HON. BENJAMIN H. SETTLE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

FRANKS LANDING INDIAN COMMUNITY, a federally recognized self-governing dependent Indian community,

Plaintiff,

v.

NATIONAL INDIAN GAMING COMMISSION; UNITED STATES DEPARTMENT OF THE INTERIOR; JONODEV CHAUDHURI, in his official capacity as Chairman of the National Indian Gaming Commission; LAWRENCE S. ROBERTS, in his official capacity as Assistant Secretary of the Interior – Indian Affairs, United States Department of the Interior; and SALLY JEWELL, in her official capacity as the Secretary of the Interior.

Defendants.

Case No.: 3:15-cv-05828-BHS

FRANK'S LANDING INDIAN COMMUNITY RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: FEBRUARY 14, 2017 (SET BY ORDER)

ORAL ARGUMENT REQUESTED

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TABLE OF AUTHORITIES

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I. INTRODUCTION

At its core, this case requires the Court to answer a very simple question: did Congress recognize the Frank's Landing Indian Community (the "Community") as a community of Indians that is eligible for the special programs and services provided by the United States to Indians because of their status as Indians, with powers of self-government? According to the very words adopted by Congress, the answer to this question is unequivocally "yes." Therefore, the Community constitutes an "Indian tribe" under the terms and meaning of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* ("IGRA").

On March 6, 2015, the Assistant Secretary of the Interior – Indian Affairs (the "Assistant Secretary") declared that the Community is not an "Indian tribe" under IGRA, because the Community is not also an "Indian tribe" under a different statute with a different definition of that same term. *See* DOI AR 0082-87 (the "March 6th Decision")(relying on the definition contained in the Federally Recognized Indian Tribe List Act of 1994, Pub. L. 103-54, 108 Stat. 4791, 25 U.S.C. §§ 5130-31 (the "1994 Tribal List Act")). In defense of that March 6th Decision, the Department of the Interior, the Secretary of the Interior, and the Assistant Secretary of the Interior – Indian Affairs (the "Defendants") go to great lengths to argue that Congress did not mean what it said when it recognized the Community "as eligible for the special programs and services provided by the United States to Indians because of their status as Indians [and]…as a self-governing dependent Indian community". Pub. L. No. 103-435, 108 Stat. 4566 (November 2, 1994)(the "1994 Frank's Landing Act"). No amount of tortured reading and interpretation can change the plain meaning of those words.

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Congress was clear in adopting a definition of the term "Indian tribe" when it enacted IGRA, and Congress was clear when it recognized the Community as a self-governing dependent Indian community six years later, using nearly the exact same language as was utilized in IGRA. Congress' actions in adopting IGRA and recognizing the Community should end the inquiry.

The Defendants refusal to adhere to the unambiguous language of the 1994 Frank's Landing Act and IGRA, as well as their reliance on the 1994 Tribal List Act, was arbitrary, capricious, and not in accordance with the law. The Community respectfully asks that this Court deny the Defendants' Motion for Summary Judgment, grant the Community's Motion for Summary Judgment, and enter an order granting the declaratory relief sought by the Community.

II. LEGAL ARGUMENT

A. The Plain Language Of The 1994 Frank's Landing Act And IGRA Make It Clear That The Community Is An "Indian tribe" For The Limited Application Of IGRA.

The Defendants urge this Court to defer to the Assistant Secretary's assertion that IGRA can only apply to Indian tribes that are recognized by the Secretary of the Interior (the "Secretary") pursuant to the 1994 Tribal List Act. *See* (Doc. 38) Defs.' Resp. at 9 ("The plain language of both IGRA and the [1994 Tribal] List Act demonstrates that IGRA is intended to encompass only federally recognized tribes."). The Defendants' argument, however, presumes that the Assistant Secretary is entitled to make this interpretation.

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As the Court of Appeals for the Ninth Circuit has explained, "[statutory] analysis must begin with the language of the statute itself; when the statute is clear, judicial inquiry into its meaning, in all but the most extraordinary circumstance, is finished." *Talamantes v. Leyva*, 575 F.3d 1021, 1023 (9th Cir. 2009)(internal quotations omitted); *see also Barnhart v Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)("The inquiry ceases if the statutory language is unambiguous and the statutory scheme is coherent and consistent.")(internal quotations omitted).

