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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMADOR COUNTY, CALIFORNIA, Plaintiff, v. SALLY JEWELL, *et al*., Defendants.	Case No. 1:05CV00658 (BJR) Honorable Barbara J. Rothstein

MEMORANDUM OF POINTS AND AUTHORITIES

IN SUPPORT OF

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. STANDARD OF REVIEW

SUMMARY JUDGMENT IN JUDICIAL REVIEW OF AGENCY ACTION

Rule 56 of the Federal Rules of Civil Procedure states that summary judgment shall be granted "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." Fed. R. Civ. P. 56(a). In judicial review of agency action under the Administrative Procedure Act, 5 U.S.C. §551, *et seq*. ("APA"), "the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *Noble Energy, Inc. v. Jewell*, 2015 WL 3544371, *2; No. CV 14-898 (CKK) (D.D.C. June 8, 2015) (quoting *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001)). In these cases, summary judgment is "the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Hosp. of Univ. of Pa. v. Sebelius,* 847 F. Supp. 2d 125, 133 (D.D.C. 2012).

ADMINISTRATIVE PROCEDURE ACT

The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C §702. "To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. §706. The reviewing court must hold unlawful and set aside agency actions that are, *inter alia*, "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," or that are adopted "without observance of procedure required by law." 5 U.S.C. §§706(2)(A), (C) and (D). The Court must consider (a) whether the agency acted within the

scope of its legal authority, (b) whether the agency has explained its decision, (c) whether the facts on which the agency purports to have relied have some basis in the record, and (d) whether the agency considered all relevant factors. *Penobscot Indian Nation v. U.S. Dep't of Hous. & Urban Dev*., 539 F. Supp. 2d 40, 47 (D.D.C. 2008).

INDIAN GAMING REGULATORY ACT OF 1988

The substantive statute relevant to this action and defining the scope of the Secretary's legal authority is the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §2701, *et seq*. ("IGRA"), which, *inter alia*, requires the United States Secretary of the Interior ("Secretary") to review and approve Class III Gaming Compacts that do not violate IGRA or other federal laws. 25 U.S.C. §2710(d)(8)(B). IGRA further provides that Class III gaming activities shall be lawful only if conducted on "Indian lands." 25 U.S.C. § 2710(d). If a proposed Indian casino site does not qualify as "Indian Lands" under IGRA, and the Secretary approves a Tribal-State Class III Gaming Compact allowing Class III gaming on that site, that agency action is unlawful and beyond the Secretary's statutory authority.

If this Court determines that the proposed casino site is not Indian Land pursuant to IGRA, it must therefore declare unlawful and set aside the Secretary's approval of the Class III Gaming Compact at issue in this litigation.

II. PROCEDURAL HISTORY

On April 1, 2005, Amador County filed its Complaint for Declaratory and Injunctive Relief against Defendants United States Secretary of the Interior, Acting Principal Deputy Assistant Secretary for Indian Affairs, and the United States Department of the Interior. Docket No. 1. The Complaint timely challenged the Secretary's approval in 2004 of the Amended Class III Gaming Compact between the State of California and the Buena Vista Rancheria (hereinafter known as "2004 Compact"). The County asserted that the 2004 Compact was approved without regard to the intended gaming lands' failure to qualify as "Indian lands" under IGRA and was therefore in violation of the APA. Docket No. 1 at ¶ 35. Accordingly, the County sought, *inter alia*, an Order declaring the Secretary's approval to be unlawful and directing the Defendants to revoke and vacate the approval of the 2004 Compact. *Id*. at 16.

On July 22, 2005, the Secretary moved to dismiss the County's Complaint. Docket No. 11. Following full briefing by the parties with regard to the Secretary's motion, on August 23, 2005, the Tribe filed a Motion for Leave to File an *Amicus Curiae* Brief. Docket No. 18. The County opposed the Motion on the basis that the Tribe is adequately represented by the United States. Docket No. 19. This Court denied the Tribe's motion by Minute Order dated March 30, 2006.

On March 21, 2008, the County filed its Amended Complaint adding two additional counts and limited additional factual allegations, but maintaining the original Complaint's allegation that Defendants' 2004 Compact approval was unlawful and requesting relief identical to that in the original Complaint: revocation and vacation of the Compact approval. Docket No. 30 at 16-17.

On April 18, 2008, Defendants moved to dismiss the Amended Complaint. Docket No. 32. The County opposed Defendants' Motion and, on September 5, 2008, filed a Motion for

Preliminary Injunction enjoining the Defendants from sanctioning the conduct of Class III gaming and/or pre-development construction activities at the site. Docket No. 39.

On January 8, 2009, this Court entered an order granting the Defendants' Motion to Dismiss and denying as moot the County's Motion for Preliminary Injunction. Docket No. 44. The Court stated that the County had failed to state a claim entitling it to relief under the APA "because the Secretary's choice to take no affirmative action on the [2004] compact [allowing it to be "deemed" approved pursuant to a provision of IGRA] is unreviewable and the Secretary's deemed approval is lawful by the express terms of IGRA." Docket No. 43 at 1-2.

The County appealed to the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). On May 6, 2011, the D.C. Circuit reversed the dismissal order and remanded the case for a decision on the merits, holding, *inter alia*, that "where, as here, a plaintiff alleges that a compact violates IGRA, thus requiring the Secretary to disapprove the compact, nothing in the APA precludes judicial review of a[n IGRA] subsection [2710](d)(8)(C) no-action approval." *Amador Cnty., Cal. v. Salazar*, 640 F.3d 373, 383 (D.C. Cir. 2011).

On November 4, 2011, the Tribe filed, through limited appearance, a Motion to Intervene for the Limited Purpose of Moving to Dismiss. Docket No. 59. On June 4, 2013, this Court denied the Motion, and the Tribe appealed to the D.C. Circuit, which affirmed this Court's order. *Amador Cnty., Cal. v. U.S. Dep't of the Interior,* 772 F.3d 901 (D.C. Cir. 2014).

III. INTRODUCTION

The issue before this Court is whether the Secretary of the Interior violated federal law in approving an Amended Tribal-State Gaming Compact between the State of California and the Buena Vista Rancheria of Me-Wuk Indians, executed on August 24, 2004. Specifically, Amador County challenges the Compact approval for the reason that gaming cannot be conducted within the Rancheria because the site does not qualify for gaming under the federal law pursuant to which Indian tribal gaming may be conducted.

The Secretary actually took no affirmative action to approve the Compact, electing instead to allow it to be "deemed approved" through a decision to neither approve nor disapprove it within the statutory period for review and decision. There is no evidence of Interior Department review and analysis of the land's legal qualification for gaming prior to the "no-action" approval which was published in the *Federal Register* on December 20, 2004. The total absence of such evidence is confirmed by the Administrative Record filed herein which contains no document even hinting that such a review and analysis occurred. This action was filed on April 1, 2005.

The Federal Defendants apparently realized that there had been no review and analysis as to the land being eligible for gaming prior to the Compact approval, so they directed the Acting General Counsel of the National Indian Gaming Commission to develop a "land determination opinion," which was rendered on June 30, 2005 – 192 days after the compact approval and 91 days after this litigation was filed. To no surprise, the determination was positive, and it has been cited by Defendants at earlier stages of this litigation. The positive determination was based on the author's assumption that the land originally was purchased in federal fee status by a federal law that legislated reservation status for the tract. To the contrary, the land was

purchased pursuant to a different law that did not even use the word "reservation," an omission that eviscerated the *raison d'etre* for the entire opinion.

The Compact approval was rendered in a cavalier manner devoid of the decision-making process required by the federal laws governing final agency action and Indian gaming. For the reasons discussed in detail below, the approval must be rejected and set aside by this Court.

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IV. STATEMENT OF UNDISPUTED FACTS

1. The United States purchased the Buena Vista Rancheria ("Rancheria") land in fee status on May 5, 1927, with funds appropriated by the Bureau of Indian Affairs Appropriation Act of August 1, 1914, 38 Stat. 582, 589 ("1914 Act").

2. Louis and Marjory Alpers were the sellers of the land, which is an irregularly-shaped tract 5,280 feet long and 578 feet wide. Beckham Report 1 (identified at ¶5, *infra*).

