IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BUTTE COUNTY, CALIFORNIA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:08-cv-00519-HHK
	)	Judge Henry H. Kennedy
HOGEN, et al.,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF THE UNITED STATES'S MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

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I. INTRODUCTION

On May 19, 2008, Plaintiff Butte County, California, filed a First Amended Complaint challenging two federal agency actions, one taken by the Secretary of the Interior ("Secretary") and one taken by the National Indian Gaming Commission ("NIGC"). Both challenged actions relate to the Mechoopda Indian Tribe of Chico Rancheria ("Tribe"). First, the Tribe has a gaming ordinance that had previously been approved by the NIGC pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701–2721. On February 8, 2007, the NIGC approved an amendment to this ordinance that the Tribe had enacted. Plaintiff now challenges the NIGC's approval of the ordinance amendment. Second, on May 8, 2008, the Secretary published notice of his intent to take a parcel of land located in Butte County (the "Chico parcel") into trust on behalf of the Tribe pursuant to Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 465. Plaintiff also challenges the Secretary's decision to take the Chico parcel into trust.

Plaintiff's Amended Complaint contains ten counts, but Plaintiff challenges only these two federal actions – one by the NIGC and one by the Secretary – seeking declaratory and injunctive relief pursuant to the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706. Plaintiff asks this Court to invalidate the NIGC's approval of the Tribe's ordinance amendment and to revoke the Secretary's acceptance of the Chico parcel into trust. Plaintiff also seeks an injunction prohibiting the United States from authorizing any Class III gaming[1/] on the Chico parcel.

[1/]IGRA divides gaming activities into three classes. Class I gaming includes social games for minimal prizes and traditional forms of gaming in connection with tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Class I gaming is within the exclusive jurisdiction of the tribe and not regulated under IGRA. Id. § 2710(a)(1). Class II gaming includes games of chance commonly known as bingo,

All of Plaintiff's claims should be dismissed as a matter of law. The lone theory underlying Plaintiff's voluminous counts is that the Chico parcel does not constitute a "restoration of lands" which would be eligible for gaming under one of IGRA's exceptions to its general prohibition on Indian gaming on lands acquired into trust after October 17, 1988. See 25 U.S.C. § 2719(b)(1). However, the administrative record shows that both the NIGC's and the Secretary's actions, which incorporated a determination that the Chico parcel does constitute a "restoration of lands," were reasonable and must therefore be upheld under the APA standard of judicial review. Plaintiff's mere desire for a different outcome does not render either of the agencies' decisions arbitrary and capricious or an abuse of discretion, as required for a court to overturn agency action under the APA. Moreover, to the extent Plaintiff seeks an injunction prohibiting any future gaming on the Chico parcel, this relief is inappropriate because, even if the NIGC's and Secretary's decisions were to be invalidated, the parcel could qualify for gaming in the future under one of IGRA's other exceptions, and because the responsibility for enforcing IGRA lies solely in the NIGC's discretion. The Defendants (collectively, "United States") therefore respectfully request that the Amended Complaint be dismissed for failure to state a claim, or, in the alternative, that summary judgment be granted in favor of the United States.

II. FACTS

A. History of the Mechoopda Tribe

The Mechoopda Tribe of Chico Rancheria is a federally recognized Indian tribe. 73 Fed. Reg.

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including pull-tabs, lotto, punch boards, tip jars, and instant bingo, and card games which are not banked. Id. § 2703(7). Class III gaming is all forms of gaming that are not Class I or II, including banked card games (such as blackjack) and slot machines. Id. § 2703(8). Class II and Class III gaming are subject to IGRA.

18553, 18554 (Apr. 4, 2008). In 1939, 26 acres of land in California were conveyed to the United States in trust for the Tribe. NIGC AR 002034, 002723.[2/] This land was known as the Chico Rancheria, and had previously been part of a ranch purchased by General John Bidwell in 1849. NIGC AR 002723, 002773. In 1958, Congress passed the California Rancheria Act, which authorized the termination of the trust and Indian status of 41 California rancherias, including the Mechoopda's. Pub. L. No. 85-671, 72 Stat. 619, amended by Pub. L. No. 88-419, 78 Stat. 390 (1964). The Tribe was terminated by a Secretarial proclamation issued on June 2, 1967. See 32 Fed. Reg. 7981 (June 2, 1967).

In 1986, the Tribe participated in a lawsuit against the United States challenging the legality of its termination and that of several other rancherias. NIGC AR 002033. Six years later, the Tribe and the United States settled the Tribe's claims with a Stipulation for Entry of Judgment ("Stipulation"). NIGC AR 002731-45. In the Stipulation, the United States agreed, among other things, that the Tribe had not been lawfully terminated and that the Tribe and its members should be equally eligible for all the rights and benefits available to other federally recognized Indians and Indian tribes. NIGC AR 002733-34. The Stipulation also specified that the former boundaries of the Chico Rancheria would not be reestablished. NIGC AR 002741. A notice of the Tribe's reinstatement to its former status was published in the Federal Register on May 4, 1992. See 57 Fed. Reg. 19133 (May 4, 1992).

B. The Indian Lands Opinion

[2/]Citations to "NIGC AR" are to pages of the National Indian Gaming Commission Administrative Record filed with the Court. Citations to "DOI AR" are to pages of the Department of Interior Administrative Record filed with the Court.

