HON. BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FRANK'S LANDING INDIAN COMMUNITY, a federally recognized self-governing dependent Indian community, Plaintiff, v. NATIONAL INDIAN GAMING COMMISSION, et al., Defendants.	Case No.: 3:15-cv-05828-BHS FEDERAL DEFENDANTS' OPPOSITION TO FRANK'S LANDING INDIAN COMMUNITY MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: March 3, 2017 (SET BY SCHEDULING ORDER)

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I. INTRODUCTION

Plaintiff Frank's Landing Indian Community challenges the United States Department of the Interior's ("Interior") determination that only federally recognized tribes can game under the Indian Gaming Regulatory Act ("IGRA"). IGRA explicitly defines "Indian tribes" eligible to conduct IGRA gaming as those groups recognized by the Secretary of the Interior ("Secretary") as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. The Federally Recognized Indian Tribe List Act of 1994 ("List Act") requires the Secretary to annually publish a list of all Indian tribes which the Secretary recognizes as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. *See* 25 U.S.C. § 5131.[1] Plaintiff Frank's Landing Indian Community is not a federally recognized Indian tribe and has never appeared on the list.

In this case, Plaintiff sought to engage in Class II gaming activities[2] under IGRA. In connection with Plaintiff's request, the Assistant Secretary – Indian Affairs informed the National Indian Gaming Commission ("NIGC") that the annual list of federally recognized Indian tribes is a definitive means to determine whether a group is federally recognized and thus an "Indian tribe" under IGRA. As Interior explained, relying on the list provides transparency, a bright line rule for knowing which entities can game under IGRA, and preserves government

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[1] At the time of its enactment, the List Act's definitional section was found at 25 U.S.C. § 479, while the requirement that the Secretary publish the list of federally recognized tribes was found at 25 U.S.C. § 479a-1. These statutes were recently transferred to 25 U.S.C. §§ 5130 and 5131, respectively. Any legal case law or administrative citations referring to the previous United States Code sections can be interpreted as referring to the as-transferred sections. In addition, the previous codification of the Indian Self-Determination and Education Assistance Act at 25 U.S.C. § 450b has since been moved to 25 U.S.C. § 5304, and any case law citations to the previous section should be read accordingly.

[2] Class I gaming under IGRA includes social games of minimal value or traditional forms of Indian gaming. 25 U.S.C. § 2703(6); *Dewberry v. Kulongoski*, 406 F. Supp. 2d 1136, 1141 (D. Or. 2005). Class II gaming includes bingo and similar games, including pull-tabs and lotto, if played in the same location as bingo, but does not include "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." 25 U.S.C. § 2703(7)(B)(ii). Class III gaming includes all forms of gaming not covered by Class I or Class II gaming, such as slot machines, casino games, and sports betting. 25 U.S.C. § 2703(8); *Dewberry*, 406 F. Supp. 2d at 1141.

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resources. Thus, only federally recognized tribes appearing on the List Act can game under IGRA. The plain language of both IGRA and the List Act support this interpretation.

Plaintiff admits that it is not a federally recognized tribe, but argues that two public laws that provided Plaintiff with access to federal programs and services for Indians allow it to engage in Class II gaming activities under IGRA. On the contrary, the plain language and legislative history of these two public laws demonstrate that Congress never intended to allow this non-federally recognized tribe to engage in gaming activities. Interior's determination that Congress did not intend to allow Plaintiff, which is admittedly and explicitly not a federally recognized tribe, to engage in Class II gaming activities was not arbitrary, capricious, or otherwise not in accordance with law. Interior is therefore entitled to summary judgment in this case.

II. BACKGROUND

A. Legal Background

1. The Indian Gaming Regulatory Act

"Congress passed the Indian Gaming Regulatory Act in 1988 in order to provide a statutory basis for the operation and regulation of gaming by Indian tribes." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 48 (1996) (citing 25 U.S.C. § 2702). Under IGRA, "[a]n Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if — . . . the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman." 25 U.S.C. § 2710(b)(1). IGRA defines "Indian tribe" as:

> any Indian tribe, band, nation, or other organized group or community of Indians which --
>
> (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and
>
> (B) is recognized as possessing powers of self-government.

25 U.S.C. § 2703(5). IGRA's implementing regulations similarly defer to the Secretary for determinations of whether groups qualify as "Indian tribes" under IGRA. *See* 25 C.F.R. § 502.13.

2. The Federally Recognized Indian Tribe List Act (the "List Act")

In 1994, Congress enacted the List Act, Pub. L. No. 103-454, 108 Stat. 4791 (1994), which provides that "[t]he Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5131(a). The List Act defines "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." 25 U.S.C. § 5130. Through the List Act, Congress affirmed the Secretary's authority to determine which tribes are federally recognized, required the Secretary to maintain an updated list of such tribes, and reserved exclusive authority to de-list or terminate federally recognized tribes. Pub. L. No. 103-454, § 103(4).

The list published in the Federal Register is ordinarily dispositive evidence of whether a tribe is federally recognized. *See Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997) (noting that inclusion of group of Indians on list ordinarily suffices to establish that group is sovereign power and thus entitled to immunity from suit); *see also LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993) (finding that for purposes of 25 U.S.C. § 1321, the term "Indian" includes only those persons who are members of a tribe that has been formally acknowledged by the Bureau of Indian Affairs). Plaintiff does not appear on the list of federally recognized tribes, as it is explicitly not federally recognized. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 81 Fed. Reg. 5,019 (Jan. 29, 2016); Indians: Technical Corrections, Pub. L. No. 103-435, § 8, 107 Stat. 4566, 4569 (1994) ("1994 Act") ("Nothing in this section may be construed to constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized Indian tribe."). Plaintiff admits that it is not a federally recognized tribe. Compl. for Declaratory & Inj. Relief ¶ 24, ECF No. 1.

