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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. 1:05-CV-00658 (BJR) Honorable Barbara J. Rothstein ORAL ARGUMENT REQUESTED

PLAINTIFF'S RESPONSE TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

This litigation was filed by Amador County ("County") challenging the decision by the Secretary of the United States Department of the Interior ("Secretary") to approve casino gaming on a tract of land owned in fee status by the Buena Vista Rancheria of Me-Wuk Indians ("Tribe"). The Rancheria land is located within the County; its dimensions are 528 feet wide and 5,280 feet long.

The Secretary purported to approve the subject land for gaming through approval of an Amended Gaming Compact that specifically identified the Buena Vista Rancheria land as being "Indian Lands," as that term is used in the Indian Gaming Regulatory Act of October 17, 1988, 25 U.S.C. §2701, *et seq.* (herein known as "IGRA"). The Defendants essentially base their Motion for Summary Judgment (Docket No. 77) on a theory that the word "reservation" has no particular legal significance but rather is a generic term for Indian land that is loosely used by the courts and the Defendants without regard to whether such land qualifies for reservation status as a matter of applicable federal law and regulations.

That the land's qualification for reservation status is the indispensable ingredient for gaming eligibility under IGRA is conceded in the second paragraph of Defendants' Introduction to their Motion:

> (1) [I]s the Buena Vista Rancheria … an "Indian reservation" as that term is used in IGRA? If yes, the inquiry is at an end and the United States is entitled to summary judgment.

This question makes clear that legal reservation status is the prerequisite for gaming on the Buena Vista Rancheria land, and the County fully agrees with that statement. However, the Defendants go on to contend that there are many ways in which non-reservation land can acquire *reservation status*, and Defendants actually argue that the term is so general as to have little formal meaning. Indeed, they assert that the term is so casually used by the Secretary and

Interior officials that land becomes a reservation whenever *they* decide to so deem it. In short, Defendants effectively assert that any land occupied by Indians will qualify for gaming without further action beyond informal characterization − an option outside the scope of the Secretarial approval at issue in this litigation.

The Defendants' argument is simply wrong. The simple truth is that "reservation" status has a special meaning as a matter of federal law – both in general and under IGRA in particular. The basic tenet for assessing this issue is the well-established principle of Indian Law that Congress has plenary power over Indian affairs as the product of the Indian Commerce Clause of the U.S. Constitution. U.S. Const. art I, §8, cl. 3. The Commerce Clause states in its entirety that the United States Congress shall have power "To regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes*." (Emphasis supplied.) The last five words (in italics) constitute the Indian Commerce Clause.[1]

These five words are critical, for they are at the heart of many disputes in Indian country, and they go to the essential question presented in this litigation: whether there is any Congressional action that has (1) legislated "reservation status" to rancherias in general or (2) legislated specific authority to the Secretary to establish reservation status for the Buena Vista Rancheria.

It is undisputed that Congress has established many Indian reservations through its ratification of Indian treaties that identified specific reservation lands for the various treaty signatory tribes. However, the Buena Vista Rancheria did not enter into any treaty because there

[1] Congress' plenary power over Indian tribes "has always been recognized by the executive, and by Congress, and by this Court, whenever the question has arisen." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Tribal sovereignty issues are "subject to the superior and plenary control of Congress." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).

was no Buena Vista tribe during the Treaty Epoch,[2] and the land was in private fee ownership prior to its purchase as federal fee land with funds appropriated in the Indian Affairs Appropriations Act of August 1, 1914 ("1914 Act") (which authorized the acquisition of the Rancheria lands not as a reservation but merely to provide a place to live for homeless Indians living nearby). It also is undisputed that Congress has enacted only one federal law of general application giving the Secretary authority to (a) take Indian land into trust status and (b) designate any Indian land as "reservation" land. That law is the Indian Reorganization Act of June 18, 1934, 25 U.S.C. §461, *et seq.* ("IRA"). Section 5 of the IRA (25 U.S.C. §465) authorizes the Secretary to accept land into federal trust status for the benefit of an applicant Tribe, and IRA Section 7 (25 U.S.C. §467) authorizes the Secretary to declare reservation status *only* for land that has been taken into trust pursuant to IRA Section 5.

Although neither of the prerequisites codified at IRA Sections 5 and 7 has been satisfied, the Defendants contend that the Rancheria is reservation land because it has always been "considered" to have such status. It is possible that some federal services administered by various federal agencies (including Interior) have been extended to the Buena Vista Rancheria, but the delivery of federal programs benefitting individual Indians does not establish reservation status for the land upon which they may reside. Indeed, various Indian programs are for the benefit of individual Indians, many of whom are members of recognized tribes not residing on tribal land.

