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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REDDING RANCHERIA, Plaintiff, v. KENNETH SALAZAR, in his official capacity as the Secretary of the United States Department of the Interior, and LARRY ECHO HAWK, in his official capacity as the Assistant Secretary for Indian Affairs for the United States Department of the Interior, Defendants.	Case No. CV 11-01493 SC PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DATE: December 2, 2011 TIME: 1:00 p.m. CTRM: 1 Honorable Samuel Conti

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INTRODUCTION

Defendants' motion for summary judgment ("Defendants' Motion") is an extended exercise in ignoring the obvious and promoting the marginally relevant. Defendants spend pages analyzing statutes of general application and implied delegations of authority to the Secretary of the Interior ("Secretary"), while turning a blind eye to the explicit provisions of the statute at issue in this case, the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA").

Defendants' argument boils down to two fundamental assertions. First, the Secretary had the authority to promulgate the regulations at issue in this case, 25 C.F.R. Part 292 ("Regulations"), because that authority is implicit in the IGRA, can be inferred from his duty to take land into trust under the Indian Reorganization Act, 25 U.S.C. § 461, et seq. ("IRA"), and can be derived from three statutes of general application, 25 U.S.C. §§ 2, 25 U.S.C. 9, and 5 U.S.C. 301. Second, the Regulations are a reasonable interpretation of the IGRA and because the Regulations prohibit the trust transfer requested by the Tribe, Assistant Secretary for Indian Affairs, Larry Echo Hawk's, December 22, 2010, decision ("Decision") denying the Tribe's request to have certain lands taken into trust for gaming purposes does not violate the IGRA or the Administrative Procedures Act, 5 U.S.C. §701, et seq. ("APA").

The fact that, as an essential provision of the IGRA, Congress created the National Indian Gaming Commission ("NIGC")[1], as an independent agency, to regulate Indian gaming, 25 U.S.C. § 2704(a), and explicitly delegated to the NIGC the authority "to promulgate such regulations and guidelines as it deems appropriate to implement the provisions" of the IGRA, 25 U.S.C. § 2706(b)(10), is, apparently, of little significance to the Defendants. Also apparently unworthy of serious consideration by the Defendants are the fact that: (1) the Regulations impose conditions on the implementation of the Restored Lands Exception that are in conflict with the plain wording of 25 U.S.C. § 2719 ("Section 2719 "), the section of the IGRA that the Regulations were intended to implement; (2) the conditions imposed by the Regulations are in

[1] *Gaming Corporation of America v. Dorsey & Whitney*, 887 F.3d 536, 544 (8th Cir. 1996) (holding that IGRA granted NIGC broad "regulatory authority" over Indian gaming).

direct conflict with the stated purpose of the IGRA; (3) the Regulations are in direct conflict with the federal case law interpreting the Restored Lands Exception; and (4) the Regulations are in direct conflict with a decade of Department of the Interior ("DOI") and NIGC interpretations of the Restored Lands Exception. Ironically, in defending the validity of the Regulations, the Defendants have effectively admitted that the Regulations violate the IGRA.

In its Motion for Summary Judgment ("Tribe's Motion"), previously filed with the Court, the Tribe has submitted to the Court a lengthy brief that addresses most of the issues raised in the Defendant's motion. In responding to the Defendants's Motion, therefore, the Tribe will not repeat those arguments. In the interest of judicial economy, it will, instead, provide a response to the main points raised in Defendants' Motion and cross reference the more extensive arguments responding to the same topic set forth in the Tribe's Motion.

I.

THE SECRETARY WAS NOT DELEGATED THE AUTHORITY TO PROMULGATE THE REGULATIONS.

The lion's share of the Defendant's argument addresses the Secretary's authority to issue the Regulations. The Defendants argument relating to the Secretary's authority can be summarized as follows:

1. The Secretary has been delegated specific duties under the IGRA and was not explicitly denied the authority to issue regulations in the IGRA. The Secretary, therefore, has implied authority to issue regulations to implement the IGRA.

2. 25 U.S.C. § 465 of the IRA authorizes the Secretary to take land into trust for Indian tribes. Because Section 2719 requires that land be taken into trust for tribes for gaming purposes, and because the taking of land into trust under the IRA for gaming purposes will require an interpretation of whether the land qualifies under the Section 2719 exceptions, the Secretary has implied authority to promulgate regulations implementing the IGRA.

3. The Secretary has authority under 25 U.S.C. § 2 ("Section 2"), 25 U.S.C. § 9 ("Section 9") and 5 U.S.C. § 301 ("Section 301") to promulgate regulations generally concerning Indians and Indian affairs. The authority to promulgate regulations set forth in

those statutes extends to the authority to promulgate regulations to implement the IGRA.

As demonstrated below, each of the Defendants' arguments is profoundly flawed.