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B. Factual Background

1. Recognition of Plaintiff as a Self-Governing Indian Community

Plaintiff is a self-governing dependent Indian community located along the Nisqually River near Olympia, Washington. 1994 Act; *Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 927 (9th Cir. 2010). Frank's Landing consists of three parcels of land that are held in trust by the United States for the benefit of individual Indians. *Nisqually*, 623 F.3d at 927. In 1987, Congress recognized Plaintiff's members "as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" and "as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act for such services." Act of Nov. 5, 1987, Pub. L. No. 100-153, § 10, 101 Stat. 886, 889 (1987) ("1987 Act"). The Senate Report for the bill stated that it was "not intended to create or establish Frank's Landing as a Federally-recognized Indian tribe," or "to establish as an Indian Reservation or to alter in any way existing jurisdictional arrangements." S. REP. NO. 100-186 at 7 (1987); AR 84.[3]

In 1994, Congress amended the 1987Act to state that Plaintiff is recognized "as a self-governing dependent Indian community that is not subject to the jurisdiction of any federally recognized tribe." 1994 Act. The amendment was enacted "at the behest of Frank's Landing Indian Community, whose members feared unilateral annexation into the Nisqually Tribal Reservation if a constitution under consideration by the Nisqually Tribe was adopted." *Nisqually Indian Tribe v. Gregoire*, 649 F. Supp. 2d 1203, 1205 (W.D. Wash. 2009). This amendment stated that "[n]othing in this section may be construed to constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized Indian tribe." 1994 Act. The section also noted that "notwithstanding any other provision of law," Plaintiff "shall not engage in any class III gaming activity" under IGRA. *Id.*

During the discussion of the bill on the House floor, House Representative and Chairman of the House Natural Resources Subcommittee on Native American Affairs Bill Richardson

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[3] Cites to the Administrative Record filed with the Court, ECF No. 20, are denoted with AR and the bates number of the page.

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stated that: "[t]he language regarding Frank's Landing does not confer the powers reserved to federally recognized Indian tribes upon this community. . . . It cannot get class II or class III gaming because it is not a federally recognized tribe." 140 Cong. Rec. 28627 (Oct. 6, 1994). Similarly, another member of Congress stated "it is my understanding that the language in the bill regarding Frank's Landing does not create a federally recognized Indian tribe, does not give the group the right to have gaming," but "simply clarifies existing rights and does not confer any other powers on the community at Frank's Landing." *Id.* (statement of Rep. Thomas).

2. Submission of Gaming Ordinance to NIGC

On December 9, 2014, Plaintiff submitted a purported Class II gaming ordinance to NIGC for the NIGC Chairman's review and approval, along with a resolution from Plaintiff's governing body enacting the ordinance. AR 3–15. The NIGC referred the matter to Interior's Office of the Solicitor, requesting an opinion on whether Frank's Landing is a tribe within the meaning of IGRA, who referred the matter to then Assistant Secretary – Indian Affairs ("Assistant Secretary") Kevin Washburn. AR 64. On March 6, 2015, the Assistant Secretary issued a memorandum to the NIGC Chairman conveying Interior's conclusion that "Congress does not appear to have intended that Frank's Landing be treated as an Indian tribe within the meaning of IGRA." AR 80. This memorandum explained that "[i]n determining whether an entity is an Indian tribe for purposes of eligibility for gaming under IGRA," the NIGC may rely on the list of federally recognized tribes published annually in the Federal Register. *Id.* The Assistant Secretary explained that some of the controversy surrounding Indian gaming is due "to perceptions of mystery and uncertainty surrounding who is eligible to engage in such gaming and where such gaming can occur," but that the list provides a "definitive means of determining whether an entity is a federally-recognized Indian tribe" that may engage in gaming under IGRA. *Id.* "The list provides transparency," "a 'bright line' rule that preserves government resources around such matters," and "will prevent what might constitute a collateral challenge to the annual list Congress has directed the Department to prepare." *Id.*

The Assistant Secretary' memorandum to the NIGC Chairman included as an attachment a memorandum prepared by the Interior Office of the Solicitor, explaining the Solicitor Office's

legal conclusion that only federally recognized tribes are entitled to engage in gaming under IGRA and that Congress did not intend that Plaintiff be treated as a "tribe" entitled to game under IGRA. AR 82–87. The memorandum notes that IGRA's definition of "tribe" is "admittedly broad," but "does not indicate an intent to cover later, specially recognized groups such as Frank's Landing." AR 85. The memorandum reviewed IGRA, as well as the 1987 and 1994 Acts (collectively, the "Frank's Landing Acts"), and determined that "Congress did not intend to recognize Frank's Landing as an Indian tribe with inherent powers of self-government." AR 86. Instead, the Solicitor's Office concluded that Congress intended to recognize Plaintiff as a tribal organization whose members could receive services and benefits "independent of any requirement that those residents get the consent of the Nisqually Tribe or any other federally-recognized tribe." *Id.* "In light of the express language of the original 1987 act and the 1994 amendment, Congress does not appear to have intended that Frank's Landing be treated as a 'tribe' within the meaning of IGRA." AR 87.

On March 6, 2015, NIGC Chairman Jonodev Chaudhuri issued a letter to Plaintiff's Chairperson, indicating that, based on the Assistant Secretary's determination that Plaintiff is not a tribe under IGRA, NIGC would not accept Plaintiff's gaming ordinance as it was not a "tribal ordinance" within the meaning of IGRA. AR 88–91.

3. Procedural History of this Litigation

Plaintiff brought this Complaint on November 13, 2015, seeking declaratory and injunctive relief against the NIGC and Interior. Compl., Prayer for Relief. On August 15, 2016, this Court granted Defendants' motion to dismiss the NIGC and its Chairman, Jonodev Chaudhuri, from the case. Order Granting Defs.' Mot. to Dismiss, ECF No. 29. Plaintiff currently seeks a declaration that (1) it is an "Indian tribe" under IGRA, and (2) Interior acted arbitrarily, capriciously, and not in accordance with law by relying on the List Act to determine eligibility for IGRA gaming.

III. LEGAL STANDARD

In judicial review under the APA, the Court need not and, indeed, may not, "find" underlying facts; thus, there are no material facts essential to the Court's resolution of this action.

See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Accordingly, summary judgment is the appropriate vehicle to resolve this case. *See* Fed. R. Civ. P. 56(a) ("The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."); *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1472 (9th Cir. 1994) (noting that because an APA case "does not present any genuine issues of material fact, summary judgment is appropriate"). Because an administrative review proceeding, such as this one, does not implicate the possibility of a trial, if the Court were to conclude from a review of the administrative record that the Defendants' decision was arbitrary or capricious, the remedy would be to remand the matter for reconsideration. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 549 (1978).