The 1994 Frank's Landing Act uses unambiguous language in describing the Community's legal status. IGRA uses the same unambiguous language to establish which groups of Indians constitute "Indian tribes." A side-by-side comparison of these two statutes makes it clear that the Community is an "Indian tribe" under IGRA:

From IGRA:	From the 1994 Frank's Landing Act:
(5) The term "Indian tribe" means 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)(emphasis added).	(a) Subject to subsection (b), the Frank's Landing Indian Community in the State of Washington is hereby ***recognized***; (1) ***as eligible for the special programs and services provided by the United States to Indians because of their status as Indians*** and is recognized as eligible to contract, and to receive grants, under the Indian Self-Determination and Education Assistance Act for such services, but 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; and (2) as a ***self-governing*** dependent Indian community that is not subject to the jurisdiction of any federally recognized tribe.

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	Pub. L. No. 103-435, 108 Stat. 4566 (November 2, 1994)(emphasis added).

The Defendants have attempted to mine ambiguity from this clear language. *See* (Doc. 38) Defs.' Resp. at 17 ("The Frank's Landing Acts are ambiguous in that they use terms generally reserved for federally recognized tribes…while at the same time stating that the Plaintiff is not a federally recognized tribe."). The Supreme Court has addressed instances where statutory language varies from the common use of the same language:

> There is no opinion of ours, and none written by any court or put forward by any commentator since Aristotle, which says, or even suggests, that "dissonance" between ordinary meaning and the unambiguous words of a definition is to be resolved in favor of ordinary meaning. If that were the case, there would hardly be any use in providing a definition. No, the true rule is entirely clear: "When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."

Bond v. United States, 572 U.S. ___; 134 S. Ct. 2077, 2096 (2014)(quoting *Stenburg v. Carhart*, 530 U.S. 194 (2000)); *see also Lawson v. Suwannee Fruit & S.S. Co*., 336 U.S. 198, 201 (1949)("Statutory definitions control the meaning of statutory words ... in the usual case.").

Congress's recognition of the Community is certainly unique, but that does not mean that the language Congress employed in recognizing the Community is ambiguous. Further, the Community's unique legal status does not render IGRA's definition of the term "Indian tribe" ambiguous when applied to the Community.

The language Congress used in recognizing the Community mirrored the language Congress used in defining the term "Indian tribe" in IGRA. There is no ambiguity about that

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fact. Congress declared the Community to be "self-governing." It also recognized the Community "as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." Pub. L. No. 103-435. The Defendants may wish to establish a bright-line rule that would exclude the Community from qualifying as an "Indian tribe" under IGRA, but the Defendants cannot ignore the words selected by Congress to achieve its policy preference. *See Sigmon Coal Co.*, 534 U.S. at 462 ("We will not alter the text in order to satisfy the policy preferences of the Commissioner."); and, *Utility Air Regulatory Group v. Environmental Prot. Agency*, 573 U.S. ___; 134 S.Ct. 2427, 2445 (2014)("An agency has no power to 'tailor' legislation to bureaucratic policy goals by rewriting unambiguous statutory terms.").

Congress recognized the Community as "[a] community of Indians, which 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] as possessing powers of self-government."[1] *See* Pub. L. No. 103-435; and, 25 U.S.C. § 2703(5). The inquiry must end there. *See Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992)("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' ") (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)) (internal citations omitted).

[1] The Defendants hang their hat on the inclusion of the phrase "by the Secretary" in IGRA's definition of the term "Indian tribe". *See* (Doc. 38) Defs.' Resp. at 19. As explained below, the inclusion of that phrase does not preclude the Community from constituting an "Indian tribe" under IGRA, because the Secretary cannot override or ignore Congress' recognition of the Community, and because the Secretary has already recognized the Community as eligible for Indian programs and services.

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Because the Defendants' March 6th Decision is not in accord with this clear and unambiguous language, it is arbitrary, capricious, and not in accordance with law.

B. Even if the Statutory Language Were Ambiguous, the Defendants' Interpretation Would Be Unreasonable Because It Ignores Entire Subsections Adopted By Congress, And It Applies Unrelated Statutory Definitions.

The Defendants assert that the March 6th Decision is entitled to deference under *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984), but this Court owes no such deference to the March 6th Decision.

