. § 2710(d)(8)(C). In other words, IGRA grants the Secretary discretion to take no action on gaming compacts while providing no standard by which a court can measure the exercise of that discretion. Thus, "the statute at issue gives virtually unfettered discretion" to the Secretary to act

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[8] See also Lincoln v. Vigil, 508 U.S. 182 (1993) (rejecting challenge to administrative agency's allocation of funds from lump-sum appropriation, finding that action was committed to agency discretion to adapt to changing circumstances and meet its statutory responsibilities in most effective way); Webster v. Doe, 486 U.S. 592 (1988) (refusing to review merits of determination by Director of Central Intelligence Agency to terminate an employee in interests of national security); Achacoso-Sanchez v. INS, 779 F.2 1260 (7th Cir. 1985) (finding that agency decision not to reopen deportation proceedings to change deportable alien's status was virtually unreviewable); ICC v. Bhd. of Locomotive Eng'rs, 482 U.S. 270 (1987) (deciding agency refusal to entertain union's petition for review of administrative order exempting participants in rail consolidation from protection afforded railroad employees was committed to agency discretion).

as he did. See Drake, 291 F.3d at 71.

Viewed against the brief 45-day period to review the compacts, it is clear that Congress's intent was not to embroil the Secretary in lengthy investigations into whether the compact violated federal law, IGRA, or trust obligations. Rather, as the Court observed in Kickapoo Tribe of Indians v. Babbitt, 827 F. Supp. 37, 43 (D.D.C. 1993) (later reversed for the separate procedural issue of failure to join an indispensable party under Fed. R. Civ. P. 19), "Congress was greatly concerned that the Secretary might not pass on the compacts quickly" and therefore allowed for the compact to be deemed approved if the Secretary took no action in 45 days.[9] In addition, IGRA preserves the ability of parties to challenge subsequent agency action relating to Indian gaming, when a compact approved by operation of law violates IGRA. By stating that the compact will be approved "only to the extent the compact is consistent with the provisions of this Act," IGRA provides a check on compacts that are effectively approved by the Secretary through inaction but that are inconsistent with IGRA. The Secretary, however, has no duty to disapprove a compact in such an instance.

This Court previously has recognized the Secretary's discretion to take no action during the 45-day approval period. In Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49, 56-57 (D.D.C.

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[9] The sole congressional report in IGRA's legislative history does no more than describe the provisions of § 2710(d)(8). S. Rep. No. 100-446, at 19 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3089. However, the report shows that Congress "concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." Id. at 13. "The legislative history thus shows that Congress looked to the compacting process primarily as a means of balancing state and tribal interests." Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 726 (9th Cir. 2003). The Secretary's role in the compact process is limited, and Congress's decision to allow the Secretary to simply pass on approving or disapproving a compact is consistent with the overall statutory scheme.

1999), the Court acknowledged that the Secretary was not under an obligation to disapprove a compact, even though the compacts at issue in that case appeared to violate IGRA's revenue sharing and regulatory fees provisions. In dismissing the challenge to the Secretary's approval on other grounds (failure to join an indispensable party), the Court noted that the Secretary "declined to disapprove the compacts" despite the compacts' apparent violation of IGRA. Id. While the Court disagreed with the Secretary's inaction, which resulted in the compacts being deemed approved, it described this approval by inaction as "unreviewable" given the Secretary's statutorily-provided discretion to avoid taking action altogether. Id.

The Court's prior analysis is consistent with the Supreme Court's decision in Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004) ("SUWA"). SUWA held that a claim to compel agency action under the APA can only be maintained where the agency failed to take action that it is required to take. Id. at 63 (emphasis in original). The County here seeks a mandatory injunction "directing defendants to revoke and vacate the Secretary's approval of the Amended Compact," and "prohibiting the defendants from authorizing or sanctioning the conduct of Class III gaming activities on the Buena Vista Rancheria." Amended Complaint ¶¶ 76, 81, 91. The Secretary took no action and produced no administrative record for review. If the Court were to remand to the Secretary, it could not order an approval or disapproval of the Amended Compact without directly contravening IGRA, which plainly gives the Secretary the authority to take no action at all. IGRA plainly provides that the Secretary is not required to affirmatively approve or disapprove a compact amendment, hence the Secretary's inaction at issue here should be protected from "undue judicial interference" as an exercise of "lawful discretion." SUWA, 542 U.S. at 63. Congress has provided the remedy for secretarial inaction on compacts submitted for

approval, thus there is no room for judicial review. Therefore, because IGRA's mechanism for compacts to take effect by operation of law provides no meaningful standard by which to review the Secretary's inaction, the County's claims are not reviewable under the APA.

