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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

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I. Introduction

The Secretary of the Interior ("Secretary") possesses broad authority to promulgate regulations, including regulations implementing the Secretary's duties under the Indian Gaming Regulatory Act ("IGRA"). The section of IGRA at issue in this case, 25 U.S.C. § 2719, explicitly vests the Secretary with the authority to administer the implementation of IGRA's prohibition on gaming on trust lands acquired after its passage, and the exceptions to that general prohibition.[1] And Congress, by vesting the Secretary with both the general authority to promulgate regulations and the specific authority to interpret Section 2719, delegated to the Secretary the authority to promulgate regulations to fill the gaps, or ambiguities, in Section 2719.

Plaintiff's Opposition to Defendants's Motion for Summary Judgment ("Pl.'s Opp.") (Doc. No. 22) offers few arguments in addition to those set forth in Plaintiff's Memorandum in Support of its Motion for Summary Judgment ("Pl.'s Mem.") (Doc. No. 17). As discussed in Defendants' Memorandum in Support of its Motion for Summary Judgment ("Defs.' Mem.") (Doc. No. 19), Defendants' Opposition to Plaintiff's Motion for Summary Judgment ("Defs.' Opp.") (Doc. No. 21) and in greater detail below, Section 2719 is the key element of a legislative scheme that vests the Secretary with the authority to promulgate regulations implementing Section 2719. Moreover, Plaintiff has failed to demonstrate that: (1) Defendants refused to consider Plaintiff's arguments in support of its application to have Interior take the Strawberry Fields and Adjacent 80 Acres properties into trust or (2) that Defendants owe plaintiff any fiduciary duty relating to the properties at issue.

II. The Secretary Possesses the Authority to Promulgate Regulations, Particularly Regulations Implementing 25 U.S.C. § 2719, under IGRA

The Secretary possesses the authority to promulgate regulations under IGRA. See Defs.' Mem. at 11. Plaintiff's opposition concedes that several sections of IGRA provide the Secretary with the authority to promulgate regulations. Plaintiff admits that, by passing six provisions of

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[1] IGRA also vests the National Indian Gaming Commission ("NIGC") with authority to interpret and apply some of the exemptions to IGRA's general prohibition on gaming on lands acquired after October 17, 1988.

IGRA, "Congress granted to the Secretary specific duties and powers." Pl.'s Opp. at 4. (referring to 25 U.S.C. §§ 2704(b)(1)(B), 2707(e), 2710(b)(3)(B), 2710(d)(3)(c), 2710(d)(7)(B)(vii), and 2710(d)(8) as the "Secretary's Statutes"). Plaintiff also admits that under these six provisions of IGRA, "where authority has been explicitly granted to the Secretary, the Secretary has the authority to promulgate regulations to carry out the duties delegated to him." Id.[2] These admissions demonstrate that Plaintiff's argument that the NIGC possesses the exclusive authority to promulgate regulations under IGRA is without merit.[3] Despite this admission, Plaintiff continues to maintain that the Secretary lacks the authority to promulgate regulations implementing IGRA's general prohibition on gaming on Indian lands acquired in trust after October 17, 1988 under 25 U.S.C. § 2719. As discussed below, the Secretary's authority to

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[2] Plaintiff's admission that certain sections of IGRA provide the Secretary with the authority to promulgate regulations is inconsistent with its continued assertion that IGRA granted the NIGC exclusive authority to promulgate regulations under IGRA. Pl.'s Mem. at 3-4, 10-12. While these admissions, as well as the authorities previously cited by the Secretary, e.g. Defs.' Opp. at 1-3, make it unnecessary to respond in detail to Plaintiff's arguments regarding NIGC's purported exclusive authority to promulgate regulations under IGRA, it merits noting that Congress enacted 25 U.S.C. §§ 2 and 9, and 5 U.S.C. § 301 to provide the Secretary with general authority to discharge future responsibilities by promulgating regulations. See United States v. Eberhardt, 789 F.2d 1354, 1361 (9th Cir. 1986). Plaintiff nonetheless argues that the Secretary's general authorities could not apply to IGRA because Congress could not have considered Indian gaming when it enacted the general authorities. Pl.'s Mem. at 10-12 (suggesting that Section 2 cannot provide a basis for promulgating regulations relating to issues that Congress did not consider in 1832). But the Secretary's general authorities would have little value if Interior could rely on them only to discharge responsibilities envisioned by Congress in 1832. See N. Arapahoe Tribe v. Hodel, 808 F.2d 741, 748-9 (10th Cir. 1987) (Sections 2 and 9, along with an 1868 "Treaty [that] does not expressly mention hunting or fishing rights" provides authority to issue regulations relating to hunting and fishing). The general authorities provide the Secretary with the authority to discharge duties imposed upon the Secretary after 1832.