On March 26, 2002, the Tribe submitted to the NIGC a request for a determination as to whether the Chico parcel[3/] constitutes Indian lands that are eligible for gaming under the "restoration of lands" exception to IGRA's general prohibition on gaming on lands acquired into trust after October 17, 1988. NIGC AR 002718. The Tribe submitted information about its historical relationship to the Chico parcel. See NIGC AR 002717-002858 ("Request for Indian Land Determination"); NIGC AR 002671-002713 ("Historical Use and Occupancy Report"); NIGC AR 002566-002605 ("Second Historical Use and Occupancy Report"). On March 14, 2003, the NIGC Office of General Counsel ("OGC") issued a legal advisory opinion determining that the Chico parcel, should it be taken into trust by the United States, would fall within the "restoration of lands" exception. NIGC AR 002027. The Secretary concurred in the OGC's conclusion. See NIGC AR 000402.

C. The Gaming Ordinance Amendment

On December 29, 2006, the Tribe submitted to the NIGC Chairman, for review and approval, an amendment to its existing gaming ordinance.[4/] NIGC AR 000343-47.[5/] On February 8, 2007, the

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[3/]The Chico parcel comprises approximately 631.05 acres of land in Butte County, California. DOI AR 000035. The complete legal description of the land can be found at DOI AR 000035-36 and NIGC AR 002768-69.

[4/]The original gaming ordinance, adopted by the Tribe for regulation of Class II and Class III gaming, can be found at NIGC AR 002873-002940.

[5/]The amendment established procedures for enforcement of mitigation measures required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4370f, related to both the trust acquisition of the Chico parcel and a management contract submitted to the NIGC for approval. The management contract is still pending before the NIGC. (To be effective, a management contract between an Indian tribe and an outside contractor must be approved by the NIGC Chairman. 25 U.S.C. §§ 2711(a), 2710(d)(9)).

NIGC Chairman approved the ordinance amendment, relying on the legal advisory opinion of the OGC concluding that the Chico parcel, if taken into trust, would constitute Indian lands for purposes of gaming under IGRA. NIGC AR 000322.

D. Trust Acquisition of the Chico Parcel

On November 7, 2001, the Mechoopda Tribal Council approved a resolution requesting that the Secretary take the Chico parcel into trust, to be used for future gaming and for other purposes. DOI AR 000282-83. The Chico parcel is approximately ten miles from the Tribe's former Rancheria. NIGC AR 002035. The former Rancheria itself was not available for purchase, as it was located in what is now the center of the city of Chico. NIGC AR 002034. On March 27, 2007, the Acting Regional Director of the Pacific Region of the Bureau of Indian Affairs ("BIA") sent to the Secretary a decision package analyzing the Tribe's application for trust acquisition of the parcel. DOI AR 000257-987. The decision package noted that the NIGC had previously determined that the parcel would qualify as a restoration of lands if taken into trust. DOI AR 000258. On May 8, 2008, the Secretary published notice of his intent to take the Chico parcel into trust for the benefit of the Tribe. DOI AR 000007; see also DOI AR 000035.

III. APPLICABLE STANDARDS

A. Standard for Dismissal under Rule 12(b)(6)

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits the Court to dismiss a complaint when it fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "[T]he accepted rule [is] that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him

to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Generally, under this standard, the Court accepts the allegations within the complaint as true and resolves ambiguities in favor of the pleader. See Harbury v. Deutch, 244 F.3d 956, 958 (D.C. Cir. 2001); Tripp v. Dep't of Def., 193 F. Supp. 2d 229, 234 (D.D.C. 2002). However, the Court "need not accept as true inferences unsupported by facts set out in the complaint or legal conclusions cast as factual allegations." Guam Indus. Servs., Inc. v. Rumsfeld, 405 F. Supp. 2d 16, 19 (D.D.C. 2005) (citing Warren v. District of Columbia, 353 F.3d 36, 39 (D.C. Cir. 2004); Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002)).

B. Conversion of Motion to Dismiss to Motion for Summary Judgment

Rule 12(d) of the Federal Rules of Civil Procedure provides for the conversion of a Rule 12(b)(6) motion to dismiss to a motion for summary judgment where "matters outside the pleadings are presented to and not excluded by the court" after there has been a "reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d). However, 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 a motion for summary judgment. See 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)). Further, where a challenge to an agency decision presents only legal questions concerning, for example, "whether the agency adhered to the standards of decisionmaking required [by law]," the court may "consult the record to answer the legal question before the court" without converting a 12(b)(6) motion into one for summary judgment. Marshall County Health Care Auth. v Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993); see also Am. Bioscience, Inc. v. Thompson, 269 F.3d 1077, 1083 (D.C. Cir. 2001) ("As we have repeatedly recognized, however, when a party

seeks review of agency action under the APA . . . [t]he 'entire case' on review is a question of law."). Finally, conversion of a motion to dismiss to one for summary judgment does not entitle a plaintiff to discovery: "Challengers to agency action are not . . . ordinarily entitled to augment the agency's record with either discovery or testimony presented in the district court." Marshall County Health Care Auth., 988 F.2d at 1226; see also Am. Bioscience, Inc., 269 F.3d at 1084 ("Absent very unusual circumstances the district court does not take testimony.").