In the first instance, an agency decision is only owed deference under *Chevron* if the language used by Congress is ambiguous. *See Ramirez-Zavala v. Ashcroft*, 336 F.3d 872, 875 (9th Cir. 2003)("Under *Chevron*, we must consider first 'whether Congress has directly spoken to the precise question at issue.'")(quoting *Chevron*). Judicial examination of a legal question does not proceed any further where Congress has clearly expressed its intent with unambiguous statutory language. *See Chevron*, 467 U.S. at 842-43. As explained above, Congress unequivocally recognized the Community as eligible to receive federal programs and services provided to Indians because of their Indian status, and as a self-governing Indian community. The very language used by Congress unequivocally establishes that the Community is an "Indian tribe" under IGRA's definition of that term. In the event that the Court determines IGRA and the 1994 Frank's Landing Act to be ambiguous, the Court must nevertheless reject the Defendants' arguments as unreasonable. *See Navarro v. Encino Motorcars, LLC*, 780 F.3d 1267 (9th Cir. 2015) ("If the agency read out a word altogether, its interpretation likely would be unreasonable."); and *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991)("But

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administrative interpretation of a statute contrary to language as plain as we find here is not entitled to deference.").

In this instance, the Defendants have attempted to (i) ignore clear directives by Congress; (ii) render entire requirements in IGRA superfluous; (iii) find an amendment to IGRA by implication; (iv) read passages of the 1994 Frank's Landing Act out of existence; (v) rely upon floor statements from individual members of Congress that are contravened by legislative action; and (vi) rely upon case law inapplicable to the question at issue. Taken individually, each of these actions would constitute an unreasonable interpretation of IGRA and the 1994 Frank's Landing Act that is arbitrary, capricious, and not in accordance with law. Together, these actions amount to a tortured reading of statutory language to reach an objective that is at odds with Congressional intent, is entitled to no deference under any canon of statutory construction, and is arbitrary, capricious, and not in accordance with the law.

1. The Community has been recognized as eligible for federal services provided to Indians because of their Indian status.

The Defendants have rested their argument on the assertion that the Community has not been recognized "by the Secretary" as eligible for federal services provided to Indians because of their Indian status. *See* (Doc. 38) Defs.' Resp. at 1 ("IGRA explicitly defines 'Indian tribes'…as those groups recognized by the Secretary of the Interior ('Secretary') as eligible for [Indian] programs and services…); at 9 ("IGRA defines 'Indian Tribe' as a group 'recognized as eligible *by the Secretary*…'")(emphasis in original); and, at 15 (stating "…Interior's broader position [is] that IGRA gaming is available only to federally recognized tribes based on the 'recognized by the Secretary' clause in IGRA…").

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The 1994 Frank's Landing Act makes it clear that Congress recognized the Community "as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.]" Pub. L. No. 103-435. The Defendants' argument suggests that the Secretary has the discretion to make an independent determination as to whether the Community is eligible "for the special programs and services provided by the United States to Indians because of their status as Indians" in accordance with 25 U.S.C. § 2703(5)(A). *See* (Doc. 38) Defs.' Resp. at 15 ("…Interior's broader position [is] that gaming is available only to federally recognized tribes based on the 'recognized by the Secretary' clause in IGRA…").

Stated simply, the Secretary does not have the authority or discretion to refuse to recognize the Community as eligible for the special programs and services provided by the United States to Indians, because Congress has already extended that recognition. The United States Supreme Court has held, "however broad an administrative agency's discretion in implementing a regulatory scheme may be, the agency may not ignore a relevant Act of Congress." *Community Television of Southern California v. Gottfried*, 459 U.S. 498, 516 (1983). The Secretary cannot ignore the fact that Congress, in the exercise of its plenary authority over Indian affairs, has already recognized the Community as eligible for the programs and services described in § 2703(5)(A). *See Spokane Tribe of Indians v. Washington*, 28 F.3d 991, 996 (9th Cir. 1994)(explaining that Congress has "complete control over Indian affairs.").

In the field of Indian law, any power vested in the Secretary to recognize the status of Indian groups is delegated by Congress. *See, e.g.*, *Native Village of Noatak v. Hoffman*, 896

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F.2d 1157, 1160 (9th Cir. 1990) ("It is true that section 1362 speaks of recognition by the Secretary of the Interior, not Congress, but the Secretary is only using power delegated by Congress."), rev'd on other grounds; *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991)(holding that Congress did not abrogate the State of Alaska's sovereign immunity from suit to allow a suit by the Village); and, *Winnemucca Indian Colony v. United States*, 837 F. Supp. 2d 1184, 1190 (D. Nev., 2011) ("Congress has delegated to the Commissioner of Indian Affairs (head of the BIA), through the Secretary of the Interior (head of the DOI), the task of recognizing Indian tribes, and it has authorized the President to promulgate applicable regulations through these agencies.")(citations omitted).

