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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

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 reply memorandum of points and authorities in support of their motion to dismiss plaintiff Amador County's ("County") first amended complaint.

Plaintiff Amador County's Memorandum of Points and Authorities in Opposition to

Defendant's Motion to Dismiss First Amended Complaint ("P. Mem.") does not overcome the jurisdictional and substantive legal deficiencies of its first amended complaint. The County has failed to establish the requisite Article III standing to maintain suit and has invoked Administrative Procedure Act ("APA") review in a matter committed to agency discretion by law and thus beyond the APA's scope of review and its waiver of the United States' sovereign immunity.

Further, the County's response rests on erroneous and unsubstantiated assertions regarding the intent of Congress in the Indian Gaming Regulatory Act ("IGRA") and the Buena Vista Rancheria's qualification as a reservation and thus "Indian lands" under that Act. Indeed, the County misstates the key issue in this case proposing that "[t]he fundamental issue that was before the Secretary and now must be considered by this Court" is whether the Rancheria is a reservation. P. Mem. at 1. The "fundamental issue" in this case, however, is whether the Secretary's inaction on the Amended Compact entered into between the State of California and the Me-Wuk Indians of the Buena Vista Rancheria's ("Tribe") was committed to the Secretary's discretion by law (IGRA) and hence unreviewable pursuant to the terms of the APA. Contrary to the County's suggestions, the Amended Compact did not change the status of the Buena Vista Rancheria,[1/] the Buena Vista Rancheria's status as an Indian reservation and the Tribe's status as

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[1/] Section 4.2 of the original 1999 Compact states "the Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may be lawfully conducted under the Indian gaming Regulatory Act." (Emphasis added). This provision was unchanged by the Amended Compact and remains in full effect. Section 4.3.5 of the Amended Compact states "… the Tribe may operate any and all Gaming Devices only on Indian lands within the boundaries of its rancheria, existing as of July 1, 2004, in Amador County… ." (Emphasis added). Thus, the Amended Compact does not alter the status of the Rancheria. Instead, the Amended Compact incorporates the Indian lands requirement of IGRA and the status of the Rancheria was not implicated in the Secretary's inaction.

a federally-recognized tribe[2/] are settled, and need not be addressed by this Court.[3/] Instead, the Court can dismiss this case on the threshold bases of Plaintiff's lack of standing and the Court's lack of APA jurisdiction.

As is demonstrated below, the County has failed to establish jurisdiction and has failed to state any claim upon which relief can be granted. The United States' motion to dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) should be granted.

ARGUMENT

I. THE COUNTY'S RESPONSE DOES NOT OVERCOME THE JURISDICTIONAL DEFICIENCIES OF ITS COMPLAINT

A. The County cannot establish that its claims are amenable to APA review.

As set forth in detail in the United States' opening memorandum, the County's claim that the United States has consented to this action under the APA, 5 U.S.C. §§ 701-706 (2000), is

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[2/] See 73 Fed. Reg. 18553 (April 4, 2008) (listing federally-recognized tribes).

[3/] On these points the County asks this Court to ignore the stipulated judgment in Hardwick v. United States, No. C-79-1710 SW (N.D. Cal. 1987), through which the Buena Vista Rancheria was restored, and declared to be "Indian Country," to "be treated by the County of Amador and the United States of America, as any other federally recognized Indian reservation," upon which "all of the laws of the United States that pertain to federally recognized Indian Tribes" shall apply. Stipulation for Entry of Judgment (Amador County) at 4 ¶¶ C, D, in Hardwick v. United States, Attachment A to Mem. of Points and Authorities in Supp. of U.S. Mot. to Dismiss First Am. Compl. ("U.S. Mem.") (emphasis added). Contrary to the County's assertions, P. Opp. at 24, the Hardwick Stipulation is highly relevant to the instant case and is properly considered by this Court in the context of the United States' motion to dismiss. Further, beyond the Stipulation's potentially preclusive effect, it has obvious bearing on the County's underlying assertion regarding the Rancheria's status.

Further, the stipulated judgment is a public record of which the Court may take judicial notice and consider without converting the United States' motion to dismiss into one for summary judgment. Am. Farm Bureau v. EPA, 121 F. Supp. 2d 84, 106 (D. D.C. 2000) ("Courts are allowed to take judicial notice of matters in the general public record, including records and reports of administrative bodies and records of prior litigation, without converting a motion to dismiss into a motion for summary judgment.") (citation omitted)).

unavailing as the action challenged here is committed to agency discretion as a matter of law. 5 U.S.C. § 701(a)(2) (final agency action is not reviewable if "(2) agency action is committed to agency discretion by law"). Thus, the waiver of sovereign immunity, a prerequisite to bringing an action against the United States, United States v. Mitchell, 445 U.S. 535, 538 (1980), contained in the APA § 704 is constrained by § 701(a)(2), which is one of the terms of the United States' consent to be sued. See Library of Congress v. Shaw, 478 U.S. 310, 318 (1986) (United States' waiver of its own immunity must be strictly construed in its favor).