III. THE COUNTY HAS FAILED TO STATE A CLAIM UNDER IGRA

Counts I-IV of the County's complaint allege various violations of IGRA. All, however, should be dismissed under Rule 12(b)(6) for failure to state a claim. IGRA does not direct the Secretary to investigate state law technicalities in the compact approval process, nor does it require that an Indian lands determination be made in connection with compact approval. Moreover, the County's assertion that the Buena Vista Rancheria does not qualify as "Indian lands" under IGRA is completely contrary to both case law and relevant agency interpretation.

A. The Secretary cannot violate IGRA by allowing a compact to become effective by operation of law.

The County's assertion that the Secretary violated IGRA in approving the Amended Compact before it was technically in effect under California law, finds no support in IGRA. Amended Compl. ¶ 30. IGRA does not require that a compact be effective under state law before the Secretary can take action. Instead, IGRA requires only that a compact be "entered into" between the tribe and the state before the Secretary can approve it:

> [a]ny State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

25 U.S.C. § 2710(d)(3)(B). The Secretary's approval authority is therefore confined only to compacts that have been "entered into" by a state and tribe, with no reference to effectiveness

dates at either the state or tribal level. As the Sandia court concluded, the "entered into" language in IGRA refers to a "contractual formation of the compact by the tribe and the state," without reference to the date the parties have agreed to make that contractual formation effective. Sandia, 47 F. Supp. 2d at 53. IGRA makes no mention of a requirement that the compact be in effect pursuant to state law before the Secretary can take action. The statute's only reference to the effectiveness of a compact relates to Secretarial approval and publication, not state or tribal effectiveness. Nothing in IGRA suggests that Secretarial approval of a compact is somehow superceded by, or is contingent upon, technical state rules regarding effectiveness. Indeed, the backdrop to the Secretary's no-action approach in the Lac Du Flambeau litigation discussed above was that the Governor and Legislature of Wisconsin were battling in court over the effectiveness of the tribal-state compacts. Issues of a compact's compliance with substantive state law, if actionable, like issues regarding consistency with IGRA, are subject to subsequent challenge.

The County does not dispute that the Amended Compact was validly entered into by the State of California and the Tribe prior to its being deemed approved by operation of law. Amended Compl. ¶ 18. Moreover, in addition to both the Governor and the Tribe executing the Amended Compact, the California State Legislature ratified it before it was submitted to the Secretary for approval. Thus, there can be no argument that Amended Compact did not satisfy IGRA's "entered into" requirement. The fact that the Amended Compact was deemed approved 11 days before it became effective under state law is immaterial as IGRA contains no requirement that a compact must be in effect under state law before it can be approved either affirmatively or by running of the statutory period.

B. Disapproval of a compact based on a state law technicality is contrary to the intent of IGRA.

IGRA provides the Secretary with a brief 45-day window to examine gaming compacts in order to avoid needlessly delaying the process for tribes and states. As the court observed in Rhode Island v. The Narragansett Indian Tribe, 1995 WL 17017347 (D.R.I. Feb. 3, 1995), the "manifest purpose of those provisions [the 45-day approval period] is to insure that gambling activity authorized by the proposed compacts is consistent with federal law and that the compacts are in the best interests of Indian tribes." Id. at *2. The short time frame Congress gives the Secretary, coupled with the automatic approval mechanism for non-action, underscores the desire of Congress to avoid forcing the Secretary to investigate state law technicalities such as the effective date of state legislative actions.