1. Provisions Of The IGRA That Assign Specific Duties And Powers To The Secretary Do Not Provide A Basis For Concluding That The Secretary Was Granted Authority To Promulgate The Regulations.

The Defendants argue that, despite the express grant of authority to promulgate regulations to implement the IGRA under Section 2706(a)(10), the IGRA does not grant the NIGC the *exclusive* authority to promulgate regulations:

> The statue provides: "The [National Indian 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)(1). 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"). 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.

Defendants's Motion, p. 9-10.

Defendants do not explain how the explicit grant of authority to the NIGC to promulgate regulations in Section 2706(b)(1) is "non-exclusive." They merely assert, without a citation to any authority to support their position, that it is non-exclusive. They also merely assert, once again, without citing to any supporting legal authority, that the Secretary has authority to promulgate regulations to implement the IGRA because Congress did not affirmatively deny that authority to the Secretary. Federal Courts have definitively rejected such an analysis: "'Agency authority may not be lightly presumed.' . . . 'Were courts to presume a delegation of power absent an express withholding of such power, agencies would enjoy virtually limitless hegemony, a result plainly out of keeping with *Chevron* [*U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)] and quite likely with the Constitution as well.'" *Texas v. United States*, 497 F.3d 491, 502-503 (5th Cir. 2007).

Even if case law did not bar such analysis, the Defendants' only stated basis for their conclusion that the authority to issue regulations was not affirmatively denied to the Secretary is a citation to 25 U.S.C. § 2711(h), which, they maintain, is evidence of retained authority.

Section 2711(h), is a transfer of authority to regulate an aspect of Indian gaming from the Secretary to the NIGC. Rather than revealing that the grant of rule-making authority was non-exclusive, the transfer of authority from the Secretary was self-evidently intended to consolidate in the NIGC the authority to regulate Indian gaming. Asserting that the act of taking authority away from the Secretary is evidence that Congress intended to reserve authority to the Secretary is absurd.

The Defendants also argue that, because the Secretary has specific duties under the IGRA, the assignment of those duties gives rise to implicit authority to issue regulations relating to Section 2719. Defendants' Motion, p. 10-15. The Defendants cite to 25 U.S.C. §2710(b)(3)(B), 25 U.S.C. §2710(d)(3)(c), 25 U.S.C. §2710(d)(8), 25 U.S.C. §2710(d)(7)(B)(vii), 25 U.S.C. §2704(b)(1)(B), and 25 U.S.C. §2707(e) (hereinafter referred to collectively as "Secretary's Statutes") as an example of specific duties Congress has delegated to the Secretary under the IGRA. The Defendants argue that the Secretary has issued regulations to implement these provisions and courts have upheld that authority, thus demonstrating that the Tribe's contention that the Secretary lacks general authority to promulgate the Regulations is incorrect. Defendants' Motion, pp. 10-11.

The problem with this analysis is obvious. In the Secretary's Statutes, Congress granted to the Secretary specific duties and powers under the IGRA. It is appropriate that in those specific areas 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. In light of the specificity of the grants of authority to the Secretary included in the IGRA, as well as the clear and unqualified delegation of the authority to promulgate regulations to implement the IGRA to the NIGC, there is no structural or textual basis for concluding that Congress impliedly granted to the Secretary the general authority to promulgate regulations. Had Congress intended to grant such authority to the Secretary, it would have done so expressly, as it did with the other duties and powers it granted to the Secretary and the NIGC in the IGRA.

The Defendants' argument is also internally inconsistent. On the one hand, they argue that IGRA's express delegation to the NIGC of the authority to issue regulations must be

interpreted narrowly, because the Secretary *is not explicitly prohibited* from issuing regulations. On the other hand, the statutory imposition of specific, limited, circumscribed duties granted to the Secretary in the Secretary's Statutes, unrelated to Section 2719, must be interpreted broadly to provide a basis for inferring that Congress intended to delegate to the Secretary expansive authority to promulgate the Regulations. Such a self-serving analysis cannot be taken seriously.

The Defendants extend this argument by stating that, because Indian gaming can only be conducted on land taken into trust *by the Secretary*: "[a]ll 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," and, therefore, the Secretary has the authority to promulgate the Regulations, Defendants' Motion, p. 11. As further support for this position, the Defendants cite to the references to the Secretary in Section 2719 as evidence of implicit authority to promulgate the Regulations.

Once again, the Defendants' argument is inherently inconsistent. Section 2719 indeed includes references to the Secretary's authority to take land into trust. Section 2719(b)(1)(B)(iii), which established the Restored Lands Exception, in contrast, does not include any reference to the Secretary. Section 2719(b)(1)(A), in fact, specifically delegates to the Secretary the obligation to determine whether a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and not detrimental to the surrounding community. But, in sharp contrast, Section 2719 does not include any delegation of authority to the Secretary to promulgate regulations.

