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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 REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT DATE: December 2, 2011 TIME: 10:00 a.m. CTRM.: 1 Honorable Samuel Conti

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INTRODUCTION

Skipping across the surface of each legal issue raised in the Tribe's motion for summary judgment ("Tribe's Motion"), the Defendants never get beyond generalities, summary denials, and conclusory statements in attempting to rebut the Tribe's arguments. The Defendants' opposition to the Tribe's Motion ("Defendants' Opposition") pivots from one unsupported assertion to the next, bootstrapping to the end, arguing: (1) The Secretary of the Interior ("Secretary") had implicit authority to promulgate 25 C.F.R. Part 292 ("Regulations"); (2) the Regulations are valid because 25 U.S.C. §2719(b)(1)(B)(iii) is ambiguous and the Secretary's interpretation of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, et seq. ("IGRA"), is permissible, and (3) because the Secretary's interpretation is permissible, the Regulations are permissible, and the application of the Regulations to the Tribe's request was reasonable.

In the Tribe's Motion and its opposition to the Defendants' motion for summary judgment ("Tribe's Opposition") the Tribe demonstrated that the Defendants' arguments do not hold up to scrutiny. Those arguments do not need to be repeated in their entirety here. Instead, in this brief the Tribe will address only a few fundamental points. First, even if the Secretary had the authority to promulgate the Regulations, the Regulations are nevertheless invalid because an agency does not have the authority to impose restrictions and conditions on the implementation of a statute that are not stated in the statute and/or are in conflict with the plain wording of the statute. Second, Defendants admit that the Regulations restrict both the "Restored Lands Exception" and the "within the original reservation exemption" ("On Reservation Exemption"), and cause them to be mutually exclusive. Standing alone, that admission provides grounds for the granting of the relief that the Tribe seeks. Third, the Secretary cannot overturn long-standing court precedent or long-standing agency interpretation of a statute without providing a reasoned explanation for the change; the Secretary has entirely failed to provide such an explanation.

In this brief, the Tribe will also address one other issue raised in the Defendants' Opposition. All of the declarations filed in support of the Tribes' Motion are admissible, because they are either a presentation of the facts in the Administrative Record or they support

the Tribe's non-APA claim that the Defendants violated their trust duties to the Tribe. Moreover, the Administrative Record filed by the Defendants must be struck, because it was not properly certified.[1]

I.

THE REGULATIONS CONFLICT WITH THE IGRA, WHICH THEY ARE INTENDED TO IMPLEMENT.

Congress stated that the purpose of the IGRA is:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and
> (3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. §2702.

This statement leaves no doubt that Congress intended to promote, not restrict, gaming on Indian lands as a means of promoting tribal economic development and to establish the National Indian Gaming Commission ("NIGC") as the federal agency responsible for the regulation of gaming on Indian lands.

This clear intention of Congress has been acknowledged by federal courts:

> As Congress clearly stated, ***the purpose of the IGRA was not to limit the proliferation of Indian gaming facilities***. Instead, it was to provide express statutory authority for the operation of such tribal gaming facilities as a means of promoting tribal economic development, and to provide regulatory protections for tribal interests in the conduct of such gaming. . . . ***The clearly defined purpose of the statute creates no basis for presuming that Congress intended to narrow the right to game except where that intent is clearly stated***. . . . As a result, the chronological limitation on the ability of tribes to game must itself be deemed an exception to the grant of general authority to game and the stated

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[1] The Administrative Record was certified by a solicitor in the Office of the Solicitor and not by a person in the Secretary's or Assistant Secretary's for Indian Affairs Office that had personal firsthand knowledge of its content. Plaintiff, therefore, has filed a separate motion to strike the Administrative Record.

> purpose to authorize gaming as a method of promoting tribal economic development and self-sufficiency.

Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan, 198 F. Supp. 2d at 933-934. (Emphasis added).

The explicitly expressed purpose of the IGRA is the foundation upon which the Regulations must be analyzed.

The Tribe has previously demonstrated that the Regulations drastically reduce tribes' rights under the Restored Lands Exception by imposing restrictions that are neither stated in the Restored Lands Exception nor consistent with it. Tribe's Motion pp. 6-13. The Tribe has also demonstrated that the Regulations cause the Exemptions and Exceptions to be mutually exclusive of one another in direct conflict with the plain wording of Section 2719, which established the Exemptions and Exceptions as independent bases for taking land into trust for gaming purposes after October 17, 1988. Tribe's Motion, pp. 11-13.

