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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

REDDING RANCHERIA, Plaintiff, v. KENNETH SALAZAR, et al. Defendant.	Case No. C 11-1493 SC **DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT** Date: December 2, 2011 Time: 10:00 a.m.

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I. NOTICE OF MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

PLEASE TAKE NOTE, that on December 2, 2011, at 10:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Samuel Conti, Courtroom No. 1, United States Courthouse, 450 Golden Gate Avenue, San Francisco, California, defendants Kenneth Salazar and Larry Echo Hawk (hereafter collectively referred to as "Defendants" or "Interior") will move this Court, pursuant to Rule 56, Federal Rules of Civil Procedure, for summary judgment on all claims in Plaintiff Redding Rancheria's complaint filed herein. The motion will be made on the grounds that this is a matter brought under the Administrative Procedure Act, 5 U.S.C. § 706, et seq. ("APA"), there are no disputed facts, and the Defendants are entitled to judgment as a matter of law.

Defendants' motion is supported by this Notice of Motion and Motion for Summary Judgment, the Memorandum of Points and Authorities in Support of Motion for Summary Judgment, which follows, the previously filed Administrative Record, the other pleadings and papers on file herein, and such further evidence and oral argument as may be presented at the hearing of the motion. A form of order granting this motion is submitted herewith, in accordance with Civil Local Rule 7-2(c).

II. INTRODUCTION

Plaintiff challenges the Secretary of the Interior's ("Secretary") promulgation of regulations implementing the Indian Gaming Regulatory Act ("the IGRA") and application of those regulations to deny Plaintiff's request that Interior take land into trust so that Plaintiff could open an additional new gaming operation. Plaintiff alleges that the Secretary's determination that Plaintiff's lands are not eligible for gaming under an exception - commonly referred to as the "restored lands exception" - to the IGRA's general prohibition on gaming on lands acquired after its passage was arbitrary, capricious, and an abuse of discretion under the APA and a breach of Defendants' alleged fiduciary duties to Plaintiff.

Plaintiff is incorrect. The Secretary possesses broad authority to promulgate regulations, including regulations implementing the Secretary's duties under the IGRA. In particular, the Secretary possessed the authority to promulgate the regulations governing the implementation of the

IGRA's prohibition on gaming on trust lands acquired after its passage, and the exceptions to that general prohibition. The challenged regulations reflect a reasonable interpretation of the IGRA's "restored lands exception." As discussed in greater detail below, for a tribe to qualify for the "restored lands exception," it must, among other things, demonstrate that the land was included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition, or that the tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands. Interior reasonably applied the plain language of the regulations to determine that Plaintiff could not meet the requirement of the "restored lands exception" because the request for land to be taken into trust that is at issue in this case was Plaintiff's third or fourth post-restoration request and Plaintiff was and is gaming on other lands.

III. STATEMENT OF ISSUES TO BE DECIDED

Pursuant to Local Rule 7-4 (a)(3), the issues before the Court are whether it was arbitrary, capricious, or a breach of any fiduciary duty owed to Plaintiff for Interior to: (1) promulgate the regulations set forth in 25 C.F.R. Part 292; and (2) apply those regulations to deny Plaintiff's request that Interior take land into trust to open an additional new gaming operation.

IV. STATEMENT OF FACTS

A. The Indian Gaming Regulatory Act

Congress enacted the IGRA, 25 U.S.C. 2701 et seq., in 1988 to provide a statutory basis for the operation and regulation of Indian gaming, finding that existing federal law did not "provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. 2701(3). See, e.g., United States v. Cook, 922 F.2d 1026, 1033 (2d Cir. 1991), cert. denied, 500 U.S. 941 (1991) ("The congressionally declared purpose of the IGRA is to promote tribal economic development and self-sufficiency in addition to shielding the tribes from the influences of organized crime through the enactment of the statutory scheme regulating the operation of gaming by Indian tribes."); Spokane Tribe v. Washington, 28 F.3d 991, 997 (9th Cir. 1994) ("The IGRA was passed to fill a void in Indian gaming regulation that arose from the states' dependence on Congress for any

authority to regulate tribal affairs."); Seminole Tribe of Fla. v. Florida, 11 F.3d 1016, 1019 (11th Cir. 1994) ("In an attempt to supply some much-needed regulation, and after contentious debate concerning the appropriate state role in the regulation of Indian gaming, Congress enacted the [IGRA].").

Section 20 of the IGRA ("Section 20") prohibits gaming on trust lands acquired after October 17, 1988, unless various exceptions apply. See 25 U.S.C. § 2719. One exception, the "restored lands exception," provides that the IGRA's general prohibition on gaming does not apply when "lands are 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).

The IGRA established the National Indian Gaming Commission ("NIGC"), 25 U.S.C. § 2704(a), and set forth the NIGC's powers and responsibilities. The IGRA also vested the Secretary of the Interior ("Secretary") with certain authorities and responsibilities. Both the Secretary, at 25 C.F.R. Parts 290-93, and the NIGC, at 25 C.F.R. Subchapters A-C, E, and G, have promulgated regulations under the IGRA.

B. The Secretary of the Interior's Promulgation of the 25 C.F.R. Part 292 Regulations

On September 14, 2000, the Secretary published proposed regulations in the Federal Register to establish procedures that an Indian tribe must follow when seeking a "Secretarial Determination" under Section 20 that a gaming establishment would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community. 65 Fed. Reg. 55471. Subsequently, the comment period for these proposed regulations was extended twice, to March 27, 2002, but no further action was taken to publish the final rule. *See* 73 Fed. Reg. 29354, May 20, 2008.

On October 5, 2006, the Secretary published a new proposed rule (71 Fed. Reg. 58769) because he determined that the rule should address all of the exceptions to the IGRA's general

prohibition on gaming set forth in Section 20 and in order to explain to the public how Interior interprets these exceptions.[1/]

On May 20, 2008, the Secretary published Interior's Final Rule interpreting Section 20 of IGRA, 25 U.S.C. § 2719. "Gaming on Trust Lands Acquired After October 17, 1988," 73 Fed. Reg. 29354 (May 20, 2008).[2/] The regulations implement Section 20 of the IGRA by articulating standards that the Department "will follow in interpreting the various exceptions to" IGRA's general prohibition on gaming on lands acquired after October 17, 1988. 73 Fed. Reg. 29354. The provisions relevant to the "restored lands exception," § 2719(b)(1)(B)(iii), are located at 25 C.F.R. §§ 292.7-12. In particular, Section 292.12 provides that, with respect to tribes like the Redding Rancheria, which was restored by a court-approved settlement agreement entered into by the United States, a parcel qualifies as restored land if the tribe can establish three types of connections to the land: a modern connection, a historical connection, and a temporal connection.

C. Redding Rancheria's Requests that the Secretary Take Land Into Trust

On June 11, 1984, the Redding Rancheria ("Redding" or "Plaintiff") was "restored to federally-recognized status pursuant to a court-approved settlement agreement with the United States." Decision document, at 2 (AR005406); Order Approving Entry of Final Judgment in Action, Hardwick v. United States, Case No. C-79-1710 SW (N.D. Cal. Dec. 22, 1983) ("Hardwick") (AR006240-53); 49 Fed. Reg. 24084 (restoring federal status to 17 California Rancherias) (AR006263). See Complaint ("Compl.") at ¶ 9 (Docket Number ("Dkt. No.") 1) (citing Hardwick).