Congress's repeated reference to the Secretary is unmistakable evidence that Congress was aware of the Secretary's role in taking land into trust and chose not to grant to him any more authority than it expressly did. Once again, where Congress has explicitly granted duties and powers to the Secretary and explicitly refers to his authority to take land into trust, but does not grant any authority to the Secretary to promulgate regulations, there is no basis for inferring that such authority has been granted. To interpret the statute otherwise would result in the Secretary having, "'virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well.'" *Texas v. United States*, 497 F.3d at 502-503,

One of the critical elements of the Defendants' argument is that the Secretary has the authority and obligation to take land into trust under the IRA and that, in order to carry out the responsibilities arising from the IRA, the Secretary must "interpret" the exceptions to the prohibition on taking lands into trust for gaming purposes after October 17, 1988 ("Prohibition"):

> As the Ninth Circuit has recognized, "the Department must make 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.

Defendants' Motion, p.14-15.

This argument is, at best, misleading.[2] The absence of authority to promulgate the Regulations would not force the Secretary "to evaluate land-into-trust requests without analyzing the legality of such requests under the IGRA." The Secretary's obligation to make determinations on land-to-trust requests pursuant to the IRA requires the Secretary to interpret the Section 2719 exceptions on a case-by-case basis as they apply to the use of the land in *individual* land-into-trust requests, 25 C.F.R. §151.10-11. *Citizens Exposing Truth About Casinos v. Kempthorne*, 494 F.3d 460, 465 (D.C. Cir. 2007) ("*Citizens*"); *Oregon v. Norton*, 271 F. Supp. 2d 1270, 1280 (D. Or. 2003) ("*Norton*"), 107 Pub. L. 63, § 134. The Secretary,

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[2] *Vancouver v. Skibine*, furthermore, does not provide support for the Defendants' argument. It addressed a purely procedural issue, whether the NIGC could approve an amendment to a tribal gaming ordinance before the DOI had made a final decision on the Tribe's fee-to-trust application. The two page decision does not address the issue of the Secretary's authority to promulgate regulations or the extent of his authority to interpret the IGRA. The cited language is dicta that is included without any analysis of the issue. The full sentence of the quoted language makes it clear that the focus was on the Secretary's authority to take land into trust under the IRA: "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, *see 25 C.F.R. § 151.10(c)*." *Id.,* 393 Fed. Appx. at 519. The Ninth Circuit found that the decision was not appropriate for publication or citation. The Defendants do not explain how they can cite to this case in their Motion since the case does not meet the requirements of 9th Cir. Rule 36-3.

with the assistance of the NIGC has taken land into trust for gaming purposes pursuant to the IRA and the IGRA for a decade without promulgating regulations implementing Section 2719. See Tribe's Motion, pp. 13-23.

The Defendants, nevertheless, make an unsupported, and unsupportable, leap of logic: "*Accordingly*, the legislative scheme of the IGRA, particularly Section 20 of the IGRA, provides the Secretary with the authority to promulgate regulations." Defendants' Motion, p. 15. (Emphasis added.) The authority to interpret the provisions of Section 2719 for the purposes of taking land into trust pursuant to the IRA has suddenly morphed into the authority to promulgate regulations implementing Section 2719.

The Defendants' argument hinges on equating "interpret" with "promulgate regulations." The authorities cited by the Defendants, the 2001 Congressional appropriations bill ("the Bill"), 107 Pub. L. 63, § 134, *Citizens*, and *Norton*, all addressed the issue of whether the Secretary has the authority to interpret specific exemptions or exceptions in 2719 in determining whether an individual parcel of land met the requirements of 25 U.S.C. § 476 ("Section 476") and the Part 151 regulations.[3] The requirement that the Secretary interpret a provision of the IGRA as applied to *individual* applications to have land taken into trust pursuant to Section 476 and the Part 151 regulations, however, is not the same as a delegation of authority to promulgate regulations implementing the provisions of the IGRA in general or Section 2719 in particular.

Neither the Bill nor the cases holding that the Secretary has the authority to interpret the provisions of the IGRA states that such interpretative authority stretches to the promulgation of regulations. In each case, the acknowledged authority is to make a determination in an individual case. The Bill states, in relevant part: "The 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." Bill § 134. The court in *Citizens*, 494 F.3d at 465, stated that the argument that the Secretary did not have a role

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[3]The Part 151 regulations are found at 25 C.F.R. § 151, et seq., and establish the criteria for the Secretary taking land into trust for Indians and Indian tribes.

in interpreting the IGRA was incorrect:

> This 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 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 Nation v. Norton, 240 F.3d 1250 (10th Cir. 2001)*, not to defer to the Secretary. (Emphasis added.)

Finally, in *Norton*, the Court stated: "IGRA grants the Secretary authority to determine whether lands are 'restored' and thus eligible for gaming purposes." *Id.*, at 1280.

