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' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: MARCH 3, 2017 (SET BY SCHEDULING ORDER)

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I. INTRODUCTION

The Indian Gaming Regulatory Act's (IGRA) plain language clearly limits gaming to federally-recognized tribes. IGRA defines "Indian tribe" as groups "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)(A) (emphasis added). The Secretary publishes "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). Plaintiff Frank's Landing Indian Community admittedly is not on the list of tribes recognized by the Secretary as eligible for the special programs and services provided by the United States to Indians. As such, Plaintiff is not an "Indian tribe" entitled to game under IGRA.

Even if the statutory language was not clear, Interior is entitled to *Chevron* deference in its interpretation that IGRA allows only federally-recognized tribes to game and that the Frank's Landing Acts (Pub. L. No. 100-153, § 10, 101 Stat. 886, 889 (1987); Pub. L. No. 103-435, § 8, 108 Stat. 4566 (1994)) do not authorize Plaintiff to engage in Class II gaming. Interior's determination that Congress did not intend Plaintiff to engage in Class II gaming was a proper construction of the statute given the language of IGRA, court cases finding that IGRA is available only to federally-recognized tribes, and the language and legislative history of the Frank's Landing Acts. As such, Defendants respectfully request this Court enter summary judgment in their favor.

II. ARGUMENT

In Federal Defendants' Opposition to Frank's Landing Indian Community Motion for Summary Judgment and Cross-Motion for Summary Judgment ("Defendants' Cross-Motion"), Defendants demonstrated that the "Secretary" clause in the definition of "Indian tribe" shows a clear intent to restrict IGRA gaming to federally-recognized tribes. ECF No. 38; *see also* S. REP. NO. 100-446, at *16 (1988) (legislative history for IGRA noting in definitions section "(5) Indian tribe (federally recognized)"). In the alternative, Defendants argued that the Frank's Landing Acts are ambiguous because they use language — "recognized as eligible for the special

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programs and services provided by the United States to Indians because of their status as Indians" — that is typically used to refer to federally-recognized tribes, while at the same time expressly stating that Plaintiff is *not* a federally-recognized tribe. Defs.' Cross-Mot. at 17–18. Defendants demonstrated that Interior's determination was reasonable, particularly given the Acts' language and legislative history.

Although urging that this case is simple, Plaintiff's purported "plain meaning" interpretation reads the "Secretary" clause entirely out of IGRA. *See* Frank's Landing Indian Cmty. Resp. in Opp'n to Defs.' Mot. for Summ. J. & Reply in Supp. of Mot. for Summ. J. 1–2, ECF No. 39 ("Pl.'s Opp'n"). Plaintiff also ignores the ambiguity found in the Frank's Landing Acts and argues against any deference to the agency. These arguments are without merit, as demonstrated below.

A. Recognition by the Secretary is Not Synonymous with Recognition by Congress.

Plaintiff's Opposition is replete with charts and bullet points purportedly breaking down the relevant statutory definitions into distinct clauses, with Plaintiff arguing that it is an "Indian tribe" under IGRA because it is both "eligible for the special programs and services provided to the United States to Indians" and has "powers of self-governance." *Id.* at 3–4, 11, 15. But these are only two of the three requirements in the IGRA definition of "Indian tribe." Under Plaintiff's interpretation, IGRA's third requirement, the "Secretary" clause, either has no meaning whatsoever or in fact means "recognized by Congress in a separate statute that did not involve any secretarial determination." Notably, "Secretary" is a defined term in IGRA: "[t]he term 'Secretary' means the Secretary of the Interior." 25 U.S.C. § 2703(10). Thus, Plaintiff is not only trying to read the "Secretary" clause out of IGRA altogether, but is also attempting to read out a defined term. This is an obviously incorrect reading of IGRA. *See United States v. Smith*, 499 U.S. 160, 183 n.8 (1991) (Stevens, J., dissenting) (noting that statutory construction must give meaning to each element of the statute in a sensible manner that does not render it superfluous).

Plaintiff attempts to circumvent the "Secretary" clause by arguing that because Congress recognized it as eligible for services and programs provided by the United States to Indians

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because of their status as Indians, the Secretary has necessarily recognized Plaintiff by definition. Pl.'s. Opp'n 8. Not so. Congress explicitly stated that nothing in the Frank's Landing Acts "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 Frank's Landing Act. Notably, Congress added this language disclaiming federal recognition to the Frank's Landing Act on the same day that it passed the List Act, which vested the Secretary with the authority to "recognize" Indian tribes on behalf of the United States. Given that Congress *explicitly declined* to recognize Plaintiff as an Indian tribe, and did so on the same day it established the process for determining federal recognition, it seems unlikely that Congress nevertheless "implicitly" designated Plaintiff as an Indian tribe solely for the purposes of IGRA.