3. Nothing in the 1914 Act legislated either trust or Indian reservation status for the Rancheria land. Docket No. 34-4.

4. The 1914 Act appropriated funds solely "[f]or the purchase of lands for the homeless Indians in California, including improvements thereon, for the use and occupancy of said Indians." *Id.*

5. During the first six months of 2007, the County's expert ethnohistorian, Dr. Stephen Dow Beckham, extensively researched federal records relevant to the Buena Vista Rancheria and the occupants thereof. Declaration of Steven Dow Beckham, Ph.D, attached as **Exhibit A**. Dr. Beckham detailed his findings in his report entitled "The Buena Vista Rancheria, Amador County, California," attached as Exhibit 1 to his Declaration ("Beckham Report"). Dr. Beckham conducted this work at, *inter alia*, the following archives: **(i)** Central California Agency, Tribal Group Files, Buena Vista, 103.3, Termination, 1951-75, Box 2; **(ii)** Central California Agency, 1972-85, Tribal Group Files, Ione 060.3, Ione Rancheria, General Correspondence, Box 3; **(iii)** Record Group 75: Records of the Bureau of Indian Affairs, National Archives, San Bruno, CA; **(iv)** Fifteenth Census of the United States, Township 2, Mokelumne East, Calaveras County, CA, 1930 Census, Roll 112, Page 2A; and **(v)** Central California Agency Census Rolls, Census Records, 1941, Box 9. Those records identified the

Rancheria land as federal fee land, and none of them identified the Rancheria as an Indian reservation or as land in trust or restricted fee status. Beckham Declar. at ¶¶4 and 6.

6. In late 2004, the Bureau of Indian Affairs determined that only descendants of Louis and Annie Oliver qualify for membership in the Rancheria Tribe, and that Rhonda Morningstar Pope and her children are the only people eligible for membership in the Tribe because she is the only person who can claim descendancy from the Oliver family. Beckham Report at 1.

7. There is no evidence that any Indians resided on the Rancheria between 1927 and 1930. *Id.*

8. There is no evidence that Louis and Annie Oliver or any of their descendants resided on the Rancheria between the time of 1927 (the time of land purchase) and 1935, and, to the contrary, there is evidence that they did not. *Id.*

9. Records for the 1930 Federal Census document that Louis and Annie Oliver and their three surviving children – Lucille (age 11), Elinor (age 9) and Enos (age 6) – were then residing in Township 2, Mokelumne East Precinct, Calaveras County, California, and not even *in* Amador County, let alone *on* the Rancheria. *Id.*

10. Local records report that in 1933, Annie Oliver and her three children – without husband present – were living in Amador County near the Town of Ione in Township 2. *Id.* (citing "Committeemen, Preston School of Industry 1933"). The Rancheria is within Township 5 and not Township 2 where the Olivers were residing. *Id.*

11. The earliest record of occupancy of the Rancheria by any member of the Oliver family is the Bureau of Indian Affairs' "Approved List of Voters for Indian Reorganization Act,

Buena Vista Rancheria (Amador County)" dated June 4, 1935, listing Louis Oliver, Annie Oliver, Johnnie Oliver and Josie Ray as the only residents of the Rancheria. *Id.* at 1-2.

12. There is no record of any occupancy of the Rancheria by any person other than the members of the Oliver family, with the exception of Enos Oliver's non-Indian stepson, John Louis Fielder, who resided on the Rancheria between 1948 and 1956. *Id.* at 8.

13. There is no evidence that the Rancheria residents ever functioned as an Indian tribe by conducting tribal meetings or tribal activities. *Id.* at 14.

14. John Louis Fielder recalled in 2007 that during the decade he lived at Buena Vista Rancheria (from fifth grade through graduation from high school), he never saw a tribal meeting or any tribal activities, and stated unequivocally that he was unaware of any tribal organization, meetings, or exercise of political authority at the Rancheria. *Id.*

15. Mr. Fielder is the only known person currently living who has first-hand knowledge of the situation on the Rancheria land during the decade of his occupancy, and his account demonstrates that there was no activity or organized entity during this entire period of time which would evidence tribal existence at the Rancheria. *Id.*

16. In accordance with the litigation settlement described in ¶18, *infra*, the Rancheria was conveyed in fee status by the United States to Louie and Annie Oliver on October 6, 1959. *See* October 6, 1959 Deed, Docket No. 39-4; Beckham Report at 11-12.

17. Following the deaths of Louie and Annie Oliver, their fee ownership of the Rancheria passed to Lucille Lucero and Enos Oliver on September 12, 1975. *See* Judgment Settling First and Final Account and Report of Administrator and of Final Distribution, Docket No. 39-5.

18. In July of 1983, the private parties to federal class action litigation referred to as the *"Tillie Hardwick Litigation"* and the defendant United States entered into a stipulated settlement agreement which "restored" each of 17 California Rancherias to their legal status that existed prior to enactment of the California Rancheria Termination Act of August 18, 1958, Public Law 85-671 (72 Stat. 619). Stipulation and Order, *Tillie Hardwick, et al. v. United States,* No. C-79-1710 SW (N.D. Cal. filed 1979) ("Federal Hardwick Settlement") (attached to Beckham Declar. as Exhibit 2).

19. The Federal Hardwick Settlement also purported to certify a class of "all those persons who received any of the assets" of the California Rancherias. *Id.* at ¶1.

20. The Federal Hardwick Settlement provided, *inter alia*, that "the status of the named individual plaintiffs and other class members… as Indians under the laws of the United States shall be restored and confirmed." *Id*. at ¶3 (emphasis supplied).

21. The Federal Hardwick Settlement stated that the Secretary of the Interior "shall recognize the Indian Tribes, Bands, Communities or groups of the seventeen Rancherias… as Indian entities with the same status they possessed prior to distribution of the assets of those Rancherias…." *Id*. at ¶4. (emphasis supplied)

22. The Federal Hardwick Settlement further provided that, within two years of the Settlement, the newly restored Tribes "may arrange to convey to the United States all community-owned lands within their respective Rancherias to which the United States issued fee title in connection with or as the result of the distribution of the assets of said Rancherias, to be held in trust by the United States for the benefit of said Tribes…" *Id*. at ¶7.

23. In none of the records of the Bureau of Indian Affairs at the National Archives, San Bruno, California, is there any identification, much less recognition, of a Buena Vista Tribe of Miwok Indians. Beckham Report at 14.

24. In the records of the Bureau of Indian Affairs at the National Archives, San Bruno, California, there is no record that the Bureau of Indian Affairs ever designated Buena Vista Rancheria a reservation. Moreover, those records also fail to document any measures of tribal presence, such as tribal governing documents, records of tribal meetings, or federal-tribal interaction of any kind. *Id*. at 14-15.

25. In 1985, the Secretary of the Interior listed the "Buena Vista Rancheria of Me-Wuk Indians of California" as a federally-recognized Indian tribe. *See* 30 Fed. Reg. 6,055-6,059.

26. There is no evidence that any effort was made to have the Buena Vista Rancheria land taken into trust by the federal government in accordance with the provisions of the Federal Hardwick Settlement. Beckham Declar. at ¶6.

27. On May 15, 1987, Judge Spencer Williams of the United States District Court for the Northern District of California approved a stipulated settlement executed only by one of the class action attorneys of record in the *Tillie Hardwick Litigation* acting on behalf of unidentified "class members from the Buena Vista Rancheria" and the Amador County Counsel representing the County Tax Collector, County Assessor and County Board of Supervisors ("Amador Hardwick Stipulation"). Docket No. 33-1.

28. The Amador Hardwick Stipulation (a) resolved the outstanding unpaid County tax assessments on the Rancheria land, (b) stated that the Rancheria would return to the County tax rolls unless placed in trust by December 31, 1988, and (c) provided that the Rancheria "shall be

treated by the County of Amador and the United States of America as any other federally recognized Indian reservation." *Id*. at ¶¶ 2C, 2D.

29. On May 1, 1996, fee title to the Rancheria was acquired by a woman named Donnamarie Potts. *See* Order Determining Succession to Real Property, Docket No. 39-6.

30. On August 1, 1996, Donnamarie Potts conveyed fee title to the Rancheria land to the Tribe. *See* August 1, 1996 Grant Deed, Docket No. 39-7.

31. On September 6, 1996, the Tribe attempted to convey title to the Rancheria property by grant deed to "The United States of America in Trust for the Buena Vista Rancheria of Me-Wuk Indians." *See* September 6, 1996 Grant Deed, Docket No. 39-8.

32. By letter dated November 18, 1996, the BIA advised both the County and the Tribe that there was no trust acceptance by the Department of the purported conveyance described at ¶31, meaning that the land title remained in fee status. Docket No. 39-10.