In *Hoffman*, the Ninth Circuit Court of Appeals addressed the very issue of whether a separate secretarial recognition was required where Congress had already recognized the tribal status of a group under a special statute (there, the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq*.). The Court stated, "If Congress has recognized the tribe, *a fortiori* the tribe is entitled to recognition and is in fact recognized by the Secretary of the Interior." 896 F.2d at 1160, reversed on other grounds, *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991).[2]

At some point in the future, the Secretary may be called upon to make a determination under § 2703(5)(A) regarding whether some other group of Indians is eligible "for the special

[2] On appeal, the United States Supreme Court reversed the decision of the Ninth Circuit Court of Appeals on the question of whether Congress had abrogated the State of Alaska's sovereign immunity for purposes of the Villages' lawsuit. *See* 501 U.S. at 786-87. The Supreme Court did not render a decision on whether a separate secretarial determination was required under the statute in question, leaving the reasoning of the Court of Appeals intact on the issue of congressional recognition.

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programs and services provided by the United States to Indians because of their status as Indians." But, with respect to the Community, the Secretary does not have discretion to make that determination, because Congress has already made it: "(a) Subject to subsection (b), the Frank's Landing Indian Community in the State of Washington ***is hereby recognized…(1) as eligible*** for the special programs and services provided by the United States to Indians because of their status as Indians…." Pub. L. No. 103-435 (emphasis added). For purposes of § 2703(5)(A), the Community "is in fact recognized by the Secretary of the Interior." 896 F.2d at 1160.[3]

2. The Defendants' interpretation would render most of IGRA's definition of "Indian tribe" superfluous.

Congress established a three-prong definition of the term "Indian tribe" within IGRA: 1) the entity must be an Indian tribe, band, nation, or other organized group or community of Indians; 2) the entity must be recognized by the Secretary as eligible for programs and services provided by the United States to Indians because of their Indian status; and 3) the entity must possess powers of self-government. *See* 25 U.S.C. § 2703(5).

The Defendants suggest that the only operative language in § 2703(5) is the requirement that a group be "recognized as eligible *by the Secretary* for the special programs and services

[3] In its initial brief to the Court, the Community provided a number of examples of services provided to the Community by the Secretary. *See* (Doc. 33) Mot. Summ. J. at 3-4. . While the Secretary has not issued an explicit determination that the Community is eligible for those services, the provision of the services themselves constitutes such recognition in deed, if not in word. There is nothing "circular" about this reasoning, as the Defendants have suggested. (Doc. 38) Defs.' Resp. at 21.

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provided by the United States to Indians because of their status as Indians." *See* (Doc. 38) Defs.' Resp. at 9 (emphasis in original).

Aside from an initial recitation of IGRA's statutory definition of "Indian tribe" at the outset of their brief, the Defendants have entirely ignored the first and third prongs of IGRA's definition: that the Community be a "community of Indians," and that the Community must possess powers of self-government. *See* 25 U.S.C. § 2703(5). The Defendants' brief contains no mention of the third prong, or any statement regarding the Community's powers of self-government.[4]

The very language Congress employed in defining the term "Indian tribe" in IGRA indicates that a self-governing Indian community like the Community could constitute an "Indian tribe" for purposes of IGRA: "The term 'Indian tribe' means any Indian tribe, band, nation***, or other organized group or community of Indians***…." 25 U.S.C. § 2703(5)(emphasis added). This language establishes three different categories of entities that could *potentially* constitute an Indian tribe for purposes of IGRA:

1) Indian tribes, Indian bands and Indian nations;

2) Organized groups of Indians; and

3) Communities of Indians.

This Court recognized as much in its order dismissing the National Indian Gaming Commission from this suit: "IGRA includes both 'Indian tribe' and 'community of Indians.'" *See* (Doc. 29) Order at 7, fn.3.

[4] This Court affirmed that the Community possesses powers of self-government in *Nisqually Indian Tribe v. Gregoire*, 649 F. Supp. 2d 1203 (W.D. Wash. 2009).