In the Defendants' Opposition, the Defendants do not deny that the Regulations impose restrictions that are not in the IGRA. Defendants' Opposition, pp.12-13. The Defendants do attempt to argue that the Regulations do not make the Exemptions and Exceptions mutually exclusive:

> Significantly, Section 292.4 does not reference, much less condition gaming upon, whether a tribe previously had land taken into trust for gaming under the "restored lands" exception. Therefore, a tribe could rely on 25 C.F.R. §292.12(c)(1) as the basis for its first land into-trust application without restricting its ability to subsequently have land taken into trust under the "last recognized reservation" exception. The exceptions are therefore not mutually exclusive.

Opposition, p. 11.[2]

Later, however, they are forced to explicitly admit that the Regulations cause the On-Reservation Exemption to operate as a bar to later utilization of the Restored Lands Exception.

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[2]The Defendants make the irrelevant distinction that the Regulations "implement the two provisions in a manner that vests each exception with independent meaning." Opposition, pp.11-12. The issue is whether, under the Regulations, the Exemptions and Exceptions can be implemented without preventing the implementation of one another, which the Defendants admit that they cannot.

> Plaintiff is essentially correct that Section 292.12(c)(1) creates a bright-line rule restricting a tribe's use of the "restored lands"exception to a "tribe's first request for newly acquired lands since the tribe was restored to Federal recognition" regardless of whether the tribe might have other lands taken into trust under other exceptions to IGRA.

Opposition, p. 19.

No matter how the Defendants wish to spin it, the Regulations restrict the ability of tribes to utilize the Exemptions and Exceptions by making the utilization of one a bar to the utilization of the other. Because of the order in which the Tribe sought to have land taken into trust, the Regulations prevent the Tribe from having land taken into trust under both the Restored Lands Exception and the On-Reservation Exemption. That is unquestionably a violation of the IGRA, which, rather than imposing such restrictions, explicitly includes the Restored Lands Exception and the On-Reservation Exemption as separate, independent bases for having land taken into trust for gaming purposes after October 17, 1988.

The Defendants do not deny that the Regulations have imposed restrictions on the Exemptions and Exceptions to the moratorium on taking land into trust set forth in Section 2719 that are not stated in the statute. Rather, the Defendants simply argue that the Secretary has the authority to impose restrictions that are not stated in the IGRA, based on the cases interpreting the IGRA: "Plaintiff inappropriately seeks to restrict Interior's ability to interpret IGRA's "restored lands" exception. . . . Imposing such a restriction on Interior's ability to promulgate regulations would be inconsistent with precedent applying IGRA prior to Interior's promulgation of the regulations at issue, including the very precedent relied upon by Plaintiff." Opposition, p. 12-13.

The Defendants' assertion that the restrictions imposed through the Regulations are consistent with the court decisions issued before the Regulations were promulgated is unfounded. All of the Court decisions that addressed the issue of the temporal relationship between a tribe's restoration and the taking of land into trust under the Restored Lands Exemption were based on *Grand Traverse* decision. But, the *Grand Traverse* decision did not *impose* a temporal restriction on the Restored Lands Exception. Rather, it suggested that a number of factual circumstances could be considered in interpreting the provision:

> Given the plain meaning of the language, the term "restoration" may be read in numerous ways to place belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion. For example, 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.

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, 935 (W.D. Mich. 2002) (*"Grand Traverse II"*).

However, the Court of Appeals, reviewing the *Grand Traverse II* decision, specifically concluded that it would not be appropriate to interpret the Section 2719 Exemptions and Exceptions narrowly nor to impose strict limits on the Restored Lands Exception:

> Indeed, the only evidence of intent strongly suggests that the thrust of the IGRA is to promote Indian gaming, not to limit it. *See 25 U.S.C. § 2702(1)* (providing that the purpose of the statute is to provide a statutory basis for gaming by Indian tribes "as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"). Although *§ 2719* creates a presumptive bar against casino-style gaming on Indian lands acquired after the enactment of the IGRA, that bar should be construed narrowly (and the exceptions to the bar broadly) in order to be consistent with the purpose of the IGRA, which is to encourage gaming.

Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the United States Atty., 369 F.3d 960, 971 (6th Cir. Mich. 2004) ("*Grand Traverse III*").

The *Grand Traverse II* Court also specifically rejected an interpretation of the IGRA that would limit tribes to the first parcel of property taken into trust after restoration.

> The State's proposed interpretation of exclusivity would impose an additional, unanticipated consequence of having used the acknowledgment process rather than Congressional action for obtaining recognition -- ***that the tribe would be limited under the IGRA to the first land taken into trust following acknowledgment***.
>
> Such a *post facto* consequence is unreasonable if Congress has not clearly expressed such an intent.

Grand Traverse II, 198 F. Supp. 2d at 933. (Emphasis added.)

More broadly, to the extent that the Secretary has any authority to promulgate any regulations implementing Section 2719, which the Tribe contends he does not, federal case law leaves no doubt that he does not have the authority to promulgate regulations that are in conflict with or in excess of the provisions of the IGRA. If a regulation unreasonably interprets a statute or is inconsistent with the statute under which it is promulgated, the regulation is

invalid.

> The rulemaking power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'

Ernst & Ernst v. Hochfelder, 425 U.S. 185, 213-14 (1976), citing *Dixon v. United States, 381 U.S. 68, 74 (1965)*.

> The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.

Manhattan General Equip. Co. v. Commissioner, 297 U.S. 129, 134 (1936).

> [R]egulations, in order to be valid, must be consistent with the statute under which they are promulgated.

United States v. Larionoff, 431 U.S. 864, 873 (1977). See also, *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (providing that agency action "is always subject to check by the terms of the legislation that authorized it").

Given this standard, where in the IGRA is there a provision that restricts a tribe seeking to have land taken into trust under the Restored Lands Exception to the first land taken into trust after the restoration of the Tribe? Where in the IGRA is there a provision that restricts a tribe to have only one parcel of land taken into trust pursuant to the Restored Lands Exception? Where in the IGRA is there a provision that restricts the Restored Lands Exception to land taken into trust within 25 years of restoration if the tribe is not gaming on other trust land? Where in the IGRA is there a provision that makes the Restored Lands Exception mutually exclusive with the On-Reservation Exemption? The answers are simple. There are no such restrictions.

The Defendants assert that restricting the Secretary's authority to promulgate regulations would "violate the analysis set forth in *Chevron*, 467 U.S. 837, and its progeny," Defendants' Opposition, p. 13. On the contrary, the Tribe's interpretation of limits on an agency's authority to promulgate regulations that conflict with the statute they are designed to implement is entirely consistent with the court decisions cited by the Defendants in support of the Secretary's

alleged power to promulgate regulations that go beyond the provisions of the IGRA. The *Chevron* Court ruled that, where an agency has been granted implicit authority to promulgate regulations, the agency's interpretation must be "reasonable," rather than the higher level of deference where the authority was explicitly granted. *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984). An interpretation of a statute that imposes restrictions that are not stated in the statute and are in conflict with the expressed purpose of the statute is not reasonable. But even where the authority has been explicitly granted: "Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or *manifestly contrary to the statute*." *Id*. Accord, *Mayo Foundation for Medical Education and Research v. United States*, __U.S. __, 131 S. Ct. 704, 711 (2011); *United States v. Mead Corporation*, 533 U.S. 218, 227 (2001).

Significantly, the Defendants also have not meaningfully addressed the impact of the canons of statutory construction for statutes enacted for the benefit of Indians on the interpretation of Section 2719:

> Finally, even assuming, *arguendo,* that the State has "muddied the waters" with respect to the meanings of the terms "restored" and "acknowledged," the Supreme Court repeatedly has held that "'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Chickasaw Nation v. United States, 534 U.S. 84, 94, 151 L. Ed. 2d 474, 122 S. Ct. 528 (2001)* (quoting *Montana v. Blackfeet Tribe, 471 U.S. 759, 766, 85 L. Ed. 2d 753, 105 S. Ct. 2399 (1988))*. This canon is "rooted in the unique trust relationship between the United States and the Indians." *Blackfeet Tribe, 471 U.S. at 766* . . . The force of this interpretive canon can be overcome only when "other circumstances evidencing congressional intent" demonstrate that "the statute is 'fairly capable' of two interpretations... [or] that the [conflicting] interpretation is fairly 'possible.'" *Chickasaw Nation, 534 U.S. at 94* (citing *Blackfeet Tribe, 471 U.S. at 766*).

Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the United States Atty., 369 F.3d 960, 972 (6th Cir. Mich. 2004).

To the extent that the Defendants' interpretation of Section 2719 is not summarily rejected by the Court, the canons of construction compel an interpretation in favor of the Tribe.

In promulgating the Regulations, the Secretary did not interpret the IGRA. He made law and that law is in clear conflict with the provisions and purposes of the statute.

II.

THE REGULATIONS ARE IN CONFLICT WITH THE APPLICABLE COURT DECISIONS AND AGENCY INTERPRETATIONS OF THE IGRA AND THE SECRETARY HAS NOT PROVIDED A REASONED EXPLANATION FOR HIS CHANGED INTERPRETATION.

The Tribe has previously demonstrated that the court decisions addressing the Restored Lands Exception all favor an expansive view of the Exemptions and Exceptions and reject interpretations that impose severe restrictions on the Restored Lands Exception or restrictions that are in conflict with the plain wording of the IGRA. See Motion, pp. 13-19, *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 *Oregon v. Norton*, 271 F. Supp. 2d 1270 (D. Or. 2003).

The Tribe has also demonstrated that the Regulations are in conflict with the interpretations of the NIGC and the Department of the Interior ("DOI"). See Tribe's Motion, pp. 19-23. See the list of NIGC and DOI lands decisions cited in the Tribe's Motion, p. 21, fn 10.

The Defendants argue that the Regulations should be upheld, regardless of whether they are inconsistent with prior judicial and agency interpretations of the IGRA, because they are a permissible interpretation of the IGRA. Defendants' Opposition, pp. 13-18. The court precedent that the Defendants' rely on, however, do not support their position.

As the Tribe has previously demonstrated, Tribe's Motion, pp. 18-19, the Defendants' argument flies in the face of the applicable court decisions. Agencies are not permitted to simply ignore existing court precedent interpreting a statute. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131 (1990); *Neal v. United States*, 516 U.S. 284, 295 (1996).

BPS Guard Services, Inc. v. NLRB, 942 F.2d 519, 523 (8th Cir. 1991); *Bankers Trust New York Corporation v. United States*, 225 F.3d 1368 (D.C. Cir. 2000).

While agencies are permitted to change their interpretation of a statute under certain circumstances, they are not permitted to do so without a reasoned explanation for the change, and the level of deference to the agency's revised interpretation is not the same as that of a first interpretation. "When an agency reverses a prior policy or statutory interpretation, its most recent expression is accorded less deference than is ordinarily extended to agency determinations. . . . The agency will be required to show not only that its new policy is reasonable, but also to provide a reasonable rationale supporting its departure from prior practice." *Seldova Native Association v. Lujan*, 904 F.2d 1335, 1345 (9th Cir.1990). "[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983). "'. . . [W]here policy has been altered, the court should be satisfied both that the agency was aware it was changing its views and has articulated permissible reasons for that change, and also that the new position is consistent with the law.' . . . [A] greater degree of scrutiny is required in the case of an action which reverses prior policy than for an action setting policy for the first time." *Center for Science in Public Interest v. Department of Treasury*, 573 F. Supp. 1168, 1173 (D.C. Cir. 1983). See also, *Burlington Truck Lines, Inc. v. United States, 371 U. S. 156, 168 (1962)*; *Morton v. Ruiz* 415 US 199 (1974); *Farmers Union Cent. Exchange, Inc. v. Federal Energy Regulatory Com.* 734 F.2d 1486 (D.C. Cir. 1984); *FORMULA v. Heckler*, 779 F.2d 743 (D.C. Cir. 1985).

Notwithstanding the Defendants' assertion that "Interior articulated a sufficient basis for adopting the Regulations implementing IGRA's 'restored lands' exception,'" Defendants' Opposition, p.17, nowhere in the May 20, 2008 Federal Register Notice, 73 Fed. Reg. 29354-29379, does the Secretary offer any explanation of why the DOI's interpretation of the IGRA *changed* or why the Secretary decided to effectively overrule the existing federal court decisions or the NIGC's and DOI's longstanding interpretation of the Exemption.

The Secretary's failure to offer a reasoned explanation for his departure from the existing court precedent and interpretation of the DOI and the NIGC was arbitrary and capricious. The Regulations, therefore, must be invalidated.