The APA directs the Court to uphold the decision unless it is deemed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Plaintiff bears the burden of showing that Interior acted arbitrarily. *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009). Although the inquiry must be thorough, the standard of review is narrow and highly deferential, Interior's decision is "entitled to a presumption of regularity," and the Court cannot substitute its judgment for that of the agency decision maker. *Citizens to Preserve Overton Park, Inv. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The agency need only articulate a rational connection between the facts found and the conclusions made. *Or. Nat. Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997).

"When reviewing an agency's statutory interpretation under the APA's 'not in accordance with law' standard," the Court must "adhere to the familiar two-step test of *Chevron*.'" *Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1014 (9th Cir. 2008) (citing 5 U.S.C. § 706(2)(A)) (quotation marks & citation omitted); *see also Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984). Under this two-step test, this Court should determine "whether Congress has directly spoken to the precise question at issue," and, if the statute is silent or ambiguous, consider whether the agency's interpretation is reasonable. *See United*

Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv., 837 F.3d 1055, 1062 (9th Cir. 2016) (quoting *Chevron*, 467 U.S. at 842).

This deference is appropriate in light of the fact that Congress has granted Interior general responsibility over matters pertaining to Indian tribes and specifically delegated to Interior the authority to decide which Indian groups merit federal recognition as Indian tribes. *See, e.g.*, 43 U.S.C. § 1457 (charging the Secretary of the Interior with the supervision of public business related to Indians); 25 U.S.C. § 2 (granting management of all Indian affairs to the Commissioner of Indian Affairs under the supervision of the Secretary of the Interior and regulations prescribed by the President); 25 U.S.C. § 9 (authorizing the President and Secretary of the Interior to prescribe regulations to carry out statutory responsibilities relating to Indian affairs). Courts have also acknowledged that Interior has special expertise in the determination of acknowledgment of Indian tribes. *United Tribe of Shawnee Indians v. United States*, 253 F.3d 543, 551 (10th Cir. 2001); *James v. U.S. Dep't of Health & Human Servs.*, 824 F.2d 1132, 1138–39 (D.C. Cir. 1987); *Masayesva v. Zah*, 792 F. Supp. 1178, 1184–85 (D. Ariz. 1992). An agency decision is accorded an especially high level of deference where, as here, technical expertise informed the decision. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 658–59 (9th Cir. 2009) (citing *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 377 (1989)).

IV. ARGUMENT

Interior's determination that only federally recognized tribes can game under IGRA and that Congress did not intend Plaintiff, which is admittedly not a federally recognized tribe, to engage in Class II gaming under IGRA is not arbitrary, capricious, or not in accordance with law. The language of IGRA and the List Act support this conclusion, as does extensive precedent. In addition, an examination of the language and legislative history of the Frank's Landing Acts shows that Congress did not intend Plaintiff to be treated as an "Indian tribe" under IGRA.

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A. Interior Reasonably Interprets Federal Law to Allow Only Federally Recognized Tribes to Engage in Class II and III Gaming.

Interior reasonably determined that gaming under the IGRA is only available to federally recognized tribes. The plain language of both IGRA and the List Act demonstrates that IGRA is intended to encompass only federally recognized tribes. To the extent that this Court finds there is any ambiguity in the statutory language, Interior's interpretation is reasonable and entitled to deference. *See United Cook Inlet Drift Assoc.*, 837 F.3d at 1062.

While IGRA does not explicitly state that gaming is only available to federally recognized tribes, it defines "Indian tribe" as groups recognized by the Secretary. Specifically, IGRA defines "Indian Tribe" as a group "recognized as eligible *by the Secretary* for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 2703(5) (emphasis added). The List Act in turn provides that "[t]he Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. § 5131. In other words, IGRA defines "tribe" as those groups recognized by the Secretary as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, and the Secretary publishes a list of those tribes under the List Act. Thus, the Secretary reasonably interprets the IGRA language deferring to recognition by the Secretary as meaning federal recognition is required.

Other language in IGRA underscores that it applies only to federally recognized tribes. For example, the findings in IGRA state that contracts dealing with Indian gaming had to be approved under 25 U.S.C. § 81. 25 U.S.C. § 2701(4). Section 81 incorporates the definition of "Indian tribe" in the Indian Self-Determination and Education Assistance Act ("Self-Determination Act"), 25 U.S.C. § 5304(e), which also includes only federally recognized tribes. *See United States v. Oseby*, 148 F.3d 1016, 1019 (8th Cir. 1998) (noting that the Self-Determination Act "allows federally recognized Indian tribes to enter into contracts with the Federal Government"); *Navajo Nation v. Dep't of the Interior*, 174 F. Supp. 3d 161, 163 (D.D.C. 2016) ("Under the ISDEAA, federally recognized Indian tribes may enter into what are termed

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'self-determination contracts' with federal agencies."), *appeal docketed*, No. 16-5117 (D.C. Cir. May 9, 2016); *Hopland Band of Pomo Indians v. Norton*, 324 F. Supp. 2d 1067, 1070 (N.D. Cal. 2004) (stating that the Self-Determination Act "was passed in 1975 for the purpose of allowing federally-recognized Indian tribes to contract with the government to take over certain federal services and programs that the government maintains and operates for the benefit of Indians and Indian tribes"). IGRA also partially abrogates tribal sovereign immunity, an action that would not be necessary for non-federally recognized tribes, which do not enjoy sovereign immunity. *See* 25 U.S.C. § 2710(d)(7)(A)(ii); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030–32 (2014) (discussing tribal sovereign immunity and IGRA's partial abrogation thereof); *Kahawaiolaa v. Norton*, 386 F.3d 1271, 1273 (9th Cir. 2004) ("Federal recognition affords important rights and protections to Indian tribes, including limited sovereign immunity . . . ."); *Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1159 (9th Cir. 2002) ("Federally recognized Indian tribes enjoy sovereign immunity from suit and may not be sued absent an express and unequivocal waiver of immunity by the tribe or abrogation of tribal immunity by Congress." (citation omitted)); *Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 472 (D.D.C. 1978) ("Without a valid tribal status, these Indians are unprotected by the doctrine of sovereign immunity.").