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The inclusion of the category "Indian tribe" within the definition of the term "Indian tribe" would render the definition of the term redundant, unless the definition also included other types of groups – such as a "community of Indians" – within the categories of entities that could potentially constitute an "Indian tribe" under IGRA. Courts and agencies charged with interpreting a statute must do so in a way that does not render provisions in the statute redundant. *See Kenaitze Indian Tribe v. Alaska*, 860 F.2d 312, 317 (9th Cir. 1984)("We cannot adopt a statutory interpretation that renders one portion of the statute redundant when there is another interpretation that avoids such redundancy."). Reading the words, "organized group or community of Indians" out of IGRA entirely would also render those words superfluous, contrary to yet another longstanding canon of statutory construction. *See Chubb Custom Ins. Co. v. Space Systems/Loral Inc*., 710 F.3d 946, 965 (9th Cir. 2013)("In interpreting statutes, we observe the cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.")(quotations omitted). A reading that renders statutory language superfluous or mere surplus would be impermissible, even under *Chevron*. *See Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Federal Labor Relations Authority*, 898 F.2d 753, 759 (9th Cir. 1990)(finding an agency's interpretation of a statute to be impermissible because it renders statutory subsections superfluous);

The Defendants also ignore the requirement that an entity must show that it possesses powers of self-government before it can qualify as an "Indian tribe" under IGRA. The Defendants attempt to diminish the Community's legal status by describing it as a tribal

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organization that is merely entitled to federal services under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. 450 *et seq*. (the "Self-Determination Act"). (Doc. 38) Defs.' Resp. at 21. In their brief, the Defendants speculate that recognizing the Community's status under IGRA would lead to gaming by all Indian organizations that receive federal services: "Under [the Community's] theory, ***all*** groups receiving benefits from the United States because of their status as Indians would be entitled to game." (Doc. 38) Defs.' Resp. at 21 (emphasis added). All such groups must also possess powers of self-government before satisfying IGRA's definition. Defendants offer up no concrete example of such groups, likely because they cannot; yet they suggest ruling in favor of the Community opens some undefined floodgate.

Similar to IGRA, the Self-Determination Act defines the term "Indian tribe" to mean "any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation…which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians[.]" 25 U.S.C. § 5304(e). But IGRA's definition contains an additional requirement that the Self-Determination Act does not: the requirement that the Indian tribe be "recognized as possessing powers of self-government". 25 U.S.C. § 2703(5). As explained above, Congress has already recognized the Community as eligible for services ***and*** as possessing powers of self-government. *See* 25 U.S.C. § 2703(5)(B).

The Defendants' interpretation of IGRA would render § 2703(5)(B) meaningless. A court, however, must interpret a statute, whenever possible, in a way that gives meaning to

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every word chosen by Congress. *See Ransom v. FIA Card Services, N.A*, 562 U.S. 61, 70 n.14 (2011)(explaining that the Court must give effect to every word of a statute wherever possible)(quoting *Leocal v. Ashcroft*, 543 U.S. 1 (2004)). Thus, the Defendants' attempt to read § 2703(5)(B) out of IGRA is unreasonable, and entitled to no deference.

3. The Defendants' interpretation relies upon an implied repeal or amendment to IGRA's definition of "Indian tribe" without evidence of Congressional intent.

Beginning with the March 6th Decision, the Defendants have claimed that the 1994 Tribal List Act has some bearing on whether the Community constitutes an "Indian tribe" under IGRA. *See* DOI AR 0080 ("[the 1994 Tribal List Act] also provides a simple 'bright line' rule that preserves government resources around such matters"); and (Doc. 38) Defs.' Resp. at 9 (asserting that status as a federally recognized Indian tribe under the 1994 Tribal List Act is necessary to qualify as an "Indian tribe" under IGRA).

In their brief, the Defendants argue that "the 'Secretary clause' [in IGRA] necessarily incorporates the [1994 Tribal] List Act and operates as a term of art to indicate that federal recognition is required." *Id*. at 19; *see also Id*. at 21 ("the IGRA definition of 'Indian tribe' necessarily incorporates the List Act…"). Since an earlier-enacted statute cannot "incorporate" the language of a later-enacted statute, the Defendants' argument must be taken to mean that the 1994 Tribal List Act repealed or amended IGRA's definition of "Indian tribe."