33. IGRA legislated a comprehensive regulatory scheme for Indian gaming which, *inter alia*, expressly limited such gaming to "Indian land," a term expressly limited to land within Indian reservations, held in trust for tribes, or land in restricted fee status. 25 U.S.C. §2703(4).

34. IGRA provides that Indian tribes can operate casino gaming only after negotiating and executing a Class III Tribal-State Gaming Compact. 25 U.S.C. §2710(d)(1)(C).

35. The Tribe failed to meet the December 31, 1988, deadline imposed by the Amador Hardwick Stipulated Judgment for placing the Rancheria land into trust status, and the Rancheria thus reverted to land subject to County taxation. See ¶ 28, *supra*.

36. On or about October 8, 1999, California Governor Gray Davis approved a Class III Gaming Compact ("1999 Compact") between the Tribe and the State specifically limiting the

Tribe to conducting Class III Gaming "only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act." 1999 Compact Sec. 4.2., AR000042.

37. Former Assistant Secretary of the Interior for Indian Affairs Kevin Gover approved the 1999 Compact, effective May 15, 2000. AR000030.

38. By letter dated February 20, 2004, the Bureau of Indian Affairs confirmed that the purported conveyance described at ¶¶31-32 was invalid, and that the Buena Vista Rancheria was not in trust status. *See* Docket No. 39-11.

39. On August 24, 2004, the Tribe and the State entered into the 2004 Compact which (a) expanded the scope of gaming permitted and (b) approved Class III gaming "on Indian lands within the boundaries of the Rancheria." 2004 Compact Sec. 4.3.5, AR000091. The 2004 Compact was signed by Governor Arnold Schwarzenegger on August 23, 2004, approved by the California legislature on August 27, 2004, chaptered pursuant to state law on September 29, 2004 and took effect on January 1, 2005. AR000086.

40. On December 20, 2004, United States Secretary of the Interior Gail Norton, acting through Acting Principal Deputy Assistant Secretary of the Interior for Indian Affairs Michael D. Olsen, published notice in the *Federal Register* that the 2004 Compact "is in effect" in accordance with the "no-action" Compact approval provision of IGRA codified at 25 U.S.C. §2710(d)(8)(C) ("Compact Approval"). AR000205.

41. On April 1, 2005, the County filed the instant litigation challenging the Secretary's 2004 Compact Approval as authorizing gaming on land that does not qualify for gaming under IGRA's statutory requirements and applicable federal regulations. Docket No. 1.

42. On June 7, 2005, counsel for Defendants requested a 60-day extension of time to respond to the Complaint specifically in order to "accommodate an impending opinion by the National Indian Gaming Commission ('NIGC') concerning a central allegation of Plaintiff's Complaint, namely, whether the land upon which the Buena Vista Rancheria of Me-Wuk Indians ('Tribe') proposes to site a gaming facility qualifies as 'Indian Country….'"[1] Docket No. 8. The Court granted a 30-day extension of time by Minute Order dated June 20, 2005.

43. On June 30, 2005 – 192 days after Compact Approval and 91 days after this litigation was filed – NIGC Acting General Counsel Penny J. Coleman propounded a land determination opinion ("NIGC Opinion") concluding that the Rancheria land qualifies for gaming under IGRA and applicable federal regulations. Docket No. 33-2.

44. The NIGC Opinion was premised in substantive part on Acting General Counsel Coleman's incorrect assumption that the Rancheria was purchased with money appropriated by the Acts of June 21, 1906 and April 30, 1908, and that specific language in those two laws using the word "reservation" legislated reservation status as a matter of law for the Rancheria land. Docket No. 33-2.

45. The 1906 and 1908 Acts described at ¶44 appropriated funds to purchase land to be used for purposes significantly different than those legislated by the 1914 Act cited and explained at ¶¶1, 4.

46. The word "reservation" does not appear in the 1914 Act. Rather, that law simply appropriated funds "[f]or the purchase of lands for the homeless Indians in California, including improvements thereon, for the use and occupancy of said Indians." *See* ¶4, *supra*.

[1] The relevant inquiry actually conducted by NIGC was whether the land qualified for gaming as "Indian Land" under IGRA, not "Indian Country," a legal designation irrelevant to Indian gaming.

V. ARGUMENT

A. The Secretary's Approval of the 2004 Compact was in Direct Violation of IGRA and, Consequently, was an Arbitrary and Capricious Action.

The fundamental issue that was before the Secretary and now must be determined by this Court is whether the Rancheria is an Indian reservation and qualifies as "Indian lands" under IGRA. Because the 2004 Compact is site-specific – it allows gaming on the Rancheria, which as discussed *infra*, is not in reservation status – this Court must grant Plaintiff's Motion for Summary Judgment and set aside the Compact Approval as unlawful.

When the Secretary took no action on the 2004 Compact within the statutory review period, the 2004 Compact was "deemed approved" with a short notice in the *Federal Register* and without legal justification or explanation of how the Rancheria qualifies as Indian Lands. AR000205. That purported legal justification came later in the form of the *post-hoc* NIGC Opinion which was not before the Secretary at the time of the Decision and, therefore, was not part of the Administrative Record. Docket No. 33-2. To the contrary, the NIGC Opinion was propounded 192 days *after* Compact Approval and 91 days *after* this litigation was filed. (Undisputed Fact No. 3.) Defendants' after-the-fact justification amounts to little more than a claim that Rancherias are reservations because the Defendants now say they are: "it has long been established that California Indian rancherias are the functional equivalent of Indian reservations." Memorandum of Points and Authorities in Support of United States' Motion to Dismiss First Amended Complaint (hereinafter "Defendants' Motion to Dismiss" or "Defs.' Br.") at 26; Docket No. 33. This is not sufficient to create reservation status, which is a legal status affecting the interests not only of the Tribe but of the State, County, County residents and the United States. Nor may Defendants deny those stakeholders, including Plaintiff Amador County, their opportunity to protect those interests by ignoring the statutory and regulatory

process of placing land in trust and declaring reservation status pursuant to the federal Indian Reorganization Act of 1934, 25 U.S.C. §461 *et seq.* ("IRA"), in favor of a process which Defendants erroneously considered to be immune from all judicial review. That immunity from review – a concept rejected by the D.C. Circuit – was necessary to Defendants' approval action because it cannot survive examination on the merits.

1. The Secretary may not approve a Tribal-State Class III Gaming Compact that authorizes gaming on land that does not qualify for gaming under IGRA.

On appeal, and as stated above, the D.C. Circuit soundly rejected Defendants' argument that "no-action" or "deemed" compact approvals pursuant to 25 U.S.C. §2710(d)(8)(C) are purely discretionary and beyond judicial review pursuant to the APA. *Amador Cnty.*, 640 F.3d at 381. Defendants astonishingly argued that the language of IGRA licensed the Secretary to approve by inaction any compact, whatever the contents, with total discretion and beyond judicial review, arguing that the permissive word "may" in 25 U.S.C. §2710(d)(8)(B) meant that the Secretary is not required to approve or disapprove a compact and thus has no duty to disapprove even notoriously illegal compacts and, in the absence of such a duty, there is no statutory standard to apply for purposes of APA review. *See* Appellee Principal Brief at 38.

The D.C. Circuit noted the language of IGRA's "no-action" approval procedure and cautioned that any compact so approved is valid "only to the extent the compact is consistent with the provisions of this Act." *Amador Cnty.,* 640 F.3d at 381. The D.C. Circuit concluded that "just as the Secretary has no authority to affirmatively approve a compact that violates any of subsection (d)(8)(B)'s criteria for disapproval, he may not allow a compact that violates subsection (d)(8)(C)'s caveat to go into effect by operation of law." *Id.* (emphasis added).

The D.C. Circuit further noted that "even if disapproval were otherwise discretionary, subsection (d)(8)(A) authorizes approval only of compacts 'governing gaming on Indian lands,' suggesting that disapproval is obligatory where that particular requirement is unsatisfied." *Id*.

The D.C. Circuit thus removed all doubt that the APA unequivocally grants this Court jurisdiction to determine whether the Compact Approval was lawful and requires it to set that final agency action aside if it determines that the Rancheria is not "Indian Lands."

2. Class III gaming may only occur on Indian Lands as defined by IGRA, and that strict requirement cannot be ignored or violated by the Secretary.

IGRA defines the term "Indian Lands" as follows:

> The term "Indian lands" means - (A) all lands within the limits of any Indian reservation; and (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. §2703(4) (emphasis added).