Moreover, in the May 20, 2008, Federal Register Notice of Final Rulemaking, the DOI did not cite to the Bill as authority for the promulgation of the Regulations. Thus, the Defendants' citation to the Bill as authority for the promulgation of the Regulations is merely a post hoc rationalization that does not provide the authority DOI claims. *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automobile Insurance*, 463 U.S. 29, 50 (1983); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-169 (1962).

Finally, the Defendants attempt to provide a justification as to why it was necessary for the Secretary to promulgate the Regulations. They argue that the Regulations "are essential to the Secretary to ensure that the 'restored lands exception' is applied in a consistent manner." Defendants' Motion, p. 17. The notion that the regulations were necessary to ensure that the Restored Lands Exception would be applied consistently is absurd. As the Tribe demonstrated in detail in the Tribe's Motion, pp. 13-23, federal courts, the NIGC and the DOI had all applied the same interpretation of the Restore Lands Exception for more than a decade before the Regulations were promulgated, a period in which the Secretary made decisions on dozens of trust acquisition applications. *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney*, 46 F. Supp.2d 689 (W.D. Mich. 1999) ("*Grand Traverse I*"); *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney of the W. Dist. of Mich.,* 198 F. Supp. 2d 920 (W.D. Mich. 2002) ("*Grand Traverse II*"); and *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the United States Atty.*, 369 F.3d 960 (6th Cir. Mich. 2004) ("*Grand Traverse III*"); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw*

Indians v. Babbitt, 116 F. Supp. 2d 155 (D.D.C. 2000); *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003), and *Norton*, 271 F. Supp. 2d 1270 (D. Or. 2003) See also, the list of NIGC and DOI lands decisions cited in the Tribe's Motion, p. 21, fn 10.

The promulgation of the Regulations has, in fact, had the opposite effect from ensuring consistency. The Regulations, by imposing conditions that are not included in the plain wording of the IGRA have lead to a sudden and dramatic change in the interpretation of the IGRA and the application of the IGRA to trust transfer applications. Now, unlike the numerous decisions and interpretations that preceded the promulgation of the Regulations, a tribe seeking to have land taken into trust for gaming purposes is limited to its first request to have land taken into trust after the enactment of the IGRA, or to an application for trust transfer within 25 years if the tribe is not currently conducting gaming. Under the Defendants' interpretation, tribes are also limited to utilizing only one of the Section 2719 exemptions or exceptions. As a result, a significant number of the decisions on requests to have land taken into trust for gaming purposes, that are consistent with the Regulations, will be inconsistent with the majority of decisions issued before the Regulations were promulgated, because they will be based on criteria that did not exist before 2008.

The Secretary's proffered need for the Regulations to ensure that the Restored Lands Exception be implemented consistently is simply not true. The Regulations were not promulgated to ensure consistency. The primary motivation behind the promulgation of the Regulations was to address the then current controversy concerning off-reservation gaming and, in particular, the fear of state and local government officials and citizen's groups of alleged reservation shopping. At the time that the Regulations were being developed, two pieces of legislation were pending in Congress to amend Section 2719 to limit or prohibit off-reservation gaming, S. 2078 introduced by Senator McCain on November 18, 2005, and H.R. 4893 introduced by Congressman Pombo on March 7, 2006. The Regulations were designed to reduce the risk that such amendments to the IGRA would be enacted. See, e.g. AR 1139, AR

1154, AR 2709-10, AR 3079, AR 3089, and AR 3458-9.[4] The primary motivation behind the Regulations, thus, is to restrict Indian gaming, which is in direct conflict with the stated purposes of the IGRA. See 25 U.S.C. § 2702.

2. Statutes, Other Than The IGRA Do Not Provide Authority For The Secretary To Promulgate The Regulations.

The Defendants' assertion that the authority to promulgate regulations to implement the IGRA can be found in Section 2, Section 9, and Section 301 other than the IGRA violates two fundamental canons of statutory construction: later enacted statutes take priority over earlier ones, and more specific statutes control more general ones. *Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Bulova v. United States*, 365 U.S. 753, 758 (1961); *Kolev v. Euromotors West/The Auto Gallery*, 2011 U.S. App. LEXIS 19254 (9th Cir. 2011). There is no question that the IGRA is both the later enacted statute and the more specific statute.

Section 2 was enacted in 1832. Section 9 was enacted in 1834. Section 301 was enacted in 1966. The IRA was enacted in 1934. The IGRA was enacted on October 17, 1988. The IGRA is, in each case, the later enacted statute.