While the County agrees that § 701 bars judicial review of agency action "committed to agency discretion by law," it asserts that "the Secretary has no discretion under Section 2710(d)(8)(B)" of IGRA, because subparagraph (B) "gives the Secretary no option other than to reject compacts which violate federal law." P. Mem. at 11-12. This assertion is plainly wrong as it has misstated what is otherwise a straightforward matter. Subparagraph (B) clearly states that the "Secretary may disapprove a compact...only if such compact violates" IGRA, federal law, or the trust obligations to Indians. Nowhere in this section does Congress direct that the Secretary "must" or "shall" disapprove a compact. The pertinent language is "may disapprove," which compels the conclusion that IGRA does not mandate action on the part of the Secretary but instead limits the grounds upon which the Secretary *may* disapprove a compact. In an attempt to bolster its contorted reading, the County cites Gray Panthers Project Fund v. Thompson, 304 F.Supp.2d 36, 40 (D. D.C. 2004), which states that the Secretary cannot violate law "because he thinks he knows best." P. Mem. at 12. Here, the Secretary's inaction was squarely within the terms of IGRA which affords complete discretion and thus bars judicial review of the Secretary's decision to avoid taking action on the Amended Compact. See Drake v. FAA, 291 F.3d 59, 70

(D.C. Cir. 2002) (noting that §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").

B. The County has not established standing to sue.

As previously set forth, in order 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" 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 County has not established the requisites of Article III standing.

1. Injury in fact.

Plaintiff contends that the Secretary's inaction on the Amended Compact resulting in its approval by operation of § 2710(d)(8)(C) of IGRA, has resulted in "injury in fact" to the County. P. Opp. at 4. First, the County claims injury based upon what it erroneously describes as instant conversion of the Rancheria lands from lands within its jurisdiction to reservation lands beyond its jurisdiction by virtue of the approval. P. Mem. at 1, 4. Second, the County describes as "certainly impending," injury from the effects of a non-existent and as yet undefined casino. Lastly, the mandatory negotiation process under the Amended Compact, which requires the Tribe to negotiate with the County respecting the very impacts that the County fears, is also

invoked as injury in fact. P. Mem. at 5-8.

a. Reservation Status.

As elaborated below, the Buena Vista Rancheria's status as an Indian reservation pre-dated the approval by operation of law of the Amended Compact. Thus, the Rancheria's status was not altered by the Secretary's inaction within the statutory 45-day approval period. Nothing in IGRA supports the County's contention that the approval "instantly converted" the Rancheria lands to lands enjoying reservation status. The County's "instant conversion" theory also ignores the fact that prior to the Amended Compact there had been, since 1999, an approved compact in effect between the Tribe and the State of California.[4/] At bottom, negotiation of the original Compact, like any Class III gaming compact under IGRA, was premised on the understanding that the State and its political subdivisions have no civil jurisdiction to regulate gaming on the Rancheria. It was from this starting point that the State negotiated with the Tribe in order to obtain a measure of state civil jurisdiction with respect to regulation of the gaming operation and to strike a balance between the interests of the Tribe, State and United States within the framework of IGRA.

[4/] 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).

The County's argument also patently ignores the 1987 Hardwick Stipulated Judgment, a final judgment entered by the District Court for the Northern District of California. See Attachment A to U.S. Mem. Paragraph C of the Hardwick Stipulation states that the original boundaries of the Rancheria are "hereby restored, and all land within these restored boundaries of the plaintiff Rancheria is declared to be "'Indian Country'". Id. at 4, ¶ C (emphasis in original). Paragraph D states that the Rancheria "*shall be treated by the County of Amador and the United States of America, as any other federally recognized Indian reservation, and all the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall apply to the* Plaintiff Rancheria and the Plaintiffs." Id. at 4, ¶ D (underlined emphasis in the original, italicized emphasis added).

b. Possible Future Claims.