[1/] Prior to publishing these regulations, the United States engaged in an extensive consultation process with Tribal governments. Letter from G. Skibine, DOI, to Tribal Leaders (Mar. 15, 2006) (AR000010-2; AR000973-89) (citing Executive Order 13175--Consultation and Coordination With Indian Tribal Governments (Nov. 6, 2000)). Plaintiff provided comments on what would become the proposed regulations on June 8, 2006. Redding Rancheria Position Paper, Restored Lands of Restored Tribes, 25 C.F.R. 292.7 (AR 001466-67).

[2/] The Secretary published a correction to the final rule on June 24, 2008. 73 Fed. Reg. 35579-80.

Following its restoration, Plaintiff made several requests that the Secretary take land into trust on Plaintiff's behalf.

In 1992, Plaintiff acquired its first trust holdings, through the transfer of the beneficial interest in approximately 8.5 acres of trust lands formerly held by Interior in trust for individual tribal members. Decision document, at 2 (AR005406). Plaintiff operates a casino on these lands. Id.; Compl. at ¶¶ 14-16.

On January 19, 1995, Plaintiff submitted a request that Interior take approximately 1.06 acres of land into trust. Id; Letter from B. Murphy, Redding Rancheria, to V. Akins, Bureau of Indian Affairs ("BIA") (Jan. 19, 1995) (AR006158). Interior accepted this parcel into trust on January 21, 2009. Decision document, at 2 (AR005406).

Prior to December 6, 2000, Plaintiff submitted a third acquisition request, which sought to have Interior take four parcels of land into trust. Id.; Notice of Land Acquisition Application (Dec. 7, 2000) (AR006159-65). Interior accepted one of these four parcels into trust on January 21, 2009. Decision document, at 2 (AR005406).

Sometime between November 2003 and April 2006, Plaintiff submitted a fourth acquisition request, seeking to have Interior take five parcels of land (the "Strawberry Fields" properties) into trust. Id.; Email from S. Setshwaelo, attorney for Redding, to J. Nelson, DOI (Nov. 10, 2010) (AR006724).

On or before April 20, 2009, Plaintiff submitted a fifth trust acquisition request for three parcels, totaling 3.65 acres. Decision document, at 2 (AR005406). In June 2010, Interior acquired these lands into trust for Plaintiff. Id.

On July 27, 2010, Plaintiff amended its application seeking to have Interior take the Strawberry Fields property into trust to add an additional three parcels of land ("the Adjacent 80 Acres" properties). Id., at 1-3 (AR005405-7).

On October 29, 2010, Plaintiff again "amended its Request by submitting written comments and documents to the Department of the Interior, arguing that, because the lands upon which it was currently gaming were within the boundaries of the Tribe's Reservation on October 17, 1988, those

lands did not constitute 'newly acquired lands' for the purposes of the Restored Lands Exception analysis." Compl. at ¶ 23.

On December 22, 2010, Defendant Larry Echo Hawk, the Assistant Secretary - Indian Affairs determined that the Strawberry Fields and Adjacent 80 Acres properties "are not eligible for [IGRA's] restored lands exception." Decision document, at 8 (AR005412). Assistant Secretary Echo Hawk determined that Plaintiff is a restored Tribe under 25 C.F.R. § 292.7, and therefore was potentially eligible to have lands taken into trust for gaming purposes under Section 20 of IGRA. Id., at 3-5 (AR005407-09). He determined, however, that Plaintiff's request that Interior take the Strawberry Fields and Adjacent 80 Acres into trust could not qualify for the "restored lands exception" because the Tribe could not demonstrate a temporal connection to the lands under 25 C.F.R. § 292.12(c). Specifically, Plaintiff could not demonstrate a temporal connection under 25 C.F.R. § 292.12(c)(1) because the Strawberry Fields and Adjacent 80 Acres properties "were not included in the tribe's first request for newly acquired lands" after restoration, and could not demonstrate a temporal connection under 25 C.F.R. § 292.12(c)(2) because Plaintiff was gaming on other lands when it sought to have the Strawberry Fields and Adjacent 80 Acres properties taken into trust.

D. Procedural History

On April 1, 2011, Plaintiff filed a complaint initiating this lawsuit. Compl. Plaintiff alleges that the Secretary's promulgation of Interior's Part 292 regulations and application of those regulations to determine that Plaintiff's lands are not eligible for gaming under IGRA's "restored lands exception" was arbitrary, capricious, and an abuse of discretion under the APA and a breach of Defendants' alleged fiduciary duties to Plaintiff. Id. Interior filed its Answer on June 14, 2011. Dkt. No. 11. On August 23, 2011, Defendants lodged the administrative record relating to the promulgation of Interior's 25 C.F.R. Part 292 regulations and issuance of Interior's December 22, 2010 Redding Rancheria decision letter. Notice of Filing of Administrative Record, filed Aug. 23, 2011 (Dkt. No. 14).

V. STANDARD OF REVIEW

Because the IGRA does not provide a private right of action, judicial review of an IGRA claim is governed by the APA, 5 U.S.C. §§ 701-06. Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 882 (1990); Or. Natural Res. Council v. Lowe, 109 F.3d 521, 526 (9th Cir. 1997). The APA imposes a narrow and highly deferential standard of review limited to a determination of whether the federal agencies acted in a manner that was "arbitrary, capricious, an abuse of discretion or contrary to law." 5 U.S.C. § 706(2)(A); Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989); Westlands Water Dist. v. U.S. Dep't of the Interior, 376 F.3d 853, 865 (9th Cir. 2004).

In interpreting an agency's construction of a statute, a Court must "give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984). If the Court determines that the statute at issue is ambiguous, it "may not disturb an agency rule unless it is 'arbitrary or capricious in substance, or manifestly contrary to the statute.'" Mayo Found. for Med. Educ. & Research v. United States, __ U.S. __, 131 S. Ct. 704, 711 (2011) (citation omitted).

A court is only to assess whether the agency's decision is "within the bounds of reasoned decisionmaking," Balt. Gas & Elec. Co. v. Natural Res. Def. Council, 462 U.S. 87, 105 (1983). "The agency . . . is required to 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made,' and [courts] in turn must review that explanation, considering 'whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Providence Yakima Med. Ctr. v. Sebelius, 611 F.3d 1181, 1190 (9th Cir. 2010) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). A reviewing court may not substitute its own judgment for that of the agency. Id.

VI. ARGUMENT

In addition to passing the IGRA, Congress has granted the President broad authority to "prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs," 25 U.S.C. §

9, which was further delegated to the Secretary, 25 U.S.C. § 2. These broad delegations with respect to Indian affairs underpin the Secretary's authority to implement IGRA in the circumstances of this case. In the context of the administration of a different statute, the Supreme Court acknowledged this, holding that:

> The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promote rules and policies, and the power has long been given explicitly to the Secretary and his delegates at the BIA.

Morton v. Ruiz, 415 U.S. 199, at 231-32 (1974).

A. Standards for Interpreting Legislative Grants of Rulemaking Authority

Plaintiff alleges that the Secretary had no authority to promulgate the regulations codified at 25 C.F.R. Part 292. Because this case involves an agency's construction of the statute it administers, the Court's analysis is governed by the two-step test established in Chevron, 467 U.S. at 842-43 (1984).