Sections 2, 9, and 301 are statutes of general application empowering officials of the executive branch to promulgate regulations generally addressing Indians and Indian affairs. The IRA addresses the structure of tribal governments, their relationship with the federal government, and the taking of land into trust for Indians and Indian tribes by the federal government. At the time that Congress enacted Sections 2, 9, and 301, and the IRA, the regulation of Indian gaming could not have been a consideration in granting the authority to issue regulations to the President and the Secretary, because the right of Indian tribes to conduct gaming was not recognized until 1987. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987) ("*Cabazon*"). Those statutes, therefore, could not have been intended to regulate Indian gaming. The IGRA was enacted in direct response to *Cabazon* for the exclusive purpose of regulating gaming conducted on Indian lands. Through the IGRA, Congress created

[4]The Tribe is unable to cite to any statement on the part of the officials of the DOI from the Administrative Record on this subject, since the internal correspondence documents have all been redacted.

a structure for the comprehensive regulation of gaming activities on Indian lands. *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184 (9th Cir. 2008). The IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands." Sen. Rpt. 100-446 at 6 (August 3, 1988); *Gaming Corporation of America v. Dorsey & Whitney, supra*, 88 F.3d at 548 ("*Gaming Corporation*") (holding the IGRA has "extraordinary" preemptive force"); *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1176 (10th Cir. 1991). See Tribe's Motion, pp. 25-28.

As was demonstrated in the Tribe's Motion, furthermore, the federal courts interpreting § 2 and § 9 have repeatedly found that those statutes, standing alone, do not provide sufficient authority to allow the Secretary to promulgate regulations. *Organized Village of Kake v. Egan*, 369 U.S. 60, 63 (1962); *Northern Arapahoe Tribe v. Hodel*, 808 F.2d 741, 749 (10th Cir 1987); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 665 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038 (1977); United States Department of the Interior, FEDERAL INDIAN LAW (1958), pp. 54-55; Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1945), p. 102. Here, given the fact that § 2 and § 9 are in conflict with the later, more specific, and comprehensive statute, there is no basis for concluding that they provide the Secretary the authority to issue the Regulations.

Congress, as part of its legislative scheme for regulating Indian gaming, established the NIGC. 25 U.S.C. § 2704(a). "To carry out the federal government's responsibilities in the scheme [to regulate Indian gaming], the IGRA created the National Indian Gaming Commission . . . , an independent federal regulatory agency within the Department of the Interior." *Colorado River Indian Tribes v. National Indian Gaming Commission*, 383 F. Supp. 2d 123, 126-127 (D.D.C. 2005); *Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295, 322 (W.D.N.Y. 2008) ("In enacting the IGRA, Congress established the NIGC as an independent agency charged with exclusive regulatory authority for Indian gaming on Indian lands."). The IGRA specifically and unequivocally delegates to the NIGC the authority "to promulgate such regulations and guidelines as it deems appropriate to implement the provisions of [the IGRA]." 25 U.S.C. § 2706(b)(10); *Gaming Corporation*, 887 F.3d at 544 (holding NIGC granted broad authority to regulate Indian gaming). In creating the NIGC, Congress transferred some

responsibilities from the Secretary to the NIGC, providing clear evidence of Congress's intent to vest in the NIGC, not the Secretary, the authority to regulate Indian gaming. See 25 U.S.C. §2711(h) (transferring authority to approve management contracts).

Given the explicit delegation of authority to promulgate regulations to implement the IGRA set forth in 25 U.S.C. § 2706(b)(10), the applicable rules of statutory construction, and the relevant case law, there is no question that Sections 2, 9, 301 and the IRA do not grant the Secretary authority to promulgate regulations to implement the IGRA.

II.

THE SECRETARY DOES NOT ADDRESS THE FACT THAT THE REGULATIONS AND THE DECISION VIOLATE THE IGRA.

The Defendants do not discuss in any detail the fact that the Regulations and the Decision that resulted from the application of the Regulations are in direct conflict with the IGRA, the federal court decisions interpreting the Restored Lands Exception and the DOI's and the NIGC's own interpretations of the Restored Lands Exceptions that were issued before the Regulations were promulgated. The Defendants instead argue that the Regulations are a reasonable interpretation of an ambiguous statute, so they are permissible. Defendants' Motion, pp. 21-23. They further argue that the Regulations prohibit the trust transfer requested by the Tribe, so the Decision does not violate the IGRA or the APA. Defendants' Motion p.23-26. Finally, they argue that the Assistant Secretary properly considered all of the Tribe's arguments. Defendants Motion, pp. 26-28.

The Tribe discussed all of those points at length in the Tribe's Motion. See the Tribe's Motion p.6 (the Restored Lands Exception is not ambiguous), pp. 6-13, (the Regulations directly conflict with the express provisions of Section 2719), pp. 13-19 (the Regulations are in conflict with the federal case law interpreting the Restored Lands Exception), pp. 19-23 (the Regulations are in conflict with the DOI and NIGC interpretations of the Restored Lands Exception), and pp 30-35 (Defendant Echo Hawk failed to consider all of the evidence and arguments submitted by the Tribe). The Tribe will not repeat those arguments here. However, the Defendants' Motion contains at least two arguments that require a response.