Plaintiff relies heavily on *Native Village of Noatak v. Hoffman*, 896 F.2d 1157 (9th Cir. 1990), *rev'd* 501 U.S. 775 (1991), in support of its argument that IGRA's "Secretary" clause does not actually require secretarial recognition. The statute at issue in *Hoffman* gave district courts "original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." *Id.* at 1160 (citing 28 U.S.C. § 1362). Although Alaska Native Villages were not formally designated as federally-recognized Indian tribes until 1993 (Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 58 Fed. Reg. 54,364, 54,365–66 (Oct. 21, 1993)), the *Hoffman* court concluded that two such Villages (Noatak and Circle Village) had nevertheless been "recognized by the Secretary of Interior" within the meaning of the statute. 896 F.2d at 1160. The court searched general federal law for clues as to how to determine when an entity was "recognized by the Secretary" within the meaning of § 1362, and found that Noatak satisfied that standard because the Secretary had approved Noatak's governing body pursuant to the Indian Reorganization Act, 25 U.S.C. § 5123 (IRA). *Id.* Similarly, the court held that Circle Village had been "recognized by the Secretary" per its inclusion as a "Native Village" in the Alaska Native Claims Settlement Act, 43 U.S.C. § 1610 (ANCSA). *Id.*

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Plaintiff argues that *Hoffman* stands for the proposition that "separate secretarial recognition [is not] required where Congress had already recognized the tribal status of a group under a special statute." Pl.'s Opp'n 9. Plaintiff then claims that the Frank's Landing Acts are the type of "special statutes" that allows Plaintiff to be "recognized by the Secretary" within the meaning of IGRA even without recognition under the List Act. According to Plaintiff, IGRA's "Secretary" clause is therefore satisfied because Congress already "recognized" Plaintiff, overriding Interior's need or authority to do so separately. *Id.* at 9–10.

There is no support for Plaintiff's reading of *Hoffman*. *Hoffman* was decided before the List Act was enacted. The court specifically noted, "[n]o statute expressly outlines how a tribe may become duly recognized for purposes of section 1362 jurisdiction." 896 F.2d at 1160. That might have been the case in 1990, thus making it reasonable for the court to rely on a secretarially-approved IRA constitution, or congressional designation as an Alaska Native Village under ANCSA, as proof of "recognition." But that is no longer true subsequent to the enactment of the List Act in 1994. While the *Hoffman* court faced an absence of congressional guidance as to what constituted "secretarial recognition" in the abstract, Congress gave concrete meaning to that statutory requirement when it passed the List Act.

Further, the Ninth Circuit subsequently undermined *Hoffman*'s reasoning, at least as it applies to Plaintiff. In *Pit River Home & Agricultural Cooperative Association v. United States*, 30 F.3d 1088 (9th Cir. 1994), the panel examined whether a tribal association had been "recognized by the Secretary" under § 1362. Finding that it had not, the court reasoned:

> Even if we assume that the Association is a tribe or band, we find it has not been "duly recognized" by the Secretary. No statute or treaty identifies the Association as a federally recognized tribe. Nor were the Association's original and amended Articles of Association and By-laws adopted pursuant to § 476 of the IRA, the statute governing the formal organization of an Indian tribe, which requires ratification at a special election authorized and called by the Secretary. See 25 U.S.C. § 476 (1934 & 1970). The BIA officials who helped the Association organize expressly stated that the Association was not organized under the IRA.

Id. at 1095. This holding is directly on point with the case at bar. Although Plaintiff is a self-governing entity, it does not have a treaty or IRA charter, and its enacting statute expressly states

that it is not a federally-recognized Indian tribe. *Pit River* shows that to whatever extent *Hoffman* might have been correctly reasoned with regard to Noatak and Circle Village in 1990, it has no application here.

Plaintiff also emphasizes the *Hoffman* court's holding that "section 1362 speaks of recognition by the Secretary of the Interior, not Congress, but the Secretary is only using power delegated by Congress. 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. But while Congress certainly recognized Plaintiff as a self-governing Indian community, IGRA requires the additional step of secretarial recognition. In the List Act, Congress delegated that authority to the Secretary, and the Secretary's exercise of its explicit authority does not "override" Congress. And if Congress had recognized Plaintiff as an Indian tribe, the Secretary would include Plaintiff on the list of federally-recognized tribes under the List Act. Here, Congress expressly declined to do so.