C. Standard for Summary Judgment

In the event the Court finds it necessary to convert the United States's motion to a summary judgment motion, Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment shall be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Rule 56 is "an integral part of the Federal Rules as a whole" insofar as it allows for the dismissal of "factually insufficient claims" before trial, and thereby prevents the "unwarranted consumption of public and private resources" required by a trial of such meritless claims. Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986).

D. Review of Agency Action Under the Administrative Procedure Act

Plaintiff's claims are brought pursuant to the APA, which provides for judicial review of certain administrative actions: namely, "[a]gency action made reviewable by statute and *final agency action* for which there is no other adequate remedy in a court." Nat'l Ass'n of Home Builders v. Norton, 415 F.3d 8, 13 (D.C. Cir. 2005) (quoting 5 U.S.C. § 704). Section 706(2)(A) of the APA provides that a court may set aside agency action where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard encompasses a

presumption in favor of the validity of agency action. Thus, "the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971); see also Mount Royal Joint Venture v. Kempthorne, 477 F.3d 745, 753 (D.C. Cir. 2007). The reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416; see also Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989).

Review is based on an examination of the administrative record. 5 U.S.C. § 706; Am. Bioscience, Inc., 269 F.3d at 1084 (citing Overton Park, 401 U.S. 402). The APA "standard of review is a highly deferential one. It presumes agency action to be valid." Am. Wildlands v. Kempthorne, 530 F.3d 991, 997 (D.C. Cir. 2008) (quoting Ethyl Corp. v. EPA, 541 F.2d 1, 34 (D.C. Cir. 1976)). A court must affirm an agency action "if a rational basis exists for the agency's decision." Am. Fin. Servs. Ass'n v. Fed. Trade Comm'n, 767 F.2d 957, 985 (D.C. Cir. 1985) (citations omitted).

E. The Indian Canon of Construction

Ambiguous statutes and ambiguous statutory provisions enacted for the benefit of Indians are to be construed liberally in their favor. See Bryan v. Itasca County, 426 U.S. 373, 392 (1976); Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444-45 (D.C. Cir. 1988); Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt, 116 F. Supp. 2d 155, 164 (D.D.C. 2000). The IRA and IGRA were enacted for the benefit of Indian tribes.

The D.C. Circuit has concluded that Section 2719 of IGRA is ambiguous, requiring its

provisions to be interpreted in a tribe's favor. City of Roseville v. Norton, 348 F.3d 1020, 1031-32 (D.C. Cir. 2003) (finding that IGRA is designed to promote the economic viability of Indian tribes and in this context, the canon of construction requires the court to resolve any doubt in favor of the tribe); see also Confederated Tribes of Coos, 116 F. Supp. 2d at 162.

IV. ARGUMENT

Plaintiff's challenges to the two final agency actions at issue here, the NIGC's approval of the Tribe's ordinance amendment and the Secretary's decision to take the Chico parcel into trust, are both premised on Plaintiff's belief that the Chico parcel should not constitute a "restoration of lands" under IGRA's Section 2719. However, under the APA standard of review, the two agency decisions should be upheld because they were both reasonable and fully supported by the administrative record. Just because Plaintiff has a different view of the status of the Chico parcel does not mean the NIGC's and Secretary's contrary determinations are arbitrary and capricious or an abuse of discretion.

Plaintiff contends that only land which was once commonly occupied or owned by ancestors of present-day Tribe members can qualify as part of a "restoration of lands" under IGRA, and that the only land meeting Plaintiff's definition is the former Bidwell Ranch. Both contentions are wrong. Plaintiff's "common occupation" test is not the law; rather, the United States has adopted – and courts have endorsed – a broad reading of the term "restoration of lands" in order to place unlawfully terminated tribes such as the Mechoopda on equivalent footing with tribes that have had continuous federal recognition. Moreover, Plaintiff is wrong to suggest that the former Bidwell ranch was the only land ever occupied by the Tribe in the past. The record contains ample evidence to support the NIGC's finding that the Mechoopda and their ancestor tribes had a historical presence in the area

surrounding the Chico parcel and that the parcel has cultural and historical significance to the present-day Tribe. Plaintiff has attempted to create a factual dispute by submitting a report it commissioned to question the Mechoopda's tribal history. However, Plaintiff's submission of its report does not render arbitrary and capricious the NIGC's and the Secretary's reliance on the other, sufficient, facts in the record. Finally, the injunction that Plaintiff seeks, barring the United States from authorizing or sanctioning any Class III gaming on the Chico parcel, is inappropriate because even were this Court to invalidate the agency actions at issue, lawful gaming on the parcel might be possible under another provision of IGRA, and because enforcement of IGRA violations is within the discretion of the NIGC. Accordingly, Plaintiff's Amended Complaint should be dismissed in its entirety, or summary judgment granted in favor of the United States.

A. The NIGC's approval of the Tribe's gaming ordinance amendment was proper.

Under the APA standard of review, this court may overturn the NIGC's approval of the amendment to the Tribe's gaming ordinance only if that approval was arbitrary and capricious, an abuse of discretion, or otherwise contrary to law. The law and the record show that the NIGC's final agency action was well-reasoned and entirely lawful, and Plaintiff has failed to provide a basis for arguing to the contrary. Accordingly, Plaintiff's challenge to the NIGC's approval of the gaming ordinance amendment fails to state a claim and should be dismissed.