IGRA further specifies that Class III gaming (indeed, all Indian gaming) may only occur on Indian Lands: "Class III gaming activities shall be lawful on Indian lands…." 25 U.S.C. §2710(d)(1). *See Michigan v. Bay Mills Indian Cmty*., 134 S.Ct. 2024, 2028, 188 L. Ed. 2d 1071 (2014) ("A tribe may conduct [Class III] gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State.").

Likewise, the 2004 Compact permits gaming only on "Indian lands" as defined by IGRA. *See* original 1999 Compact §4.2.5, AR000030. Thus, IGRA's statutory limitation on land upon which gaming may occur is in both the federal law and the 2004 Compact.

Defendants have never asserted that the Rancheria is held in trust or "restricted fee" status and the Undisputed Facts above confirm that the Tribe's ownership has always been, and

still is, in fee simple title. Undisputed Facts Nos. 26-32. Therefore, the only issue is whether it is "reservation" land pursuant to IGRA as a matter of law.

3. The Rancheria is not "Indian Lands" as defined by IGRA.

Because the Compact Approval was "deemed approved" under IGRA's "no action" provision without a Record of Decision, AR000205, Defendants' only legal justifications for the Compact Approval appear in the NIGC Opinion and within their pleadings in this case. In their Motion to Dismiss, Defendants asserted that "it has long been established that California Indian rancherias are the functional equivalent of Indian reservations. The D.C. Circuit Court of Appeals has accepted this proposition as have many other courts." *Id*. at 26. Defendants then identified a series of cases purporting to support their statement that Rancherias are identical to reservations. Defs.' Br. at 26-30. However, the cited authority does not support that statement. Instead, Defendants have attempted to "bootstrap" reservation status for the Buena Vista Rancheria by referencing cases involving Indian tribes for which Congress affirmatively mandated the Secretary to accept land in trust and designate it as "reservation" land. Each of the cited cases is distinguishable and inapposite.

First, Defendants cited *City of Roseville v. Norton*, 348 F.3d 1020, 1022 (D.C. Cir. 2003), Defs.' Br. at 26. In *City of Roseville*, the City challenged the Secretary's determination that land owned by the United Auburn Indian Community was eligible for gaming pursuant to IGRA §20(b)(1)(B)(iii), 25 U.S.C. §2719(b)(1)(B)(iii), as restored land for a restored Tribe. But the D.C. Circuit, rather than "accepting the proposition" that Rancherias are equivalent to reservations, in fact stated "[t]he Auburn Band currently has no reservation…" *City of Roseville,* 348 F.3d at 1022. Congress specifically authorized the Secretary to place land in trust status for the Tribe in the Auburn Indian Restoration Act, which mandated that such land "shall be part of the Tribe's reservation." 25 U.S.C. §1300l-2. No such Congressional action created or

authorized either trust or reservation status for the Buena Vista Rancheria, and the Tribe's only attempt to place the land in trust status was rejected by Defendants. Undisputed Facts Nos. 22 and 30.

Defendants next cited to a footnote in a California district court opinion describing Rancherias as "small Indian reservations." *Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1176, n.1 (E.D. Cal. 2003), Defs.' Br. at 26. In that case, a group of California card rooms and charities challenged the Secretary's trust acceptance of land for gaming purposes on the Lytton Rancheria – a trust acceptance mandated by Congress in the Omnibus Indian Advancement Act of 2000, which stated: "The Secretary shall declare that such land is held in trust by the United States for the benefit of the Rancheria and that such land is part of the reservation of such Rancheria under [the Indian Reorganization Act of 1934]." Pub.L. 106–568 §819, 114 Stat 2868. No such Congressional action created or authorized trust or reservation status for the Buena Vista Rancheria.

Further, the statement in the *Artichoke Joe's* opinion that Rancherias are "small Indian reservations" relied on *Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981), in which the United States Court of Claims stated that "Rancherias are numerous small Indian reservations or communities in California." *Id*. at 38 (emphasis added). This citation ignores the fact that Buena Vista Rancheria has never been extended reservation status pursuant to federal law, a fact that strongly suggests that the Rancheria was never anything more than a "community" as described in *Duncan.* Defendants also rely on the *Duncan* Court's statement that "Congress clearly contemplated that this land have the same general status as reservation lands," Defs.' Br. at 26, but omit the Court's basis for reaching that conclusion: that the 1906 Act which appropriated the funds used for the purchase of the Lytton Rancheria land also authorized the Secretary of the

Interior to "fence, survey and mark the boundaries of such Indian Reservations."[2] *Id*. at 41. The Buena Vista Rancheria was purchased not with funds appropriated by the 1906 Act, but rather with funds appropriated by the 1914 Act. As stated above, the 1914 Act did not mention "reservations" at all, but rather simply appropriated money for "the purchase of lands for the homeless Indians in California, including improvements thereon, for the use and occupancy of said Indians…" *Id*. at 589. These funds were to benefit all homeless Indians without regard to tribal ancestry or the presence of functioning tribes.

In the case of *Santa Rosa Band of Indians v. Kings County,* cited by Defendants at Defs.' Br. at 26, Kings County sought to enforce its zoning ordinances on the Santa Rosa Rancheria. 532 F.2d 655 (9th Cir. 1975). Unlike the Buena Vista Rancheria, the Santa Rosa Rancheria is held in trust status and the Ninth Circuit's opinion that the County lacked jurisdiction was decided on that basis. *Id*. at 658 ("At the outset, we emphasize that this suit involves an attempt to regulate Indian use of Indian trust lands.").

Finally, Defendants cited *Governing Council of Pinoleville Indian Cmty. v. Mendocino Cnty.,* in which Mendocino County sought to prevent industrial uses of the Pinoleville Rancheria. 684 F. Supp. 1042 (N.D.Cal. 1988). Defs.' Br. at 26. But, like the Lytton Rancheria in *Artichoke Joe's*, the funds for purchase of the Pinoleville Rancheria were authorized by 1908 Act, not the 1914 Act, *id*. at 1043, and that case is therefore unavailing to Defendants' argument.

Not all lands called "Rancherias" have the same legal status. While other Rancherias may be in reservation status or composed of trust land or both, the Buena Vista Rancheria is neither and is therefore ineligible for Indian gaming.

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[2] It is important to note that the 1906 and 1908 Acts did not create reservations, but merely appropriated funds to survey existing reservations. While these Acts are irrelevant to the Buena Vista Rancheria, they are legally insufficient to create new reservation status even for those Rancherias to which they are applicable.

4. The Stipulated Judgments in *Tillie Hardwick v. United States* neither created nor authorized new Indian reservations.

The Hardwick Stipulations, filed nearly 24 years ago in the *Tillie Hardwick Litigation* did not in any way create Indian reservations.

The Federal Hardwick Stipulation[3] defined the plaintiff class as "all those persons who received any of the assets of the [17] Rancherias listed and described in paragraph 1 pursuant to the California Rancheria Act and any Indian heirs, legatees or successors in interested of such persons…." Federal Hardwick Stipulation at ¶2. That Stipulation bound the United States to restore the class members as Indians, *id.* at ¶3, and to recognize the 17 listed Rancherias, including Buena Vista, "as Indian entities with the same status they possessed prior to distribution of the assets of those Rancherias…." *Id.* at ¶ 4. Most relevant to this litigation, that Stipulation provided that, within two years of the judgment, the referenced Tribes "may arrange to convey to the United States all community-owned lands within their respective rancheria to which the United States issued fee title in connection with or as the result of distribution of the assets of said rancherias, to be held in trust…" *Id.* at ¶7 (emphasis added).

While the Federal Hardwick Stipulation offered the Buena Vista Rancheria residents the opportunity to place land in trust status – an offer which other Rancherias accepted but which Buena Vista never did – it did not itself create trust or reservation status. Nor could it have, because a stipulated judgment, which is essentially a contract – even one to which the United States is a party – is an entirely inappropriate vehicle to confer that legal status which can only be designated pursuant to the IRA, through the process described in Section A.6 *infra*.