Congress established the 45-day approval period precisely to avoid the delay that would occur should the Secretary decide to undertake a full-scale investigation of state law matters. The Kickapoo court noted that "[i]f the Secretary was allowed to postpone action every time there was uncertainty as to some issue in IGRA or in a compact, the Secretary would be able to forestall approval of compacts indefinitely." Kickapoo, 827 F. Supp at 44 n.12. The Court in Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997), faced an analogous situation involving the Secretary's duty under IGRA to investigate the state law granting a governor authority to enter into a gaming compact. Santa Ana, 104 F.3d at 1556. The court concluded that Congress could not have expected the Secretary "to resolve state law issues regarding that authority in the 45-day period given to him to approve a compact." Id. at 1557. If Congress did not intend for the Secretary to use the 45-day period to investigate important state law matters

such as a governor's authority to execute a compact, it clearly did not contemplate that the Secretary would investigate a state law technicality regarding the effective date of a validly entered into, legislatively ratified, and fully executed compact. The Secretary's decision to avoid taking action on the Amended Compact was, therefore, wholly consistent with the purpose of the 45-day approval period. A disapproval based on the state law effectiveness technicality would have undermined the purpose of IGRA and needlessly delayed federal approval of the Amended Compact for both the Tribe and the State of California.

C. IGRA does not require the Secretary to render Indian lands opinions in connection with compact approval.

Without citation to a particular provision of IGRA, the County baldly asserts that the Secretary is precluded from approving a tribal-state compact without first making a determination that the "site is 'Indian land' within the meaning of IGRA."[10] Amended Compl. ¶ 33. While § 2710(d)(8)(A), dealing with compact approval through an affirmative determination, authorizes the Secretary to approve any tribal-state compact governing gaming on "Indian lands of such Indian tribe," it does not mandate that the Secretary undertake an analysis of whether the gaming will take place on Indian lands. In the instant case, the Amended Compact took effect by virtue of the Secretary's inaction within the statutory period. If the Secretary has discretion to take no action at all on a submitted compact, it follows *a fortiori*, that

[10] We note that many compacts are approved in advance of a final casino site being settled upon. Additionally, compacts may be approved for site-specific gaming about which there is no Indian lands status dispute requiring analysis. Such dispute arises principally in connection with lands acquired in trust by the Secretary after the passage of IGRA (October 17, 1988) as such lands must meet one of IGRA's Section 20 exceptions in order to qualify as gaming-eligible. 25 U.S.C. § 2719 (2000).

the Secretary has no duty to render an Indian lands opinion in connection with such inaction. Moreover, the County's claim ignores the fact that compact approval by operation of law is only approval "to the extent the compact is consistent with the provisions of this chapter [IGRA]." 25 U.S.C. § 2710(d)(8)(C). In other words, the Secretary's inaction here resulted in the Amended Compact becoming effective, but only to the extent it does not violate IGRA. If, hypothetically, the County were correct that the Buena Vista Rancheria did not qualify as Indian lands under IGRA, then the geographic component of the Compact would not be in effect and any subsequent agency actions relating to gaming on such lands would likely be subject to challenge. The County, however, is incorrect in its assertion that the Rancheria does not meet IGRA's Indian lands definition.

D. The Buena Vista Rancheria qualifies as Indian lands under IGRA.

The County's amended complaint sets forth the IGRA definition of "Indian lands," which expressly includes "all lands within the limits of any Indian reservation." Amended Compl. ¶ 10; see also 25 U.S.C. § 2703(4)(A). The amended complaint goes on, however, to assert that the Buena Vista Rancheria is not an Indian reservation, noting that the Rancheria is not comprised of land that is either held in trust by the United States or subject to a restriction by the United States against alienation. Amended Compl. ¶¶ 12-14. Both Congress and the NIGC define "Indian lands" to encompass fee lands within a reservation, even non-Indian owned fee lands. See, e.g., Letter from Cindy Shaw, Senior Attorney, to NIGC Acting General Counsel (March 14, 2005) (regarding tribal jurisdiction over gaming on fee land at White Earth Reservation). Neither Congress nor the NIGC, however, has specifically defined "Indian reservation" as applicable to IGRA. Thus, courts should infer that "Congress intended 'to incorporate the established

meaning of the term.'" Sac & Fox Nation of Mo. v. Norton, 240 F.3d 1250, 1266 (10th Cir. 2001). Interpreting the term "reservation" more narrowly than its established meaning would undermine Congress's goal to promote tribal economic development reflected in IGRA. 25 U.S.C. § 2701(4), § 2702(1).[11]