The County next claims that its injuries are "certainly impending" from a proposed and yet-to-be-built casino that cannot take final form without the negotiated approval of the County. P. Mem. at 5. The County compares the proposed casino project to actually existing casinos as evidence of certainly impending injury. Id. The County's reliance on casinos elsewhere highlights the obvious fact that there is no casino yet built that may or may not cause certain injury to the County.[5/]

c. Negotiations Between the County and the Tribe.

The County goes so far as to cite the negotiation process itself as an injury, notwithstanding that the Amended Compact requires this process for the very purpose of

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[5/] Also noteworthy is the fact that the referenced casinos were constructed before the State of California secured a compact amendment protocol that includes detailed negotiation requirements intended to address mitigation of off-reservation impacts of Indian casinos.

protecting the County from the injuries about which it now speculates. P. Mem. at 5-7. While the negotiation process may require the County to invest some resources, the intended purpose of the process (protection of the County) seriously undermines the County's claim of certainly impending injury. Furthermore, through the negotiation process, the County has opportunities to secure additional revenues which could be used to offset any negotiation costs. Ultimately, the County's reference to the negotiations as a source of injury underscores the role of the negotiations as a comprehensive tool to address any potential future injuries to the County. Although a casino, if actually built, likely would impact the County in some way, the nature and scope of such impact is at this point purely speculative, particularly given the County's significant role, through the Amended Compact, in the mitigation of impacts.[6] The County's assertion of "quality-of-life" impacts that "cannot be mitigated," P. Mem. at 7, ignores the fact that the Amended Compact requires the Tribe pay for "increased public services and other costs that result from the casino." Amended Compact Section 10.8.8 (ii)-(iv). This compact provision further undermines the County's claim to injury in fact. Ultimately, the County advances injuries and impacts as "certainly impending" when they are in fact contingent upon a process that the County has the power to shape to its advantage. As such, the County has failed to satisfy its burden of demonstrating injury in fact.

2. Causation.

The County argues that the approval by operation of law of the Amended Compact

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[6] The County inaccurately downplays the mandatory negotiation process with the Tribe. Citing a laundry list of possible impacts, from traffic to crime to health services, the County fails to mention that the Amended Compact specifically requires that the negotiation process comprehensively address the County's concerns. P. Mem. at 5-6.

satisfies the causation requirement for standing under Article III because the Secretary has allowed the casino project "to go forward" and has "essentially" converted fee land under County jurisdiction to Indian Lands. P. Mem. at 8. The Secretary did not, and indeed could not have effected a conversion of the Rancheria to reservation status since that status pre-dated the statutory approval of the Amended Compact. Moreover, as previously explained, the County is wrong in its assertion that the Secretary here had an obligation under IGRA to make an "Indian lands" determination.[7/] See U.S. Mem. at 24-25. In the instant case, the Amended Compact took effect by virtue of the Secretary's inaction within the 45-day statutory period. If the Secretary has discretion to take no action at all on a submitted compact, it follows *a fortiori* that the Secretary has no duty to render an Indian lands opinion in connection with such inaction.

3. Redressability

The County asserts that its injuries are "indeed real" and therefore redressable. P. Opp. at 9. Yet, as discussed above, the injuries asserted are entirely speculative. Judicial resources should not be expended on a suit based upon conjectural injury that may never actually occur.

The County's further claim that the United States' position in this case amounts to the proposition that the Secretary "has discretion to violate federal law without reprisal," P. Opp. at 9, is answered by IGRA itself. See Lac Du Flambeau v. Norton and Ho-Chunk Nation, 327 F.Supp. 2d 995, 999 (W.D. Wis. 2004) ("When 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

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[7/] This is true in part because the Amended Compact maintains IGRA's requirement that gaming take place only on Indian lands.

further consideration without interfering with the congressional scheme."), 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).

Finally, the plain language of IGRA makes clear that compacts that are deemed approved, are approved "only to the extent the compact is consistent with [IGRA]." 25 U.S.C. § 2710(d)(8)(C). Assuming, *arguendo*, the County were correct that the Amended Compact violates some provision of IGRA, then subsequent final agency actions relating to gaming under the Amended Compact likely would be subject to challenge. Seeking to invalidate the approval by operation of law of the Amended Compact, however, will not redress the alleged injury to the County and would undercut the congressional scheme that affords the Secretary discretion to allow compacts to be deemed approved under IGRA.