But that is what the Defendants have claimed that the subsequent Amador Hardwick Stipulation accomplished, despite the fact that the United States was not even a party to that

[3] *See* Undisputed Fact No. 18.

agreement.[4] Defs.' Br. at 32. The Amador Hardwick Stipulation (a) purported to create obligations going beyond those in the Federal Hardwick Stipulation (to which the United States *was* a party) and (b) provided in pertinent part:

> C. The original boundaries of the plaintiff Rancheria ... are hereby restored, and all land within these restored boundaries of the plaintiff Rancheria is declared to be "**Indian Country**."…
>
> D. The plaintiff Rancheria shall be treated by the County of Amador and the United States of America, as any other federally recognized Indian Reservation, and all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall apply to the Plaintiff Rancheria and the Plaintiffs.
>
> E. All real property taxes heretofore paid to the County of Amador by Plaintiffs for the tax year 1979 and any subsequent tax year for Indian parcels shall be refunded in full to Plaintiff or the estate of Plaintiff, **if the plaintiff makes an election to return said parcel to trust status no later than December 31, 1988**….. Defendants shall be entitled to keep all real property taxes collected on all property located on the plaintiff Rancheria except as specifically set forth above.
>
> F. Defendants shall not collect or recover any Unpaid Property Taxes, assessments or fees on Indian Parcels within the boundaries of the Plaintiff Rancheria as restored….
>
> G. The County may impose real property taxes on Indian owned parcels that are not owned in trust by the United States of America, **if the Indian property owner has not filed within the tax year an exemption form** with the county assessor establishing the property owner's status as an Indian…..

Amador Hardwick Stipulation at ¶¶2.C-G (underlined emphasis in original, boldface emphasis added). This stipulation was fatally flawed.

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[4] In the NIGC Opinion, Acting General Counsel Penny Coleman wrote that "[w]hile the United States, as co-defendant, did not sign the 1987 stipulation, it did however sign the underlying stipulation that restored the Tribe in 1983. … For these reasons, the United States considers itself bound by both stipulations." NIGC Opinion at 5 n.4. (Emphasis added.) As a matter of law, these Defendants cannot be bound by the Amador Hardwick Stipulation through the *post-facto*, non-binding NIGC Opinion letter since it is grounded on an assumed land status for the Rancheria that has not been determined through the detailed processes required for trust and reservation status by federal law and regulations. *See* 25 CFR Part 151.

First, the term "Indian Country" has no relevance to Indian Gaming because that term is much broader than IGRA's "Indian Lands" status required for the conduct of Indian gaming. 18 U.S.C. §1151 (Reservations are but one type of land status of several composing "Indian Country").

Second, Paragraph D of the Stipulation purports to bind the United States of America, a co-Defendant in the *Hardwick* litigation but a non-party to the Amador Hardwick Stipulation. Co-defendants may not be bound by stipulated settlements to which they are not parties. *See Howard Young Med. Ctr. Inc. v. Shalala*, 207 F.3d 437, 443 (7th Cir. 2000) (Secretary of Health and Human Services not bound by stipulation to which Secretary was not a party); *see also Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 529, (1986) ("Parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement.")[5] The United States was a non-party to the Amador Hardwick Stipulation and may not avoid its own statutory and regulatory obligations by now purporting to consider itself legally and administratively bound by that stipulation.

Finally, the question of the Rancheria's legal status as "reservation" is a conclusion of law. Conclusions of law are to be reached only by courts; stipulated conclusions of law have no preclusive effect. *See generally Weston v. Washington Metro. Area Transit Auth.*, 78 F.3d 682, 685 (D.C. Cir. 1996) (parties may not stipulate to legal conclusions to be reached by the court). Thus, the legal conclusion that the Rancheria is a "reservation" agreed to in the Amador Hardwick Stipulation cannot bind the County in unrelated litigation challenging the Secretary's approval of the 2004 Compact. *See also TI Fed. Credit Union v. DelBonis*, 72 F.3d 921, 928 (1st

[5] The notion that the Defendants are bound by the Amador Hardwick Stipulation is absurd. Indeed, if the Defendants wanted a result that is contrary to the Stipulation's provisions, they would have a very strong – and correct – argument that they are *not* bound by the Amador Hardwick Stipulation.

Cir. 1995) (parties may not stipulate to legal conclusions to be reached by the court and, accordingly, courts are not bound to accept as controlling the stipulations as to questions of law); *Koch v. Dep't of the Interior*, 47 F.3d 1015, 1018 (10th Cir. 1995) (federal court of appeals is not bound by stipulations as to questions of law); *In re Lawson Square, Inc*., 816 F.2d 1236, 1240-1241 (8th Cir. 1987) (stipulations are generally not considered binding as to issues of law).

Because the Rancheria's status as a "reservation" is a legal designation affecting the property rights of the Tribe and the County, as well as third parties including the Tribe's neighbors, other County residents, the State and the United States, that status cannot simply be stipulated to in civil litigation, particularly for purposes so far removed from the County's original interest at issue in that stipulation – the payment of taxes on land within its jurisdiction.

5. The Amador County *Tillie Hardwick* Stipulated Judgment does not preclude this litigation.

The *Tillie Hardwick* Stipulated Judgments have no preclusive effect on the County or the United States in the determination of the Tribe's eligibility for gaming. Because the approval of an illegal compact cannot survive judicial review on the merits, Defendants previously attempted to have this case dismissed by arguing that, in the Amador Hardwick Stipulation, the County forfeited its right to challenge the reservation status of the casino site. Defs.' Br. at 3. Defendants relied heavily on this argument on appeal. *See* Appellee's Principal Brief at 51; *Amador Cnty., Cal. v. Salazar*, 640 F.3d 373 (D.C. Cir. 2011).

Issues not "actually litigated" generally have no preclusive effect in subsequent actions. *Amador Cnty,* 640 F.3d at 384.[6] On appeal, the D.C. Circuit accepted Plaintiff's argument that

[6] The United States Court of Claims has explained: "As a general rule, … an issue is not 'actually litigated' for purposes of collateral estoppel unless the parties to the stipulation manifest an intent to be bound in a subsequent action." *Red Lake Band v. United States*, 607 F.2d 930, 934 (Ct.Cl. 1979). And this same principle was confirmed by the D.C. Circuit in *Otherson v. Dep't of Justice*, 711 F.2d 267, 274 (D.C. Cir. 1983): "Generally speaking, when a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been 'actually litigated' and thus is not a proper candidate for issue preclusion."

"[h]ere, of course, we have a stipulated judgment, and issues dealt with in such judgments are not 'actually litigated' for the purpose of issue preclusion." *Id*. The D.C. Circuit noted, however, that when a stipulation "clearly manifests the parties' intent to be bound in future actions," it may have a preclusive effect. *Id*.

The County did not intend, and could not have intended, to be bound by the *Hardwick* stipulations for gaming-related purposes. That litigation had nothing to do with Indian gaming, which did not even exist at the time it was filed some eight years before the Supreme Court ruled that Indian tribes have a legal right to conduct gaming under certain circumstances. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). IGRA's enactment in late 1988 was the direct product of *Cabazon*. The operative provisions and intent of the Amador Hardwick Stipulation,[7] to which neither the Tribe nor the United States was a party, concerned real property tax issues between the County and the individual property owners of the land within the former Rancheria boundaries. *See* Amador Hardwick Stipulation, Docket No. 33-1. Paragraphs E-G of the Amador Stipulation are the only substantive obligations undertaken by the County and they are <u>each related to the collection of taxes</u> by the County. The County agreed to (1) cancel any previously assessed taxes and liens, and (2) forego further taxation if, <u>and only if</u>, the *Tillie Hardwick* plaintiffs met a critical condition: placing the Rancheria in trust. *Id*. at ¶¶2.C-G. The Tribe did not meet that condition by the December 31, 1988 deadline and the County's obligations then expired. Apart from unenforceable provisions regarding legal conclusions and the cancellation of the Rancheria's past tax bill, the Amador Hardwick Stipulation accomplished nothing.

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[7] The Amador Hardwick Stipulation was approved on May 15, 1987. Undisputed Fact No. 27.

Indeed, the County could not have intended, or even contemplated the possibility, that the stipulation designate the Rancheria as "Indian lands" for gaming purposes because the *Hardwick* litigation was initiated in 1979 and the Amador Hardwick Stipulation was filed on May 14, 1987, but IGRA did not become law until October 17, 1988. *See, e.g., Washington Hospital v. White*, 889 F.2d 1294 (3rd Cir. 1989) (in construing ambiguous stipulation, court may properly consider circumstances surrounding formation of the stipulation which may explain the meaning of words used by the parties).