1. California Rancherias are the functional equivalent of Indian reservations.

Contrary to the County's erroneous claim, it has long been established that California Indian rancherias are the functional equivalent of Indian reservations. The D.C. Circuit Court of Appeals has accepted this proposition as have many other courts. See City of Roseville v. Norton, 348 F.3d 1020, 1022 (D.C. Cir. 2003) (describing federal government's provision to Auburn Tribe of "a small 20-acre reservation, which was expanded to 40 acres in 1953, known as the Auburn 'Rancheria.'"); see also Artichoke Joe's Cal. Grand Casino v. Norton, 278 F. Supp. 2d 1174, 1176 n.1 (E.D. Cal. 2003) (describing rancherias as "small Indian reservations"); Duncan v. United States, 667 F.2d 36, 41 (Ct. Cl. 1981) (finding with respect to Robinson Rancheria that "Congress clearly contemplated that th[e] land have the same general status as reservation lands."), cert. denied, 463 U.S. 1228 (1983); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 657 (9th Cir. 1975) (equating California rancherias with Indian reservations); Governing Council of Pinoleville Indian Cmty. v. Mendocino County, 684 F. Supp. 1042, 1046 (N.D. Cal. 1988) (finding against backdrop of termination and restoration

[11] It would also violate the canon of construction that laws passed for the benefit of Indians or tribes "are to be liberally construed, doubtful expressions being resolved in favor of the Indians." Alaska Pac. Fisheries Co. v. United States, 248 U.S. 78, 89 (1918); Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460, 471 (D.C. Cir. 2007) (explaining that because "IGRA is designed to promote the economic viability of Indian Tribes, the Indian canon of statutory construction requires the court to resolve any doubt in favor of the Band").

history parallel to that of Buena Vista Tribe, intent "to restore all land within the original Rancheria as Indian Country and . . . to treat the entire Rancheria as a reservation.")[12]; see also Attachment B (Letter from Penny J. Coleman to Judith Kammins Albeitz, Esq., at 10 n.8). Indeed, the Supreme Court settled long ago in connection with the Reno Indian Colony that the reservation designation is not dispositive of reservation-like status:

> The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as 'reservations.' . . . and it is immaterial whether Congress designates a settlement as a 'reservation' or 'colony.'

United States v. McGowan, 302 U.S. 535, 538-39 (1938).

On this point, the Court is assisted by the advisory opinion of the NIGC's Office of General Counsel. Attachment B.[13] The Office of General Counsel issued its analysis of the

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[12] Like the Pinoleville Tribe, the Buena Vista Tribe was subject to termination pursuant to the California Rancheria Act, Pub. L. No. 85-671 (1958). That Act authorized termination of the trust relationship between the United States and the residents of the many California rancherias and resulted in the distribution of rancheria land to individual Indians. In 1979, however, the residents of seventeen rancherias, including the Buena Vista Rancheria, filed a class action seeking restoration of the reservation status of their lands based upon the United States' unlawful, and, thus, ineffective, termination efforts. Hardwick v. United States, No. C-79-1710 SW (N.D. Cal. filed 1979). The Hardwick litigation was settled through discrete stipulated judgments. As the NIGC Buena Vista Opinion points out, the Hardwick Stipulation for Entry of Judgment concluded between Amador County and Indians of the Buena Vista Rancheria expressly states both that the Rancheria is "Indian country," and that the Rancheria "shall be treated by the County of Amador and the United States of America, as any other federally recognized Indian reservation." Attachment B (Letter from Penny J. Coleman to Judith Kammins Albeitz, Esq., at 11) (emphasis added).

[13] The NIGC Buena Vista Indian Lands Opinion is publicly available on the NIGC's website at http://www.nigc.gov/LinkClick.aspx?link=NIGC+Uploads%2findianlands%2f05_buenavstaracharamewukindns.pdf&tabid=120&mid=957. As previously discussed, the Court may take judicial

"Indian land" status of the Buena Vista Rancheria in response to the Tribe's request for such a determination. Attachment B (Letter from Penny J. Coleman to Judith Kammins Albeitz, Esq., at 1). In this regard, the Tribe's request was consistent with other tribal requests to both the Interior Department[14] and the NIGC, in advance of substantial tribal investment in controversial casino developments. As explained by the Opinion:

> The NIGC has already approved a site specific Tribal Gaming Ordinance for the Tribe which constitutes a recognition of the Rancheria as Indian lands. Further, a written Indian lands opinion is not required before a Tribe may conduct gaming. However, the Tribe requested the Office of General Counsel to provide an opinion because of the controversy surrounding the proposed gaming operation.