II. THE COUNTY'S RESPONSE HAS NOT STATED ANY IGRA-BASED CLAIM UPON WHICH RELIEF CAN BE GRANTED

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

The County argues that the Secretary's inaction, which resulted in approval by operation of law of the Amended Compact, violated IGRA because the Amended Compact was not yet technically effective at the state level.[8/] P. Mem. at 13-14. This argument rests on the confusing

[8/] Notwithstanding that the Amended Compact was entered into by the Governor and ratified by the State Legislature, the County complains of an eleven-day difference between the federal approval by operation of law and the formal effectiveness date of the Amended Compact under California law. Notably, neither the Governor nor the California Legislature has expressed any concern with the validity of the approval of the Amended Compact pursuant to § 2710(d)(8)(C) of IGRA.

and inaccurate proposition that a properly executed compact that has a delayed effectiveness date should be considered as never having been "entered into" in the first instance. Section 2710(d)(3)(B) of IGRA requires only that a state and tribe validly "enter into" a compact in order for the Secretary to be able to consider it for approval. Nowhere, however, does IGRA state that such a validly entered into compact must also be in effect at the state level before it can be forwarded to the Secretary for consideration.

While the County criticizes the United States' position as lacking authority, P. Mem. at 13, the fact is that the Act is completely silent on this point. Nowhere in IGRA is there any reference to a requirement that a compact be in effect at the state level prior to Secretarial approval (whether by action or inaction), and as a result, there is no statutory authority on the matter. Thus, the County's assertion that there is such a requirement under IGRA is a misreading of the statute. The Tenth Circuit's decision in Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997), underscores that "the 'entered into' language imposes an independent requirement and the compact must be validly entered into by a state before it can go into effect, via Secretarial approval, under IGRA." Id. at 1555. The Tenth Circuit properly viewed the "entered into" requirement as separate from the effectiveness of the compact. Notably, the only reference in IGRA to effectiveness occurs with the Secretary's approval, *not* with the date of state effectiveness. 25 U.S.C. § 2710(d)(3)(B).

Finally, the County describes the fully executed and legislatively ratified compact as "not a final document and subject to repeal by the California legislature" during the eleven-day gap between the federal and state effectiveness dates. P. Mem. at 13. Had the State Legislature actually revoked its ratification of the Amended Compact within that eleven-day period, perhaps

the County would have a colorable claim. However, in this instance, the Secretary received a validly entered into compact that was executed by the Tribe and the State of California, through the Governor's signature and the State Legislature's vote of ratification. For the Secretary to have forestalled compact approval on the highly unlikely ground that the State Legislature might revoke its ratification, would have thwarted the intent of Congress to speed, rather than protract, the approval process. See Kickapoo Tribe v. Babbitt, 827 F. Supp. 37, 44, n12 (D.D.C. 1993). The County's interpretation of IGRA must be rejected as unsupported by the text of the Act and as contrary to the special, Indian-favoring canons of construction. Under these canons statutory silence or ambiguity is not to be interpreted to the detriment of Indians. Montana v. Blackfeet Tribe, 471 U.S. 759, 766 (1985). Instead, statutes are to be construed liberally in favor of the Indians, with any ambiguities to be resolved in their favor. Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 200 (1999); City of Roseville v. Norton, 348 F.3d 1020, 1031-32 (D.C. Cir. 2003); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F.Supp. 2d 155, 164, 158-59 (D.D.C. 2000) (remanding back to Interior Department an Indian lands opinion for application of Indian-favoring canons of construction).

B. The Secretary had no duty to disapprove the Amended Compact based on a technicality of State law.

The County ignores the clear desire of Congress to avoid having the Secretary investigate all potential legal issues underlying or related to each tribal-state compact presented for approval. In asserting that there is no authority supporting this proposition, P. Mem. at 15, the County also ignores relevant case law. As set forth in the United States' opening memorandum, U.S. Mem. 6, the statutory scheme is clear: the Secretary has only 45 days to review compacts, the statute provides only three broad grounds upon which the Secretary "may" disapprove a

compact, and the Secretary is given discretion to take no action on a compact, thereby triggering approval by operation of law. 25 U.S.C. § 2710(d)(8). Given the structure of IGRA, courts have concluded that Congress did not intend for the Secretary to delve into complex or technical legal analyses within the 45-day review period.

In Santa Ana, for example, the Tenth Circuit observed that "Congress did not intend to force the Secretary to make extensive inquiry into state law" to determine the authority to enter into a compact. 104 F3d 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.[9] In Kickapoo Tribe, this court stated 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." 827 F. Supp. at 44, n12. The District Court of Rhode Island similarly concluded that Congress did not intend for the Secretary to investigate the question of which entity within a state is authorized to sign a compact. Rhode Island v. Narragansett Indian Tribe, 1995 WL 17017347, *2 (D.R.I. Feb. 3, 1995). The court reasoned that "such an intent should not be imputed to Congress, because it is patently unreasonable to expect that potentially complex questions of that nature can be adequately addressed during the 45-day review period mandated by IGRA." Id.

