IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Civil Action No. 1:12-cv-02039-BAH Honorable Beryl A. Howell Consolidated Case

PLAINTIFF PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS' REPLY IN SUPPORT OF ITS MEMORANDUM ADDRESSING ISSUES RAISED BY PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiff Picayune Rancheria of the Chukchansi Indians ("Picayune Tribe") respectfully submits this Reply to the United States' Response and Intervenor the North Fork Rancheria of Mono Indians' ("North Fork") Opposition to its Memorandum Addressing Issues Raised by the Motion for Preliminary Injunction filed in these consolidated cases by Plaintiffs Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God-Madera, and Dennis Sylvester (the "Stand Up Plaintiffs"). As with its original Memorandum, the Picayune Rancheria submits this Reply to address the likelihood of success on the merits of arguments raised by the Stand Up Plaintiffs that are common to Picayune's Complaint.[1]

[1] The Picayune Tribe has not separately moved for injunctive relief. The purpose of the Picayune Tribe's original Memorandum and this Reply is to provide the Court with the Tribe's position on arguments common to its claims and the claims raised by the Stand Up Plaintiffs. The United States' argument that the Picayune Tribe has failed to address "the irreparable harm, the balance of equities and the public interest prongs of the preliminary injunction test" thus misses the point. U.S. Response at 10.

Both North Fork and the United States attempt to defend the Assistant Secretary's decision by directly contradicting it and claiming that it says what it does not. They argue that the Assistant Secretary's consideration of the harms to the Picayune Tribe was discretionary, when the Assistant Secretary stated that he was "compel[led]" to consider them. Record of Decision, Secretarial Determination Pursuant to the Indian Gaming Regulatory Act for the 305.49-Acre Madera Site in Madera County, California, for the North Fork Rancheria of Mono Indians ("IGRA Decision") at 85; *see* North Fork Opposition at 22-24; U.S. Response at 8-10. And North Fork argues that the Assistant Secretary "did not apply a 'diminished weight' standard in evaluating the Picayune's concerns", North Fork Opposition at 21-22, when he expressly reasoned that their concerns were due "less weight", IGRA Decision at 85. These attempts to flee from what the Assistant Secretary said only highlight the errors in his decision. He impermissibly brushed aside acknowledged competitive harms to the Picayune Tribe, violating IGRA and his own regulations.

I. THE ASSISTANT SECRETARY WAS COMPELLED TO CONSIDER ADVERSE EFFECTS ON THE PICAYUNE TRIBE

The Indian Gaming Regulatory Act ("IGRA") contains a broad prohibition: casino-style gaming "shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). A narrow exception to this general policy applies only if the Secretary finds that gaming on the acquired lands "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). As the United States concedes, this restriction carries out Congress's clear preference for on-reservation gaming over off-reservation gaming. *See* IGRA Decision at 82, 86; North Fork Opposition at 2-3 (noting the "stringent" restrictions in IGRA limiting off-reservation gaming).

The Assistant Secretary found, on the basis of uncontested evidence not challenged here, that the Picayune Tribe would suffer substantial economic harms by the operation of North Fork's proposed casino. But he incorrectly held that these acknowledged harms to the Picayune Tribe were legally "not sufficient" to constitute detriment. *Id.* at 86. Both North Fork and the United States attempt to justify this holding in the Assistant Secretary's decision by recharacterizing it as unnecessary. North Fork Opposition at 22-24; U.S. Response at 8-10. They argue that the Assistant Secretary's consideration of the harms to the Picayune Tribe was only discretionary—that the Secretary had already found that the Picayune Tribe is not part of "the surrounding community" under IGRA because it is farther than 25 miles from the proposed casino. North Fork states this most directly: "the Secretary was not required to give [Picayune's] concerns any consideration[,] so any review he conducted was administrative grace." North Fork Opposition at 22. This ignores the relevant regulation, 25 C.F.R. § 292.2, which creates only a rebuttable presumption of 25 miles, as well as the face of the Assistant Secretary's decision, which found that the presumption had been rebutted.

As the United States recognizes, Interior's regulation defining the "surrounding community" under § 2719(b)(1)(A) as the area within a 25-mile radius of the proposed facility is only a prima facie definition that creates a "rebuttable presumption." U.S. Response at 7 (quoting 73 Fed. Reg. 29354, 29357 (May 20, 2008)). The 25-mile presumption can be rebutted by "a *nearby* Indian tribe located beyond the 25-mile radius" if it shows "that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment." 73 Fed. Reg. 29354, 29357 (May 20, 2008) (emphasis added); *accord* U.S. Response at 7; 25 C.F.R. § 292.2. In other words, the regulations correctly recognize that an Indian tribe is sufficiently "nearby" to qualify as part of the "surrounding

community" if it is close enough to be affected "directly, immediately, and significantly" by operation of the proposed casino.