As was discussed in the Tribe's Motion, Section 2719 does not provide that land can be taken into trust for gaming purposes under *either* a § 2719(a) Exemption or a § 2719(b) Exception, *but not both.* Nor does § 2719 provide that land can be taken into trust for gaming purposes under only one of the § 2719(b) Exceptions. Tribe's Motion, pp. 11-13. The effect of the Regulations, however, is to make the Exemptions and the Exceptions mutually exclusive. When 25 C.F.R.§ 292.2, is combined with 25 C.F.R.§ 292.12(c)(1), 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 a § 2719(a) Exemption and one or more than one § 2719(b) Exception. That interpretation is in conflict with the IGRA, and the court decisions interpreting the IGRA.

The Defendants state that "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)." Defendants's Motion, p. 26. That would appear to be an admission by the Defendants that the Exemptions and Exceptions are not mutually exclusive. Nevertheless, the Defendants argue that the Regulations indeed limit tribes to one Exemption or one Exception.

> 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. . . . 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.' . . . Indeed, the language of the regulations place no qualification on the word 'land.' Based on the plaint meaning of 'newly acquired lands,' Interior reasonably determined that any post-restoration required by Plaintiff that Interior take land into trust for Plaintiff was a request for 'newly acquired lands.'

Defendants' Motion, p. 25.

Thus, the Defendants' unequivocally state that 25 C.F.R. §292.12(c)(1) limits tribes to one Exemption or Exception under 2719. Such a limitation is in direct conflict with the applicable decisions of federal courts. As the District Court stated in *Grand Traverse*: "I find no evidence of Congressional intent to establish mutually exclusive categories of exceptions under *§ 2719(b)(1)(B).*" *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Attorney of the W. Dist. of Mich.,* 198 F. Supp. 2d 920, 934 (W.D. Mich. 2002) ("*Grand Traverse II*"). The Supreme Court, furthermore, has concluded that the Secretary is not

authorized to impose through regulations conditions or criteria that are not provided by statute and where there is no gap in the statute to fill. *Carcieri v. Salazar*, 555 U.S. 379 (2009).

The Defendants' justification for adding conditions that are not found in Section 2719 is "it is unnecessary for the Secretary's regulations to impose the exact conditions upon the "restored lands exception" envisioned by Congress. Defendants' Motion, p. 22. The Defendants cite to *Mississippi Power & Light Co. v. Mississippi ex rel Moore*, 487 U.S. 354 (1988). That decision say nothing about an agency adding additional criteria to the requirements of a statute through regulations, only that agencies have the authority to interpret the extent of their own jurisdiction. The language cited in the Defendants' Motion, furthermore, conflicts with their assertion: courts " defer, of course to [an agency's] construction if *it does not violate plain meaning and is a reasonable interpretation of silence or ambiguity*." *Id.*, 487 U.S. at 380. Adding conditions that restrict tribes from having land taken into trust for gaming purposes under the Exemptions and Exceptions is not a reasonable interpretation of silence or ambiguity. On the contrary, it conflicts directly with the purpose of the IGRA, to promote tribal economic development through gaming, and the express provisions of Section 2719, which provide for multiple exemptions and exceptions without limitation.

Finally, in what appears to be a response to the argument that the Defendants violated the APA by not considering evidence and argument presented to the Assistant Secretary, the Defendants argue that the issue of whether a tribe is limited to one Exemption or Exception has no impact on this case: "Just as this Court need not decide all issue raise by a Plaintiff where a single issue is dispositive, Interior need not consider in detail every argument raised by Plaintiff." Defendants' Motion p. 27. The Defendants are simply wrong.

The Tribe demonstrated at length that the Assistant Secretary was obligated to consider all of the Tribe's bases for its application, and could not summarily dismiss them. See, Tribe's Motion, p. 30-34. The failure to do so is a violation of the APA, *Butte County v. Hogan*, 613 F.3d 190 (D.C. Cir. 2010). Moreover, the Defendants' assertion that the conclusion that the Regulations provided a basis for denial of the Regulations is not dispositive of the argument that the Exemptions and Exceptions are not mutually exclusive, since that argument calls into

question the validity of the Regulations. The case cited in support of the Defendants' assertion *Baghramyan v. Holder*, 491 Fed. Appx. 750, 751 (9th Cir 2011)[5] is entirely irrelevant to the question. That decision ruled that appellant's failure to address, in appellant's opening brief, the issue of whether his petition to the Board of Immigration Appeals to reopen his case was time barred and, therefore, constituted a waiver of a challenge to that ruling. Because the issue of timeliness was dispositive, the petitioner's other arguments were not addressed. *Id.* There is no parallel failure to address a procedural bar to jurisdiction in this case. The Tribe's claims made in support of its application were all claims on the merits that required a ruling on the merits.