C. The Hardwick Stipulated Judgments Reinstated the Rancheria as a Reservation.

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[9] In this connection, the County's argument that it informed the Secretary during the approval period of the state law technicality, P. Mem. at 15, suggests that simple awareness of the state law effectiveness issue should have triggered an investigation and analysis well beyond what Congress intended for the Secretary to accomplish in the 45-day approval window.

Notwithstanding the many pages devoted to disavowing and distancing itself from the Hardwick litigation, P. Mem. 24-25, 31-38, the County cannot evade the fact that through the stipulated judgments in that case, the Buena Vista Rancheria was restored as a federal Indian reservation. The County's claim that the 1987 Hardwick stipulated judgment has no relevance to this case because that litigation did not involve Indian gaming is unavailing. The stipulated judgment directs that "all the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall apply" to the Rancheria. There is no basis for carving IGRA or any other generally applicable federal Indian law out of the "all laws" language of the stipulation. See Attachment A to U.S. Mem. at 4, ¶ D. Nor is it reasonable to argue as does the County, P. Mem. at 32, 35, that the restoration of the Rancheria to reservation status was confined to the taxation context. The stipulated judgment states that the Buena Vista Rancheria was never "lawfully terminated under the California Rancheria Act ("Rancheria Act"), of August 18, 1958, Pub. L. 85-671, 72 Stat. 69." Id. at 4 ¶ B 2. It does not say that the Rancheria was never lawfully terminated (and thus restored) solely for taxation purposes. Put simply, the Rancheria was a reservation under federal law prior to the California Rancheria Act and that reservation status was restored and confirmed by the Hardwick stipulated judgments.[10/]

D. California Rancherias are Indian Reservations within the meaning of IGRA.

The County's additional theories as to why the Buena Vista Rancheria – and by logical extension every other rancheria in California – does not qualify as an Indian reservation and thus

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[10/] It is noteworthy that the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-494a (2000), required the Secretary of the Interior to conduct a vote on all "reservation[s]" to give the Indians thereon an opportunity to reject the IRA, id. § 478, and the Buena Vista Rancheria had such an election. See Theodore H. Haas, Ten Years of Tribal Government Under I.R.A., U.S. Indian Service Tribal Relations Pamphlets 1 (1947) at 15.

is not eligible to be the site of gaming under IGRA are equally unavailing. As explained in the United States' opening memorandum, it is beyond dispute that rancherias are reservations.[11/] U.S. Br. at 22-26. Moreover, since Indian reservations are squarely within IGRA's "Indian lands" definition, 25 U.S.C. § 2703(4)(A), the County has failed to state a claim for violation of IGRA.

1. The 1864 Act did not freeze the number of allowable Indian reservations in California.

Ignoring case law, statutory law and administrative practice to the contrary, the County asserts the Buena Vista Rancheria's qualification as a reservation under the 1988 Indian Gaming Regulatory Act, is controlled by an 1864 statute granting the President discretionary authority to establish four reservations within California. Cal. Indian Reservation Act of April 8, 1864, 13 Stat. 39; Ex. 2 to P. Mem. Plaintiff presents the 1864 Act as freezing, for all time, the allowable number of reservations within California. Subsequent acts of Congress, actions of the Secretary,

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[11/] Rancheria is yet another term used to describe tribal land in California, and it is well established that Rancherias are "for all practical purposes" reservations. Solicitor's Op., M-28958 (Apr. 26, 1939); 1 Op. Sol. on Indian Affairs 891 (U.S.D.I. 1979); City of Roseville v. Norton, 348 F.3d 1020, 1022 (D.C. Cir. 2003) (describing the Auburn Rancheria as "a small 20-acre reservation, which was expanded to 40 acres in 1953"); 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), cert. denied, 463 U.S. 1228 (1983) (finding with respect to the Robinson Rancheria that "Congress clearly contemplated that th[e] land have the same general status as reservation lands."); 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, (N.D. Cal. 1988). In addition, as explained in the United States' opening memorandum, Rancherias also meet the traditional definition of Indian reservation. U.S. Mem. at 30.