B. The Fact that Plaintiff is a "Community" Does Not Mean it Satisfied IGRA.

Plaintiff next argues that Interior's interpretation is unreasonable because IGRA's definition of "Indian tribe" includes multiple groups, such as Indian tribes, Indian bands, Indian nations, organized groups of Indians, and communities of Indians. Pl.'s Opp'n at 6, 10–14. Because Congress recognized Plaintiff as a "community," Plaintiff claims that limiting IGRA to federally-recognized Indian tribes would impermissibly read out all of these other entities from the statute altogether. *Id.* at 12. This interpretation is without merit.

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(2) (emphasis added). Thus, a community could be an "Indian tribe" under the List Act, so long as it has been recognized by the Secretary, belying Plaintiff's argument that the federal-recognition requirement impermissibly narrows IGRA's similar definition. In addition, all federally-recognized tribes necessarily are communities, as the federal acknowledgment regulations require petitioners to demonstrate, *inter alia*, that they comprise a distinct community and have since 1900. 25 C.F.R. § 83.11(b). Plaintiff's attempt to split

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IGRA's definition of "Indian tribe" into various distinguishable subgroups of entities thus misses the point that Congress has designated all such entities as examples of "Indian tribes," at least so long as they are recognized by the Secretary.

The Department of Health and Human Services (HHS) recently rejected a variation of Plaintiff's argument. In the Patient Protection and Affordable Care Act (ACA), Congress limited the Indian-specific benefits to members of federally-recognized "Indian tribes." *See, e.g.*, 81 Fed. Reg. 94,058, 94,128–29 (Dec. 22, 2016) (acknowledging federal recognition requirement). The ACA provisions setting out these Indian benefits, however, incorporated the definition of "Indian tribe" from different statutes with slightly different definitions. *See, e.g.*, 42 U.S.C. § 18031(c)(6)(D) (incorporating definition from Indian Health Care Improvement Act (IHCIA)); 42 U.S.C. § 18071(d)(1) (incorporating definition from the Indian Self-Determination and Education Assistance Act (ISDEAA)); 26 U.S.C. § 5000A(e)(3) (incorporating definition from the Internal Revenue Code). For example, the Internal Revenue Code included "pueblos" in its definition of "Indian tribe," while the other two statutes did not, and the IHCIA was the only statute to include "groups" as an eligible entity. Commenters expressed concern over whether the various ACA benefits would be withheld from members of pueblos or "groups" based on the definitional distinctions. In response, HHS noted in its Final Rule that:

> We accept that the definitions of "Indian" as provided under [these statutes] operationally mean the same thing: an individual who is a member of an Indian tribe. In their definitions of an "Indian tribe," [these statutes] have nearly identical language that refers to a number of Indian entities (tribes, bands, nations, or other organized groups or communities) that are included in this definition on the basis that they are "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians."

77 Fed. Reg. 18,310, 18,346 (Mar. 27, 2012).

HHS did not say that "federally-recognized Indian tribes" are one discrete category of entity for the purposes of these definitions, pueblos a second category, "communities" a third, "groups" a fourth, and so on. Rather, HHS recognized that this common definition of "Indian tribe" across federal statutes was a general term of art that should not be dissected into numerous

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sub-categories, each of which is eligible for separate services.[1] *Id.* HHS correctly noted that in practice, the term "federally-recognized Indian tribe" *necessarily includes* Indian tribes, bands, organized groups, communities, pueblos, and Alaska Native Villages. And HHS specifically rejected arguments that these definitions should be read as including members of entities that were not federally-recognized tribes. *Id.* at 18,345–46; *see also Pit River*, 30 F.3d at 1095 ("Even if we assume that the Association is a tribe or band, we find it has not been 'duly recognized' by the Secretary.").

C. Plaintiff's Argument Could Open the Doors to Other Non-Federally-Recognized Entities Attempting to Game.

Plaintiff also argues that even if it is allowed to game, IGRA's "self-governance" clause would prevent a subsequent flood of non-tribal gaming applicants because none of the entities that are "eligible for services because of their status as Indians" exercise powers of self-governance. Pl.'s Opp'n 13. This ignores the cases cited in Defendants' Cross-Motion — *Pink v. Modoc Indian Health Project, Inc.*, 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 Resource Tribes*, 801 F.2d 373, 375–76 (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); and *J.L. Ward Associates, Inc. v. Great Plains Tribal Chairmen's Health Board*, 842 F. Supp. 2d 1163, 1173 (D.S.D. 2012) (noting cases where courts