1. The Indian Gaming Regulatory Act and the "restoration of lands" exception

IGRA was enacted in 1988, designed "in large part to 'provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'" Citizens Exposing Truth About Casinos v.

Kempthorne, 492 F.3d 460, 462 (D.C. Cir. 2007) ("CETAC") (quoting Taxpayers of Mich. Against Casinos v. Norton, 433 F.3d 852, 865 (D.C. Cir. 2006) ("TOMAC"); 25 U.S.C. § 2702(1)). IGRA recognizes that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands" as long as the gaming complies with federal law and takes place in a state where gaming is not prohibited. 25 U.S.C. § 2701(5). The statute regulates various aspects of Indian gaming. For example, a tribe that wishes to conduct gaming under IGRA must adopt a tribal gaming ordinance that meets certain requirements and is approved by the NIGC Chairman. See id. § 2710. A tribe wishing to contract with an outside manager for the management of a gaming facility must first obtain the Chairman's approval of the management contract. See id. § 2711.[6] In addition, with certain important exceptions, IGRA generally prohibits gaming activities on land acquired into trust by the United States after October 17, 1988. Id. § 2719(a).

One of these exceptions, the so-called "restoration of lands" exception, applies to land taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." Id. § 2719(b)(1)(B)(iii).[7] This exception, along with the others contained in the same section,

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[6]IGRA also established the NIGC, 25 U.S.C. § 2704, granting it authority to implement the Act, id. § 2706(b)(1), while granting specific authority for certain other aspects of Indian gaming to the Secretary, Indian tribes, and the States. IGRA authorizes the NIGC Chairman to bring enforcement actions and collect civil fines for substantial violations of IGRA, NIGC regulations, and approved tribal gaming ordinances. Id. § 2713(a). The Chairman has the authority to temporarily close Indian gaming, and the full Commission has the authority to halt gaming permanently if it finds a substantial violation. Id. § 2713(b).

[7]In addition to the requirement of a "restoration of lands," this exception applies only to tribes that have been "restored to Federal recognition." Here, Plaintiff does not claim that the Mechoopda are not a restored tribe. Courts have interpreted the "restored tribe" phrase "expansively, so as to include tribes whose termination or recognition is accomplished administratively rather than by an act of Congress."

"ensur[es] that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." City of Roseville, 348 F.3d at 1030.

"Restoration of lands" is not defined in the statute, see id. at 1024, and courts have held that the term is ambiguous. See Oregon v. Norton, 271 F. Supp. 2d 1270, 1277-78 (D. Or. 2003) (citing Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 843 (1984)); cf. City of Roseville, 348 F.3d at 1032. The NIGC and the Secretary have interpreted the term "restoration of lands" in a broad manner that covers the concept of restitution to tribes to compensate for past wrongs, rather than a restrictive interpretation that would cover only giving back to tribes specific land that they once had. See, e.g., City of Roseville, 348 F.3d at 1026-27. Courts have endorsed this approach, noting that a broad, but not unlimited, interpretation of "restoration of lands" places unlawfully terminated or later-recognized tribes "in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion." Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for W. Dist. of Mich. ("Grand Traverse II"), 198 F. Supp. 2d 920, 935 (W.D. Mich. 2002).[8] The Grand Traverse II court suggested three factors for the NIGC and courts to consider

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City of Roseville, 348 F.3d at 1026 (citing cases); see also Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Attorney for the W. Dist. of Mich., 369 F.3d 960, 967 (6th Cir. 2004) (noting that a "history of governmental recognition, withdrawal of recognition, and then reinstatement of recognition" satisfies the definition of "restored to Federal recognition"). In keeping with this case law, the NIGC here concluded that the Mechoopda were a restored tribe because, like other tribes deemed "restored," the Mechoopda fit the pattern of having been acknowledged as a tribe by the United States, then terminated, and then finally reinstated to federal recognition. NIGC AR 002032-33.

[8]In this opinion, the court reiterated ideas it had first put forth in a ruling on a motion for preliminary injunction three years earlier. See Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich. ("Grand Traverse I"), 46 F. Supp. 2d 689, 700 (W.D. Mich.

when evaluating whether a piece of land is reasonably deemed to be restored: "the factual circumstances of the acquisition, the location of the acquisition, [and] the temporal relationship of the acquisition to the tribal restoration." Id.

Several other courts have endorsed and followed the Grand Traverse approach, which calls for a fact-specific inquiry as to the parcel of land in question to determine whether it constitutes a restoration of lands for the particular tribe. See Wyandotte Nation v. Nat'l Indian Gaming Comm'n, 437 F. Supp. 2d 1193, 1213-14 (D. Kan. 2006) (applying three Grand Traverse factors and noting importance of the land's location vis-a-vis the tribe's historical location in upholding NIGC's determination that a parcel was not restored lands); Oregon, 271 F. Supp. 2d at 1279 (after noting that Secretary has authority to interpret the term "restoration of lands," upholding finding that a certain parcel was restored); Confederated Tribes of Coos, 116 F. Supp. 2d at 164 (rejecting, as too restrictive, the position then taken by the United States that a Congressional act of restoration was required for lands to qualify as "restored").