The Assistant Secretary concluded that the 25-mile presumption had been rebutted under this standard. He quoted this same regulatory language and stated that he was "compel[led]" to "accord some weight to the Picayune Tribe's concerns in this instance" due to "[t]he reality of the economics of class III gaming, tribal government service delivery, and tribal interests in land." IGRA Decision at 85. He "consider[ed]" Picayune's comments due to "the relative proximity of Picayune to the [Madera] Site, and the relative proximity of the Chukchansi Gold Casino to the Site," "approximately 39 miles from the Site." IGRA Decision at 77; *id*. at 85 (considering Picayune's comments because of "the relative proximity of Picayune's lands, headquarters, and existing class III gaming facility to the Site"). Even in concluding that the Picayune Tribe's harms were insufficient, the Assistant Secretary stated again, correctly, "we must accord weight to Picayune's concerns." *Id.* at 86. Neither the United States nor North Fork comes to grips with the Assistant Secretary's own words. Neither acknowledges or explains the Assistant Secretary's correct conclusion that he was "compel[led]" here—the word "compel" does not appear in their briefs. The only way to read this statement by the Assistant Secretary is that he found that the rebutting conditions, which he quoted, had been met by the considerations he listed.

The United States argues that the Picayune Tribe was not "consulted as part of the process set forth in 25 C.F.R. § 292.19" and that therefore, regardless of what the Assistant Secretary may have said about being "compel[led]" to consider harms to the Picayune Tribe, he was mistaken, because he had not "formally" consulted with them. U.S. Response at 8. This impermissibly dismisses what the Assistant Secretary himself said. That the Assistant Secretary

failed to "formally" consult with the Picayune Tribe is only another error in his decision. Once he decided that he was required to consider the Picayune Tribe's harms, failure to do so properly could not render that decision discretionary.

In any event, even if the Defendants were correct regarding what the Assistant Secretary did here, such an interpretation of the 25-mile limitation would be contrary to the plain text of the regulations, which expressly require the Secretary to consider adverse economic effects on "a nearby Indian tribe located beyond the 25-mile radius" if the tribe "can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment." 73 Fed. Reg. at 29357; 25 C.F.R. § 292.2. Considering those impacts is not an act of administrative "grace"; it is a matter of statutory and regulatory command. And while an agency is entitled to significant deference in interpreting its own regulation, this Court will "reject an agency's interpretation of its own regulation where such interpretation is unreasonable, plainly erroneous, or inconsistent with the regulation's plain meaning." *Seifert v. Winter*, 555 F. Supp. 2d 3, 14 (D.D.C. 2008) (internal citations omitted). The Assistant Secretary was correct to consider the Picayune Tribe as "a nearby Indian tribe located beyond the 25-mile radius" that had rebutted the presumption, and the Defendants' attempts to escape that conclusion are futile.

II. THE ASSISTANT SECRETARY CATEGORICALLY DISCOUNTED THE DETRIMENTAL ECONOMIC EFFECTS OF THE PROPOSED CASINO ON THE PICAYUNE TRIBE

Having determined that he was required to consider harms to the Picayune Tribe because it had overcome the rebuttable presumption, the Assistant Secretary then accorded those harms "less weight" than harms to a tribe within the presumption, IGRA Decision at 85, and held that under this standard, "competition from the [North Fork] Tribe's proposed gaming facility in an overlapping gaming market is not sufficient." *Id.* at 86. The United States does not defend this

analysis on its own terms; it argues only that the Assistant Secretary was not required to conduct the analysis at all. North Fork attempts to defend it, but again fails to take the Assistant Secretary at his word.

North Fork argues that the Secretary did not apply a "formal 'diminished weight'" standard in evaluating the Picayune's concerns, but rather "properly took a case-by-case approach to the Picayune's concerns", and "reasonably observed that a gaming establishment generally will have fewer effects on tribes the farther outside the 25-mile radius those tribes are." *Id.* at 24. The Assistant Secretary's own words tell the story, though. He did not state that *harms* may decrease with distance, which might well have been a reasonable observation. Instead, he stated that the *weight* accorded the comments by tribes who had overcome the presumption would be less. The Secretary specifically stated that the Picayune Tribe's "comments must be accorded *less weight* than comments submitted by communities and tribes that fall within the definition of 'surrounding community' in our regulations." IGRA Decision at 85 (emphasis added). He stated this standard not in the context of any particular argument by the Picayune Tribe, but generally, before addressing each of its arguments, including not just its arguments about economic harm but also its arguments about the historical record. *See id.* at 86. North Fork's attempt to recast this statement only spotlights the Assistant Secretary's error. In any event, IGRA does *not* instruct the Secretary to balance the detriment to nearby tribes against the benefit to the applicant tribe, and contains *no* exceptions for detriments to the surrounding community that the Secretary may discount or ignore on the basis of previously unarticulated policy preferences. 25 U.S.C. § 2719.