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[1] In fact, some courts have held that the phrase "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians" generally refers to federally-recognized tribes, with or without a "Secretary" clause. *See, e.g.*, *Franco v. U.S. Forest Serv.*, No. 2:09-cv-01072-KJM-KJN, 2016 WL 1267639, *8 (E.D. Cal. Mar. 31, 2016) (citing 54 U.S.C. § 300309); *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1215–16 (9th Cir. 2008) (noting that National Historic Preservation Act did not apply to entity prior to its recognition as an Indian tribe by the Secretary). This is (1) yet another example of how the various permutations of federal statutory definitions of "Indian tribe" require federal recognition, (2) another explanation as to why Congress, despite deeming Plaintiff as eligible for federal programs and services, felt compelled to clarify that Plaintiff was not a federally-recognized tribe, and (3) further evidence that Congress's loose treatment of the definition of "Indian tribe" makes IGRA ambiguous within the meaning of *Chevron*.

have found that tribally-authorized entities carrying out self-governance activities are entitled to tribal sovereign immunity) — in which the courts found that various tribal consortia and other organizations were "Indian tribes" for various purposes precisely because they acted as sovereign arms of one or more tribes. For example, the *Ward* court noted:

> In *Hagen*, *Dillon*, and *Weeks*, the Eighth Circuit considered it critical to the issue of entitlement to sovereign immunity that the organizations served as "arms of the tribe" and were established by tribal councils pursuant to the councils' powers of self-government. *See Hagen*, 205 F.3d at 1043 ("[T]he College serves as an arm of the tribe and not as a mere business and is thus entitled to tribal sovereign immunity."); *Dillon*, 144 F.3d at 583 (tribal housing authority established by tribal council pursuant to its powers of self-government was a tribal agency rather than "a separate corporate entity created by the tribe."); *Weeks*, 797 F.2d at 670-71 ("As an arm of tribal government, a tribal housing authority possesses attributes of tribal sovereignty and suits against an agency like the housing authority normally are barred absent a waiver of sovereign immunity.") (internal citation omitted); *see also Native Am. Council of Tribes v. Weber*, No. Civ. 09-4182, 2010 U.S. Dist. LEXIS 48969, 2010 WL 1999352, at *9 (D.S.D. May 18, 2010) ("For a tribal agency to have sovereign immunity, the agency must be established by a tribal council pursuant to its powers of self-government and serve as an arm of the tribe.").

J.L. Ward, 842 F. Supp. 2d at 1171–72. Thus, there are numerous types of entities that would qualify as "Indian tribes" under IGRA pursuant to Plaintiff's statutory interpretation. Plaintiff's argument should be rejected.

D. Interior's Interpretation Does Not Repeal or Amend IGRA's Definition of "Indian Tribe."

According to Plaintiff, by interpreting the Secretary clause as requiring federal-recognition, Interior is amending IGRA's definition of tribe. Interior is doing nothing of the sort. The IGRA definition of "Indian tribe" is still applicable, and one prong of that definition is Secretarial recognition. Congress itself clarified that this was the correct reading of the statute when it explained in the "Section By Section Analysis" of IGRA's Senate Report that in the definitions section, the phrase "Indian tribe" meant "Indian tribe (federally recognized)." S. REP. NO. 446 at 16. Given that the List Act is a definitive list of those groups the Secretary recognizes as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, Interior (and NIGC) properly relies on the List Act to

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determine whether a group is recognized by the Secretary. This list informs the decision of whether a group "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." 25 U.S.C. § 2703(5). It would be error for Interior to ignore this list. *Passamaquoddy Tribe v. Maine*, 75 F.3d 784, 789 (1st Cir. 1996) ("Put simply, courts must recognize that Congress does not legislate in a vacuum.").

And, under the court's reasoning in *Hoffman*, upon which Plaintiff bases much of its argument, it is entirely proper to determine Secretarial recognition through an examination of relevant federal law. As noted, in 1990, relevant statutes may have included the IRA or ANCSA. Since 1994, it has been the List Act.