As noted by the D.C. Circuit, "the scope of preclusion by settlement arises from contract, and we measure intent by ordinary contract principles," *Amador Cnty., Cal. v. Salazar*, 640 F.3d at 384 (internal quotations omitted). The rights of a party pursuant to a contractual agreement are determined by law existing when the contract was made. *Jackson v. People's Republic of China*, 596 F.Supp. 386 (N.D. Ala. 1984). *See also Gates v. Gomez*, 60 F.3d 525 (9th Cir. 1995) (contracts are interpreted to give effect to mutual intention of the parties as it existed at the time the contract was made); *Stone and Michaud Ins., Inc. v. Bank Five for Sav*., 785 F.Supp. 1065 (D.N.H. 1992) (interpretation of contract focuses upon parties' intent at the time of contracting); *Mendes, Jr. Intern. Co. v. M/V Sokai Maru*, 758 F.Supp. 1169 (S.D. Tex. 1991) (where differences in contract interpretation arise, the meaning each party attaches at the time the contract was made prevails).

In considering the preclusive effect of the Amador Hardwick Stipulation, the D.C. Circuit relied on its own previous opinion in *Otherson v. Dep't of Justice, I.N.S*. to note that stipulated judgments are not "actually litigated." 711 F.2d 267, 274 (D.C. Cir. 1983). In *Otherson*, the D.C. Circuit also noted that "preclusion in the second trial must not work an unfairness. Preclusion is sometimes unfair if the party to be bound lacked an incentive to litigate in the first

trial, especially in comparison to the stakes of the second trial." *Id*. at 273. "Fears that a party might have litigated less than fully because the stakes in the first action were low in relation to those in the second inhere in the justification for not preclusively establishing issues not actually litigated." *Id*. at 275.

In 1987, the County's incentive to litigate the Amador Hardwick Stipulation was minimal. The Stipulation appears to have been a "form" document (at least in substantive part) submitted to at least several counties.[8] The Stipulation presented an opportunity to resolve the tax dispute, and the prospect of expensive litigation was undesirable in light of the minimal reward of a judgment in the County's favor, as the *Hardwick* Plaintiffs appeared poised, by the terms of the Federal Hardwick Stipulation, to place the land in trust and off the County tax rolls (although they never did so).

The D.C. Circuit further noted that when a non-party invokes issue preclusion, greater weight should be given to the party's lack of incentive for litigating in the first instance. *Id*. at 277 (citing RESTATEMENT (SECOND) OF JUDGMENTS § 28 comment j). While the United States was a defendant in the *Tillie Hardwick* litigation, it was neither a party nor signatory to the Amador Stipulation, but has invoked issue preclusion as a defense in this litigation. The United States' non-party status obliges this Court to give greater weight to the County's minimal incentive to litigate the issue rather than accept the proffered Stipulation. As discussed below, the County has described the injury and costs that such a casino would work on the County and its residents. See Sec. D, *infra*. Simply put, had the County believed that it was agreeing to the

[8] The identical language regarding the treatment of Rancherias as "Indian Country" and providing that the Rancherias "shall be treated by the County… and the United States of America" appears *verbatim* in other County-Rancheria Hardwick Stipulations as quoted in publicly available Indian Land Opinions on the NIGC website (available at http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx), including the Land Opinions for the Picayune Rancheria of Chukchansi Indians and Mooretown Rancheria of Maidu Indians of California. On information and belief, each of the other County-Tribe stipulations was presented to the Counties with identical or virtually identical language.

construction and operation of a large Indian casino at the Rancheria location, its decision to settle the tax claims would surely have been different. The change in relevant circumstances cannot be ignored by this Court in assessing the County's intent at the time of the Stipulation's execution.

6. The *Tillie Hardwick* Stipulated Judgments could not convert the Rancheria land into reservation land under applicable federal laws.

The IRA plainly states the manner in which reservation status may be attained:

> The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: *Provided*, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

25 U.S.C. §467 (emphasis added). The IRA is the only law of general application authorizing the creation of reservation status. The IRA authorized the Secretary – not the federal courts, or the parties to a stipulation – to proclaim new Indian reservations, but only if the land so designated is first taken into trust pursuant to the IRA's authority under 25 U.S.C. §465. The process governing fee-to-trust provisions is specifically regulated by 25 CFR Part 151, and the Secretary has never complied with that process in order to establish trust status for the Rancheria. Indeed, a trust application under 25 CFR Part 151 requires advance notice to the State and County and an opportunity for comment, 25 CFR §151.10, as well as Secretarial consideration of substantive factors including, *inter alia*, the statutory authority for the acquisition, §151.10(a), the purposes for which land will be used, §151.10(c), the impact of the land's removal from local and State taxation, §151.10(e), and the extent to which the application provides information related to compliance with the National Environmental Policy Act.[9] § 151.0(h).

[9] The National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. ("NEPA"), applies to all "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The decision to acquire land into trust for the benefit of the Tribe and to issue a reservation proclamation constitutes "major federal actions" as defined in 40 C.F.R. § 1508.18. Further, NEPA compliance requires consideration of the proposed use of the federal land at issue. *Lockhart v. Kenops*, 927 F.2d 1028, 1033 (8th Cir. 1991).

The authority to place land in trust and create reservation status is vested in Congress, *United States v. Lara,* 541 U.S. 193, 194 (2004) ("the Constitution, through the Indian Commerce and Treaty Clauses, grants Congress 'plenary and exclusive' powers to legislate in respect to Indian tribes"), which in turn delegated the authority for fee-to-trust acceptance and subsequent reservation designation only to the Secretary of the Interior and only when accomplished through the process set forth in the IRA. See 25 U.S.C. §§465, 467.

While courts may *review* the validity of designations of reservation status by the United States, they have no authority *to create* that status. Thus, the County's statement at ¶D in the Amador Hardwick Stipulation that the parcel "shall be treated by the County of Amador and the United States of America, as any other federally recognized Indian reservation…" could not, and did not, create reservation status, and the *Hardwick* Court's entry of the Amador Stipulated Judgment likewise did not create reservation status.

7. In the absence of a federal law enacted subsequent to the California Four Reservations Act of 1864, the Rancheria legally cannot have reservation status.

a. The 1864 law authorized the President to proclaim no more than four Indian reservations within California, and the four that were established did not include the Rancheria.

The California Indian Reservation Act of April 8, 1864, 13 Stat. 39 ("1864 Act"), Docket No. 34-2, specifically limited to four the number of Indian reservations that could be established in California:

> SEC. 2. And be it further enacted, That there shall be set apart by the President, and at his discretion, not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purposes of Indian reservations *** [Emphasis supplied.]

The four reservation limitation not only was confirmed in *Mattz v. Arnett*, 412 U.S. 481, 489 (1973), but the Court even identified the four reservations established under that law.[10] Once the 1864 Act became law, the process for establishing reservations within California became strictly limited in a way distinct to that State in that no more than four reservations could be established absent specific future Congressional action. In a 1913 challenge to the federal expansion of the Hoopa Valley Reservation (one of the four reservations established pursuant to the Act), the United States Supreme Court held that expansion of existing reservations was within the discretion of the United States but noted that the discretion to *add* reservations was limited to "abolishing reservations once made, and establishing others in their stead." *Donnelly v. United States*, 228 U.S. 243, 258 (1913) (emphasis added). Thus, Secretarial designation of the Rancheria as a reservation would have required either (a) abolishment of one of the original four reservations proclaimed pursuant to the authority of the 1864 Act or (b) new Congressional action.

Absent an applicable legislated exception to the 1864 Act, the Secretary does not have authority to proclaim "reservation" status for *any* land in California. It is noted that Congress has enacted two broad exceptions to the four reservation limitation relevant to California: the Mission Indians Relief Act of January 12, 1891, 26 Stat. 712 and the IRA. The former does not apply to the Rancheria and the United States has not satisfied the IRA's requirements for proclamation of reservation status.

b. The Mission Indians Relief Act of 1891 authorized reservation status only for identified Mission Indian tribes.

[10] *Mattz v. Arnett* recites the history of the 1864 Act, at 412 U.S. at 489-91, and identifies the reservations established pursuant thereto as (a) Round Valley, (b) Mission, (c) Hoopa Valley and (d) Tule River.

The Mission Indians Relief Act authorized the establishment of reservations for Mission Indians residing in Southern California, which were to be set aside from lands then in the public domain. The identity of Mission Indians was and is well known — they are the Indians historically residing adjacent to, or near, the Catholic missions in Southern California and who were members of four tribal groups living at 42 villages and named sites: Serranos, Dieguenos, Coahuilas and San Luis Rey or San Luisenos. *See* S. Rep. No. 74, 50th Cong., 1st Sess. (1890) at 1-4. Nowhere in the Mission Indians Relief Act is there authorization for a reservation for Indians in Amador County.

c. The IRA authorized a legal process through which tribes can acquire land and secure trust and reservation status, a process not pursued by the Rancheria.