Under the first step in Chevron, a court should determine whether "Congress has directly spoken to the precise question at issue." Id. at 842-43. The Court's inquiry under this first step begins, and often ends, with the text of the statute and its context. See Conn. Nat'l Bank v. German, 503 U.S. 249, 253-54 (1992). ("In interpreting a statute, a court should always turn first to one, cardinal canon before all others. . . courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then this first canon is also the last: judicial inquiry is complete.") (citations omitted). If analysis of the statute reveals that "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." Chevron, 467 U.S. at 842-43.

By contrast, if the court determines that Congress did not specifically address the matter at issue, the court "must respect the agency's construction of the statute so long as it is permissible." FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000). Under this second step in

the Chevron analysis, "[t]he sole question for the Court . . . is 'whether the agency's answer is based on a permissible construction of the statute.' " Mayo Found., 131 S. Ct. at 712 (citing Chevron, 467 U.S. at 843). See also, Satterfield v. Simon & Schuster, Inc., 569 F.3d 946, 952 (9th Cir. 2009) (citing Chevron, 467 U.S. at 844) (court may reverse an agency's construction of a statute only if it is "arbitrary, capricious, or manifestly contrary to the statute."). Even where Congress has not expressly delegated authority to implement particular provisions of a statute, "it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." United States v. Mead Corp., 533 U.S. 218, 229 (2001) (Citing Chevron, 467 U.S. at 844).

B. The Secretary Had the Requisite Statutory Authority to Promulgate the Part 292 Regulations.

In its first claim, Plaintiff argues that the Secretary had no statutory authority to promulgate the 25 C.F.R. Part 292 regulations, and that those regulations therefore are null and void. Compl. at ¶ 28. Plaintiff bases this claim on 25 U.S.C. § 2706(b)(10), arguing that this provision gives the National Indian Gaming Commission ("NIGC") the *exclusive* authority to promulgate regulations and guidelines to implement the provisions of the IGRA, including the "restored lands exception." Compl. at ¶ 27. The Tribe's claim is not supported by IGRA's plain language or Congress's legislative scheme, which both explicitly and implicitly vests the Secretary with authority over many issues relating to the acquisition of trust lands for gaming purposes.

1. The plain, unambiguous language of the IGRA does not vest the NIGC with the exclusive authority to promulgate regulations under the IGRA.

First, the plain language of 25 U.S.C. § 2706(b)(10) does not provide the NIGC with the *exclusive* authority to promulgate IGRA regulations.[3/] The statute provides: "The [National Indian

[3/] Plaintiff does not challenge the NIGC's authority to interpret and implement 25 U.S.C. § 2719. As discussed more fully below, the NIGC and the Secretary share this authority. The NIGC has adopted the regulations at issue, National Indian Gaming Commission Notation No.

Gaming] Commission . . . shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter." 25 U.S.C. § 2706(b)(10). This "non-exclusive" grant of authority stands in stark contrast to the unequivocal language Congress used to transfer authority relating to management contracts to the NIGC. 25 U.S.C. § 2711(h) ("The authority of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81), relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission").[4/] The plain language of the IGRA does not similarly prohibit the Secretary from promulgating regulations under the IGRA, in general, or the Section 292 regulations at issue in this case, in particular.

Second, Plaintiff's argument is contrary to the legislative scheme of the IGRA, which sets forth duties for both the NIGC and the Secretary. The IGRA imposes multiple duties upon the Secretary beyond those set forth in 25 U.S.C. § 2719.[5/]

1) Evaluating and approving revenue allocation plans - 25 U.S.C. § 2710(b)(3)(B);

2) Evaluating and approving gaming compacts between tribes and states - 25 U.S.C. § 2710(d)(3)(c); 25 U.S.C. § 2710(d)(8);

3) Prescribing Class III gaming procedures in the event that a tribe and state are unable to negotiate a gaming compact - 25 U.S.C. § 2710(d)(7)(B)(vii);

4) Appointing two of the three members of the NIGC - 25 U.S.C. § 2704(b)(1)(B);

01-09 (AR006586-90), and the agencies cooperate pursuant to a Memorandum of Agreement in determining whether lands are eligible for gaming under IGRA. Memorandum of Agreement Between the National Indian Gaming Commission and the Department of the Interior (May 13, 2010) (AR006594-6); Memorandum of Agreement Between the National Indian Gaming Commission and the Department of the Interior (Nov. 12, 2010) (AR006726-8).

[4/] Section § 2706(b)(10)'s general grant of authority to the NIGC is unsurprising, as the IGRA *established* the NIGC. 25 U.S.C. § 2704(a). The NIGC would have lacked authority to promulgate any regulations without 25 U.S.C. § 2706(b)(10)'s explicit grant of such authority. In contrast, and as discussed below, it was unnecessary for the IGRA to create such authority for the Secretary, because the Secretary already possessed the authority to promulgate regulations, particularly regulations relating to the acquisition of trust lands. See, e.g., 25 U.S.C. §§ 2, 9; 25 U.S.C. § 465.

[5/] The NIGC has also promulgated multiple regulations under the IGRA. 25 C.F.R. Chapter III.

5) Providing administrative support services to the NIGC - 25 U.S.C. § 2707(e).

Contrary to Plaintiff's contention that the NIGC possesses the exclusive authority to promulgate regulations under the IGRA, the Secretary's promulgation of regulations relating to these duties is entirely consistent with the legislative scheme of the IGRA. See 25 C.F.R. Part 290 (governing evaluation and approval of revenue allocation plans under 25 U.S.C. § 2710(b)(3)(B)); 25 C.F.R. Part 293 (governing approval of gaming compacts under 25 U.S.C. § 2710(d)). Indeed, the Ninth Circuit recognized that the IGRA authorized the Secretary to promulgate regulations under the IGRA. In United States v. Spokane Tribe of Indians, the Ninth Circuit addressed Section 11 of the IGRA, which governs the negotiation of gaming compacts between tribes and states. 139 F.3d 1297, 1299 n.2 (9th Cir. 1998). It recognized that, in the event that a tribe and a state are unable to reach agreement on a gaming compact through mediation, "tribes are constitutionally precluded from bringing suit against recalcitrant states that do not consent to being sued." Id. (citing Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 72 (1996)). Therefore, the Ninth Circuit adopted the Eleventh Circuit's position that the IGRA (1) provides the Secretary with a role in the development of gaming compacts; and (2) authorizes the Secretary to "address the problem [posed by states' sovereign immunity] by regulation." Id. at 1301 (citing 25 U.S.C. § 2710(d)(7)(B)(vii)). Plaintiff's contention that the Secretary lacks the general authority to promulgate regulations under the IGRA is therefore contrary to Ninth Circuit precedent.

Section 20 of the IGRA, which is implemented by the regulations challenged by Plaintiff, similarly envisions a significant role for the Secretary in its implementation. Congress specified that the conduct of gaming activities on land acquired and taken into trust *by the Secretary* after IGRA's enactment date would be illegal, except for certain exceptions. 25 U.S.C. § 2719. All of the exceptions to the IGRA's general prohibition on gaming on lands acquired after 1988 invoke some aspect of the Secretary's authorized duties.