E. Courts Have Unanimously Concluded that IGRA Applies Only to Federally-Recognized Tribes.

In response to the voluminous case law Defendants cited concerning IGRA's limitation to federally-recognized tribes, Plaintiff argues that all such holdings were either dicta or factually distinct. Pl.'s Opp'n 19–21. Admittedly, few courts have had reason to examine the question in detail. But there is no denying that dozens of courts have unanimously concluded (whether in dicta or more substantively, and whether or not specifically examining non-tribal entities) that IGRA only applies to tribes that are federally-recognized pursuant to the List Act. *See* Defs.' Cross-Mot. 10–13. Should this Court hold that Plaintiff is entitled to Class II gaming, despite the fact that it is not a federally-recognized Indian tribe, it would be the first time in the thirty year history of IGRA that a non-federally-recognized tribe was deemed eligible to game. In light of this extensive precedent, Interior did not act unreasonably in determining that Plaintiff is not entitled to game under IGRA.

F. Interior Properly Relied on the Legislative History of the Frank's Landing Acts.

Plaintiffs argue that Interior improperly relied on the legislative history of the 1994 Frank's Landing Act, which contained statements by the Chairman of the House Natural Resources Subcommittee on Native American Affairs and another House Representative stating that Plaintiff cannot get Class II or Class III gaming because it is not a federally-recognized tribe.

140 Cong. Rec. 28627 (Oct. 6, 1994). Reliance on such statements was proper here and demonstrates that Interior's decision was reasonable. *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000) ("We focus on the most authoritative and reliable materials of legislative history, including: the conference committee report, committee reports, sponsor/floor manager statement and floor and hearing colloquy.").

Plaintiffs focus on the language in the 1994 Act stating that Plaintiff cannot engage in Class III gaming, arguing that this is clear evidence that Congress intended Plaintiff to be able to engage in Class II gaming. Interior, however, considered this argument, and rejected it, explaining that the 1994 Act's statement that the legislation does not classify Plaintiff as a federally-recognized tribe is in conflict with Plaintiff's position. This interpretation was reasonable and did not violate the Administrative Procedure Act.

G. The Indian Canons of Construction Should Not Apply Here.

Plaintiff argues that if the Court finds the Frank's Landing Act and IGRA to be ambiguous, the Indian canons of construction mandate that these statutes be read in Plaintiff's favor. Pl.'s Opp'n 21–22. This statement is false.

First, the Ninth Circuit has repeatedly held that the Indian canons "must give way to agency interpretations that deserve *Chevron* deference because *Chevron* is a substantive rule of law." *Williams v. Babbitt*, 115 F.3d 657, 663 n.5 (9th Cir. 1997) (deferring to agency interpretation under *Chevron* notwithstanding Indian canons) (citing *Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989) & *Shields v. United States*, 698 F.2d 987, 990 (9th Cir. 1983)); *Seldovia Native Ass'n, Inc. v. Lujan*, 904 F.2d 1335, 1342 (9th Cir. 1990) (same). To the extent that the statutes are ambiguous, Interior's *Chevron* argument trumps Plaintiff's Indian canons argument.

Second, the Ninth Circuit has also held that the Indian canons should be "applied only when there is a choice between interpretations that would favor Indians on the one hand and state or private actors on the other," and that the canons do not apply "when tribal interests are adverse because '[t]he government owes the same trust duty to all tribes.' It cannot favor one tribe over another." *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) (quoting

Confederated Tribes of Chehalis Indian Reservation v. Washington, 96 F.3d 334, 340 (9th Cir. 1996)). While there has been some uncertainty as to how to establish "adverse Indian interests" in this context, a recent district court decision held that there must be "some evidence that there are American Indian interests on both sides of a case for the Indian canon of deference to not apply. For example, American Indian tribes, organizations, or individuals can intervene as defendants, or they can present depositions, declarations, or affidavits explaining that they seek or oppose the requested relief." *Navajo Health Found. v. Burwell*, No. CIV 14-0958 JB/GBW, 2015 U.S. Dist. LEXIS 176111, at *115 (D.N.M. Aug. 31, 2015). Here, the Nisqually Tribe has interests on the other side of the case. While this Court denied Nisqually's motion to intervene, Nisqually has, at the least, demonstrated an interest in the case that is adverse to Plaintiff's. As such, the Indian canons do not apply.

III. CONCLUSION

This Court should reject Plaintiff's attempts to read the "Secretary" clause out of IGRA's definition of "Indian tribe." Interior reasonably determined that Plaintiff is not a federally-recognized tribe and thus not recognized "by the Secretary" within the meaning of IGRA. Congress clearly intended to give Plaintiff special rights through the Frank's Landing Act, but just as clearly stated that Plaintiff is not a federally-recognized tribe eligible for IGRA gaming. As such, Interior's determination should be upheld and this Court should grant Defendants' motion for summary judgment.

Submitted this 1st day of March, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 1, 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 1st day of March, 2017.

s/ Devon Lehman McCune

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