Plaintiff tries to discredit the United States's interpretation of "restoration of lands," which incorporates the concept of restitution, by fashioning its own novel legal theory: that to qualify as restored lands under IGRA, the particular parcel must have been "occupied or owned as a tribe" previously by the tribe in question. Am. Compl. at 10. Plaintiff goes on to conclude that only the former Bidwell Ranch/Chico Rancheria is eligible to be designated as restored lands, "[b]ecause there was no land commonly occupied by the ancestors of the current Mechoopda tribal membership or the

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1999).

Tribe other than the Bidwell Ranch or Chico Rancheria." Am. Compl. at 15. Plaintiff's theory, however, does not coincide with the law. And even if Plaintiff's theory about prior tribal occupation and ownership of the land were correct, in this case, as explained in the following section, the NIGC reasonably found that the Mechoopda did have a historical presence on and in the proximity of the Chico parcel.

2. The NIGC's approval of the gaming ordinance amendment was reasonable and supported by applicable law.

On February 8, 2007, the NIGC Chairman approved the amendment to the Tribe's gaming ordinance. NIGC AR 000322. The Chairman has statutory authority to approve gaming ordinances, and a tribe must have an approved ordinance before it can lawfully engage in Class III gaming. 25 U.S.C. § 2710(d). Approvals of gaming ordinances and amendments thereto are reviewed under the APA. See Citizens Against Casino Gambling in Erie County v. Hogen, 2008 U.S. Dist. LEXIS 52395, *87-90 (W.D.N.Y. July 8, 2008). The APA's "arbitrary and capricious" standard of review means that a reviewing court "must uphold an agency's action where [the agency] 'has considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" Transcon. Gas Pipe Line Corp. v. FERC, 518 F.3d 916, 919 (D.C. Cir. 2008) (quoting Nat'l Ass'n of Clean Air Agencies v. EPA, 489 F.3d 1221, 1228 (D.C. Cir. 2007)). In other words, the APA "standard of review is 'satisfied if the agency enables us to see what major issues of policy were ventilated … and why the agency reacted to them as it did.'" Milk Indus. Found. v. Glickman, 132 F.3d 1467, 1476 (D.C. Cir. 1998) (quoting Republican Nat'l Comm. v. Fed. Election Comm'n, 76 F.3d 400, 407 (D.C. Cir. 1996)).

Plaintiff challenges the NIGC's approval of the gaming ordinance amendment on only one ground: that it approves gaming on a site, the Chico parcel, that is not eligible for lawful Indian gaming because it does not qualify as restored lands under IGRA. See, e.g., Am. Compl. at 11. However, the gaming ordinance amendment approval incorporated and relied on the Indian lands legal advisory opinion issued by the NIGC General Counsel in 2003, which determined that the Chico parcel did qualify as part of a "restoration of lands" to the Mechoopda Tribe. In that Indian lands opinion, the General Counsel analyzed the history of the Mechoopda and the facts surrounding the Chico parcel to conclude, in keeping with the legal standards described above, that the parcel would constitute a "restoration of lands" if taken into trust. This determination was reasonable, rational, and not arbitrary or capricious. In turn, the NIGC Chairman's later approval of the gaming ordinance amendment was not arbitrary and capricious or an abuse of discretion simply because it relied on the earlier "restoration of lands" legal opinion. The NIGC Chairman's decision to approve the ordinance amendment should be upheld.

a. The General Counsel's legal advisory opinion evaluated all relevant factors and reasonably concluded that the Chico parcel would constitute restored lands if taken into trust.

In March 2002, the Tribe submitted to the NIGC a request for a determination as to whether the Chico parcel constituted Indian lands that would be eligible for gaming under IGRA's "restoration of lands" exception. NIGC AR 002718. On March 14, 2003, the OGC issued a legal advisory opinion determining that the Chico parcel, should it be taken into trust by the United States, would fall within the "restoration of lands" exception. NIGC AR 002027. When preparing this opinion, the OGC evaluated the three Grand Traverse factors – factual circumstances, location, and timeline – to

determine whether the Chico parcel was properly considered part of a restoration of lands to the Mechoopda. The OGC fully explained the policy issues involved and "articulated a rational connection," Transcon. Gas Pipe Line Corp., 518 F.3d at 919, between the record's facts about the parcel and the agency's conclusion that the parcel constituted a restoration of lands.

First, for the "factual circumstances of the acquisition" factor, the OGC noted that upon the Tribe's restoration to federal recognition in 1992, the former Rancheria had been lost and the Tribe was landless. NIGC AR 002034; see id. 002718-19. Accordingly, the Tribe began to reorganize and seek to reacquire a land base. NIGC AR 2034. Second, for the "location" factor, the OGC observed that the Chico parcel is approximately ten miles from the former Rancheria, NIGC AR 002035, and lies within the boundaries that contained the Mechoopda's 23 historical villages. NIGC AR 002036; see id. 002587, 002590-95, 002673, 002683. The Chico parcel also is within the area that was historically occupied by the Northwestern Valley Maidu, ancestors of the Mechoopda. NIGC AR 002036; see id. 002718, 002790. The parcel is part of the land base promised to the Mechoopda in an unratified 1851 treaty between the Tribe and the United States. NIGC AR 002036; see id. 002586-95, 002819. In addition, the Tribe has historical and cultural connections to the Chico parcel, which was the site of a historic trail linking Mechoopda and Maidu villages and was part of the area used by the Tribe's ancestors for hunting and gathering. NIGC AR 002036-37; see id. 002583, 002790-91. Three buttes with cultural significance to the Tribe also lie nearby. NIGC AR 002036; see id. 002675. The third factor is the timing of the Tribe's request for trust acquisition of the Chico parcel vis-a-vis its 1992 restoration to federal recognition. The OGC concluded that this factor, too, supported a determination that the parcel would constitute restored lands if taken into trust, in part