[3] Plaintiff claims that Defendants' memorandum asserted "without a citation to any authority" that (1) the plain language of 25 U.S.C. § 2706(b)(10) does not provide the NIGC with the exclusive authority to promulgate regulations under IGRA and (2) the Secretary possesses the authority to promulgate regulations under IGRA. Pl.'s Opp. at 3. Plaintiff is wrong. We rely on the language of IGRA, and the recognition by the Ninth Circuit in United States v. Spokane Tribe of Indians, which adopted the position that IGRA authorizes the Secretary to "address the problem [posed by states' sovereign immunity under Section 11 of IGRA] by regulation." 139 F.3d 1297, 1301 (9th Cir. 1998). See Defs.' Mem. at 11.

promulgate regulations under IGRA is not limited to the regulations that the Secretary has promulgated under 25 U.S.C.§§ 2710(b)(3)(B) and 25 U.S.C. § 2710(d). See Defs.' Mem. at 11. Congress's legislative scheme, particularly 25 U.S.C. § 2719, vests the Secretary with the authority to promulgate the challenged regulations.

Section 2719, the section of IGRA at issue in this case, provides the Secretary with ample authority to address its ambiguities by promulgating regulations. See Defs.' Opp. at 4-6 (establishing, among other things, that challenges to an agency's authority to promulgate regulations are governed by Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 843 (1984) and its progeny). Plaintiff claims that, while IGRA provides the Secretary with some authority to interpret Section 2719, the Secretary lacks the authority to promulgate regulations because: (1) the Secretary's authority to interpret IGRA is limited to evaluating whether to take land into trust under the Secretary's other authorities; and (2) the Secretary has only been granted the authority to interpret Section 2719 on a case-by-case basis. Pl.'s Opp. at 4-8. Plaintiff is incorrect that the Secretary's authority is restricted in this manner.

Congress granted the Secretary broad authority under Section 2719 that supports the Secretary's promulgation of regulations. See Defs.' Mem. at 9-19; Defs.' Opp. at 1-7. Cf. Pl.'s Opp. at 4. For example IGRA provides for an exception to its general prohibition on gaming 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). Similarly, "[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." Dept. of Interior and Related Agencies Appropriations Act of 2001, § 134, Pub. L. 107-63, 115 Stat. 414 (emphasis added).[4] Congress therefore confirmed,

[4] As the 2001 Appropriations Act *confirmed* that IGRA itself delegated to the Secretary the authority to interpret reservation status under IGRA, it was unnecessary for the Secretary to cite to the 2001 Act as additional authority for the challenged regulations. Contra

at a minimum, that IGRA explicitly provides the Secretary with authority to determine reservation status for the purpose of applying four exceptions to IGRA's general prohibition on gaming on land acquired after October 17, 1988. See 25 U.S.C. §§ 2719(a)(1), (a)(2)(A), (a)(2)(B), (b)(1)(B)(ii); Defs.' Mem. at 12-13. Section 2719 delegated authority to the Secretary in a manner that is at least as explicit as the provisions of IGRA that Plaintiff admits provide the Secretary with the authority to promulgate regulations. See, e.g., Pl.'s Opp. at 4; 25 U.S.C. § 2710(d)(7)(B)(vii) (if a state does not consent to a proposed tribal-state gaming compact, "the Secretary shall prescribe, in consultation with the Indian tribe, procedures" governing the tribe's conduct of class III gaming that are consistent with the proposed compact, IGRA, and state law); 25 U.S.C. § 2710(b)(3)(B) (providing that gaming revenues can be used to make per capita payments to tribal members pursuant to tribal revenue allocation plans where "the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii)" of Section 2710(b)(2)(B)).[5] Plaintiff's assertion that every section of IGRA that imposes explicit duties on the Secretary, with the exception of Section 2719, provides the Secretary with the authority to promulgate regulations is unsustainable. See Pl.'s Opp. at 4. Put another way, the starting point for determining whether the Secretary is accorded Chevron deference in administering a statute, and has the authority to promulgate rules interpreting that statute, is the statute itself. Defs.' Opp. at 4-6. Here, Section 2719 explicitly delegates to the Secretary the authority to interpret and apply at least five of the seven exceptions to IGRA's general prohibition on gaming on lands acquired after October 17, 1988.