III.

THE SECRETARY HAS VIOLATED HIS TRUST OBLIGATIONS TO THE TRIBE.

The Defendants argue that the Secretary does not have any trust obligations arising out of the IGRA. The Defendants' claim to the authority to promulgate regulations applicable to the Restored Lands Exception, however, is based upon the IGRA's specified delegation of the authority to the Secretary to make determinations on whether to take land into trust for tribes under the IRA. Taken together, both the IGRA and IRA impose specific duties on the Secretary with respect to the Tribe's Reservation lands. It is beyond question that a trust relationship exists between the United States and the Tribe with respect to its Reservation lands.

> . . . we adopt and applied our panel holding in *Navajo Tribe of Indians v. United States*, . . . , 624 F.2d 981, 987 (1980), 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.

Duncan v. United States, 667 F.2d 36, 41-42 (Ct. Cl. 1981).

Having established that a trust relationship exists between the United States and the Tribe with respect to its Reservation lands, the Secretary's conduct in interpreting the IGRA and promulgating the Regulations must be evaluated in accordance with his role as trustee:

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[5]The Ninth Circuit ruled that this decision, too, "is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3*." The Defendants do not explain how the decision meets the requirements of 9th Cir. R. 36-3 and, therefore, can be cited to this Court.

"[T]he standard of duty for the United States as trustee for Indians is not mere 'reasonableness,' but the highest of fiduciary standards." *Duncan v. United States, supra*, 667 F.2d at 30.

> . . . that the United States did not herein fulfill its fiduciary duties to the Indian people . . . , duties that must be exercised with "great care" [citation omitted], in accordance with "moral obligations of the highest responsibility and trust," that must be measured "by the most exacting fiduciary standards."

Smith v. United States, 515 F. Supp. 56, 60 (N.D. Cal. 1978).

The Secretary's attempts to impose restrictive conditions on the right of the Tribe to take land into trust for gaming under Section 2719, which are in conflict with the plain wording of the IGRA, has limited the Tribe to gaming at only one location on its Reservation lands, and has denied the Tribe's application to have land taken into trust for gaming purposes on that basis, the Secretary has breached his fiduciary obligations owed to the Tribe.

CONCLUSION

One of the main purposes of Section 2719 was to place tribes that had been terminated on an equal footing with those tribes that had never been terminated. Many tribes that were never terminated acquired trust land at multiple locations off of their reservations. Those tribes were free to establish and operate gaming facilities at each of those locations.[6] Because of the illegal termination of the Tribe by the United States, the Tribe was prohibited from doing the same.

After the Tribe acquired its tribal trust land for on-Reservation gaming, the Tribe was eligible to acquire a parcel of land like the Strawberry Fields Property under the Restored Lands Exception and conduct gaming on it. Then, in 2008, the Secretary changed the rules of the game. With a stroke of the pen, the Secretary promulgated the Regulations, taking away the Tribe's right, under the Restored Lands Exception, to game on the Strawberry Fields' Property or any other off-reservation restored lands.

The Secretary did this without being able to point to any provision in the IGRA that grants him the authority to establish new criteria for an Indian tribe to qualify for the Restored

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[6] See, Declaration of Lester J. Marston In Opposition to the Defendants' Motion for Summary Judgment, pp. 2-3, ¶¶ 6-7.

Lands Exception. Where in the IGRA does it say that a tribe cannot utilize an exception or exemption more than once? Where in the IGRA does it say that, once an unterminated tribe begins gaming on a piece of land taken into trust for it by the Secretary, it can never again have another parcel of property taken into trust for it for gaming purposes? The answer is simple: it doesn't.

The Secretary's Regulations do not just limit Indian gaming, they prohibit it and prohibit unterminated tribes, like the Tribe, from being placed on an equal gaming footing with those tribes that were never terminated. Such a result not only violates the provisions of Section 2719 and the express purposes of the IGRA, but also runs afoul of basic notions of fair play and substantial justice.

Section 2719 is clear, unambiguous, and leaves no room for the Secretary to fill in any gaps. The Secretary exceeded his authority in promulgating the Regulations, which, in any event, are void because they conflict with the IGRA. For these reasons, this Court should exercise the authority vested in it under the APA and strike down the Regulations.