In addressing one of the exceptions to the IGRA's general prohibition on gaming on lands acquired after its passage set forth in Section 20, Congress essentially rejected Plaintiff's argument that the NIGC has exclusive authority to interpret the IGRA. The first exception to the IGRA's

general prohibition on gaming, the "on reservation" exception, provides that lands that are located within the boundaries of a tribe's reservation are excepted from IGRA's prohibition on gaming if they are located on or contiguous to the tribe's reservation. 25 U.S.C. § 2719(a)(1). In 2001, the Tenth Circuit addressed the Secretary's definition of the term "reservation" under this exception. Sac & Fox Nation of Mo. v. Norton, 240 F.3d 1250, 1265 (10th Cir. 2001) ("Sac & Fox"). The Tenth Circuit interpreted the IGRA to charge the NIGC "with the exclusive regulatory authority for Indian gaming conducted pursuant to IGRA," including the ability to interpret ambiguous terms such as "reservation." Id. In response, Congress enacted legislation that essentially overturned the Tenth Circuit's decision and confirmed that the IGRA vested the Secretary with that authority. Congress explicitly provided that "[t]he authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988." 107 Pub. L. 63 at § 134 (Nov. 5, 2001). Subsequently, the D.C. Circuit held that the Secretary is due Chevron deference in interpreting the "initial reservation" exception to the IGRA. Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460, 465 (D.C. Cir. 2007) (Plaintiff's argument to the contrary

> ignores both the Secretary's substantial role in administering IGRA, most relevantly here in determining whether an exception to IGRA's gaming ban applies, and Congress's action in 2002 [sic] eliminating any doubt about the Secretary's authority to determine whether specific land is a 'reservation' and overruling the legal premise of the Tenth Circuit's decision [in Sac & Fox] not to defer to the Secretary.

See also Oregon v. Norton, 271 F. Supp. 2d 1270, 1276 (D. Or. 2003). Accordingly, Congress's legislative scheme, including the IGRA, vests the Secretary with substantial authority relating to the land-into-trust process, including the authority to promulgate regulations under the IGRA.

The Secretary's authority to determine what land constitute's a tribe's reservation also vests the Secretary with authority to interpret three of the IGRA's other exceptions. Where tribes lacked reservations on the date that the IGRA was enacted, the IGRA provided two different exceptions to its general prohibition on gaming. The "Oklahoma former reservation" exception allows a tribe located in Oklahoma that lacked a reservation on the date that the IGRA was enacted to game on lands located in Oklahoma that "are within the boundaries of the Indian tribe's former reservation,

as defined by the Secretary." 25 U.S.C. § 2719(a)(2)(A)(i) (emphasis added). Similarly, the "last recognized reservation" exception allows a tribe located in a state other than Oklahoma to game on lands that "are within the Indian tribe's last recognized reservation." 25 U.S.C. § 2719(a)(2)(B). Additionally, the "initial reservation" exception provides that the IGRA's general prohibition on gaming does not apply to lands taken into trust as part of "the initial reservation of an Indian tribe **acknowledged by the Secretary** under the Federal acknowledgment process." 25 U.S.C. § 2719(b)(1)(B)(ii) (emphasis added). Just as the Secretary has the authority to "determine whether specific land is a 'reservation,'" for the purposes of interpreting the "on reservation" exception, Citizens Exposing Truth About Casinos, 492 F.3d at 465, the Secretary also has the authority to make determinations relating to the applicability of the other three exceptions to the IGRA that are based upon reservation or former reservation status.

Another of the IGRA's exceptions explicitly vests the Secretary with the responsibility to make determinations regarding the potential benefits and harms that might be caused by a tribal gaming proposal. The so-called "Secretarial determination" exception to IGRA's prohibition on gaming applies where the "Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The Secretary's implementation of the "Secretarial determination" exception is governed by 25 C.F.R. Part 292 Subpart C (§§ 292.13 – 292.24). The Secretary's promulgation of these regulations is consistent with the IGRA's imposition of duties relating to the "Secretarial determination" exception upon the Secretary.

Similarly, Section 20 of the IGRA allows gaming on lands that are taken into trust as part of the settlement of a land claim. 25 U.S.C. § 2719(b)(1)(B)(i). This exception also vests the Secretary with authority that would support the promulgation of regulations. Indeed, the First Circuit declined to defer to the NIGC's interpretation of the scope of the IGRA because it determined that it was the Secretary's duty to reconcile the Maine Indian Lands Claims Settlement

Act of 1980 with the IGRA. Passamaquoddy Tribe v. Maine, 75 F.3d 784, 794 (1st Cir. 1996) (declining to find that "Congress intended to entrust the Commission with reconciling the [IGRA] and other statutes in the legislative firmament.").

Finally, Section 20 of the IGRA allows gaming on "lands [that] are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). This exception vests the Secretary with the authority to determine whether lands are "restored." The IGRA does not affect the Secretary's well-established authority relating to the taking of land into trust under, among other statutes, the Indian Reorganization Act ("IRA"). 25 U.S.C. § 2719(c) ("Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust."). With respect to the "restored lands exception," the IGRA must be read in conjunction with the IRA's provision of authority to the Secretary, as "[u]nder § 3 of the Indian Reorganization Act, the Secretary of the Interior was authorized 'to restore to tribal ownership the remaining surplus lands of any Indian reservation.'" Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 605 (1977) (quoting 48 Stat. 984). The Secretary has promulgated general land-into-trust implementing regulations to govern Interior's acquisition of trust lands under the IRA, which also provides that "[t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. These regulations, which are located at 25 C.F.R. Part 151, generally provide that the Secretary will consider, among other factors: 1) "statutory authority for the acquisition and any limitations contained in such authority;" 2) "[t]he need of the . . . tribe for additional land;" 3) "[t]he purpose for which the land will be used;" and 4) "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. §§ 151.10-11. See 66 Fed. Reg. 3452.

As the Ninth Circuit has recognized, "the Department must make a determination regarding the applicability of Section 20 of IGRA, 25 U.S.C. § 2719, as part of the fee-to-trust approval process." Vancouver v. Skibine, 393 Fed. Appx. 528, 529 (9th Cir. 2010) (citing 25 C.F.R. §

151.10(c)). It would be inconsistent with Congress's legislative scheme for the Secretary to apply the above referenced factors to evaluate land-into-trust requests without analyzing the legality of such requests under the IGRA, including whether the lands at issue qualify for the IGRA's "restored lands exception." Accordingly, the legislative scheme of the IGRA, particularly Section 20 of the IGRA, provides the Secretary with the authority to promulgate regulations.

2. The IGRA, in Conjunction with 25 U.S.C. §§ 2 and 9 and 5 U.S.C. 301 Provided Ample Authority for the Secretary to Promulgate the 25 C.F.R. Part 292 Regulations.

In this case, Congress provided the Secretary with the authority to promulgate the regulations at issue through the Secretary's general authority statutes 25 U.S.C. §§ 2 and 9 and 5 U.S.C. § 301, when combined with the IGRA's imposition of certain duties upon the Secretary and Congress's preexisting statutory scheme relating to the taking of land into trust. 25 U.S.C. § 9 provides as follows:

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

25 U.S.C. § 2 provides:

> The Commissioner of Indian Affairs shall,[6] under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

Finally, 5 U.S.C. § 301 provides:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

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[6] Reorganization Plan No. 3 of 1950, 5 U.S.C. Appendix, 64 Stat. 1262, as amended June 1, 1971, Pub. L. 92-22, section 3, 85 Stat. 76, transferred to the Secretary all functions of the other officers and employees of the Department, which includes the functions of the Commissioner of Indian Affairs.