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Pl.'s Opp. at 8.

[5] Curiously, Plaintiff attempts to distinguish the provisions of IGRA that it acknowledges provide the Secretary with the authority to promulgate regulations from Section 2719 by claiming that Section 2719 does not explicitly grant the authority to promulgate regulations to the Secretary. Pl.'s Opp. at 7. But 25 U.S.C. §§ 2710(d)(7)(B)(vii) and (b)(3)(B), do not provide any such additional, more explicit, grant of rulemaking authority. Section 2719 provides a similar, and similarly sufficient, grant of the authority to promulgate regulations.

The Secretary's authority to promulgate regulations interpreting IGRA is not limited to the provisions of IGRA that explicitly grant authority to the Secretary. It is well-established that Congress can implicitly provide an agency with the authority to promulgate regulations:

> This Court in Chevron recognized that Congress not only engages in express delegation of specific interpretive authority, but that "sometimes the legislative delegation to an agency on a particular question is implicit." 467 U.S. at 844. Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet 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. Id., at 845. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, see id., at 845-846, but is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable . . .

United States v. Mead Corp., 533 U.S. 218, 229 (2001). See also Arnett v. Comm'r, 473 F.3d 790, 793 (7th Cir. 2007) ("When the statute does not delegate rulemaking authority explicitly, we shall consider statutory ambiguities to be implicit delegations to the agency administering the statute to interpret the statute through its rulemaking authority."). When considered along with Section 2719's explicit grants of authority to the Secretary, "it requires no great leap of logic to conclude that the" Secretary possesses the authority to interpret IGRA's "restored lands" exception. Oregon v. Norton, 271 F. Supp. 2d 1270, 1278 (D. Or. 2003).

Plaintiff is incorrect that the Secretary must exercise the substantial authority granted by Section 2719 on a case-by-case basis, rather than by promulgating regulations. See Pl.'s Opp. at 6. "[E]ven if a statutory scheme requires individualized determinations, the decisionmaker has the authority to rely on rulemaking to resolve certain issues of general applicability unless Congress clearly expresses an intent to withhold that authority." Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 612 (1991). Agencies are "not required continually to revisit 'issues that may be established fairly and efficiently in a single rulemaking proceeding." Lopez v. Davis, 531 U.S. 230, 244 (2001) (quoting Heckler v. Campbell, 461 U.S. 458 (1983)). None of the authorities cited by Plaintiff explicitly require the Secretary to carry out the duties imposed by IGRA through individualized determinations, much less prohibit the Secretary from employing notice

and comment rulemaking to adopt a well-defined, uniform interpretation of Section 2719. See Pl.'s Opp. at 6-7. Indeed, adopting a uniform interpretation of Section 2719 through such rulemaking procedures is preferable to the "case-by-case decisionmaking" proposed by Plaintiff, which "could invite favoritism, disunity, and inconsistency." Lopez, 531 U.S. at 244. Defs.' Mem. at 23; Defs.' Opp. at 17-18.