We note that the County's assertion that the NIGC Indian lands opinion quoted something never written, P. Mem. at 30, is not entirely accurate as the quoted language does appear in the Artichoke Joe's decision cited above.

as well as interpretations by courts, the Interior Department and the National Indian Gaming Commission ("NIGC") demonstrate the fallacy of the County's argument. Contrary to its strained interpretation, the 1864 Act must be read in historical context. While the Act does reflect Congress's intent that the President, in his discretion, set about establishing four reservations within California, it in no way constrains, nor could it constrain subsequent Congress's ability to take future action to establish additional reservations in California, or to delegate additional authority to the Executive to do so. Indeed, not only has Congress established additional reservations in California, it has also specifically authorized the Secretary to do the same.

Plaintiff fastens on the 1864 Act to the point of ignoring more than a hundred years of subsequent history. The grant of authority to the President in the 1864 Act was analyzed by the Supreme Court in Donnelly v. United States, 228 U.S. 243 (1913). There, the Court concluded that the 1864 Act showed Congress's intent to confer merely a discretionary power upon the Executive. See id. at 256. This decision was based on two factors. First, the Court noted that the state of Indian affairs within California in 1864 was such that Congress could not have thought that the President would be able to accomplish the purposes of the Act if he were obligated to act once and for all and was left powerless to alter and enlarge the reservations from time to time. Id. at 256-57. Second, the Court noted that beginning shortly after the passage of the 1864 Act, both Congress and the President construed the Act as conferring a continuing discretionary authority upon the Executive Branch. See id. at 257. To illustrate this point, the Court cited subsequent governmental actions which enlarged, reduced, or abolished reservations created pursuant to the 1864 Act. The meaning of the 1864 Act was further examined by the

Court of Claims in Short v. United States, 486 F.2d 561 (1973), which found that "the powers conferred by [the Act] are to be construed in keeping with the broad connotations of the words employed: 'at his discretion,' 'suitable extent,' 'accommodation of the Indians,' 'practicable' and 'due regard.'" Short, 486 F.2d at 564. Thus, the Act has not been construed rigidly to constrain the President's authority provided therein, nor should the Act be invoked today to impose an artificial limit on the allowable number of reservations within California.

Since the 1864 Act, both Congress and the Secretary have acted to establish new reservations in California. For example, through a series of Executive Orders over the two decades after the passage of the Act, a reservation for the Pechanga Band was established, disestablished, re-established and reshaped. See 1 C. Kappler, Indian Affairs, Laws, and Treaties 819-24 (1904) (reproducing the Orders). Additionally, because the ever-changing reservation sites under the 1864 Act proved unsatisfactory, Congress enacted the Mission Indians Relief Act, 26 Stat. 712 (1891). See Arenas v. United States, 322 U.S. 419, 421 (1944). The 1891 Act empowered the Secretary of the Interior to oversee the establishment of new, more secure reservations. The first step in the process was for the Secretary to appoint commissioners to propose reservation sites. Their selections became "valid when approved by the President and the Secretary of the Interior." The Act instructed the Secretary that "if no valid objection exists, (he) shall cause a patent to issue for each of the reservations selected by the commission." More recently, Congress enacted the Auburn Indian Restoration Act, 25 U.S.C. §§ 1300*l*-7 (2000). Through this Act Congress directed the Secretary to accept lands located on the Tribe's former reservation into trust, id. § 1300*l*-2(b), and directed that all land taken into trust "shall be part of the Tribe's reservation." Id. § 1300*l*-2. See also 25 U.S.C. § 1300i-1(b) (2000) (establishing

Hoopa Valley Reservation); 25 U.S.C. § 1300i-1(c) (2000) (establishing Yurok Reservation); 25 U.S.C. § 1300m-3(b) (2000) (establishing reservation for Paskenta Band of Nomlaki Indians of California); 25 U.S.C. § 1300n-3(c)(2000) (establishing reservation for Graton Rancheria of California).

Congress also granted the Secretary authority to proclaim new reservations in the 1934 Indian Reorganization Act ("IRA"), 25 U.S.C. § 467. The Secretary has exercised this authority to proclaim reservations in California. See, e.g., Notice of Proclamation of Hopland, Coyote Valley and Karok Reservations, 54 Fed. Reg. 30953 (July 25, 1989); Notice of Reservation Proclamation for Pomo Indians of California, 61 Fed. Reg. 58700 (Nov. 18, 1996); Notice of Reservation Proclamation for Pinoleville Indian Community of California 61 Fed. Reg. 59107 (Nov. 20, 1996). As this sampling of congressional and executive branch activity demonstrates, the County's reliance on the 1864 Act as precluding the establishment of more than four Indian reservations in California finds no support in modern Indian affairs.