A cursory examination of each statute reveals that Congress used two separate definitions of the term "Indian tribe" to achieve two separate purposes:

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From IGRA:	**From the 1994 Tribal List Act**:
(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which— (B) 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).	(2) The term "Indian tribe" means 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(2).

Had Congress intended to make the 1994 Tribal List Act's definition of "Indian tribe" applicable to IGRA, or any other federal statute, it would have done so explicitly. But it did not. This Court acknowledged that fact in its August 15, 2016 Order in this case, stating:

> Moreover, the List Act appears to be irrelevant to any qualification under the IGRA because the IGRA includes both "Indian tribe" and "community of Indians" (25 U.S.C. § 2710(b)(1)) whereas the List Act defines "Indian tribe" to include a "community that the [Secretary] acknowledges to exist as an Indian tribe" (25 U.C.S. § 479a). In other words, the IGRA does not explicitly state that a community of Indians must be a federally recognized Indian tribe.

Doc. 29 at fn.3.

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The Defendants would have this Court find a repeal of IGRA's definition of "Indian tribe" by implication, contrary to yet another longstanding canon of statutory construction. *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974)(explaining that "repeals by implication are not favored" absent "clear and manifest" Congressional intent). The Defendants have provided no evidence that Congress intended to repeal IGRA's definition of "Indian tribe" when it enacted the 1994 Tribal List Act. As the Community has already demonstrated, Congress often supplies different definitions of the term "Indian tribe" when it enacts different statutes.[5] The fact that Congress adopted different definitions of the defined term in IGRA and the 1994 Tribal List Act is not abnormal in the context of federal Indian law.

A statutory interpretation that relies upon a repeal or amendment of express statutory language by implication, without any evidence of Congressional intent to do so, is unreasonable and entitled to no deference.

[5] The Defendants point to the Indian Child Welfare Act, Pub. L. 95-608, 92 Stat. 3069 ("ICWA") as an example of a statute with a similar definition of the term "Indian tribe" that is only applicable to federally-recognized Indian tribes. *See* (Doc. 38) Defs.' Resp. at 14. ICWA defines "Indian tribe" to mean "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, including any Alaska Native village as defined [in the Alaska Native Claims Settlement Act]." 25 U.S.C. § 1903(8). At the time Congress enacted ICWA in 1978, Alaska Native villages were not considered federally-recognized Indian tribes. Those entities did not become full federally-recognized Indian tribes until 1993, when they were administratively recognized by the Assistant Secretary of the Interior. *See* 58 Fed. Reg. No. 202, 54,364-369 (October 21, 1993). ICWA is another example of Congress applying a special purpose Indian statute to entities that were not federally- recognized Indian tribes, highlighting the fact that it is common for Congress to apply specific statutes to tribes and tribal entities that are not full-fledged federally-recognized Indian tribes.

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4. The Defendants' interpretation also renders key provisions of the 1994 Frank's Landing Act superfluous, and relies upon Congressional floor statements contravened by legislative action.

When it enacted the 1994 Frank's Landing Act, Congress expressed its intent regarding the interplay of the Frank's Landing Act and IGRA by acknowledging IGRA and prohibiting the Community from engaging in class III gaming: "Notwithstanding any other provision of law, the Frank's Landing Indian Community shall not engage in any class III gaming activity (as defined in section 3(8) of the Indian Gaming Regulatory Act of 1988). Pub. L. No. 103-435. The term "class III gaming" is created by, and not did not have meaning prior to the enactment of, IGRA. Yet, the Defendants assert that there is no interplay of the Frank's Landing Act and IGRA.

The Defendants argue that the express language in the 1994 Frank's Landing Act prohibiting the Community from engaging in class III gaming is inoperative, and thus, superfluous. *See* (Doc. 38) Defs.' Resp. at 19 (arguing that language relating to class III gaming does not authorize class I and class II gaming). In support of this argument, the Defendants reference statements placed into the record by members of Congress. *Id*. at 4, 19.[6]

The Community has already explained that those statements were manufactured by lobbyists for the Nisqually Tribe after Congress had already rejected an amendment to expressly prohibit the Community from engaging in all forms of gaming under IGRA. (Doc. 33) Mot.

[6] The Defendants have also stated that it is "plausible" that Congress added the class III gaming prohibition to apply in the event that the Community "eventually achieves federal recognition and otherwise qualifies under IGRA…." (Doc. 38) Defs.' Resp. at fn.5. The Defendants have not cited any statutory language, precedent, or other authority to demonstrate that Congress intended the 1994 Frank's Landing Act to be read in this fashion.