Id. at 1 n.2. In concluding that the Buena Vista Rancheria is Indian lands under IGRA, the Opinion finds that the Rancheria is a reservation and that the Tribe's proposed gaming facility would be sited within the Rancheria. Id. at 10-12. In the course of arriving at these conclusions the Opinion explains that because the Buena Vista lands qualify as reservation lands there is no additional requirement that they be taken into trust by the United States. Id. at 11. Further, the Opinion rejects the notion implicit in the County's amended complaint that subsection § 2703(4)(B)[15] of IGRA's Indian lands definition should be applied to the analysis of the Buena

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notice of matters in the general public record, including reports of administrative agencies, without converting this motion to dismiss into one for summary judgment. Am. Farm Bureau v. EPA, 121 F. Supp. 2d 84, 106 (D.D.C. 2000).

[14] The Department of the Interior, Office of the Solicitor, concurred in the NIGC's opinion respecting the Indian lands status of the Buena Vista Rancheria. Attachment B (Letter from Penny J. Coleman to Judith Kammins Albeitz, Esq., at 12). Thus, the two federal agencies charged with IGRA authority and steeped in Indian law expertise do not question the IGRA qualification of the Tribe's lands.

[15] 25 U.S.C. § 2703(4)(B) includes as Indian lands, "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian

Vista Rancheria's status: "The Indian lands definition is subject to the requirements of subsection (B) only if subsection (A) does not apply. Because subsection (A) does apply (the Rancheria is a reservation), we need not address subsection (B)." Id.[16]

The effect of the U.S. Department of the Interior, the Solicitor's Office, the NIGC, and various courts taking the position that California Rancherias are the functional equivalent of Indian reservations means that there is no legitimate basis for treating the two any differently, especially for jurisdictional purposes such as under IGRA Section 4 (25 U.S.C. § 2703(4)). See United States v. McGowan, 302 U.S. 535, 539 (1938) ("it is not reasonably possible to draw any distinction between this Indian 'colony' and 'Indian country'"). Thus, just as it is "immaterial whether Congress designates a settlement as a 'reservation' or 'colony,'" it is immaterial that a "reservation" has historically been called a "Rancheria." Id. at 538-39 (referring to land purchased pursuant to congressional appropriation to provide settlement for needy Nevada Indians, much like the 1906 and 1908 appropriations acts here). The Supreme Court previously has used the same "functional equivalent" style of reasoning to find Indian reservations. See

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tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power."

[16] The NIGC's opinion, while not a formally adopted opinion, is, at a minimum, "'entitled to respect' under [the Court's] decision in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)." Christensen v. Harris County, 529 U.S. 576, 587 (2000) (finding that interpretations such as opinion letters lacking the force of law are entitled to something less than full Chevron-style deference). Under Skidmore informal agency interpretations are "'entitled to respect' . . . to the extent that those interpretations have the 'power to persuade.'" Id. (quoting Skidmore, 323 U.S. at 140). The degree of deference in such situations will "vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." United States v. Mead Corp., 533 U.S. 218, 228 (2001). The NIGC's opinion is at least entitled to the broadest respect available under Skidmore as a thoroughly analyzed and carefully reasoned legal opinion.

Minnesota v. Hitchcock, 185 U.S. 373, 390 (1902) ("[a] certain specified tract . . . became, in effect, an Indian reservation"). In fact, the court in Hitchcock explained that even if Indians chose for themselves a tract to settle upon that was "acquiesced in by the United States…[it] is immaterial…[t]he reservation thus created stood precisely in the same category as other Indian reservations." Id. at 390 (emphasis added).

In addition to the government's consistent position that Rancherias are the equivalent of reservations, and the Interior Department's treatment of over fifty California Rancherias as reservations, Rancherias also meet the conventional "reservation" definitions under federal law. See 73 Fed. Reg. 18,553 (Apr. 4, 2008).