Although 25 U.S.C. §§ 2 and 9 and 5 U.S.C. § 301 do not specifically state that the Secretary's authority includes the power to promulgate regulations to resolve ambiguities or gaps in the IGRA, the Secretary nonetheless has this authority. Mead Corp., 533 U.S. at 229. Without a doubt, the President is empowered to make such regulations as he may think fit for carrying into effect the provisions of any Act relating to Indian affairs, and the Secretary is authorized to act for the President in such matters. See Adams v. Freeman, 50 P. 135, 137-8 (Okla. 1897); Armstrong v. United States, 306 F.2d 520, 522 (10th Cir. 1962); United States v. Eberhardt, 789 F.2d 1354, 1360 (9th Cir. 1986).

Interpreting a very similar grant of rulemaking authority, the Supreme Court explained that where Congress authorizes an agency to "make . . . such rules and regulations as may be necessary to carry out the provisions of this Act," the validity of a regulation promulgated under that grant "will be sustained so long as it is 'reasonably related to the purposes of the enabling legislation.'" Mourning v. Family Publ'n Serv., Inc. 411 U.S. 356, 369 (1973) (citations omitted). Similarly, in Eberhart, the Ninth Circuit held that Sections 2 and 9 generally authorized Interior to issue fishing regulations, even "in the absence of specific legislation giving Interior authority to regulate Indian fishing." Eberhardt, 789 F.2d at 1360. See also, Spokane Tribe of Indians, 139 F.3d at 1301; N. Arapahoe Tribe v. Hodel, 808 F.2d 741, 748-750 (10th Cir. 1987) (25 U.S.C. §§ 2 and 9, together with the 1868 Treaty of Fort Bridger, provided the Secretary with broad authority to regulate hunting). Texas v. United States, 497 F.3d 491, 509-510 (5th Cir. 2007) (finding that Interior lacked authority to promulgate regulations under 25 U.S.C. §§ 2 and 9 where the subject of the regulations addressed non-trust gambling revenues rather than trust resources or property). Here, Sections 2 and 9, when considered in conjunction with the above-discussed provisions of Section 20 of the IGRA, provide the Secretary had authority to promulgate the regulations at issue.

The Secretary published the final regulations implementing 25 U.S.C. § 2719 on May 20, 2008. 73 Fed. Reg. 29354. Those regulations, codified at 25 C.F.R. Part 292, went into effect on August 25, 2008. 73 Fed.Reg. 35579. The regulations implementing the "restored lands exception" are set forth at 25 C.F.R. §§ 292.7 - 292.12. Those regulations easily satisfy the Mourning standard

because the rules and procedures contained in them are essential to the Secretary to ensure that the "restored lands exception" is applied in a consistent manner. The regulations are therefore directly related to the purposes of the "restored lands exception" and were promulgated in accord with the grant of rulemaking authority "for carrying into effect the various provisions of any act relating to Indian affairs" contained in 25 U.S.C. § 9.

Congress has directly authorized the Secretary to promulgate the regulations at issue. Congress has "delegated sweeping authority to the Secretary in interpreting and administering laws governing Indian tribes," Norton, 271 F. Supp. 2d at 1276 (holding, pursuant to 25 U.S.C. §§ 2, 9, and 465, that the Secretary had the authority to interpret the IGRA's "restored lands exception"). Moreover, the "IGRA contains no restriction on the Secretary's general authority to interpret laws governing Indian tribes." Id. Because 25 U.S.C. §§ 2 and 9 and 5 U.S.C. § 301 unambiguously grant the Secretary the authority to promulgate Interior's 25 C.F.R. Part 292 regulations, the first prong of Chevron is satisfied and judicial inquiry regarding the Secretary's authority to promulgate the regulations at issue is complete. Conn. Nat'l Bank, 503 U.S. at 253-54. (citations omitted); Morton, 415 U.S. at 231-32.

3. Even if there is ambiguity with respect to the Secretary's authority to promulgate regulations under the IGRA, the Secretary's determination that he possessed the authority to promulgate the 25 C.F.R. Part 292 regulations was permissible.

Congress's vesting of the NIGC with non-exclusive authority to promulgate regulations under the IGRA creates, at most, an ambiguity as to whether the Secretary also possesses authority to promulgate regulations under the IGRA. Assuming, arguendo, that there is any ambiguity regarding the Secretary's authority to promulgate regulations under the IGRA, the Secretary's determination that he possessed such authority is entitled to deference because it was "based on a permissible construction of the statute." Chevron, 467 U.S. at 843. See also Providence Yakima Med. Ctr., 611 F.3d at 1190 (applying Chevron deference in the absence of an expression of clear congressional intent forbidding the Secretary from promulgating regulation); Pub. Serv. Co. v. U. S. EPA, 949 F.2d 1063, 1065 (10th Cir. 1991) (where there is "no clear Congressional or

Presidential intent expressly forbidding EPA from imposing internal waste stream effluent limitations . . . we owe substantial deference to EPA's interpretation of its authority."); Trans Union, LLC v. FTC, 295 F.3d 42, 50 (D.C. Cir. 2002) (where act "does not expressly confer authority to define" one term, but confers express authority to define a second term, an agency's definition of the first term is "entitled to Chevron deference"). As discussed above, the IGRA vests the Secretary with several duties, making the Secretary's determination that he possessed the authority to promulgate regulations under the IGRA a permissible construction of the statute.

The public comments received and considered by the Secretary in promulgating the final regulations set forth at 25 C.F.R. Part 292 reinforce the reasonableness of the Secretary's determination. Plaintiff's claim that NIGC possesses the sole authority to promulgate regulations under the IGRA is refuted by NIGC's public comments on the proposed regulations, which implicitly recognize that Interior possessed the authority to promulgate the regulations at issue. Letter from P. Hogen, NIGC, to G. Skibine, Office of Indian Gaming Management (Nov. 7, 2006) (AR001984-2007).[7] Indeed, Plaintiff's claim that the Secretary lacked the authority to promulgate the regulations at issue stands in stark contrast to Plaintiff's prior comments. Plaintiff twice stated that it, along with many other tribes, viewed "an Interior regulation under IGRA Section 20" as "appropriate." Letter from B. Murphy, Redding Rancheria, to G. Skibine, Office of Indian Gaming Management (Feb. 2, 2007) (AR003406-7); Letter from B. Murphy, Redding Rancheria, to G. Skibine, Office of Indian Gaming Management (Feb. 27, 2007) (AR003458-9). Plaintiff's February 27, 2007 letter provided, in part, that:

> In the l09th Congress, the Senate Indian Affairs Committee and the House Resources Committee both introduced legislation to amend Section 20 of the Indian Gaming Regulatory Act to restrict Indian gaming on lands acquired after 1988. Most tribal governments opposed the legislation because: 1) concerns expressed in the media were overblown; and 2) **an Interior regulation under IGRA Section 20 was a more appropriate avenue to address any policy concerns. Congress deferred**

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[7] The NIGC subsequently adopted the regulations after their issuance. National Indian Gaming Commission Notation No. 01-09 (AR006586-90) ("for purposes of deciding Indian lands questions, the Commission will follow the newly enacted regulations of the Bureau of Indian Affairs at 25 C.F.R. part 292.").