Similarly, Section 2719's delegation of authority allows the Secretary to do more than "interpret" Section 2719 in order to fulfill the duties imposed by other statutes. Cf. Pl.'s Opp. at 6-8. The Secretary's general authorities, 25 U.S.C. §§ 2 and 9, and 5 U.S.C. § 301, provide authority to promulgate regulations, even "in the absence of specific legislation giving Interior authority to regulate." Defs.' Opp. at 3, 6-7 (quoting Eberhardt, 789 F.2d at 1361); Defs.' Mem. at 15-19. Here, Section 2719 itself provides the Secretary with responsibilities and authorities that independently support the Secretary's promulgation of regulations interpreting Section 2719.[6] The Secretary possesses the authority to "administer" Section 2719. See Defs.' Mem. at 12-13, Defs.' Opp. at 4- 6, 14 (citing, among other cases, Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460, 465 (D.C. Cir. 2007)). And, Section 2719 grants the Secretary authority independent of any other statute, as the Secretary's determination of whether a tribe can game on land should be accorded Chevron deference even where the land has already been taken into trust under the Secretary's other authorities. Defs.' Opp. at 5 (citing Norton, 271 F. Supp. 2d at 1278). There can be no question that, where the legislative scheme (1) vests the Secretary with the authority to administer a statute and (2) ensures that the Secretary's exercise of that discretion must be accorded Chevron deference, the Secretary may rely on notice and comment rulemaking to interpret ambiguous provisions of the statute. Id. at 3-6.

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[6] Plaintiff asserts that the Secretary's arguments relating to his authority to promulgate the challenged regulations are based upon the Secretary's authority to take land into trust under other statutes. Pl.'s Opp. at 2-3, 7. Section 2719 delegates authority to the Secretary in a manner that is complemented, rather than limited, by the fact that Congress also granted the Secretary the authority to take land into trust under other statutes, such as the Indian Reorganization Act ("IRA"). Defs.' Mem. at 9-15; Defs.' Opp. at 1-7. And these other authorities form a small part of the legislative scheme that vests the Secretary with authority to promulgate regulations under Section 2719.

Ultimately, the challenged regulations are appropriate under Chevron and its progeny because they reflect a permissible construction of Section 2719 by an agency entrusted by Congress to interpret the section. See Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 712 (2011); Mead Corp., 533 U.S. at 229. The Secretary need not demonstrate that it was "necessary," as Plaintiff argues, Pl.'s Opp. at 8-9, for Interior to depart from prior interpretations of Section 2719. 25 U.S.C. § 9 ("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).[7] Interior may change its interpretation of a statute and adopt an interpretation that conflicts with prior judicial precedent through notice and comment rulemaking. Defs.' Mem. at 13-18. At a minimum, the preamble to the challenged regulations establishes that the regulations implement Section 2719, including the "restored lands" exception, in a rational and permissible manner. Defs.' Opp. at 16-18 (citing Gaming on Trust Lands Acquired after Oct. 17, 1988, 73 Fed. Reg. 29,354-74 (May 20, 2008); FCC v. Fox TV Stations, Inc., 556 U.S. 502, 129 S. Ct. 1800, 1810 (2009)). The challenged regulations should therefore be upheld.

III. Defendants Have Addressed and Demonstrated That Neither the Regulations nor the Secretary's Decision Violate IGRA

In Section II of its opposition, Plaintiff argues that the Secretary has not addressed its contention that the regulations and decision by the Secretary violate IGRA. Pl.'s Opp., at 12-15. Plaintiff is incorrect.

Plaintiff's argument that Interior's regulations implementing the "restored lands" exception are invalid is based upon Plaintiff's conclusion that Interior interpreted IGRA's "restored lands" and "last recognized reservation" exceptions in a manner that rendered the exceptions "mutually exclusive." Pl.'s Opp. at 13-14. Plaintiff contends that Interior's regulations render these two exceptions mutually exclusive because they prohibit a tribe from

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[7] Plaintiff's discussion of the Secretary's "motivation" for promulgating the regulations is similarly irrelevant. Pl.'s Opp. at 9-10. The challenged regulations "articulate[] standards that the BIA will follow in interpreting the various exceptions to the gaming prohibitions contained in section 2719 of IGRA" and "explain to the public how the Department interprets these exceptions. 73 Fed. Reg. 29,354. See also, Id. at 29,365-6.

having land taken into trust for gaming purposes under both exceptions. Id. ("the effect is to restrict Indian tribes that were landless on October 17, 1988, to gaming on one parcel of land, even if the tribe qualifies under [] more than one § 2719(b) Exception."). However, Plaintiff is mistaken, and its argument fails because Interior's regulations do not prohibit a tribe from taking advantage of both exceptions.