2. The County's reliance on the August 1, 1960 Opinion of the Solicitor of the Interior is misplaced.

The August 1, 1960 Opinion of the Solicitor of the Department of the Interior ("1960 Solicitor's Opinion"), which the County discusses in its response, is irrelevant here and the County's reliance on this Opinion is misplaced. The 1960 Solicitor's Opinion relates primarily to the rights of individual Indians living within rancherias to use certain designated tracts of land and the rights of individuals who obtained title to those tracts after the rancheria lands were distributed pursuant to the California Rancheria Act. The Opinion does not directly address the status of the rancherias as Indian reservations or Indian country.

Moreover, and more importantly, the County's assertion that "the [1960] Opinion is

additional evidence that rancherias have never been viewed by the Department as reservations" is patently wrong. The rancherias have, in fact, been viewed and treated by the Department as Indian reservations. The County's assertion ignores the more instructive April 26, 1939 Opinion of the Solicitor of the Department of the Interior ("1939 Opinion"), Solicitor's Op. M-28958, which addressed the jurisdiction of the State of California over the rancherias. The 1939 Opinion expressly states that the rancherias "are, for all practical purposes, small reservations," and also states unequivocally that, "there can be no question but that the specified areas [rancherias] are Indian Country." The County has failed to address the fact, confirmed by the 1939 Opinion, that the Rancheria meets the traditional definition of an Indian reservation under federal law. See U.S. Mem. at 30-33.

Moreover, the County cannot refute the fact that the Hardwick stipulations restored the Rancheria's Indian reservation status. As noted above, the 1987 Hardwick stipulation recognized that "[t]he plaintiff Rancheria [was] never and [is] not now lawfully terminated under the California Rancheria Act." Attachment A to U.S. Mem. at ¶ 2.B.2. Given that the Rancheria was never lawfully terminated, all the land of the Rancheria was restored to Indian reservation status and continues as such to this day. The United States District Court for the Northern District of California reasoned similarly when presented with the identical "restoration" issue:

> all Since the Rancheria was not effectively terminated and it, therefore, still exists, land located within its boundaries remains Indian country. This is true even of land which is retained by those who choose not to return to the government the parcels of land they received pursuant to the distribution plan.

Table Bluff Band of Indians v. Andrus, 532 F. Supp. 255, 261-62 (N.D. Cal. 1981). The Table Bluff court's reasoning pertains here. The Buena Vista Rancheria was a reservation under federal law from the time of its set-aside by the United States through the two federal

appropriations acts. The Hardwick stipulations restored that status and confirmed that the Rancheria was never lawfully terminated. Accordingly, the Rancheria qualifies as Indian lands under IGRA.

3. The NIGC Opinion, concurred in by the Solicitor's Office, is assistive to the Court.

Finally, we note that the County has gone to great lengths to persuade this Court to disregard the legal analysis of NIGC's Office of General Counsel concerning the Buena Vista Rancheria's status as a reservation and thus "Indian lands" under IGRA. P. Mem.17-20, 25-30. The opinion was referenced in the United States' opening brief because it is clearly relevant to Plaintiff's challenge to the "Indian lands" status of the Buena Vista Rancheria. Contrary to Plaintiff's suggestion, it is not merely an opinion of staff lawyers as contended by plaintiff, P. Mem. at 25, but an opinion that was signed by the Acting General Counsel of the NIGC and, importantly, concurred in by the Office of the Solicitor of the Department of the Interior. NIGC Op. at 12. As such, it is entitled to some respect, if not deference, as the considered analysis of the legal divisions of two federal agencies with Indian law expertise and responsibility for implementing and interpreting IGRA.

The United States' citation to the NIGC Opinion is not, as the County suggests, inconsistent with the position advanced in the government brief attached as Exhibit 1 to Plaintiff's memorandum. That brief was concerned with the non-finality of a different opinion letter of the NIGC's Office of General Counsel. Plaintiff's Ex. 1 at 15. The County further asserts that the NIGC Opinion improperly considered a 1906 appropriations act. P. Mem. at 27-28. However, the NIGC's consideration of the 1906 appropriations act was appropriate as it was the first of a series of such acts regularly appropriating funds for the purchase of lands on behalf

of California Indians. See, e.g., 38 Stat. 582, 589 (1914); 44 Stat 453, 461 (1926); 44 Stat. 934, 941 (1927); see also Duncan, 667 F.2d at 38 (describing series of appropriations acts under which lands "were purchased by the Government (with Congressional authorization) for Indian use from time to time in the early years of this century--a program triggered by an inquiry (in 1905-06) into the landless, homeless or penurious state of many California Indians"). All of these acts relate to the same subject and are therefore in *pari materia* and may be construed together. See Branch v. Smith, 538 U.S. 254, 281 (2003) (the meaning of earlier statutes can "shed[]light" on later statutes). Accordingly, while the abbreviated text of later acts such as those passed in 1914 and 1926 did not include the term "reservation," the later acts are properly read in conjunction with the earlier acts to discern the clearest possible understanding of Congress's intent and policy purposes.