> **action on both Senate and the House bill against the background of the Secretary's rulemaking and Indian tribes generally support the regulatory process**.
>
> For example the National Indian Gaming Association Resolution on the issue explains:
>
> ["]NIGA supports the promulgation of regulations in accordance with Executive Order 13175, governing the implementation of the Section 20 two-part determination process, respecting the interest and rights of tribal governments, including nearby Indian tribes, and state and local governments.["]

AR003458 (emphasis added). Accordingly, if there is any ambiguity in the applicable statutes, that ambiguity should be resolved in favor of the Secretary. It was reasonable for the Secretary to interpret the IGRA, along with the Secretary's other authorities, to permit the Secretary's promulgation of the Part 292 Regulations.

C. The Secretary Had Authority to Promulgate the Regulations Set Forth in 25 C.F.R. §§ 292.12(c) and 292.2.

As discussed above, Section 20 of the IGRA prohibits gaming on Indian lands acquired in trust after October 17, 1988, unless various exceptions apply. See 25 U.S.C. § 2719. One exception, the "restored lands exception," provides that the IGRA's general prohibition on gaming does not apply when "lands are 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). Plaintiff's second and fourth claims allege that the Secretary's regulations relating to the "restored lands exception" are arbitrary and capricious because they "impose[] conditions for the restored lands determination that Congress never intended." Compl. at ¶¶ 34-35, 50-51. Plaintiff contends that the Secretary acted arbitrarily and capriciously by promulgating 25 C.F.R. §§ 292.12(c) and 292.2, in particular, because the cited regulations impose conditions for the "restored lands exception" that Congress never intended and which are in conflict with judicial interpretations of the IGRA. Compl. ¶¶ 34-35.

Plaintiff's claim fails because the challenged regulations are a reasonable interpretation of IGRA's ambiguous "restored lands exception" through proper notice-and-comment rulemaking by the agency entrusted by Congress to administer Indian affairs. As discussed below, the Secretary resolved the exception's ambiguity in a reasonable manner through regulations that provide a tribe

with the ability to qualify for the "restored lands exception" if it establishes that its application was supported by three types of connections, including a temporal connection between the date of acquisition of the land and the date of the tribe's restoration. 25 C.F.R. §§ 292.11-12. The Secretary's definition of this temporal connection requirement similarly represents a reasonable exercise of the Secretary's discretion.

1. The Secretary possessed the authority to interpret 25 U.S.C. § 2719(b)(1)(B)(iii)'s "restored lands" exception to the IGRA's general prohibition on gaming on lands acquired after October 17, 1988.

As discussed above, the Secretary possessed the general authority to promulgate Interior's Part 292 regulations. The Secretary also possesses the authority to interpret the meaning of "restored lands" in section 2719(b)(1)(B)(iii) of the IGRA. Because the Secretary possesses this authority, he also possessed the authority to establish factors to determine which lands qualify for the "restored lands exception." Norton, 271 F. Supp. 2d at 1276.

In order to determine if the Secretary possesses this interpretive authority, the initial question that must be addressed is whether Congress has directly spoken to the issue. Chevron, 467 U.S. at 842. The IGRA's "restored lands exception" allows gaming on lands acquired in trust by the Secretary after October 17, 1988 if those lands are taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). Here, "no statutory provision defines the terms 'restore' or 'restoration of lands' and no provision expressly limits the Secretary's authority to interpret these terms." Norton, 271 F. Supp. 2d at 1277. Therefore, the statutory language is considered ambiguous.

In Norton, the district court rejected Oregon's argument that "the lack of a specific delegation of authority to interpret the term 'restoration of lands' implies congressional intent to withhold such authority from the secretary." 271 F. Supp. 2d at 1277. The court held that under Chevron,"gaps in statutory language are wholly consistent with the routine delegation of powers granted to agencies which have considered and specialized expertise." Id. As discussed above, Congress clarified that the Secretary possesses authority to determine whether an area of land is a "reservation" under the IGRA. Interpreting the ambiguous "restored lands exception" similarly is

within the Secretary's expertise. Id. at 1278 ("it requires no great leap of logic to conclude that the Secretary's authority to interpret the term 'reservation' within the contiguous lands exception extends to the phrase 'restoration of lands' within the restored lands exception."). As the "restored lands exception" contains an "implicit delegation of authority to the Secretary to provide meaning to the terms 'restore' and 'restoration' of lands," it was reasonable for the Secretary to promulgate regulations interpreting those terms. Id.

2. The Secretary's interpretation of the IGRA's ambiguous "restored lands" exception was permissible.

With the initial inquiry answered, that the Secretary does possess the authority to interpret the meaning of "restore" and "restoration of lands," Chevron requires the court to defer to the Secretary's interpretation of the "restored lands exception" unless it is impermissible. 467 U.S. at 844. "In determining whether an agency's construction is permissible, the court considers whether Congress has explicitly instructed the agency to flesh out specific provisions of the general legislation, or has impliedly left to the agency the task of developing standards to carry out the general policy of the statute." Tovar v. U. S. Postal Serv., 3 F. 3d 1271, 1276 (9th Cir. 1993). More specifically, where the delegation of authority is implicit, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Chevron, 467 U.S. at 844. Plaintiff cannot meet this high threshold.

The Secretary's implementation of the "restored lands exception" through 25 C.F.R. §§ 292.2 and 292.7-12, was reasonable and consistent with congressional intent. The Part 292 regulations generally provide that a tribe can meet the requirements of the "restored lands exception" if it establishes that its application was supported by three types of connections: (1) a modern connection to the land; (2) a historical connection to the land; and (3) a temporal connection between the date of acquisition of the land and the date of the tribe's restoration. Decision document, at 5 (AR005409) (applying 25 C.F.R. § 292.11-12). Plaintiff specifically challenges only the provisions that implement the temporal connection requirement under the "restored lands exception." See Compl. at ¶¶ 34-35, 53.

Section 292.12(c) provides that:

> (c) The tribe must demonstrate a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration. To demonstrate this connection, the tribe must be able to show that either:
>
> > (1) The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or
> >
> > (2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands.

Section 292.12 must be read in conjunction with Section 292.2, which defines "newly acquired lands" as "land that has been taken, or will be taken, into trust for the benefit of an Indian tribe by the United States after October 17, 1988." 25 C.F.R. § 292.2. As Interior stated in its decision document, "[i]n order to qualify under Section 292.12(c)(1), the Parcels [that Plaintiff sought to have taken into trust for gaming] must have been included in the Tribe's first request for newly acquired lands since the Tribe was restored to Federal recognition." Decision document, at 7 (AR005411).

Contrary to Plaintiff's suggestion, Compl. at ¶ 34, it is unnecessary for the Secretary's regulations to impose the exact conditions upon the "restored lands exception" envisioned by Congress. Miss. Power & Light Co. v. Miss. ex rel. Moore, 487 U.S. 354, 380 (1988) (courts should "defer, of course, to [an agency's] construction if it does not violate plain meaning and is a reasonable interpretation of silence or ambiguity). Regardless, it is well-established that, even prior to the Secretary's promulgation of Interior's 25 C.F.R. Part 292 regulations, the imposition of a temporal connection requirement is consistent with Congress's intent. See Neb. ex rel. Bruning v. U. S. DOI, 625 F.3d 501, 510 (8th Cir. 2010) ("courts have articulated a three-factor test to determine whether a parcel was taken into trust as part of the restoration of land to a tribe; under this test, 'land that could be considered part of such restoration might appropriately be limited by the factual circumstances of the acquisition, the location of the acquisition, or the **temporal relationship of the acquisition to the tribal restoration**.') (citing Grand Traverse Band of Ottawa & Chippewa Indians v. U. S. Atty. for the W. Dist. of Mich., 198 F. Supp. 2d 920, 935 (W.D. Mich. 2002) (emphasis added). Accordingly, the Secretary's implementation of a temporal requirement

conflicts with neither Congressional intent nor prior precedent. Therefore, to the extent that Plaintiff's claim that it was arbitrary and capricious for the challenged regulations to impose a temporal requirement upon tribes, such a challenge must fail.