because, aside from an unusable almond orchard, the parcel would be the Tribe's first land acquisition after its restoration. NIGC AR 002037; see id. 002719. In addition, the Stipulation that restored the Tribe to federal recognition provided for the acquisition of land outside the boundaries of the former Chico Rancheria as part of the Tribe's restoration. NIGC AR 002037, 002735, 002739. All of these facts demonstrate the reasonableness of the OGC's conclusion that the Chico parcel qualifies as part of a restoration of lands to the Tribe, and, in turn, the reasonableness of the Chairman's reliance on that conclusion when approving the Tribe's gaming ordinance amendment.

b. The NIGC's determination that the Chico parcel would be a "restoration of lands" is supported by Circuit precedent.

Moreover, the D.C. Circuit has also endorsed a broad interpretation of "restoration of lands" that includes newly acquired land serving as recompense for historically wronged tribes whose original reservation or rancheria is no longer available for tribal use. In City of Roseville, the court held that a parcel of land taken into trust by the Secretary for the United Auburn Indian Community constituted a "restoration of lands" even though the parcel was not part of the tribe's reservation at the time the tribe lost federal recognition. City of Roseville, 348 F.3d at 1025. The reasoning in City of Roseville, applied to the present case, shows that the NIGC reasonably concluded that the Chico parcel was a "restoration of lands."

Like the Mechoopda, the Auburn Tribe was terminated in the 1960s and later restored to federal recognition. Id. at 1022. Before termination, the Auburn Tribe had a 40-acre reservation on a rancheria in California, but the rancheria was terminated along with the tribe in 1967, and by the time of the Auburn's restoration in 1994, most of the land comprising the former rancheria was owned in fee

and unavailable to the Tribe. Id. Accordingly, the Auburn acquired a parcel some 40 miles from its former reservation and applied to have the parcel taken into trust for purposes of gaming. Id. at 1022-23. A nearby city challenged the designation of the parcel as part of a "restoration of lands" to the Auburn, alleging that the parcel could not be restored lands because the Auburn Tribe "never owned those acres in the past as part of its former reservation, the Rancheria, and the tract of land is too different from the Rancheria to be a 'restoration' of it." Id. at 1024. The court held, however, that the parcel was restored lands.

First, the court noted that restored lands "could easily encompass new lands given to a restored tribe to re-establish its land base and compensate it for historical wrongs is evident" where much of the tribe's original Rancheria was now unavailable to it. 348 F.3d at 1027. Here, the land that was once the Mechoopda Tribe's Rancheria is now in the center of the city of Chico, California. One half of the former Rancheria is part of California State University, Chico; the other half contains 50 separate lots with mixed uses. NIGC AR 002034.

Second, the D.C. Circuit noted that even if "restored" lands had to be originally occupied by the tribe in question, it was appropriate to look back through history and not limit the inquiry to the tribe's reservation at the time of termination. 348 F.3d at 1027. "The Maidu and Meiwok Tribes from which the Auburn Tribe descended once occupied much of central California. For the Cities to now argue that the 49 acres are a windfall, as if the Tribe's ancestors had never possessed any more, is ahistorical." Id. The Mechoopda, too, are descended from the Maidu, NIGC AR 002773-74, 002790, and their ancestors once occupied large portions of central California. NIGC AR 002718.

Third, the City of Roseville court pointed out that limiting the definition of restored lands to a

tribe's former reservation "practically reads the 'restoration of lands' provision out of existence," because another Section 2719 exception applies to a tribe's "last recognized reservation." 348 F.3d at 1027-28; see 25 U.S.C. § 2719(a)(2)(B). The court concluded that restored lands must cover something more than simply a tribe's previous reservation, especially because of "[t]he difficulty of reassembling a former reservation" when substantial time has passed between a tribe's termination and its restoration to federal recognition. 348 F.3d at 1028. This factor applies in the present case as well. To limit the Mechoopda's potential "restored lands" to only the Rancheria that the Tribe occupied immediately before termination would "read[] the 'restoration of lands' provision out of existence." Id. at 1027.

Finally, the Indian canon of construction also supports the conclusion that the NIGC's broad interpretation of "restoration of lands" must be upheld. City of Roseville, 348 F.3d at 1032. IGRA was enacted for the benefit of Indian tribes, and any ambiguities in the law must therefore be construed in favor of the Tribe.