That the County itself regards the views of the NIGC as meaningful is evidenced by Exhibit 5 to its memorandum. In that exhibit, an October 27, 2004, letter to Secretary Norton, the County requests that the Secretary "ask the National Indian Gaming Commission for a lands determination on the gaming status of the [Buena Vista] Rancheria." Apparently now that the NIGC Office of General Counsel, with the concurrence of the Solicitor's Office, has rendered views that the County disagrees with, the County would have this court disregard the opinion. Instead, the Court should consider the persuasive analysis supplied by the NIGC Opinion.

4. The County's belated attack on the Tribe's status is meritless.

In furtherance of its attack on the Rancheria's status, the County now apparently attacks the Tribe's status as a federally-recognized tribe. Tribal status determinations, however, are uniquely the province of the political branches. See United States v. Holliday, 70 U.S. 407, 419

(1865) (if executive and other political departments recognize Indians as tribe, court must do the same).[12/] Moreover, any claim that the Tribe was not properly recognized by the United States is subject to the general six-year statute of limitations applicable to civil actions against the United States. 28 U.S.C. § 2401(a) (barring a "civil action commenced against the United States . . . unless the complaint is filed within six years after the right of action first accrues"). Failure to sue a federal agency within the limitations period can operate to deprive the reviewing court of jurisdiction. See Soriano v. United States, 352 U.S. 270, 273 (1957). Given that the Tribe has appeared on the Secretary's Federal Register list of recognized tribes since 1985, 50 Fed. Reg. 6055 (Feb. 13, 1985), any attack on the Tribe's status is now time-barred.

Further, even if Plaintiff's assertions were reviewable, that the Tribe is a tribe today and was a tribe at the time of the 1927 land set-aside is settled. First, the United States acquired the Rancheria land in 1927 for the "Me-Wuk Indians," and not for persons in their individual capacity.[13/] Second, the California Rancheria Act, 72 Stat. 619, terminated the corporate status of the subject tribes (including "Buena Vista") and was enacted in order to distribute Rancheria

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[12/] That tribal status determinations are committed to the political branches of the federal government is reflected by the fact that Congress, pursuant to its plenary authority over Indian affairs, enacted the now controlling 1994 Federally Recognized Indian Tribe List Act, ("List Act"), 108 Stat. 4791 (1994)(partially codified at 25 U.S.C. §§ 479a, 479a-1). That Act not only ratified the Secretary's then-current Federal Register list (which included the Tribe) as reflecting "all federally recognized tribes" with which the United States "maintains a government-to-government relationship," but reserved to Congress, the sole authority to de-list, or terminate a tribe. See 25 U.S.C. § 479(a), Historical and Statutory Notes, Findings (2), (4), and (6). In other words, Congress has confirmed its recognition of the Tribe, which judgment cannot be disturbed by either Interior or this Court absent evidence that the recognition of the Tribe clearly falls outside the limits of Congress's authority over Indian affairs. See, e.g., United States v. Sandoval, 231 U.S. (1913).

[13/] See NIGC Op. at 2.

assets "to individual Indians." Id. at Sec. 2. Finally, the initial 1983 Hardwick stipulated judgment expressly restored the recognized status of the plaintiff tribes (including "Buena Vista") and provided for their listing on the Secretary's Federal Register list of tribes. Hardwick v. United States, No. C-79-1710 SW (N.D. Cal. 1983), Stipulation for Entry of Judgment at 3 ¶ 4. The Tribe appeared on the 1985 Federal Register list of recognized tribes, 50 Fed. Reg. 6055 (Feb. 13, 1985), and has appeared on every subsequent list. Thus, it is clear that the Tribe enjoyed federally-recognized status historically and that such status remains today. The County's claims pertaining to the Tribe's status must be rejected as time-barred and non-justiciable.

CONCLUSION

For the foregoing reasons, federal defendants request that their motion be granted and that Plaintiff's first amended complaint be dismissed pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

Respectfully submitted this 9th day of May, 2008.

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