Without exception, courts have held that IGRA applies only to federally recognized tribes. Many courts have made substantive findings to this effect. *See Timbisha Shoshone Tribe v. U.S. Dep't of the Interior*, 824 F.3d 807, 809 (9th Cir. 2016) ("Moreover, only federally recognized tribes may operate gambling facilities under the federal Indian Gaming Regulatory Act. *See Big Lagoon Rancheria v. California*, 789 F.3d 947, 949–50 (9th Cir. 2015) (en banc)."); *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 792 n.4 (lst Cir. 1996) ("[IGRA] has no application to tribes that do not seek and attain federal recognition."); *Ala. ex rel. Rich v. 50 Serialized JLM Games, Inc.*, Civ. No. 14-0066-CG-B, 2015 WL 2365417, at *3 (S.D. Ala. Mar. 30, 2015) (IGRA "only applies to federally recognized Indian Tribes. Congress did not define 'Indian tribes' as 'state, federal and common law recognized tribes.' Instead, IGRA explicitly states tribes recognized as eligible for federally recognized programs and services by the

Secretary of the Interior."); *Picayune Rancheria of the Chukchansi Indians v. Tan*, No. 1:14-cv-0220 AWI SAB, 2014 U.S. Dist. LEXIS 29973, at *8-9 (E.D. Cal. Mar. 7, 2014) ("Plaintiffs are not an 'Indian tribe' for purposes of IGRA because they do not fall within such definition under [IGRA, 25 U.S.C. § 2703]."); *Carruthers v. Flaum*, 365 F. Supp. 2d 448, 466–67 (S.D.N.Y. 2005) ("In particular, IGRA applies only to the activities of federally recognized tribes."); *Trump Hotels & Casino Resorts Dev. Co., LLC v. Roskow*, No. 3:03CV1133 (RNC), 2004 WL 717131, *2 n.3 (D. Conn. Mar. 31, 2004) ("A necessary predicate to falling within the preemptive scope of IGRA is that the claim pertain to a federally recognized tribe."); *Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1187 (E.D. Cal. 2003) ("Lytton cannot conduct class III gaming under IGRA unless it is a federally recognized tribe."); *First Am. Casino Corp. v. E. Pequot Nation*, 175 F. Supp. 2d 205, 208 (D. Conn. 2000) ("IGRA does not apply because defendant has not attained formal federal recognition and therefore is not an 'Indian tribe' within the meaning of IGRA."); *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, Civ. No. 97-334, 1997 U.S. Dist. LEXIS 19039, at *10 (D.D.C. Aug. 18, 1997) ("IGRA has no application, however, to tribes that are not federally recognized. . . ."); *Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians of Fla.*, 898 F. Supp. 1549, 1551 (S.D. Fla. 1994) ("IGRA permits federally recognized Indian tribes, such as the Miccosukee Tribe, to establish gaming activities on their lands.").

Even more courts have noted, without elaboration, that IGRA requires federal recognition. *Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1079 (7th Cir. 2015) ("As we noted earlier, IGRA divides all Indian gaming (that is, gambling run by federally recognized tribes) into three classes, each subject to different levels of tribal, federal, and state regulation."); *KG Urban Enters., LLC v. Patrick*, 693 F.3d 1, 7 (1st Cir. 2012) ("The IGRA creates a cooperative federal-state-tribal scheme for regulation of gaming hosted by federally recognized Indian tribes on Indian land."); *Patchak v. Salazar*, 632 F.3d 702, 705 n.2 (D.C. Cir. 2011) ("The Gaming Act permits federally recognized Indian tribes to conduct gaming on 'Indian lands.'"); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 736 (9th Cir. 2003) ("Proposition 1A was enacted in response to IGRA, a federal law explicitly designed to readjust the regulatory

authority of various sovereigns over class III gaming on the lands of federally recognized Indian tribes."); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 616 (6th Cir. 2002) ("The [IGRA] establishes the framework by which a federally recognized tribe can require a State to enter into negotiations concerning the establishment of a casino."); *Kansas v. United States*, 249 F.3d 1213, 1218 (10th Cir. 2001) ("Assuming other requisites of the Act are met, IGRA permits a federally recognized Indian tribe to establish gaming facilities on 'Indian lands' within the tribe's jurisdiction."); *United States v. 162 Megamania Gambling Devices*, 231 F.3d 713, 717 (10th Cir. 2000) ("Following the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 . . . (1987) (*Cabazon I*), which authorized gaming on federally recognized Indian lands, Congress enacted the [IGRA], codified at 25 U.S.C. §§ 2701-2721."); *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1337 (D.C. Cir. 1998) ("Although the Act permits federally recognized tribes to apply for Commission approval of gaming proposals, an early version of IGRA contained a provision specifically excluding the Narragansetts."); *Great Elk Dancer v. City of Logan*, No. 2:13-cv-0565, 2013 WL 4479140, *2 (S.D. Ohio Aug. 19, 2013) ("This was contrary to the Indian Gaming Act of 1988 that permits federally recognized Indian tribes to offer games of chance on tribal lands."); *Menominee Indian Tribe of Wis. v. DOI*, No. 09-C-496, 2010 WL 4628916, *1 (E.D. Wis. Nov. 4, 2010) ("As a federally recognized tribe, the Tribe is authorized to operate gaming facilities for Tribal economic development under the IGRA, and can apply to have land taken into trust for that purpose under the IRA even if the land is off reservation."); *Ysleta del Sur Pueblo v. Nat'l Indian Gaming Comm'n*, 731 F. Supp. 2d 36, 38 n.1 (D.D.C. 2010) ("The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, permits federally-recognized Indian tribes to conduct gaming on 'Indian lands.'"); *St. Croix Chippewa Indians of Wis. v. Kempthorne*, Civ. No. 07-2210 (RJL), 2008 WL 4449620, *2 (D.D.C. Sept. 30, 2008) ("Under IGRA, federally-recognized tribes may conduct gaming on 'Indian lands' within their jurisdiction . . . ."); *Collins v. DOI*, 468 F. Supp. 2d 113, 115 n.6 (D.D.C. 2006) ("In that regard, federally-recognized Indian tribes are able to operate casinos in the State of Connecticut pursuant to the mechanisms prescribed by the IGRA. See 25 U.S.C. § 2710."); *Mechoopda Indian Tribe of*