There has never been a legal barrier precluding the United States from proceeding to establish trust or reservation status for the Rancheria, according to the longstanding statutory authority of the IRA. In fact, the *Hardwick* Stipulations provided that the Tribe could place the Rancheria land into trust pursuant to the IRA or the Rancheria would revert to a taxable status.[11] Amador Hardwick Stipulation, Docket No. 33-1 at ¶G. The Tribe never did so. The IRA delegates to the Secretary discretion to proclaim reservations at 25 U.S.C. §467. However, such reservation proclamations can only be extended to lands already accepted into trust by the Secretary pursuant to Section 5 of the IRA, 25 U.S.C. §465. The IRA is the only federal law of general application authorizing the Secretary to take Indian land into trust status, and it makes clear that the Secretary cannot use IRA authority to proclaim reservation status for the Rancheria until, and unless, the Rancheria first is taken into trust under that same law.

[11] That process may only lawfully proceed under the Secretary's fee-to-trust regulations (25 CFR Part 151) governing the acquisition of land by the United States in trust status for individual Indians and tribes. Part 151 imposes various criteria on the United States, including mandatory consideration of the impact on the State and its political subdivisions, including the County, resulting from the removal of the land from the tax rolls.

Several California tribes have successfully petitioned Congress for tribe-specific legislation establishing reservation status for their land, but those private laws have been enacted on a case-by-case basis. No such legislation has been enacted on behalf of the Buena Vista Rancheria.

B. No "Tribe" Occupied the Rancheria at Any Point in Time Relevant to Establishing Reservation Status.

The history of the Rancheria and its residents was thoroughly researched in 2007 by the County's expert, Dr. Stephen Dow Beckham. The resulting Report details facts demonstrating that the handful of Rancheria residents – all members of the Oliver family – never constituted an Indian tribe, never conducted any formal tribal meetings, and never considered themselves to be an Indian tribe. *See* Statement of Facts ¶¶ 7-17, *supra*. Indeed, there is no evidence that they even resided on the land until 1935, or some eight years after it was purchased in 1927 in federal fee ownership. Undisputed Facts ¶¶ 8-11.

The distinction between Indian tribes and "homeless Indians" cannot be ignored. The Secretary's own filings in this litigation have conceded that "reservations" are set aside for "tribal Indians" – not groups of homeless Indians. Defendants cited to Cohen's Handbook of Federal Indian Law, stating:

> Cohen's treatise explains that "reservation" means "land set aside under federal protection for the residence or use of tribal Indians, regardless of origin," or "federally protected Indian tribal lands without depending on any particular source."

Defs.' Br. at 31, Docket No. 33 (quoting Cohen's Handbook of Federal Indian Law 189 (2005)) (emphasis added). Defendants further relied on *Tuscarora v. N.Y. Power Auth.*, 257 F.2d 885, 887 (2d Cir. 1958), noting that the court in that case found a "tract of land acquired by purchase by United States for [a] tribe" to be a reservation. Defs.' Br. at 32, Docket No. 33 (emphasis supplied). Parcels of land purchased for homeless Indians are not reservations.

Congress has never authorized the proclamation of reservation status for the Rancheria. While the Secretary treats California rancherias as "the functional equivalents" of reservations for various administrative purposes and programs, she cannot do so in the case of Indian gaming which is limited to "Indian Lands." The Secretary cannot administratively waive the 1864 Act's statutory prohibition.

C. The NIGC Opinion Written After this Litigation was Filed Cannot Create Reservation Status Where None Exists, and the Opinion is Owed No Deference by this Court.

The 2004 Compact was approved on December 20, 2004, but the NIGC Opinion was not written until June 20, 2005, or 192 days[12] after the date on which the Secretary's decision at issue was rendered. Docket No. 33-2. The NIGC Opinion letter was commissioned specifically for use in this litigation which was filed on April 1, 2005, despite the fact that the letter can never be part of the Administrative Record for APA review since it was not part of, or considered during, the Secretary's decision-making process. Defendants' Motion for Extension of Time, Docket No. 8.

Courts reviewing agency action under the APA may not affirm that action on "a reasoned basis different from the rationale actually put forth by the agency." *Pub. Media Ctr. v. F.C.C.*, 587 F.2d 1322, 1332 (D.C. Cir. 1978); *Motor Vehicle Ass'n of U.S. v. State Farm, supra*, 463 U.S. at 43. This means that Defendants may not rely on the *post-hoc* NIGC opinion, which was not before Defendants at the time of the Compact Approval and is not part of the Administrative Record, to save the arbitrary and capricious Compact Approval on review by supplying, after the fact, a rationale that the agency's decision itself did not provide. *See KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1059 (D.C. Cir. 2003); *Balt. & Annapolis R.R. Co. v. WMATC,* 642 F.2d 1365, 1370 (D.C. Cir. 1980).

[12] See Undisputed Fact No. 43.

Nor is the NIGC Opinion binding on this Court, the County or even the Defendants. NIGC land determinations are not opinions of the NIGC itself or final agency actions, but are rather mere opinions of lawyers staffing the NIGC Office of General Counsel. This characterization of NIGC land determinations comes from federal attorneys successfully opposing judicial review of the same determinations under the APA. For example, in *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253 (D. Kan. 2004), the plaintiff tribe sued various federal and state officials seeking APA review of a similar NIGC land determination concluding that a tract of tribal land did not qualify for gaming. *Id.* at 1262. In that case, the federal defendants characterized NIGC land opinions as "non-binding agency interpretations" and "informal pronouncements." Docket No. 34-1. The federal defendants wrote that Indian land determinations are an "intermediate administrative view of the law articulated by subordinate officials and not 'final agency action'" and that "[s]uch intermediate opinions in the administrative process are necessarily 'tentative, provisional, or contingent.'" *Id.*; *See also U.S. ex rel. the Saint Regis Mohawk Tribe v. President R.C.-St. Regis Mgmt. Co*., 451 F.3d 44, 49 (2d Cir. 2006), as corrected (June 27, 2006) (NIGC General Counsel opinion letter was merely advisory and not an appealable, final agency decision) (citing *Cheyenne–Arapaho Gaming Comm'n v. NIGC*, 214 F.Supp.2d 1155, 1167–68 (N.D. Okla.2002)).

Further, this NIGC Opinion is a fatally flawed sleight of hand – a collection of factual errors and unsupportable legal conclusions made in the service of reaching the same, pre-determined conclusion that the Agency had already reached: that the Rancheria is a reservation.

At the outset, the NIGC Opinion declared at p.1: "The Rancheria was purchased in 1927 with money appropriated by the Acts of June 21, 1906 (34 Stat. 325-328) and April 30, 1908 (35 Stat. 70-76)." The following paragraph then quotes the 1906 Act in part, taking care to quote the

word "reservation" to imply that Congress somehow intended that lands purchased with the appropriated funds would have reservation status. As stated *supra,* the Rancheria was purchased not with funds appropriated in the 1906 and 1908 Acts, but with funds appropriated by the 1914 Act which did *not* use the word "reservation." The Rancheria was purchased with funds appropriated "[f]or the purchase of lands for the homeless Indians in California, including improvements thereon, for the use and occupancy of said Indians, $10,000, to be immediately available and to remain available until expended, said funds to be expended under such regulations and conditions as the Secretary of the Interior may prescribe." Docket No. 34-4. It is possible that the 1906 and 1908 appropriations were used to purchase land for tribes, but the 1914 Act appropriation was to be used to purchase land for homeless individual Indians and not tribes. Indeed, the few Rancheria residents were members of a nomadic family[13] and not an Indian tribe.

The NIGC Opinion also mischaracterized the *Hardwick litigation* in several self-serving ways. The Opinion states:

> In 1979, Indian residents from the Rancheria joined Indians from sixteen other California Rancherias in a class action lawsuit to restore the reservation status of their land, asserting that their trust relationship had been illegally terminated under the Rancheria Act of 1958.

NIGC Op. at 3. While other co-plaintiff Rancherias may have enjoyed "reservation" status, the Buena Vista Rancheria never did, and the *Tillie Hardwick Litigation* could not "restore" a status which the Rancheria never had.