25 C.F.R. § 292.4, which implements the "last recognized reservation" exception does not prohibit a tribe that has used the "restored lands" exception from having additional land taken into trust:

> For gaming to be allowed on newly acquired lands under the exceptions in 25 U.S.C. 2719(a) of IGRA, the land must meet the location requirements in either paragraph (a) or paragraph (b) of this section.
>
> (a) If the tribe had a reservation on October 17, 1988, . . .
>
> (b) If the tribe had no reservation on October 17, 1988, the lands must be either:
>
> * * *
>
> (2) Located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population.

25 C.F.R. § 292.4. It must be noted that Section 292.4 does not reference, much less condition gaming upon, whether a tribe previously had land taken into trust for gaming purposes under the "restored lands" exception. Therefore, a tribe could rely on 25 C.F.R. § 292.12(c) as the basis for its first land-into-trust gaming application without restricting its ability to subsequently have land taken into trust under the "last recognized reservation" exception. Thus, the exceptions are not mutually exclusive. Defs.' Opp. at 10-11.

Consequently, it is irrelevant whether Grand Traverse 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), or any of the other cases relied upon by Plaintiff, established that IGRA unambiguously prohibits its exceptions from being interpreted as "mutually exclusive." Cf., Pl.'s Opp. at 13. In Grand Traverse, the court rejected Michigan's argument that "[b]ecause the Band uncontestedly was acknowledged by the Secretary under subsection (B)(ii), . . . it may not be considered restored under subsection (B)(iii)." Grand Traverse, 198 F. Supp. 2d at 929. Michigan's

interpretation of the "initial reservation" and "restored lands" exception would have rendered those exceptions mutually exclusive. Here, since the challenged regulations do not render the "last recognized reservation" and "restored lands" exceptions mutually exclusive, Grand Traverse cannot be read to preclude Interior's interpretation of the "restored lands" exception in this case. The regulations interpreting IGRA's "restored lands" and "last recognized reservation" exceptions both (1) interpret each exception to give it independent meaning and (2) allow a tribe to satisfy both exceptions under appropriate circumstances.

Because the "restored lands" exception is ambiguous, it leaves a gap for the Secretary to fill. Defs.' Opp. at 13-14 (citing Nat'l Cable & Telecommc'n Ass'n v. Brand X Internet Servs., 545 U.S. 967, 982-3 (2005)). Plaintiff's citation to Carcieri v. Salazar, 555 U.S. 379 (2009), offers no support for Plaintiff's claim that the Secretary lacks the authority to fill such ambiguities or gaps by promulgating regulations. Pl.'s Opp. at 13-14. In Carcieri, because the word "now" in the statute limited the definition of Indian, there was no gap to fill. 555 U.S. at 391 ("Here, the statutory context makes clear that 'now' does not mean 'now or hereafter' or 'at the time of application.' Had Congress intended to legislate such a definition, it could have done so explicitly, as it did in §§ 468 and 472, or it could have omitted the word 'now' altogether."). Here, Section 2719 does not define the terms - "restoration of land" and "restored" - that must be interpreted to give effect to the "restored lands" exception. 25 U.S.C. § 2719(b)(1)(B)(iii). Congress therefore "impliedly left to the agency the task of developing standards to carry out the general policy of the statute." Norton, 271 F. Supp. 2d at 1277 (citation omitted). In such circumstances, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." Id. (quotation omitted); Mayo Found., 131 S. Ct. at 712 ("The sole question for the Court . . . is 'whether the agency's answer is based on a permissible construction of the statute.'") (citation omitted). 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. Norton, 271 F. Supp. 2d at 1278.

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Plaintiff's sole additional argument regarding the Secretary's applications of the challenged regulations reflects a misunderstanding of the Secretary's decision. Plaintiff claims that Interior acted in an arbitrary manner by not considering the issue of whether a tribe can have land taken into trust under two different exceptions to IGRA's general prohibition on gaming. See Pl.'s Opp. at 14. But Plaintiff's application presented the question of whether Plaintiff's application relating to the Strawberry Fields and Adjacent Acres properties met the requirements of the "restored lands" exception. Defs.' Mem. at 27; Defs.' Opp. at 18-21. As set forth in Defendant's memorandum, it was unnecessary for the Secretary to determine whether Plaintiff's 1992 trust acquisition was Plaintiff's first request for newly acquired lands because Plaintiff's two additional land-into-trust applications between 1995 and 2000 barred Plaintiff from relying on 25 C.F.R. § 292.12(c)(1). Defs.' Mem. at 27. Defendants need not have considered in detail whether Plaintiff's 1992 acquisition independently barred Plaintiff from relying on the "restored lands" exception. See, Baghramyan v. Holder, 419 Fed. Appx. 750, 751 (9th Cir. 2011).[8] Therefore, the Secretary's decision is "within the bounds of reasoned decisionmaking," and should be upheld. Balt. Gas & Electric Co. v. Natural Res. Def. Council, 462 U.S. 87, 105 (1983).