Chico Rancheria v. Schwarzenegger, Civ. No. S-03-2327 WBS/GGH, 2004 WL 1103021, at *3 (E.D. Cal. Mar. 12, 2004) ("The IGRA establishes the framework by which a federally recognized tribe can require a state to enter into negotiations concerning the establishment of a gaming facility. Under 25 U.S.C. § 2710(d)(3)(A), a federally-recognized tribe initiates the negotiation process by making a formal request to enter negotiations with the state."); *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 173 F. Supp. 2d 725, 726 (W.D. Mich. 2001) ("Congress established through the IGRA a mechanism whereby a tribe 'having jurisdiction over the Indian lands upon which' a casino is proposed may compel a recalcitrant state to negotiate concerning the casino. 25 U.S.C. § 2710(d)(3)(A). A federally recognized Indian tribe initiates the process by making a formal request to the state to begin negotiations.").

This holding that IGRA applies to federally-recognized tribes is universal. Interior is not aware of *any* cases authorizing a non-federally-recognized tribe to engage in IGRA gaming. Interior is also not aware of any groups other than federally-recognized tribes that are allowed to engage in IGRA gaming. This overwhelming precedent shows that Interior's decision is reasonable.

The *Alabama ex rel. Rich* case is instructive here. 2015 WL 2365417. There, the court determined that the plaintiff was not covered by IGRA because it was not a federally-recognized tribe. *Id.* at *2. The court stated that "IGRA explicitly states tribes recognized as eligible for federally recognized programs and services by the Secretary of the Interior," and noted the extensive precedent supporting "the conclusion that IGRA applies only to federally recognized tribes." *Id.* at *3. In addition, the court relied on the Supreme Court's decision in *Bay Mills*, 134 S. Ct. 2024. In *Bay Mills*, a federally-recognized tribe began conducting gaming activities off Indian lands, and the Supreme Court held that IGRA did not apply to the gaming activities. *Id.* at 2030. "Key to the Supreme Court's ruling was its reluctance to expand the purview of IGRA and thus threaten a *federally recognized* tribe's sovereign immunity." *Rich*, 2015 WL 2365417, at *4 (citing *Bay Mills*, 134 S. Ct. at 2034). The court therefore concluded that IGRA did not apply to the plaintiff because the plaintiff was not federally-recognized by the Secretary. The same logic supports Interior's decision here.

Notably, other statutes that define "Indian tribe" similarly to IGRA also require federal recognition. The Indian Child Welfare Act defines "Indian tribe" similarly to IGRA as "any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians." 25 U.S.C. § 1903(8). Courts have held that this definition requires federal recognition. *Keyes v. Huckleberry House*, 936 F.2d 578 (9th Cir. 1991) ("At the time Keyes filed this action in district court, the Houma tribe was not on the list of tribes which were recognized as eligible for services."); *Disanto v. Thomas*, No. 5:15-cv-36, 2016 WL 410030 (S.D. Ga. Feb. 2, 2016) (finding group that was not on published list of federally recognized tribes was not an "Indian tribe" under the Indian Child Welfare Act); *see also In re C.H.*, 79 P.3d 822, 826 (Mont. 2003) (holding that Indian Child Welfare Act "does not apply to tribes which have not yet been federally recognized"); *In re Termination of Parental Rights to Arianna R.G.*, 657 N.W.2d 363, 370 (Wis. 2003) (citing Indian Child Welfare Act definition of "Indian tribe" then noting that children were not members of a federally recognized tribe). Thus, the Indian Child Welfare Act, which uses similar language regarding the necessity for Secretarial recognition for eligibility "for the special programs and services provided by the United States to Indians because of their status as Indians" have been held to apply only to federally recognized tribes.

Under certain other statutes with different definitions of "Indian tribe," non-federally recognized groups may receive federal benefits and services. *See, e.g.*, 25 U.S.C. § 4103(13)(A) (making state-recognized tribes eligible for funding under the Native American Housing Assistance and Self Determination Act). These groups, while receiving services and benefits from the United States because of their status as Indians, are not entitled to game under IGRA, however. *See, e.g.*, *First Am. Casino Corp. v. Eastern Pequot Nation*, 175 F. Supp. 2d 205, 208 (D. Conn. 2000) ("IGRA does not apply because [the state-recognized tribe] has not attained formal federal recognition and therefore is not an 'Indian tribe' within the meaning of IGRA.").

In sum, the Secretary's interpretation of the IGRA as requiring federal recognition as a precursor to gaming is reasonable given the language of the IGRA and the List Act, the overwhelming precedent holding that IGRA is available only to federally recognized tribes, and

judicial interpretation of similarly-worded statutes. To the extent that this Court finds that the intent of Congress is not clear from the language of the statutes, Interior's decision "is based on a permissible construction of the statute[s]," and thus is afforded deference under *Chevron*. *United Cook Inlet Drift Assoc.*, 837 F.3d at 1062.

B. Interior Reasonably Determined That Congress Did Not Intend That Plaintiff be Treated as an "Indian Tribe" Under IGRA.

In addition to Interior's broader position that IGRA gaming is available only to federally recognized tribes based on the "recognized by the Secretary" clause in IGRA, an examination of the Frank's Landing Acts does not indicate that Congress extended federal recognition to Plaintiff, considered Plaintiff to be an Indian tribe, or intended to authorize Plaintiff to engage in gaming. Interior's findings to that effect are reasonable.

1. The Frank's Landing Acts Show That Congress did not Intend Plaintiff to be Considered an "Indian tribe."

First, the 1994 Act explicitly stated that Plaintiff is not a federally recognized Indian tribe. *See* 1994 Act ("Nothing in this section may be construed to constitute the recognition by the United States that the Frank's Landing Indian Community is a federally recognized Indian tribe."). As discussed above, courts are unanimous that IGRA applies solely to federally recognized Indian tribes. The 1994 Act's express statement that Plaintiff is not such a tribe is itself dispositive evidence that Congress did not intend for Plaintiff to engage in gaming activities.