Similarly, the Opinion quoted the relief requested in the *Hardwick* Complaint as if it were the relief actually received: that "the Secretary of the Interior is under a duty to treat all of the

[13] Undisputed Facts No. 7-12.

subject Rancherias as Indian reservations in all respects." *Id*. That was not the result of either the Federal Hardwick Stipulation or the Amador Hardwick Stipulation.

The NIGC Opinion further mischaracterized the limited effect of the Federal Hardwick Stipulation by conflating the term "Indian Country" with "Indian Lands" and then glibly inserting the word "reservation:"

> The effect of the judgment was that all lands within the Rancheria boundaries, as they existed immediately prior to the illegal termination, were declared to be "Indian Country" as defined by 18 U.S.C. §1151…. Thus the Rancheria consists entirely of the original reservation land base of approximately 67.5 acres.

Id. at 5 (emphasis added). The Buena Vista never had an "original reservation land base." And, by the statutory definition, "reservation" land is only one of several types of "Indian Country," so while Indian reservations are always "Indian Country," the reverse is not true:

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. §1151. Had Congress intended that Indian gaming be conducted throughout "Indian Country," it would have saved itself the trouble of defining the much more limited term "Indian Lands"[14] and using it throughout IGRA.

D. Unmitigated Casino Impacts Would Harm the County and County Residents.

[14] 25 U.S.C. §2703(4).

The two parties to the 2004 Compact authorizing the gaming activity are the State and the Tribe, both of which enjoy sovereign immunity from suit. If Indian gaming is commenced at the Rancheria, the County would have no remedy for any injury suffered as a result.

1. Intrusion on County jurisdiction.

As a political subdivision of the State (*See* CAL. GOV. CODE §§ 23000, 23003 and 23004 (Deering 2004)), Amador County has jurisdiction over the lands within its borders that are neither federal lands, nor "Indian lands" as defined by IGRA. *Id*. at §§ 65800, 65802 and 65851. *See also, e.g., Castiglione v. County of San Diego*, 93 Cal. Rptr. 499 (Cal. Ct. App. 1971) (county government may regulate the use of land within its borders).

Because the Rancheria is neither trust land (it is owned in fee by the Tribe) nor a reservation, it currently is subject to the County's jurisdiction. The Secretary's approval of the 2004 Compact directly and adversely affects the County's lawful statutory rights and interests. Thus, the County is significantly affected by the Secretary's approval of the 2004 Compact because the approval constitutes an unlawful federal authorization for the Tribe to conduct Class III gaming on land currently under the County's jurisdiction which does not meet the "Indian lands" requirement of both IGRA and the 2004 Compact.

The land is zoned by the County as "R1A," Single Family Residential and Agricultural District. *See* June 18, 2008 Letter from the County's Planning Department, Docket No. 39-13, also attached as **Exhibit B**. Notwithstanding the County's designations that this land is to remain rural in nature with a density of not more than one family per 40 acres, *id*., the Tribe has been authorized by the 2004 Compact to commence site preparation, construction and commercial development of a major casino.

The R1-A Single-Family Residential-Agricultural District is among the various zoning districts that are established by the Amador County Code and applied to land within the

unincorporated area within which the Rancheria is located. AMADOR COUNTY CODE at §19.12.010 (establishing the districts); *id*. at §19.24.045 (providing the regulations governing R1-A Districts). Numerous uses are designated for the R1-A district, all intended to maintain the District's rural, farming and residential character. Large (or even small) casinos are not among the enumerated uses, and in fact are contrary to the residential and agricultural uses specified by the Code and which are reflected in the actual use of the R1-A district.[15]

2. Public safety, environmental and other impacts to the County.

The County has first-hand experience with the impacts of an Indian casino within its borders. Specifically, it is already the home of a large casino and resort located near Jackson, CA (Amador County seat) by the Jackson Rancheria, and has been since long before this litigation was filed in 2005.[16] The Amended Complaint alleged those impacts as follows:

> Financial impacts would include, among others, increases in staffing, infrastructure, and related costs associated with: (i) the provision of public safety – including Sheriff's Office services, County jail operations, emergency dispatch services, Sheriff's Office administration, District Attorney's Office services, Public Defender's services, volunteer first responder services, and social and public health services; (ii) the inevitable need for expansion of

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[15] See AMADOR COUNTY CODE §19.24.045 (permitting the following uses of land within an R1-A District):

> 1. Single-family dwelling; 2. Home occupations as defined by Section 19.28.010; 3. Crop and tree farming; 4. General farming, including but not limited to, the raising, growing, and harvesting of vegetable, field orchard, bush, and berry crops; vineyards; silviculture; 5. Wholesale operation of nurseries; greenhouses; mushroom rooms; floriculture; and uses of a similar nature; 6. Pasture for grazing (including supplemental feeding), raising, maintaining, breeding, and training of horses, cattle, sheep, and goats, hogs, and similar livestock, provided there is no feeding of garbage, sewage, refuse, or offal, and subject to any limitations in number of animals in Chapter 19.48, General Provisions and Exceptions of the AMADOR COUNTY CODE; 7. Feed lots, feed yards, provided there is no feeding of refuse, garbage, sewage, or offal; 8. Poultry farms; 9. Dairies; 10. The raising, feeding, maintaining, breeding, and slaughtering of livestock, chickens, turkeys, rabbits, pigeons, ducks, geese, fish, frogs, and small animals or fowl; 11. Processing, packing, selling, shipping of agricultural products not done on an on-site retail sales basis; wells, water storage and reservoirs, including on site excavation or removal of materials for construction thereof; 12. Storage of petroleum products for use by the occupants of the premises; 13. Any structure, building, equipment, or use incidental and necessary to any of the foregoing uses.

[16] *See* https://en.wikipedia.org/wiki/Jackson_Rancheria

> public education to meet the needs of new casino employees moving to the County; (iii) necessary road, interchange/intersection, bridge, and drainage improvements; and, (iv) remediation of environmental impacts. Preliminary estimates indicate that the initial cost to the County to address the financial impacts created by construction and operation of the Indian casino would be tens of millions of dollars, as well as subsequent additional annual expenses which cannot be estimated at this time.

Amended Complaint ¶ 26; *See also* Declaration of Hugh S. Herfel, Chairman of the Board of Directors for the Jackson Valley Fire Protection District, Docket No. 39-17, also attached as **Exhibit C**; Declaration of Michael W. Israel, Director of the Environmental Health Department for Amador County dated August 28, 2008, Docket No. 39-16, also attached as **Exhibit D**.

3. The Compact's mitigation measures do not protect the County.

Contrary to Defendants' assertions, the 2004 Compact does not require the Tribe to mitigate all impacts. Docket No. 33 at 12. While the 2004 Compact does contemplate mitigation of the adverse financial impacts, it makes no assurance whatsoever that they in fact will be mitigated. (*See* 2004 Compact at Article VII, "Mitigation of Off-Reservation Impacts.") That there almost certainly will be unmitigated off-reservation impacts was conceded by the Defendants with their admission that the Tribe is only required by the 2004 Compact to identify mitigation measures which in its sole judgment are "feasible." *Id.* at 33. This undefined standard gives the Tribe total control over deciding which impacts can be feasibly mitigated, while affording the County no right or ability to contest unilateral tribal decisions that ignore significant impacts. If the Tribe breaches its mitigation obligations under the 2004 Compact, only the State, in its sole discretion, may file an action for that breach. 2004 Compact Sec. 9.0 *et seq.*

Finally, as the Amended Complaint alleged at ¶27, development of a large Indian casino would impact the County in ways that could not be mitigated even voluntarily by the Tribe:

> Amador County is a small rural county with a population of approximately 35,100 residents. The anticipated vehicle traffic generated by the proposed casino – which will be served by a planned parking facility which will accommodate 3,500 to 4,000 vehicles – will be in excess of 20,000 new vehicle trips per day on narrow, rural County roads, a level of traffic which will overwhelm the County and its residents and cause numerous adverse quality-of-life impacts. These impacts will include a dramatic increase in crime, a wide variety of detrimental environmental impacts – including air and water quality degradation, and significant noise and light pollution – and traffic congestion on narrow local roads.

See also Second Declaration of Larry S. Peterson, Public Works Director of Amador County, dated August 28, 2008, Docket No. 39-14, also attached as **Exhibit E**.

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VI. CONCLUSION

For the reasons stated above, Plaintiff Amador County respectfully requests that this Court grant its Motion, declare that the Rancheria does not qualify for Indian gaming under IGRA and set aside the Compact Approval.

DATED this 31st day of August 2015.

AMADOR COUNTY, CALIFORNIA

By Counsel

/s/

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