III.

THE NIGC, NOT THE SECRETARY, WAS DELEGATED AUTHORITY TO PROMULGATE REGULATIONS IMPLEMENTING THE IGRA AND THE SECRETARY DOES NOT EXPLAIN WHY THE IGRA SHOULD BE INTERPRETED TO IMPLICITLY GRANT THAT SAME AUTHORITY TO THE SECRETARY.

The Tribe has previously demonstrated that the IGRA does not expressly delegate to the Secretary the authority to promulgate regulations implementing the IGRA and, to the extent that it does so implicitly, that delegation is limited to those areas where the Secretary has been delegate specific obligations or authority to implement the statute. Tribe's Motion pp. 23-29, Tribe's Opposition, pp. 3-10.

In the Defendants' Opposition, the Defendants repeat their assertion that the Secretary was implicitly granted authority to promulgate regulations implementing the IGRA. Defendants' Opposition, pp. 1-7.

What the Defendants never address, however, is why Congress would explicitly delegate the authority to issue regulations to the NIGC, the agency Congress created to regulate Indian Gaming as part of the IGRA, if it intended that the Secretary have that authority. Such an interpretation essentially makes the delegation of authority to promulgate regulations to the NIGC superfluous, as there is no reason to have two agencies promulgate regulations on the same subject. The Court of Appeals for the Fifth Circuit has found that, even where the Secretary has be delegated express authority under the IGRA, that authority is limited to those areas included within the delegation of authority. "When Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken." *Texas v. United States*, 497 F.3d 491 (5th Cir. 2007).

IV.

THE SECRETARY'S IMPOSITION OF DRASTIC RESTRICTIONS ON THE USE OF TRIBAL TRUST LAND AND THE TRIBE'S RIGHTS UNDER THE IGRA ARE A CLEAR VIOLATION OF THE SECRETARY'S TRUST OBLIGATIONS.

When Congress enacts a statute imposing specific duties on the government to manage Indian property or money, a fiduciary or trust relationship is created and the government can be held accountable for breaching those trust duties. *Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981), *cert. denied* 463 U.S. 1228 (1983).

By enacting the IGRA, Congress imposed specific duties on the Secretary with respect to the regulation and use of gaming revenues and the taking of property into trust for gaming purposes. See, for example, 25 U.S.C. § 2710(b)(3)(B), requiring Secretary to approve tribal plan to allocate gaming revenues consistent with the IGRA; 25 U.S.C. 2710(b)((1)(A), requiring Secretary to determine whether taking land into trust for gaming purposes is in the best interests of the Tribe.

The IGRA creates a comprehensive scheme giving the NIGC and DOI full responsibility for the regulation and management of Indian gaming, gaming revenues, and the taking of property into trust for gaming purposes, all for the benefit of Indian tribes. The IGRA thereby establishes a fiduciary relationship between the NIGC and DOI on the one hand and Indian tribes on the other, and defines the contours of the governments and, in particular, the Secretary's fiduciary responsibilities. See, *United States v. Mitchell*, 463 U.S. 206 (1983), (holding comprehensive statutory scheme regulating tribal timber resources created trust or fiduciary relationship).[3] To argue that the IGRA creates no such trust duty flies in the face of this comprehensive scheme and is absurd.

[3] Further evidence that Congress intended to create a trust relationship between the Department of the Interior and Indian tribes, by imposing specific duties on the Secretary under the IGRA, is found in the express wording of statute that authorities the Secretary to disapprove any tribal-state compact that "violates" "the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B)(iii).

V.

PLAINTIFF'S DECLARATIONS ARE ADMISSIBLE.

Defendants assert, but do not show, that: (1) the four declarations Plaintiffs filed in support of their Motion for Summary Judgment are outside the Administrative Record and should be stricken, and (2) the declarations constitute hearsay, are irrelevant, and lack foundation. Though the declarations of Jason Hart, Sara Dutschke-Setshwaelo, Barbara Murphy, and Leon Benner were not submitted by the agency as part of the Administrative Record, these declarations (in particular, the Murphy and Benner Declarations) are cited in support of Plaintiffs' argument that the Secretary failed to consider arguments advanced by the Tribe, as well as the Tribe's breach of trust claims.