In addition, Interior reasonably determined the Frank's Landing Acts show that Congress intended to recognize Plaintiff as a "tribal organization" under the Self-Determination Act instead of an "Indian tribe," thereby making services and benefits available to residents of Frank's Landing by allowing Plaintiff to enter into self-determination contracts with the United States. AR 84 (citing S. REP. NO. 100-186, at 7). Under the Self-Determination Act, tribal organizations can contract with and receive grants from federal agencies. *See* 25 U.S.C. § 5304(*l*).

The 1987 Act stated that Plaintiff is eligible to enter into contracts and receive grants under the Self-Determination Act. Notably, it also abrogated a provision of the Self-

Determination Act that otherwise would have applied to Plaintiff. *See* 1987 Act (stating that "the proviso in section 4(c) of such Act (25 U.S.C. 450b(c)) shall not apply with respect to grants awarded to, and contracts entered into with, such community"). Section 4(c) in the 1988 version of the Self-Determination Act defines "tribal organization," and the proviso in that section states that "where a contract is let or grant made to an organization to perform services benefitting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting or making of such contract or grant." Pub. L. No. 93-638, § 10, 88 Stat. 2203, 2204 (1975); 25 U.S.C. § 5304(l). That Congress explicitly referenced the definition of "tribal organization" and preempted the application of the proviso specific to tribal organizations indicates that Congress recognized Plaintiff as a tribal organization, not a tribe.

As Interior noted in its legal memorandum, Congress passed the 1987 Act in reaction to longstanding disputes between Plaintiff and the nearby Tribes in which Plaintiff's residents were members in order to ensure that such individuals would be eligible for Federal services and benefits "independent of any requirement that those residents get the consent of the Nisqually Tribe or any other federally recognized tribe." *See* AR 83, 86; *Gregoire*, 649 F. Supp. 2d at 1203 (detailing legal disputes between various Indian Tribes and Plaintiff). Thus, Interior reasonably interpreted the Frank's Landing Acts as congressional recognition that Plaintiff is a tribal organization that can enter into contracts and receive grants under the Self-Determination Act without needing permission from tribes with which Plaintiff has strained relations. AR 86. Because "tribal organizations" are not included within the IGRA definition of gaming-eligible entities, the 1987 Act demonstrates that Plaintiff is ineligible to engage in gaming.[4]

[4] While the 1994 Act subsequently referred to Plaintiff as a "self-governing dependent Indian community," none of the 1994 Act's amendments to the 1987 Act abrogated or otherwise altered the 1987 language preempting the application of the tribal organization requirement to Plaintiff. There is accordingly no evidence that Congress viewed or intended to characterize Plaintiff's underlying organizational or legal status differently in 1994 than it did in 1987. Nor did Congress include any other language in the 1994 Act indicating that it believed Plaintiff to be a gaming-eligible Indian tribe.

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2. The Legislative History of the Frank's Landing Acts Removes Any Doubt that Congress did not Intend Plaintiff to Game.

The legislative history of the Frank's Landing Acts reinforces the reasonability of Interior's decision. Generally, a court "may consider legislative history if the statute is ambiguous or if the legislative history clearly indicates that Congress meant something other than what it said." *United States v. Crooked Arm*, 788 F.3d 1065, 1073 (9th Cir. 2015) (internal quotation omitted). The Frank's Landing Acts are ambiguous in that they use terms generally reserved for federally recognized tribes — "eligible for the special programs and services provided by the United States to Indians because of their status as Indians" — while at the same time stating that Plaintiff is not a federally recognized tribe. The 1994 Act in particular — which uses language about Plaintiff being a "self-governing dependent Indian community," a term not used elsewhere to Defendants' knowledge — is not clear on its face. In addition, here, where the question is whether Interior reasonably interpreted the Frank's Landing Acts and Interior relied on the legislative history in its decision, the legislative history is relevant evidence and may be considered.

The 1994 Act's legislative history contains several explicit statements that the Act was not intended to allow Plaintiff to game under IGRA. *See* 140 Cong. Rec. 28627 (Oct. 6, 1994) (noting member's understanding that the 1994 Act "does not give [Plaintiff] the right to have gaming"); *id.* (stating that Plaintiff "cannot get class II or class III gaming because it is not a federally recognized tribe"). The legislative history also states that the 1987 Act authorized Plaintiff "to enter into self-determination contracts. That is the full extent of their powers." *Id.* Thus, the legislative history supports Interior's conclusion that Congress did not intend in the Frank's Landing Acts to extend gaming rights to Plaintiff, but rather sought to ensure that they could benefit from programs and services under the Self-Determination Act independently of the Nisqually Tribe.

The Senate Report on the 1987 Act also explicitly states that the Act did not intend "to create or to establish Frank's Landing as a Federally-recognized Indian tribe" or "to establish [an] Indian reservation or to alter in any way existing jurisdictional arrangements." S. REP. NO. 100-186 at 7. The Report discusses that most members of the Frank's Landing Community are

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members of the Puyallup or Nisqually Tribes, although some members are full-blood Indians descended from several tribes who do not meet the blood quantum requirements of any tribe. *Id.* at 6. Thus, the Report states that the Act "is intended to clarify that residents of Frank's Landing are eligible for the special programs and services provided by the United States to Indians because of their status as Indians, notwithstanding their tribal membership status." *Id.* at 7. This, along with the statutory language exempting Plaintiff from the proviso requiring tribal organizations have tribal approval before entering into contracts or receiving grants, supports Interior's conclusion that Congress did not view the Frank's Landing Acts as conferring Plaintiff tribal status under IGRA. Again, Interior's decision should be afforded deference under *Chevron*, as it certainly is a permissible construction of the Frank's Landing Acts. *See United Cook Inlet Drift Assoc.*, 837 F.3d at 1062.