Similarly, it was reasonable for the Secretary to interpret the "restored lands exception" in a manner that requires a tribe to demonstrate that the parcel was included within its first trust request, unless the tribe has not been able to attain the benefits of gaming under the IGRA elsewhere. See 25 C.F.R. § 292.12(c). As set forth in the preamble to the challenged regulations, "the temporal limitation effectuates IGRA's balancing of the gaming interests of newly acknowledged and/or restored tribes with the interests of nearby tribes and the surrounding community." 73 Fed. Reg. 29367. The Secretary relied upon agency expertise and experience in balancing these competing interests to select the specific criteria at issue. See id. ("the 25 year number [in 25 C.F.R. § 292.12(c)(2)] is both a practical and reasonable number based on the Department's experience under section 2719"). The Secretary's interpretation of the "restored lands" exception to include particular temporal connection requirements set forth in the challenged regulations constitutes a permissible interpretation of an ambiguous statute. Accordingly, the challenged regulations are neither arbitrary nor capricious. See Chevron, 467 U.S. at 844; Mayo Found., 131S. Ct. at 715 (deferring to Department of the Treasury regulation based, in part, upon agency's conclusion that the regulation would promote administrability and certainty).

D. Interior's Application of 25 C.F.R. § 292.12(c) to Bar Plaintiff from Gaming on Several Parcels of Land Acquired by Plaintiff After the Passage of the IGRA is Consistent with both the IGRA and the APA.

Plaintiff challenges Interior's application of 25 C.F.R. § 292.12(c)(1) to determine that the Strawberry Fields and Adjacent 80 Acres properties do not qualify for the "restored lands" exception to IGRA's general prohibition of gaming on lands acquired after October 17, 1988 was arbitrary and capricious. See Compl. at ¶¶ 46, 55. As discussed below, Plaintiff's argument fails because Interior reasonably determined that in order for the temporal connection alternative in Section 292.12(c)(1) to apply, (1) Plaintiff would have to demonstrate that the subject parcels were included in its first request for newly acquired lands after its restoration, and (2) Plaintiff submitted at least two requests

for newly acquired lands prior to its request relating to the Strawberry Fields and Adjacent 80 Acres properties.

Plaintiff based its request to have the Strawberry Fields and Adjacent 80 Acres properties taken into trust on the "restored lands exception," which allows gaming on lands acquired after October 17, 1988 if those lands are taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). Plaintiff was restored to Federal recognition. Decision document, at 3-5 (AR005407-09) (applying 25 C.F.R. §§ 292.7-10). Therefore, Plaintiff could meet the requirements of the "restored lands exception" if it established that its application was supported by three types of connections: (1) a modern connection to the land; (2) a historical connection to the land; and (3) a temporal connection between the date of acquisition of the land and the date of the tribe's restoration. Decision document, at 5 (AR005409) (applying 25 C.F.R. § 292.11-12). As Interior concluded that Plaintiff established a modern and historical connection to the lands at issue, Decision document, at 6-7 (AR005410-11), Plaintiff's challenge to Interior's application of the regulations must be limited to the temporal connection requirement.

To the extent that Plaintiff is challenging the Secretary's application of 25 C.F.R. § 292.12(c)(1), this challenge must fail. "As a general interpretative principle, the plain meaning of a regulation governs." Dir., OWCP v. Matson Terminals, Inc., 2011 U.S. App. LEXIS 14273,at *2; 2011 WL 2689355, at *1 (9th Cir. July 12, 2011) (quotations omitted). The plain language of 25 C.F.R. § 292.12(c)(1) prohibits Plaintiff from relying on the "restored lands exception" to IGRA's prohibition against gaming on lands acquired after October 17, 1988 if Plaintiff cannot establish the requisite temporal connection. As discussed above, to meet the requirements of Section 292.12(c)(1), a tribe must establish that the land it seeks to have taken into trust "is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition."[8/]

[8/] Plaintiff did not base its request to have Interior take the Strawberry Fields and Adjacent 80 Acres properties into trust on 25 C.F.R. § 292.12(c)(2), which is unavailable to tribes that were already gaming on other lands at the time of its application. It is beyond dispute that

Accordingly, it was consistent with the plain language of Section 292.12(c)(1) for the Secretary to determine that "[i]n order to qualify under Section 292.12(c)(1), the Parcels [that Plaintiff sought to have taken into trust for gaming] must have been included in the Tribe's first request for newly acquired lands since the Tribe was restored to Federal recognition." Decision Document, at 7 (AR005411).

Similarly, the Secretary's interpretation of the regulatory definition of "newly acquired lands" in determining whether Plaintiff's application for the Strawberry Fields and Adjacent 80 Acres properties were included within Plaintiff's first post-restoration request for newly acquired lands was reasonable. The Secretary determined that "the definition of 'newly acquired lands' is not limited to trust lands acquired for gaming purposes or trust lands acquired off reservation," but rather includes all lands taken into trust on behalf of a tribe. Decision document, at 7 n.12 (AR 005411). Section 292.2 plainly defines "newly acquired lands" in a manner that includes all lands taken into trust for a tribe. And the preamble to the regulations confirms that "newly acquired lands includes tribal land acquired in trust." 73. Fed. Reg. at 29367.[9] Indeed, the language of the regulations place no qualification on the word "land." See Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 515 (1994) ("The Secretary's interpretation of the [regulation] is thus far more consistent with the regulation's unqualified language than the interpretation advanced by petitioner."). Based on the plain meaning of "newly acquired lands," Interior reasonably determined that any post-restoration request by Plaintiff that Interior take land into trust for Plaintiff was a request for "newly acquired lands." Decision document, at 7 (AR 005411).

Plaintiff could not meet this alternative criterion to satisfy the temporal connection test, because Plaintiff was already gaming at the time it submitted the application. Decision document, at 7-8 (AR005411-12).

[9] Indeed, the preamble to the regulations rejected the comment that Section 292.12(c)(1) be modified "because a tribe should not lose its chance to satisfy the criteria in §292.12(c)(1) if it acquires land in trust for housing which is not intended for gaming." 73. Fed. Reg. at 29367. Interior determined that the modification was unnecessary "because paragraph (c)(2) allows a tribe that already has newly acquired lands[] to acquire a site for gaming as long as the tribe submits an application within 25 years of its restoration and is not gaming on other lands."