Furthermore, the cases cited by Defendants to support their assertions regarding the standard of review and the admissibility of extra-record evidence all involve the review by a district court of formal rule making. See, *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. USDA,* 499 F.3d 1108 (9th Cir. 2007) ("*Ranchers Cattlemen*"); *Animal Def. Council v. Hodel,* ("*Animal Def. Council*"), 840 F.2d 1432, 1436 (9th Cir. 1988). In this case, the agency action under review did not occur after a formal comment period, nor did the action involve promulgation of a rule. Moreover, *Animal Def. Council* cites *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971) for the proposition that where no formal findings are made by an administrator, a court may examine information outside of the administrative record. *Animal Def. Council,* 840 F.2d at 1436. As such, these cases are irrelevant for purposes of the court's review of this action.

Even if Defendants are generally correct that the court may not consider evidence outside the administrative record, the declarations are still admissible. First, neither the Hart Declaration nor the Dutschke-Setshwaelo Declaration states any facts that are not supported by and cited in the Administrative Record. As such, neither declaration addresses issues not already in the Administrative Record. See, *Friends of the Earth v. Hintz,* 800 F.2d 822, 829 (9th Cir. 1986). In addition, in *Ranchers Cattlemen* and *Animal Def. Council*, the extra-record material deemed inadmissible was submitted to show facts and circumstances not in existence

at the time of the agency's decision. Here, both declarations outline the relevant facts in existence at the time of the agency's decision and are not submitted to show facts and circumstances outside the Administrative Record before the court. Because the Hart and Dutschke-Setshwaelo Declarations relate to facts and circumstances that were before the Assistant Secretary and Secretary at the time the decision that is the subject of this action was made, and are supported by the Administrative Record, both declarations are admissible.

Second, the court may consider evidence outside the administrative record if the evidence fits one of four narrow exceptions. *Ranchers Cattlemen,* 499 F. 3d at 1115. Two exceptions apply here: (1) if admission of extra-record evidence is necessary to determine whether the agency has considered all relevant factors and has explained its decision and (2) when plaintiffs make a showing of agency bad faith. *Id.*

Here, the Murphy and Benner Declarations are firsthand accounts of the history of the BIA's relationship with and obligations to the Tribe. Both declarations present facts that would have been relevant to the Assistant Secretary's decision regarding the Tribe's request to have its land taken into trust. Furthermore, the fact that the Assistant Secretary so completely failed to consider these factors in making his decision supports the Tribe's bad faith and breach of trust claims. As such, both declarations are submitted to demonstrate deficiencies in the agency's decision making process - i.e. flaws in the [agency]'s approach. *Ranchers Cattlemen,* 499 F.3d at 1117. Finally, all facts stated in the Murphy and Benner Declarations were in existence at the time of the agency's decision and were available to the Assistant Secretary to consider in making his decision. Because inclusion of the Murphy and Benner Declarations will allow for effective judicial review of whether the Assistant Secretary considered all relevant factors in his decision and fully explained his decision, and because both declarations are germane to whether the Assistant Secretary acted in bad faith, both declarations are admissible.[4]

[4] In addition, on a motion for summary judgment, Rule 56 of the Federal Rules of Civil Procedure expressly authorizes a moving party to file declarations to prove any facts that are relevant to the disposition of the case.

CONCLUSION

The Defendants' analysis is an exercise in bootstrapping, which fails at each level of their analysis. The Restored Lands Exception is not ambiguous. The Secretary was not implicitly granted authority to promulgate regulations implementing the Restored Lands Exceptions. The Secretary's interpretation of the IGRA is not permissible. The Secretary does not have the authority to impose restrictions that are in conflict with the IGRA. The Secretary cannot deviate from the existing court decisions and agency interpretations without a reasoned explanation.

The Secretary, in attempting to impose restrictions on the Tribe's ability to have land taken into trust for gaming purposes through the Regulations and by interpreting the IGRA, the IRA and the Regulations in a manner that is manifestly in conflict with the interests of the Tribe, has violated his trust obligations to the Tribe.

For these reasons, the Tribe respectfully requests that the Court grant its motion for summary judgment.

Respectfully submitted,

DATED: November 14, 2011

RAPPORT AND MARSTON

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

CERTIFICATE OF SERVICE

I hereby certify that on the November 14, 2011, my office electronically filed the foregoing document 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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