2. Rancherias meet the traditional definition of "reservation" under federal law.

While federal law contains no universal "Indian reservation" definition,[17] the term generally refers to any size tract of land set aside formally or informally by the federal government for the use or occupancy of Indians.[18] See, e.g., United States v. Celestine, 215 U.S. 278, 285 (1909); Minnesota v. Hitchcock, 185 U.S. 373, 390 (1902); see also Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 n.2 (1995); Okla. Tax Comm'n v. Sac & Fox

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[17] The key jurisdictional distinction in Indian law is whether a particular tract constitutes "Indian country" under 18 U.S.C. § 1151 (2000), not that it constitute any particular form of Indian country. See Okla. Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991).

[18] The Interior Department's Solicitor's Office has stated that "the Department has [never] attempted to make a general definition of the term" reservation. Judicial and Departmental Construction of the Words "Indian Reservation," 2 Op. Solicitor 1378 (1945). This remains true and the term continues to be a broad one — "simply a convenient way of designating the tract." Id.

Nation, 508 U.S. 114, 123 (1993) (referring to informal reservations). Cohen's treatise explains that "reservation" means "land set aside under federal protection for the residence or use of tribal Indians, regardless of origin," or "federally protected Indian tribal lands without depending on any particular source." Cohen's Handbook of Federal Indian Law 189 (2005) ("Cohen"). The Interior Department has, through regulation, defined "Indian reservation" as "any area established by treaty, Congressional Act, Executive Order, or otherwise for the use or occupancy of Indians." 25 C.F.R. § 81.1(q) (2007).[19]

Moreover, it is not required that an Indian reservation be created by a specific treaty, statute, or executive order. See 25 U.S.C. § 461 (2000) (referring to reservations created by "treaty or agreement with the Indians, Act of Congress, Executive order," as well as by "purchase

or otherwise") (emphasis added).[20] The Supreme Court has stated that "in order to create a

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[19] Importantly, as these definitions evidence, no requirement exists under federal statutory or decisional law that a reservation lands be held in trust. See, e.g., Indian Country, U.S.A. v. Oklahoma, 829 F.2d 967, 975-76 (10th Cir. 1987) (noting fee title is "not an obstacle to …reservation…status"). Further, Cohen explains that "reservation" has meant any land reserved for tribe "regardless of the form of tenure," and has been applied to individual and unrestricted lands. Cohen at 189 n.393. If all reservations were required to be held in trust, or even in restricted fee, then many fewer reservations would exist today than actually do today. In the late 1800s, Congress embarked on a policy to divide up Indian reservations into small parcels or allotments. See Cohen at 75-79. Prior to Congress's 1934 reversal (in IRA Section 1) of the allotment policy, a significant number of reservations across the country were heavily allotted. Id. However, a "reservation" is determined by the existence or not of its boundaries, and the status of land within a reservation's boundaries (i.e., fee, trust, restricted fee) is simply not relevant to the issue of whether a reservation exists. Solem v. Bartlett, 465 U.S. 463, 470 (1984).

[20] As previously explained, in Hardwick v. United States, No. C-79-1710 SW (N.D. Cal. filed 1979), Amador County entered a Stipulation for Entry of Judgment which states that the Buena Vista Rancheria "shall be treated by the County of Amador and the United States of America, as any other federally recognized Indian reservation." Attachment B (Letter from Penny J. Coleman to Judith Kammins Albeitz, Esq., at 11) (emphasis added).

reservation, it is not necessary that there should be a formal cessation or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes." Minnesota v. Hitchcock, 185 U.S. at 390 (emphasis added). The courts also have recognized the validity of Indian reservations not created by any specific treaty, statute, or executive order. Sac & Fox Tribe of Miss. in Iowa v. Licklider, 576 F.2d 145, 149-50 (8th Cir. 1978) (finding "de facto" reservation); Tuscarora v. N.Y. Power Auth., 257 F.2d 885, 887 (2d Cir. 1958) (finding "Indian Reservation" from tract acquired by purchase by United States for tribe).

3. The Buena Vista Rancheria meets the requirements for an Indian reservation under federal law because it was a reservation prior to the California Rancheria Act and it was later restored to a reservation under the Hardwick stipulations.