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

Interior did not breach any fiduciary duty to Plaintiff relating to the Strawberry Fields and Adjacent 80 Acres properties because no such duty exists. Defs.' Mem. at 28-29. Absent a trust res, there can be no fiduciary relationship or fiduciary duties; and here, as in Inter Tribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199 (9th Cir. 1995), there is no trust corpus.

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[8] In its Opposition, Plaintiff questioned the propriety of Defendants' citation of Baghramyan under "9th Circuit R. 36-3." Pl.'s Opp. at 15 n.5. See also, id., at 6 n.2. The current Circuit Rule 36-3, "Citation of Unpublished Dispositions and Orders," provides as follows: "Unpublished dispositions and orders of this court issued on or after January 1, 2007 may be cited to the courts of this circuit in accordance with FRAP 32.1." Federal Rule of Appellate Procedure 32.1(a) provides that "[a] court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been (i) designated as 'unpublished,' 'not for publication,' 'non-precedential,' ' not precedent,' or the like; and (ii) issued on or after January 1, 2007."

Plaintiff's claim that Interior breached its fiduciary duties to Plaintiff also must fail because IGRA simply does not expressly impose any trust responsibilities on Defendants. Defs.' Mem. at 28-29. Plaintiff claims that "the IGRA and IRA impose specific duties on the Secretary with respect to the Tribe's Reservation lands." Pl.'s Opp. at 15. But Plaintiff fails to identify any duty-creating provision of either of these statutes, much less how Interior violated that provision. Id. Indeed, Plaintiff fails to address Defendants' argument that IGRA, the statutory basis for Plaintiff's claims, does not impose any fiduciary duties on the United States. See Defs.' Mem. at 28-29. (quoting Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States, 259 F. Supp. 2d 783, 790-1 (W.D. Wis. 2003) and citing Vizenor v. Babbitt, 927 F. Supp. 1193, 1201-2 (D. Minn. 1996)). And Plaintiff's reliance on the IRA is likewise misplaced, as that statute vests Interior with the discretionary authority, rather than the responsibility, to take land into trust on behalf of tribes. 25 U.S.C. § 465 ("The Secretary of the Interior is hereby authorized, in his discretion, to acquire . . . any interest in lands, water rights, or surface rights to lands, within or without existing reservations . . . for the purpose of providing land for Indians."). Plaintiff's claim that Interior has breached its fiduciary duties fails because Plaintiff has not identified "a specific, applicable, trust-creating statute or regulation." United States v. Navajo Nation, 556 U.S. 287, 129 S. Ct. 1547, 1550 (2009).

The sole case cited by Plaintiff in support of its argument that Interior owes Plaintiff a fiduciary duty in this case is unavailing. Pl.'s Opp. at 15-16 (citing Duncan v. United States, 229 Ct. Cl. 120 (1981)). In Duncan, the Court of Claims stated that "where the Federal Government **takes over control or supervision of Indian property** the fiduciary relationship normally exists . . . even though nothing is said expressly in the statute about a trust or fiduciary connection." Id. at 128-9 (emphasis added). It is, at best, questionable whether Duncan remains good law following the Supreme Court's holding that "[t]he Federal Government's liability cannot be premised on control alone." Navajo Nation, 129 S. Ct. at 1558 (rejecting Federal Circuit's suggestion "that the Government's 'comprehensive control' over coal on Indian land gives rise to fiduciary duties based upon common law trust principles"). The "Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute."

United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2325 (2011). As discussed above, Plaintiff has failed to identify a specific trust-creating statute.