Respectfully submitted,

DATED: October 28, 2011

RAPPORT AND MARSTON

By: /s/ Lester J. Marston
Lester J. Marston
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2011, my office electronically filed the Plaintiff's Opposition to Defendants' Motion for Summary Judgment using the ECF System for the United States District Court, Northern District of California, which will send notification of such filing to the following:

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

REDDING RANCHERIA, Plaintiff, v. KENNETH SALAZAR, in his official capacity as the Secretary of the United States Department of the Interior, and LARRY ECHO HAWK, in his official capacity as the Assistant Secretary for Indian Affairs for the United States Department of the Interior, Defendants.	Case No. CV 11-01493 SC DECLARATION OF LESTER J. MARSTON IN OPPOSITION TO THE DEFENDANT'S MOTION FOR SUMMARY JUDGMENT Date: December 2, 2011 Time: 1:00 p.m. Ctrm.: 1 Hon. Samuel Conti

1. I am Special Counsel to the Redding Rancheria ("Tribe"), the plaintiff in this case. I am submitting this declaration in support of plaintiff's opposition to defendants' motion for summary judgment in the above-entitled case. The information contained in this declaration is of my own personal knowledge and if called as a witness in these proceedings, I can competently testify thereto.

2. I am also special Gaming Counsel to the Ho-Chunk Nation ("Nation"). Since 1996, I have represented the Nation in all of its Tribal-State compact negotiations with the State of Wisconsin, pursuant to the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 et seq. ("IGRA"). I have also negotiated a number of municipal services agreements with cities within the State of Wisconsin to provide municipal services to some of the Nation's gaming facilities and assisted the Nation in obtaining a determination that it could conduct gaming on its existing trust lands, pursuant to 25 U.S.C. § 2719.

3. The Ho-Chunk Nation is a federally recognized Indian tribe. Its central headquarters are located in Black River Falls, Wisconsin. The Nation's trust lands are located throughout a fourteen (14) county area of the State of Wisconsin.

4. The Nation status as a federally recognized Indian Tribe and its government-to-government relationship with the United States has never been terminated by the United States. In the early 1960's, the Nation was recognized by the Secretary of the Interior ("Secretary") as a separate governmental entity from the Winnebago Tribe. It has retained its status as a federally recognized tribe from the time that it was recognized as a separate governmental entity to the present.

5. Between the time it was recognized as a separate governmental entity by the Secretary until October 18, 1988, the Nation acquired land throughout the State of Wisconsin and the Secretary accepted title to the various parcels of land in trust for the Nation upon which it is presently gaming.

6. The Nation presently conducts gaming pursuant to the IGRA on six (6) separate parcels of land located at six separate sites in the State of Wisconsin: Black River Falls,

Nekoosa, Madison, Tomah, Wisconsin Dells and Wittenberg.

7. The Nation is presently conducting Class III gaming on five (5) of these sites (Black River Falls, Nekoosa, Tomah, Wisconsin Dells and Wittenberg) pursuant to its Tribal-State Compact with the State of Wisconsin entered into pursuant to the IGRA. The Nation presently conducts Class II gaming at its gaming facility located in the capitol of the State of Wisconsin, the City of Madison.

8. David Rapport, my law partner, and I were the attorneys of record who filed and litigated the case of *Tillie Hardwick, et al. v. United States,* United States District Court Northern District of California, Case No. C-79-1910 SW (*"Hardwick"),* which resulted in the Redding Rancheria being unterminated. The Redding Rancheria was illegally terminated in 1962 and unterminated and restored to federal recognition in 1983. During that period, the Tribe was unable to have land taken to trust for it by the United States.

9. Mr. Rapport and I have been general counsel to the Tribe from the time it was unterminated to the present. Our law firm represented the Tribe in negotiating the leases of the parcels of trust land within the Reservation, "Lot 6", which was owned by the United States in trust for Lorena Forman Butler, and "Lots 4 and 5" which were owned by the United States in trust for Arthur K. Hayward, Mac Hayward, Orval Hayward, William Hayward, and Karen Hayward Hart, all members of the Tribe. Pursuant to the leases, the Tribe built its Casino and related facilities on Lots 4, 5, and 6, within the boundaries of the Reservation, and began conducting gaming on those Lots. Our law firm also represented the Tribe in the Tribe's subsequent purchase of the beneficial ownership of Lots 4 and 5, on October 7, 1992 and Lot 6, on November 2, 1992, and the United States' approval of the trust-to-trust transfer of Lots 4, 5, and 6 to the Tribe, pursuant to the provisions of the Indian Land Consolidation Act, 25 U.S.C. §§ 2201, et seq., and the Judgment entered in the *Hardwick* case on January 31, 1986.

10. At the time the Tribe purchase the Lots, it had the option of continuing to lease the Lots. At the time that the Tribe purchased the Lots and the Secretary took the Lots into trust for the Tribe, the Secretary had not published the 25 C.F.R Part 292 Regulations ("Regulations"). At the time that the Tribe purchased the Lots, the Tribe was eligible to have the

Strawberry Fields Property taken into trust under the Restored Lands Exception if it had owned the Strawberry Fields Property at that time. If the Tribe never purchased the Lots and continued to lease them from its members, it would currently be eligible under the Regulations to have the Strawberry Fields Property taken into trust for gaming purposes.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct; executed this 28th day of October, 2011 at Ukiah, California.

/s/ Lester J. Marston

LESTER J. MARSTON