The only substantial difference between City of Roseville and the present case is that in City of Roseville, the Auburn Tribe had been restored by a congressional restoration act that designated a tribal "service area" comprising several counties in California and authorized the Secretary to take any acreage in the service area into trust for the Auburn. 25 U.S.C. § 1300l-2(a), 1300l-6(7).[9/] The parcel at issue was within the service area. However, a parcel of land need not be mentioned or referenced in a restoration act in order to qualify as restored lands. In Oregon, the tribe had a

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[9/]The court noted it had no occasion to decide what constituted restoration of lands in the absence of a tribal restoration act. 348 F.3d at 1026.

restoration act that specifically mentioned three parcels of land, but not the parcel sought to be designated as restored lands. Oregon, 271 F. Supp. 2d at 1272-73. Nonetheless, the court affirmed the Secretary's determination that the parcel was restored lands: "[I]f a particular parcel of trust land is not identified in a restoration act, the task falls to the Secretary to determine whether such land is restored," and the Secretary's decision is entitled to deference. Id. at 1278. Similarly, in Grand Traverse II, there was no restoration act, but the court found that the parcel in question was restored lands because, among other factors, the site lay within counties previously ceded by the tribe to the United States, the parcel carried "historic, economic, and cultural significance" for the tribe, and the parcel was part of the newly-acknowledged Tribe's early attempts to build a tribal land base. Grand Traverse II, 198 F. Supp. 2d at 936. In addition, none of the court's reasoning described above is affected by the presence or absence of a restoration act and designated service area.

c. The record supports the NIGC's determination despite Plaintiff's attempts to create a factual dispute.

The central theme of Plaintiff's Amended Complaint is that "[t]he modern Mechoopda Tribe is not descended from a historical tribe, but rather is descended solely from the disparate group of Indian and non-Indian residents of the Bidwell Ranch." Am. Compl. at 10. From this flawed premise, Plaintiff concludes that "[t]he former Chico Rancheria is the only land to which the current Mechoopda tribal members can document any historic ties or connections as a group." Id. [10/] These statements are

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[10/] Although Plaintiff goes out of its way to state that it "does not question the Tribe's recognition or sovereignty," Am. Compl. at 2, the Complaint is nonetheless sprinkled with insinuations that members of the Mechoopda Tribe have nothing in common except the fact that their ancestors were once employees on the Bidwell Ranch. Despite these insinuations, the record is filled with evidence of the Tribe's history as a tribe. In addition, "the Secretary has authority to recognize tribes by virtue of a

unsupported by anything in the record other than a report commissioned by Plaintiff. Record evidence establishes that, contrary to the conclusion in Plaintiff's report, the Mechoopda were living on the ranch at the time General Bidwell purchased it in 1849. See NIGC AR 002681, 002773. In addition, as described above, ample evidence in the record supports the NIGC's determination that the Mechoopda have a historical connection to the Chico parcel as well as to the former Chico Rancheria/Bidwell Ranch.

In short, the NIGC Chairman's approval of the gaming ordinance amendment, which relied on the OGC's legal opinion that the Chico parcel, if taken into trust, would constitute restored lands eligible for Indian gaming under Section 2719 of IGRA, was reasonable. It was not arbitrary or capricious and not an abuse of discretion. Plaintiff's presentation of allegations that contradict the conclusions drawn by the NIGC does not negate the fact that ample evidence supports the Chairman's decision to approve the Tribe's ordinance amendment, which relied on the OGC legal opinion. "The APA does not permit a reviewing court to decide which side of the factual dispute it thinks 'the preponderance of the evidence' in the administrative record falls on. Rather . . . judicial review under the APA requires that the agency's decision be upheld as long as there is enough support in the record to assure it is not 'arbitrary.'" Ctr. for Auto Safety v. Dole, 828 F.2d 799, 804-05 (D.C. Cir. 1987). Because the NIGC "considered the relevant factors and articulated a rational connection between the facts found and the choice made," Transcon. Gas Pipe Line Corp., 518 F.3d at 919 (quotation omitted), its determination was not arbitrary and must be upheld. Plaintiff's challenge to the NIGC's

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complex set of historical facts, which may or may not include prior express recognition by the United States and the Secretary." Grand Traverse II, 198 F. Supp. 2d at 931.

approval of the Tribe's gaming ordinance amendment fails to state a claim and should be dismissed.

B. The Secretary's decision to take the Chico parcel into trust was reasonable.

The second federal agency action Plaintiff targets, the Secretary's determination to accept the Chico parcel into trust on behalf of the Mechoopda Tribe, was also reasonable and fully supported by the record. Plaintiff cannot show that the trust acquisition decision was arbitrary, capricious, or an abuse of discretion. Accordingly, Plaintiff's challenge to the trust acquisition fails to state a claim and should be dismissed.

1. The Indian Reorganization Act

The IRA was enacted in 1934 as part of the federal government's return to a policy supporting "principles of tribal self-determination and self-governance." Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior, 228 F.3d 82, 85 (2d Cir. 2000) (quoting County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 255 (1992)). The law was specifically intended to stop the alienation of Indian land and "to support Indians, and to provide for acquisition of additional acreage for tribes. This comprehensive legislation sought to offset the unintended and devastating effects of prior federal Indian policies, including cultural destruction, poverty, and loss of land." Felix Cohen, Handbook of Federal Indian Law § 1.05 (1982 ed.). To this end, Section 5 of the IRA authorizes the Secretary to take lands into trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. Section 5 provides the Secretary with "broad authority to acquire property in trust for Indian tribes." Sokaogon Chippewa Cmty. v. Babbitt, 214 F.3d 941, 943 (7th Cir. 2000).