Assuming, *arguendo*, that Plaintiff identified a specific trust-creating provision of IGRA, Plaintiff's suggestion that the Secretary's promulgation of the challenged regulations is governed by that trust relationship is incorrect. Plaintiff claims that "the Secretary's conduct in interpreting the IGRA and promulgating the Regulations must be evaluated in accordance with his role as trustee." Pl.'s Opp. at 15. As discussed above, the challenged regulations must be evaluated under Chevron and its progeny. This is so even where the statute at issue relates to tribes. Chugach Alaska Corp. v. Lujan, 915 F.2d 454, 457 n.4 (9th Cir. 1990) ("The canon of construction that statutes benefiting [sic] Native Americans should be construed liberally in their favor. . . is not applicable here. . . .[T]he canon does not apply when the agency charged with administering the statute is owed deference.) (citation omitted); Haynes v. United States, 891 F.2d 235, 238-9 (9th Cir. 1989). Under Chevron, the challenged regulations must be upheld as long as they reflect a permissible interpretation of IGRA, regardless of whether there is any applicable trust duty in this case.

Moreover, Plaintiff fails to even allege that IGRA imposes any fiduciary duty applicable to the Strawberry Fields and Adjacent 80 Acres properties. Plaintiff claims that "a trust relationship exists between the United States and the Tribe with respect to **its Reservation Lands**." Pl.'s Opp. at 15 (emphasis added). Even if such a duty existed, it would not apply to the Strawberry Fields and Adjacent 80 Acres properties. These properties are not located on Plaintiff's reservation. AR5410. The Strawberry Fields and Adjacent 80 Acres properties therefore cannot be "reservation lands." Plaintiff fails to allege, much less establish, how Interior could owe it any fiduciary duty with respect to the non-reservation lands at issue.

Regardless, no trust duty can exist with respect to the Strawberry Fields and Adjacent 80 Acres properties because those lands are not held in trust. Defs.' Mem. at 28-29. In Duncan, the court determined that a trust duty generally exists where the United States controls the property at issue. 229 Ct. Cl. at 128-9. Indeed, no trust duty can exist with respect to lands that the United States has not acquired in trust. Defs.' Mem. at 28-29. See also, Marceau v. Blackfeet Housing

Auth., 540 F.3d 916, 927 (9th Cir. 2008) (No trust duty where United States has plenary control of neither money nor property). It is uncontested that the Strawberry Fields and Adjacent 80 Acres properties are held in fee by Plaintiff. AR5405; AR5416; AR6027. Interior simply owes no fiduciary duties to Plaintiff with respect to land that is not held in trust.

V. Defendants' Objections to Plaintiff's Additional Extra-Record Declaration

In their opposition, Defendants objected to Plaintiff's submission of four declarations Plaintiff filed in support of its motion for summary judgment. Plaintiff now offers the additional Declaration of Lester J. Marston in Opposition to the Defendant's Motion for Summary Judgment ("Counsel's Declaration" or "Cls Decl."). Defendants object to Counsel's Declaration and move the Court to strike it from the record in this case. It should be excluded from consideration and stricken because: 1) Pursuant to the Administrative Procedure Act, the review of this matter is limited to the AR which was compiled by DOI and filed in this case; and, 2) the contents of Counsel's Declaration do not conform to the Federal Rules of Evidence.

The reasoning and grounds for excluding and striking Counsel's Declaration are the same as those cited and argued in Part IV of Defendants' Opposition Memorandum, plus one additional reason. Counsel's Declaration is a platform for and includes legal argument in support of the relief sought by Plaintiff in this action. Pl.'s Opp. at ¶¶ 8-10. Legal argument is improper and has no place in a declaration offered pursuant to Fed.R.Civ.P 56(e). "An affidavit or declaration may contain only facts, must conform as much as possible to the requirements of Fed.R.Civ.P 56(e), and must avoid conclusions and argument . . . . An affidavit or declaration not in compliance with this rule may be stricken in whole or in part." Civil Local Rule 7-5(b), Northern District of California.

Based upon the foregoing points and authorities, Counsel's Declaration should be wholly disregarded and stricken from the record in this matter.

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VI. Conclusion

For the foregoing reasons, Defendants respectfully request that the Court grant Defendants' motion for summary judgment and deny Plaintiff's motion for summary judgment.

Respectfully submitted this 17th day of November, 2011.

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