Plaintiff's request that Interior take the Strawberry Fields property into trust was not its first post-restoration request that Interior take land into trust. Plaintiff was restored to federally recognized status in 1984. Decision document, at 2 (AR005406). Plaintiff acquired its first trust holdings through successful trust-to-trust transfers in 1992. Id. Plaintiff then submitted two additional land-into-trust applications between 1995 and 2000. Id. See also, Letter from B. Murphy, Redding Rancheria, to V. Akins, Bureau of Indian Affairs ("BIA") (Jan. 19, 1995) (AR006158); Notice of Land Acquisition Application (Dec. 7, 2000) (AR006159-65). Plaintiff applied for the Strawberry Fields property to be taken into trust between November 2003 and April 2006. Decision document, at 2 (AR005406). And it sought to add the Adjacent 80 Acres property to its Strawberry Fields application in 2009. Id., at 3 (AR005407). It was therefore reasonable for Interior to determine, based upon Plaintiff's 1995 and 2000 trust applications alone, that "the Tribe made two requests for fee-to-trust acquisitions that predate its request relating to the Strawberry Fields Property." Id., at 7 (AR005411). As a consequence, the Strawberry Fields parcel was not the Tribe's first trust acquisition request and thus did not fit the regulatory criteria. Interior therefore did not act arbitrarily or capriciously in determining that the Strawberry Fields and Adjacent 80 Acres properties could not meet 25 C.F.R. § 292.12(c)(1)'s temporal connection requirement because they "were not 'included in the [T]ribe's first request for newly acquired lands since the [T]ribe was restored to Federal recognition.'" Decision document, at 7 (AR005411).

E. Interior Adequately Considered Plaintiff's Argument that Plaintiff's Gaming on Lands Acquired in 1992 Did Not Bar Plaintiff from Acquiring Additional Gaming Lands under the "Restored Lands Exception."

Plaintiff's third claim is based entirely upon Plaintiff's allegation that Interior "refused to consider" Plaintiff's argument that it could use both 25 U.S.C. § 2719(a)(1) and the 25 U.S.C. § 2719(b)(1)(B)(iii)'s restored lands exception to acquire lands for gaming. Plaintiff's argument reflects a fundamental misunderstanding of Interior's decision, as Interior did not refuse to consider this argument. To the contrary, Interior assumed that Plaintiff is correct that Plaintiff's use of Section 2719(a)(1) did not preclude its later use of Section 2719(b)(1)(B)(iii). Decision document, at 7 (AR005411).

Plaintiff argues that its acquisition of approximately 8.5 acres of land for gaming purposes in 1992 should not bar its request that Interior take the Strawberry Fields and Adjacent 80 Acres properties into trust because 25 U.S.C. § 2719(a)(1) provides an exception to IGRA's general prohibition of gaming on lands acquired after October 17, 1988 for lands that were "located within or contiguous to the boundaries of the reservation of the Indian tribe" on October 17, 1988. Compl. at ¶¶ 38-48. Plaintiff similarly argued that the "current gaming parcels are within the exterior boundaries of the original Redding Rancheria and thus are outside the Scope of 25 U.S.C. § 2719." Plfs. Oct. 29, 2010 letter, at 2 (AR006122). Contrary to Plaintiff's contention, Interior considered Plaintiff's assertion "that the trust-to-trust transfers giving the Tribe its first trust holdings in 1992 should not be considered newly acquired land, as the land was already held by the Secretary in trust before October 17, 1988." Decision Document, at 7 (AR005411). Interior's determination that it did "not have to reach" this issue does not reflect a lack of consideration. Id. To the contrary, it reflects Interior's conclusion that, "whether we consider the Tribe's first request for newly acquired lands to be" Plaintiff's 1992 application for the lands on which it is currently gaming or Plaintiff's two additional land-into-trust applications between 1995 and 2000, Plaintiff could not meet 25 C.F.R. § 292.12(c)(1)'s temporal connection requirement because they "were not 'included in the [T]ribe's first request for newly acquired lands since the [T]ribe was restored to Federal recognition.'" Decision document, at 7 (AR005411).

Interior considered Plaintiff's argument regarding its 1992 application and determined that an entirely different issue was dispositive. Just as this Court need not decide all issues raised by a Plaintiff where a single issue is dispositive, Interior need not consider in detail every argument raised by Plaintiff. See Baghramyan v. Holder, 419 Fed. Appx. 750, 751 (9th Cir. 2011) ("As the timeliness issue is dispositive, we need not reach [Plaintiff's] other contentions."). Accordingly, Interior's decision is "within the bounds of reasoned decisionmaking," Balt. Gas & Elec. Co., 462 U.S. at 105.

F. Congress Imposed no Fiduciary Duty upon Defendants with Respect to the Strawberry Fields and Adjacent 80 Acres Properties at Issue in this Case.

Plaintiff cannot establish a claim for breach of fiduciary duty. See Compl. at ¶¶ 57-62[10]. While the United States has created a general trust relationship between itself and Indian tribes, this general relationship does not establish any enforceable fiduciary obligations. United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2324-5 (2011). As the Supreme Court recently confirmed, the "Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." Id. at 2325 (holding that the fiduciary exception to the attorney-client privilege, which applies to common law trustees, does not apply to the United States). At a minimum, a Tribe must "identify a specific, applicable, trust-creating statute or regulation that the Government violated" to establish the existence of a fiduciary duty. United States v. Navajo Nation, 556 U.S. 287, 129 S. Ct. 1547, 1550 (2009). See also, Gros Ventre Tribe v. United States, 469 F.3d 801, 813 (9th Cir. 2006) ("the government does not bear complete fiduciary responsibility unless it has 'take[n] full control of a tribally-owned resource and manage[d] it to the exclusion of the tribe.'"). Contrary to Plaintiff's assertion, Compl. at ¶ 60, the IGRA does not impose a trust duty upon the United States.

The IGRA "does not create a fiduciary duty . . . Nothing in the Act indicates any intention by Congress to recognize or create a fiduciary duty." Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States, 259 F. Supp. 2d 783, 790-1 (W.D. Wis. 2003). See also, Vizenor v. Babbitt, 927 F. Supp. 1193, 1201-2 (D. Minn. 1996) (holding that IGRA imposes "no fiduciary duty," in part, because the federal government was not holding money or property in trust for a tribe). Indeed, Plaintiff appears to recognize that the IGRA does not expressly accept any trust responsibilities. Compl. at ¶ 58 (alleging that "[i]n addition to the express statutory obligations owed to the Tribe under the IGRA, the defendants have a fiduciary duty . . ."). Moreover, no trust

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[10] Plaintiff claims that Defendants "have a fiduciary duty in the nature of a continuing trust obligation to assist the Tribe in engaging and conducting gaming and by interpreting the provisions of the IGRA and the regulations promulgated thereunder in favor of the Tribe and to the Tribe's benefit." Compl. at ¶ 58.

duty can exist where the United States "never acquired the subject land in trust for plaintiffs. Without a trust, there is no fiduciary duty." Lac Courte Oreilles, 259 F. Supp. 2d at 790. Accord, Inter Tribal Council of Ariz., Inc. v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995) (Even where common law trust principles may be applicable, there is "no common law trust in this case because . . . property is not properly the subject of a trust corpus."); Cobell v. Norton, 240 F.3d 1081, 1098 (D.C. Cir. 2001) (citation omitted) (As the parcels of land at issue are not held in trust, there is no "control or supervision over tribal monies or properties" from which "the fiduciary relationship normally exists with respect to such monies or properties."). Plaintiff's breach of trust claim is without merit because the IGRA does not expressly impose any trust responsibilities on Defendants.

VII. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' cross-motion for summary judgment.

Respectfully submitted this 30th day of September, 2010.

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CERTIFICATE OF SERVICE

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