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Summ. J. at 16-17. Those statements cannot override the clear actions of Congress in the exercise of its plenary legislative authority. *See Sigmon Coal Co.*, 534 U.S. at 457 ("Floor statements from two Senators cannot amend the clear and unambiguous language of a statute. We see no reason to give greater weight to the views of two Senators than to the collective votes of both Houses, which are memorialized in the unambiguous statutory text.").

If Congress had not considered the Community to constitute an "Indian tribe" for purposes of IGRA, Congress could have remained silent on the classes of gaming the Community could operate, or Congress could have explicitly prohibited the Community from engaging in all forms of gaming under IGRA. It did neither. In fact, Congress rejected a proposed amendment to expressly prohibit the Community from engaging in all forms of gaming under IGRA.[7]

The Defendants' argument would render the class III gaming prohibition to be inoperative surplus. Upholding the Defendants' determination would write into the Franks

[7] The Defendants have argued that IGRA's abrogation of tribal sovereign immunity is evidence that groups like the Community, which is not a federally-recognized Indian tribe for all purposes, do not constitute an "Indian tribe" under IGRA. (Doc. 38) Defs.' Resp. at 10. The Community has not asserted that it is cloaked with sovereign immunity, and that question is not at issue in this case. Nevertheless, it is important to note that IGRA's abrogation of tribal sovereign immunity allows states and other Indian tribes to file lawsuits in federal court to enforce class III gaming compacts. *See* 25 U.S.C. § 2710(d)(7)(A)(ii)(granting jurisdiction to federal courts "to enjoin a ***class III*** gaming activity"' in violation of a tribal-state gaming compact)(emphasis added). The 1994 Frank's Landing Act prohibits the Community from engaging in class III gaming activities. Even if the Community is not cloaked with tribal sovereign immunity, IGRA's partial abrogation of immunity to enjoin class III gaming activities does not serve as evidence that the Community cannot engage in class II gaming under IGRA. To the contrary, Congress' express language prohibiting the Community from engaging in class III gaming could be read in harmony with the Defendants' suggestion that the Community is not cloaked with sovereign immunity.

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Landing Act the very amendment that Congress rejected. Defendants attempt to portray a material weakness to their argument as a strength.

5. The Defendants' interpretation of IGRA's definition of "Indian tribe" relies upon judicial statements with no precedential value.

The Defendants devote nearly four pages of their brief to a string citation to support their assertion that, "[w]ithout exception, courts have held that IGRA applies only to federally recognized tribes." (Doc. 38) Defs.' Resp. at 10-13. A reading of each of the cases cited by the Defendants reveals that none of those courts "have held" that IGRA applies exclusively to federally-recognized Indian tribes. The application of § 2703(5) was not at issue in any of the cases cited by the Defendants. The quoted passages cited by the Defendants barely constitute dicta, let alone binding judicial holdings; instead, the quoted passages are analysis-free statements made in passing on the way to judicial decisions on other issues. Thus, those cases do not constitute "overwhelming precedent" in support of the Defendants' position. In fact, those cases don't constitute precedent at all.

The Defendants highlight an unpublished case from the U.S. District Court for the Southern District of Alabama as precedent for their assertion that only fully-recognized Indian tribes may engage in gaming under IGRA. (Doc. 38) Defs.' Resp. at 13, citing *Alabama ex rel Rich v. 50 Serialized JLM Games, Inc*., Civ. No. 14-0066-CG-B, 2015 WL 2365417 (S.D. Ala. March 30, 2015). *Alabama ex rel Rich* involved the MOWA Band of Choctaw Indians' (the "Band") assertion of sovereign immunity from suit. The MOWA Band was not a federally-recognized Indian tribe, as the Bureau of Indian Affairs had previously denied its petition for

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federal acknowledgment. *Id*. at 2. In its defense against a lawsuit by the State of Alabama, the Band asserted that it constituted "a tribe at common law," and that it was therefore cloaked with sovereign immunity. *Id*.