Prior to the California Rancheria Act, the Buena Vista Rancheria was a reservation because it was tract of land purchased by the federal government for the occupancy or use of the Indians at Buena Vista. See Amended Compl. ¶¶ 28-29. The County does not dispute this. Indeed, the County acknowledges that the Rancheria was acquired "for the specific purpose of providing a place of occupancy" for the Tribe. Id. at ¶ 28. Additionally, this arrangement, which the County characterizes as a "federal fee" ownership is plainly analogous to trust lands acquired in trust by the United States for the benefit of a tribe, even if no formal trust patent existed for the Rancheria. Thus, contrary to the County's assertions, the Rancheria clearly was a reservation prior to the California Rancheria Act.

Further, the Rancheria was "restored" to a reservation following the Hardwick litigation because, as the County acknowledges, the Hardwick stipulations restored that status, and effectively "'unterminat[ed]' each of the subject Rancherias." Letter from Danna R. Jackson,

Staff Attorney, to Sara J. Drake, Dep't of Justice (Dec. 3, 2001); see also County's Surreply Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss, at 13 ("[B]oth the [Hardwick] Master Stipulation with the federal government and the Stipulation with Amador County – purported only to restore the lands to their pre-Termination status!) (emphasis in original). As the "pre-Termination" status of the Buena Vista Rancheria was a reservation, it continues as a reservation under the Hardwick stipulations. Accordingly, the Rancheria is an Indian reservation under federal law. Letter from Danna R. Jackson to Sara J. Drake, at 8 (finding that Picayune Rancheria "is a reservation" under virtually same facts as exist here) (emphasis added).

4. IGRA does not require historical presence.

It is undisputed that the Tribe is a federally recognized Indian tribe that occupies the Buena Vista Rancheria in Amador County. It is also undisputed that its proposed gaming project is within the Rancheria's boundaries. The County's allegations concerning the Tribe's historical presence at its Rancheria do not salvage the County's failure to state viable IGRA-based claims. Accordingly, even if the County could demonstrate standing and that its claims were reviewable, Count VII, as with its other preexisting Counts, must be dismissed because it fails to state any claim upon which relief can be granted.

The County's new allegations concerning the Tribe's historical occupation of the Buena Vista Rancheria, are legally irrelevant to the question of whether the Rancheria constitutes "Indian lands" under IGRA, or whether the Tribe can construct and proceed with its gaming project at this location under its Amended Compact and IGRA. Amended Compl. ¶¶ 38-56. As the amended complaint correctly acknowledges, "the Tribe is a federally recognized Indian tribe,

which occupies the Buena Vista Rancheria in Amador County and proposes to conduct gaming on land within the Rancheria's boundaries." Amended Compl. ¶ 11. As discussed above, IGRA defines "Indian lands" to include "(a) all lands within the limits of any Indian Reservation" and the Buena Vista Rancheria is a "reservation" for purposes of that definition. IGRA does not contain any requirement that a Tribe have or demonstrate "historical presence" on land otherwise qualifying as Indian lands, and the County's amended complaint cites no authority for this proposition.

In light of agency interpretation, the overwhelming authority in the case law and the explicit terms of the Hardwick Stipulated Judgment to which the County is a signatory, the County's claim that the Buena Vista Rancheria does not qualify as Indian lands under IGRA must be rejected under Rule 12(b)(6).

IV. THE COUNTY IS NOT ENTITLED TO DECLARATORY OR INJUNCTIVE RELIEF

The County seeks several forms of declaratory relief that essentially reargue its first through fourth, and now seventh causes of action. This Court should deny such relief for the reasons stated above. The County also seeks mandatory injunctive relief "[d]irecting the defendants to revoke and vacate the Secretary's approval of the Amended Compact," and "[e]njoining the defendants from authorizing or sanctioning the conduct of Class III gaming activities on the Buena Vista Rancheria." Amended Compl., Requested Relief ¶¶ E., F. Because the matter at issue is committed to agency discretion by law, the Court lacks jurisdiction to entertain the County's requested relief.

CONCLUSION

For the foregoing reasons, the United States requests that its motion be granted and that the County's first amended complaint be dismissed pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

Respectfully submitted this 18th day of April, 2008.

/s/ Judith Rabinowitz

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