Regulations implementing Section 5, set forth in 25 C.F.R. Part 151, govern the fee-to-trust process. A tribe wishing to have land taken into trust must file a written request with the Secretary. 25

C.F.R. § 151.9. The Secretary must then notify the state and local governments having regulatory jurisdiction over the proposed trust land so that they can provide written comments about potential impacts on regulatory jurisdiction, property taxes, and special assessments. Id. at § 151.10. The regulations oblige the Secretary, in deciding whether to approve a tribe's request, to consider several factors, including the tribe's need for the land; the use to which the land will be put; the impact on the state and its political subdivisions of removing the land from the tax rolls; jurisdictional problems and potential conflicts of land use; whether the BIA is equipped to discharge any additional responsibilities resulting from the trust status; and compliance with the National Environmental Policy Act ("NEPA"). See id. at § 151.10(b), (c), (e)-(h).

2. The Secretary lawfully decided to take the land into trust.

As with its challenge to the ordinance amendment approval, Plaintiff attacks the Secretary's decision to take the Chico parcel into trust on the lone ground that it approves gaming on a site that is not eligible for lawful Indian gaming because it does not qualify as restored lands under IGRA. See, e.g., Am. Compl. at 12. To begin with, Plaintiff's assertion that the Secretary's trust acquisition of the Chico parcel "purports to approve gaming" on that site, id., is incorrect. The Secretary's decision was to take the land into trust for gaming purposes. He did not decide that the Tribe may engage in gaming on the land; the Tribe's ability to engage in gaming is conditional upon its compliance with IGRA. All that the Secretary did was to note very briefly that the NIGC had previously determined that the Chico parcel, if taken into trust, would qualify as a "restoration of lands" for the Tribe under IGRA Section

2719.[11/] DOI AR 000036, 000258. Plaintiff has pointed to nothing that renders the Secretary's decision unlawful.

The APA requires a reviewing court to "uphold an agency's action where [the agency] 'has considered the relevant factors and articulated a rational connection between the facts found and the choice made.'" Transcon. Gas Pipe Line Corp., 518 F.3d at 919 (citation omitted). In the context of taking land into trust, the "relevant factors" are the Part 151 regulations and the several criteria they require the Secretary to consider. Here, the Secretary followed the established Part 151 procedures, providing a written analysis of each factor he is required to consider.[12/] For example, the decision package discussed the Tribe's need for the land under 25 C.F.R. § 151.10(b). DOI AR 000260-61. It also discussed the purpose for which the Tribe planned to use the land, as required by 25 C.F.R. § 151.10(c), and the impact on state and local governments should the land be removed from the tax rolls, as required by 25 C.F.R. § 151.10(e). DOI AR 000261-63. The Secretary also considered jurisdiction problems and potential land use conflicts under 25 C.F.R. § 151.10(f). DOI AR 000263.

In any event, Plaintiff does not even allege that the Secretary inadequately considered any of the required factors. Plaintiff claims only that the trust decision is somehow rendered invalid because it refers to the NIGC's determination that the Chico parcel would qualify as part of a "restoration of lands" if taken into trust. However, as described above, the NIGC's determination that the Chico

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[11/]At the time that the NIGC's Indian lands opinion was written, the Secretary concurred in the conclusion that the Chico parcel would, if taken into trust, be restored lands qualifying for the Section 2719 exception. See NIGC AR 000402.

[12/]The discussion is found in the decision package sent by the Acting Regional Director of the Pacific Region of the Bureau of Indian Affairs ("BIA") to the Secretary. DOI AR 000257-987.

parcel would qualify as restored lands was reasonable, and so to the extent the Secretary's decision to take the land into trust is dependent on the restored lands determination, it too is reasonable. Plaintiff's challenge to the Secretary's decision to acquire the Chico parcel in trust fails to state a claim and should be dismissed.

C. The injunctive relief Plaintiff seeks is inappropriate because it goes beyond the issues presented in this case.

Finally, as part of its requested relief, Plaintiff asks this court for an injunction prohibiting the United States from "authorizing or sanctioning Class III gaming activities" on the Chico parcel. Am. Compl. at 14, 17, 18. This injunctive relief is inappropriate for two reasons. First, even if the NIGC's and Secretary's decisions were to be invalidated, the parcel could qualify for gaming in the future under one of IGRA's other exceptions to the general prohibition on gaming on lands acquired in trust after October 17, 1988. See 25 U.S.C. § 2719. Second, the remedy for violations of IGRA is an enforcement action brought by the NIGC, which has the power to issue a closure order against an Indian gaming operation for substantial violations of IGRA, the NIGC's regulations, or an approved tribal gaming ordinance. See id. § 2713(b). Not only must enforcement wait until a gaming operation actually exists, which it does not here, but the decision whether to commence an enforcement action is left to the discretion of the NIGC. The "decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion." Heckler v. Chaney, 470 U.S. 821, 831 (1985). See also Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1482 (D.C. Cir. 1995) (holding that Indian tribe cannot force Attorney General to pursue water rights claims where duty was not specifically imposed by treaty, statute, or agreement). Plaintiff's request for

an injunction prohibiting all future Class III gaming on the Chico parcel is therefore improper.

V. CONCLUSION

For the reasons stated above, the United States respectfully requests that the Court dismiss Plaintiff's Amended Complaint, or in the alternative grant summary judgment in favor of the United States.

Dated: September 12, 2008

Respectfully submitted,

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/s/

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