3. Plaintiff's Interpretation of the Frank's Landing Acts is Unsupported.

Plaintiff makes several arguments in support of its interpretation of the Frank's Landing Acts, but none carry water. First, Plaintiff states that the 1994 Act incorporates IGRA's language of "recognized as eligible for the special programs and services provided by the United States Indians because of their status as Indians." Frank's Landing Indian Community Mot. for Summ. J. 11, ECF No. 33 ("Pl.'s Mot. for Summ. J."). But this language was unchanged from the 1987 Act, and thus could not have incorporated IGRA, which had not yet been passed. *See* Pub. L. No. 100–153, 101 Stat. 886; Pub. L. No. 103-435, 108 Stat. 4566.

In addition, there is a significant difference between the 1994 Act, which states that Plaintiff is "eligible for the special programs and services provided by the United States to Indians because of their status as Indians," and IGRA, which defines "Indian tribe" as groups "recognized by the *Secretary* as eligible for the special programs and services provided to the United States to Indians because of their status as Indians." *Compare* 1994 Act *with* 25 U.S.C. 2703(5). As this Court noted in its decision dismissing NIGC from the case, "the IGRA unambiguously states that the community of Indians must be recognized by the Secretary of the Interior, not by Congress." Order Granting Defs.' Mot. to Dismiss 7, ECF No. 29 (citing 25 U.S.C. § 2703(5)). Plaintiff argues that the only distinction between the 1994 Act and IGRA's

definition of "Indian tribe" is the Secretarial recognition clause and that such distinction does not affect Plaintiff's argument because the 1994 Act's reference to "the United States" by definition includes the Secretary. Pl.'s Mot. for Summ. J. 11 n.4. This is wrong. As discussed above, the "Secretary clause" necessarily incorporates the List Act and operates as a term of art to indicate federal recognition is required. To ignore the distinction between the 1994 Act and IGRA would be to violate the basic tenet of statutory interpretation that statutes should be interpreted in a way that gives each word effect and does not render any provisions meaningless. *See In re The Village at Lakeridge, LLC*, 814 F.3d 993, 1007 (9th Cir. 2016). Plaintiff would have the "recognized by the Secretary" clause dismissed as meaningless.

Plaintiff also argues that the statement in the 1994 Act stating that "[n]otwithstanding any other provision of law, the Frank's Landing Indian Community shall not engage in any class III gaming activity" under IGRA indicates that Congress intended to allow Plaintiff to engage in class II gaming under IGRA. Interior considered this argument and found that because the Act also clearly stated that the legislation was not intended to recognize Plaintiff as a federally recognized tribe, "the language prohibiting Class III gaming by Frank's Landing cannot imply that Frank's Landing is a federally recognized tribe entitled to game under IGRA." AR 86. This finding was particular reasonable in light of the legislative history explicitly stating that the House did not intend the amendment to allow Plaintiff to engage in Class II or Class III gaming. Further, in the highly-regulated Indian gaming context, it is unlikely that Congress would authorize a non-federally recognized tribe to engage in gaming activities without explicitly stating that it was doing so. *See, e.g., United States v. 103 Elec. Gambling Devices*, 223 F.3d 1091, 1101–02 (9th Cir. 2000) (noting Congress's explicit statutory direction in IGRA as to the applicability of other anti-gaming statutes).[5]

[5] Plaintiff argues that the fact that Congress has explicitly barred other tribes from engaging in IGRA gaming, but that the Frank's Landing Acts only bar Class III gaming, indicates that Congress deliberately chose to authorize Plaintiff to engage in Class I and II gaming. Pl.'s Mot. for Summ. J. 17–18. But the legislative history does not support this position, and it is equally plausible that, for example, Congress simply indicated that if Plaintiff eventually achieves federal recognition and otherwise qualifies under IGRA, it may engage in Class I and II but not Class III gaming. And in any event, as discussed, it is extremely unlikely that Congress would

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Plaintiff cites an internal DOI memo stating that "there could be an argument that Frank's Landing is a tribal organization that uniquely falls within the definition of 'tribe' only for purposes of Class I and Class II gaming under IGRA" as proof that Interior's legal counsel agreed with Plaintiff's interpretation. Pl.'s Mot. for Summ. J. 18, AR 78. This is incorrect and deliberately misleading. The statement was part of a larger memorandum that ultimately concluded that "the better and more defensible position in light of the express language of the original 1987 act and the 1994 amendment is that Frank's Landing is not a 'tribe' within the meaning of IGRA." AR 78. That Interior acknowledged the existence of an opposing argument is neither evidence that it found the argument compelling nor supports the notion that Interior's contrary conclusion was unreasonable.

C. Plaintiff's Remaining Arguments are Without Merit.

In addition to Plaintiff's incorrect interpretation of the Frank's Landing Acts, its remaining arguments are equally unpersuasive.

First, Plaintiff sets up a straw man that Interior's reliance on the List Act to determine eligibility for IGRA means that Interior believes that the List Act "establish[es] a bright line definition of the term 'Indian tribe' for all federal purposes – including IGRA." Pl.'s Mot. for Summ. J. 19. Interior is not using the List Act definition as a "uniform definition of the term 'Indian tribe,'" as Plaintiff contends. *Id.*; *see also* ECF No. 33. Indeed, Plaintiff is correct that an entity may be considered an "Indian tribe" under some statutes even when it is not a "federally recognized Indian tribe" under the List Act. *See id.* at 22. "There is no universally recognized legal definition of the phrase, and no single federal statute defining it for all purposes." *Kahawaiolaa*, 386 F.3d at 1272. That is irrelevant to the question at hand, however, because IGRA specifically requires Secretarial recognition and uses language that mirrors the List Act.

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casually authorize a unique, non-tribal entity to engage in Indian tribal gaming without saying so directly.

25 U.S.C. §§ 2703(5), 5131. Thus, while the List Act definition of "Indian tribe" does not apply to all statutes that use the term "Indian tribe," it does apply to IGRA.[6]

Plaintiff also makes the circular argument that because it receives services from Interior, it has been "recognized" by Interior within the meaning of IGRA. Pl.'s Mot. for Summ. J. at 11 n.4. In doing so, Plaintiff essentially claims that because it is eligible for *some* federal programs and services as an Indian entity, it automatically qualifies for *all* such services provided by "the United States," including Interior, and extending to IGRA. This is not true. Under Plaintiff's theory, all groups receiving benefits from the United States because of their status as Indians would be entitled to game. As discussed above, certain groups receive services from the United States but are not federally recognized and are not entitled to game because different statutes define "Indian tribe" differently. Relevant here, tribal organizations can enter into contracts and receive grants under the Self-Determination Act. A "tribal organization," however, is different from an "Indian tribe." *See* 25 U.S.C. § 5322. And, "federal recognition" is a term of art: the fact that Plaintiff receives services as a tribal organization does not mean that it has been "recognized" by the Secretary within the meaning of IGRA or the List Act.