It is all too evident from the decision that the Assistant Secretary gave very little weight to the Picayune Tribe's concerns. He acknowledged that the Picayune Tribe would be harmed by

operation of the proposed casino. IGRA Decision at 86. He did not dismiss this harm, as counsel now does, as a "mere specter." U.S. Response at 9. Rather, he held that it was "insufficient" as a matter of law. IGRA Decision at 86. Unmoored from statutory or regulatory text, he simply declared that the Picayune Tribe's demonstrated harms did not count because they would be the result of "competition" – a policy rationale completely without basis in IGRA or its implementing regulations which, by its application in this case, flouts the one policy directive on which all parties agree, *i.e.*, IGRA's preference for on-reservation gaming over off-reservation gaming. And neither the United States nor North Fork offers any defense of the Assistant Secretary's inconsistent treatment of competition-based harms, *see* Picayune Memorandum at 5-7, because there is none.

Piecing together bits from an administrative record that has not yet been compiled, North Fork argues that the Secretary, although not required to do so, did in fact fully consider the detrimental economic effects of the proposed casino on the Picayune Tribe. North Fork Opposition at 26-29. In support of this proposition, North Fork cites to the draft environmental impact statement's ("DEIS") analysis that because "even in the scenario where market share declines by 20%, the impact on the viability of operations is not one that jeopardizes the casino's ability to remain open", "disproportionately high and adverse effects to competing tribes would not occur[.]" *Id.* at 27; DEIS 4.7-64. But IGRA permits no balancing of proven detriments to the surrounding community against anticipated benefits to the applicant tribe, and provides no direction to the Secretary to decide whether proven harms are or are not "disproportionately high and adverse." 25 U.S.C. § 2719.

Moreover, the DEIS was not cited or relied on by the Assistant Secretary and cannot overcome the Assistant Secretary's own rationale. The mere presence of material in the

administrative record does not indicate that the Secretary relied on it or adopted it. *See, e.g.*, *Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1147 (D.C. Cir. 2005) (finding final rule arbitrary and capricious where agency largely ignored evidence present in precursor report published by the agency and abandoned that report's recommendations "without reasonable explanation."). Here, the Secretary stated only that "[t]he proposed Resort would not be detrimental to . . . the Picayune Rancheria" because "competition" was not a "sufficient" harm. IGRA Decision at 84; *id* at 86. He did not conduct or adopt any analysis that would allow a fact-based conclusion of an absence of detriment. Rather, he discounted competitive harms categorically, citing free-floating dicta from a Seventh Circuit decision that "[did] not resolve" the issue for which the Secretary cites it. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) ("We need not resolve the question whether this interest [against competitive harm] is protectable . . . ."), cited in IGRA Decision at 86.

Finally, North Fork offers the straw man argument that the Picayune Tribe cannot assert a "right to be free from economic competition." North Fork Opposition at 26. The Picayune Tribe has made no such claim. IGRA does, however, protect the Picayune Tribe and its on-reservation gaming operations from the adverse economic impacts of disfavored off-reservation gaming. The Secretary should therefore have recognized that North Fork's opportunistic attempt to place an off-reservation casino in a location designed to commandeer the market of the Picayune Tribe's previously existing, *on-reservation* casino not only constitutes a detrimental impact on the surrounding community, but also undercuts the policy of IGRA.

III. CONCLUSION

For the foregoing reasons, Plaintiffs are likely to succeed on their claim that the Secretary violated IGRA by failing to properly consider the magnitude of the detrimental economic impacts on the Picayune Tribe, in contravention of 25 U.S.C. § 2719(b)(1)(A) and 25 C.F.R. §§ 292.2, 292.18(f), and 292.21. The IGRA Decision was arbitrary, capricious, an abuse of discretion, and issued in a manner not in accordance with law, 5 U.S.C. § 706(2), and the Stand Up Plaintiffs' Motion for Preliminary Injunction should be granted.

DATED this 22nd day of January 2013

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