The MOWA Band did not advance an argument that it satisfied IGRA's definition of the term "Indian tribe," but instead relied upon its assertion that it satisfied a common law standard for tribal status. The court noted that the MOWA Band "[was] not federally recognized by the Secretary of the Interior." *Id*. at 8. While the court did state that only federally-recognized Indian tribes could engage in gaming under IGRA, it did so in a much different context. The MOWA Band did not (and could not) point to any act of Congress recognizing its self-governing status under federal law, and its eligibility for Indian programs and services provided by the federal government. In fact, the Court rejected the MOWA Band's argument by noting that IGRA could only apply to tribes "recognized as eligible for federally recognized programs and services by the Secretary of the Interior." *Id*. at 6.[8]

Alabama ex rel Rich has no application to this case. *See White v. City of Pasadena*, 671 F.3d 918, n3 (9th Cir. 2012)(rejecting unpublished district court opinion as persuasive authority because it did not consider relevant law on point of contention). It is an unpublished opinion that analyzed a different question: whether a group could constitute an Indian tribe under common law for purposes of sovereign immunity. The Court was not analyzing whether a Congressionally–recognized, self-governing Indian community satisfied the statutory definition

[8] Like the Defendants here, the Court conflated this requirement with full federal recognition. As addressed throughout this brief, IGRA's definition includes more than the requirement that a tribe or community of Indians be recognized as eligible for federal services; it also requires a tribe or community to possess powers of self-government.

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of "Indian tribe" under IGRA. Its pronouncements on IGRA's scope have no application beyond that particular decision, are not binding on this Court, and are not applicable to the unique status of the Community.

C. The Indian Law Canons Of Construction Support The Community's Interpretation Of IGRA And The 1994 Frank's Landing Act.

As explained above, the Defendants' interpretations of the 1994 Frank's Landing Act and IGRA's definition of the term "Indian tribe" are wholly unreasonable because they ignore key statutory language, render other language superfluous, rely upon a definition of the term "Indian tribe" supplied by a separate and inapplicable statute, and are not based upon any judicial precedent. Therefore, this Court owes no deference to the Defendants' interpretations.

To the extent that the 1994 Frank's Landing Act and IGRA are ambiguous, the Court must apply the Indian law canons of construction to discern Congress's intent. *See Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)(explaining that ambiguous statutes must be construed liberally in favor of Indians); and, *United States v. Errol D., Jr.*, 292 F.3d 1159, 1164 (9th Cir. 2002)(applying the canons of Indian law construction to resolve potential conflict between two statutes in favor of Indian tribe). The canons of Indian law construction guide a court to resolve ambiguous language in a statute in favor of Indians, because of the unique trust relationship between the United States and Indians. *See New York v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

To the extent that there is any ambiguity with respect to the Community's status under IGRA, in light of the 1994 Frank's Landing Act, this Court should resolve that ambiguity in favor of the Community. Congress recognized the Community as a self-governing Indian

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community eligible for the federal programs and services provided to Indians. That is the same standard Congress used when it defined the term "Indian tribe" in IGRA.

Resolving ambiguous language in the 1994 Frank's Landing Act and IGRA in favor of the Community would not be unreasonable or lead to absurd results. To the contrary, the Defendants have acknowledged that the Community's interpretation is both plausible and reasonable:

> [We] recognize 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.

DOI AR 0078 (Memorandum from Scott Keep, Senior Counsel to Kevin Washburn, Assistant Secretary – Indian Affairs (March 3, 2015)).

III. CONCLUSION

Congress was clear in adopting a definition of the term "Indian tribe" when it enacted IGRA. Congress was also clear when it recognized the Community as a self-governing dependent Indian community six years later, using nearly the exact same language as was utilized in IGRA. The language employed by Congress was unmistakable and unambiguous, and any inquiry posed by this case must end with a review of that unambiguous language.

The Defendants refusal to adhere to the unambiguous language of the 1994 Frank's Landing Act and IGRA, as well as their reliance on the 1994 Tribal List Act", was arbitrary, capricious, and not in accordance with the law. For those reasons, and the reasons set forth herein, the Community respectfully asks that this Court deny the Defendants' Motion for

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Summary Judgment, grant the Community's Motion for Summary Judgment, and enter an order granting the declaratory relief sought by the Community.

Date: February 10, 2017

Respectfully submitted,

SCOTT CROWELL

s/ Scott Crowell

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CERTIFICATE OF SERVICE

I hereby certify that, on February 10, 2017, I filed the foregoing FRANK'S LANDING INDIAN COMMUNITY'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF FRANK LANDING'S MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record in this matter.

DATED: February 10, 2017

s/ Scott Crowell
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