Nor does a recent Final Rule concerning the relationship between the United States and Native Hawaiians support Plaintiff's argument.[7] Plaintiff argues that in the Native Hawaiian Final Rule, Interior cited IGRA's definition of "Indian tribe" without also referring to the List Act and thus took a position different than its position in this case. Pl.'s Mot. for Summ. J. 22–23. Plaintiff is wrong. As discussed, Interior has a longstanding position that the "Secretary clause" in the IGRA definition of "Indian tribe" necessarily incorporates the List Act, so the lack of explicit reference to the List Act is not inconsistent with Interior's position in this case or any

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[6] Plaintiff's related argument that Interior's alleged blanket application of the List Act impermissibly usurps congressional plenary authority over Indian tribes, Pl.'s Mot. for Summ. J. at 11 n.4, 19-20, is accordingly meritless as well.

[7] *See* Procedures for Reestablishing a Formal Government-to-Government Relationship With the Native Hawaiian Community, 81 Fed. Reg. 71,278 (Oct. 14, 2016) (to be codified at 43 C.F.R. pt. 50) (establishing an administrative procedure and criteria that the Secretary of Interior would use if the Native Hawaiian community forms a unified government that then seeks a formal government-to-government relationship with the United States) ("Native Hawaiian Final Rule").

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other. In addition, the Preamble to the Native Hawaiian Final Rule lists several reasons why the Native Hawaiian government will be prohibited from gaming under IGRA. One reason is specifically because the group does not appear on the list of federally recognized tribes published under the List Act. 81 Fed. Reg. at 71,286 n.4 (noting that "Native Hawaiians would not be added to the list that the Secretary is required to publish under sec. 104 of the List Act, 25 U.S.C. 479a-1(a)"); *see also id.* at 71,316 (noting that "the Native Hawaiian community would not be recognized by the Secretary 'to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians,' 25 U.S.C. § 479a-1(a), and the Native Hawaiian Governing Entity would not appear on the list compiled under the List Act"). This is the same argument that Interior makes here.

As a final point, Plaintiff's interpretation could lead to adverse policy consequences for both the United States and tribes nationwide. While Plaintiff may be unique in having the Frank's Landing Acts and being recognized as a "self-governing dependent Indian community," Plaintiff is incorrect that its *sui generis* status means a ruling in its favor would not have broader policy implications. Plaintiff argues that "organized groups" who receive benefits from the government should be allowed to engage in gaming. There are other tribal consortia and entities that are recognized by the United States as eligible for federal services and possess the powers of self-governance that are not federally recognized Indian tribes. Classifying Frank's Landing as an Indian tribe could certainly result in similar claims, regardless of their merit, by other types of non-tribal entities. *See, e.g., Pink v. Modoc Indian Health Project*, 157 F.3d 1185, 1188 (9th Cir. 1998) (finding that tribal health consortium was a "tribe" within the meaning of Title VII of the Civil Rights Act given that the entity carried out tribal self-governance activities); *Dille v. Council of Energy Res. Tribes*, 801 F.2d 373, 375 (10th Cir. 1986) (finding that a tribal business consortium was a "tribe" within the meaning of Title VII of the Civil Rights Act given that the entity carried out tribal self-governance activities); *J.L. Ward Assoc., Inc. v. Great Plains Tribal Chairmen's Health Bd.*, 842 F. Supp. 2d 1163, 1173 (D.S.D. 2012) (noting cases where courts have found that tribally-authorized entities carrying out self-governance activities are entitled to tribal sovereign immunity).

For this reason — and in addition to being supported by the plain language of IGRA and the List Act, unanimous case law, and relevant legislative history — Interior's determination best achieves IGRA's goals and furthers public policy. In making its decision, Interior noted that "[t]o the extent that Indian gaming is controversial, it is due in part to perceptions of mystery and uncertainty surrounding who is eligible to engage in such gaming and where such gaming can occur." AR 80. By using a "bright line" rule in the IGRA context such as the List Act's definitive list of federally recognized tribes, Interior eliminates uncertainty, provides transparency, "preserves government resources around" gaming matters, and prevents "collateral challenge[s] to the annual list Congress has directed the Department to prepare." *Id.* A contrary holding would undercut all of these goals by encouraging non-federally recognized tribes and entities, potentially bankrolled by self-interested gaming companies or attorneys, to establish non-tribal entities similar to Plaintiff in an attempt to obtain federal permission to game, and embroil the United States in litigation. This, in turn, will further hamstring the ability of the United States to provide oversight, services, and guidance to the federally recognized tribes with whom the United States has a government-to-government relationship, and on whose behalf Congress enacted IGRA in the first instance.

The Frank's Landing Acts and their legislative history support Interior's conclusion that Congress did not intend Plaintiff to engage in gaming under IGRA. Interior's conclusion was reasonable and entitled to deference. *See United Cook Inlet Drift Assoc.*, 837 F.3d at 1062.

V. CONCLUSION

In the Frank's Landing Acts, Congress assisted Plaintiff in receiving certain federal services and benefits and engaging in self-governance. In so doing, Congress explicitly stated that Plaintiff is not a federally recognized Indian tribe. Interior's conclusion, based on IGRA's language, that only federally recognized tribes are "Indian tribes" under IGRA is reasonable and entitled to deference. In addition, the Frank's Landing Acts and their legislative history demonstrate that Congress did not intend Plaintiff to engage in gaming under IGRA. Interior's determination to that effect was not arbitrary, capricious, or otherwise not in accordance with law. As such, Defendants are entitled to summary judgment in their favor.

Submitted this 13th day of January, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 13, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all Counsel of record.

DATED this 13th day of January, 2017.

s/ Devon Lehman McCune

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