Finally, as discussed *infra*, in its development of the law that became IGRA, Congress was acutely aware that Indian gaming would be controversial and, consequently, carefully

[2] The first treaty between the United States and an Indian Tribe was the Treaty with the Delawares of September 17, 1778, 7 Stat 13. The last treaty between the United States and an Indian tribe was the Treaty with the Nez Percés of August 13, 1868, 15 Stat. 693. No treaty was ever executed between the United States and an entity known as the Buena Vista Rancheria of Me-Wuk Indians.

limited the lands upon which tribal casinos could be located. The term "reservation" was carefully (and not casually) used in critical sections of the law, and neither IGRA nor the so-called "Clarification Act"[3] cited by Defendants created any authority for the Secretary to establish reservation status for any gaming site *other* than in one specific instance. That single instance is set forth at IGRA Section 20(b)(1)(B)(ii), 25 U.S.C. §2719(b)(1)(B)(ii), which specifically authorizes reservation status for land taken into trust "as part of *** (ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process…." The federal acknowledgment process referenced in IGRA is a highly regulated and onerous administrative process conducted by the BIA Office of Federal Acknowledgment pursuant to the regulations at 25 C.F.R. Part 83. Applicants for tribal recognition through the federal acknowledgment process wait years, and sometimes decades, for approval. The Buena Vista Rancheria Tribe never underwent the process.[4]

The United States purchased the Rancheria from private owners in federal fee status as a place where "homeless Indians" could reside. It has never been taken into trust status and has never been lawfully extended reservation status. The term "reservation" has specific legal significance in federal Indian law, and casual references to reservation status (which repeatedly appear throughout the Defendants' Motion for Summary Judgment) cannot establish that status.

While there are other issues before this Court, the Defendants' Motion and Memorandum in Support thereof clearly have focused on the reservation issue. This is understandable: the Secretary's gaming approval was *predicated* on the (incorrect) assumption that the Rancheria was already in reservation status. Since the Rancheria is not (and, absent some further qualifying

[3] This Act relied on by the Defendants is discussed *infra* at Section II.B.2.

[4] The acknowledgement regulations require, as a threshold matter, that the applicant "has been identified as an American Indian entity on a substantially continuous basis since 1900." 25 C.F.R §83.7(a). For this reason alone, the federal acknowledgment process is not available to the Buena Vista Rancheria because the Rancheria land was not even purchased from private owners until some time after the funds to do so were appropriated in the 1914 Act.

federal action, cannot be) in reservation status, the Secretary's gaming approval decision was arbitrary, capricious and contrary to federal law.

II. ARGUMENT

A. Congress Has Never Designated the Rancheria as a Reservation.

1. The 1914 Indian Affairs Appropriations Act was the only federal law authorizing purchase of the Buena Vista Rancheria land, but it did not legislate reservation status for that land.

The Buena Vista Rancheria was purchased with funds appropriated by the 1914 Act, which appropriated funds for, *inter alia*, "the purchase of lands for the homeless Indians in California, including improvements thereon, for the use and occupancy of said Indians…." Docket No. 34-4. Because the 1914 Act did not purport to create a reservation, or even mention *the word* "reservation," it cannot support Defendants' claim that the 1914 Act or some other act of Congress casually vested the Buena Vista Rancheria with reservation status.

Defendants claim that the 1914 Act must be read *in pari materia* with other laws to produce a construction that all lands purchased with funds from any Indian Appropriations Act (even if silent as to reservation status) are reservations. This argument is unavailing.

The "*in pari materia*" canon of construction cited by Defendants is appropriate only when two statutes are created by the same legislative act, and "designed to serve the same purpose and objective." *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1248 (D.C. Cir. 2008). The other Acts cited by Defendants were enacted years before the 1914 Act. If Congress had intended to mirror the objective of those Acts, it would have said so. Indeed, the word "reservation" does not appear in the 1914 Act's appropriation to purchase fee land for "the homeless Indians in California."

Nonetheless, Defendants have cited to a litany of authority relating to the reservation status of other California rancherias created pursuant to other acts of Congress − the same

authority cited in their Motion to Dismiss (*See* Docket No. 33, Sec. D.1 ("California Rancherias are the functional equivalent of Indian reservations"). Plaintiff has already addressed each of these decisions and distinguished them from the circumstances surrounding the creation of the Buena Vista Rancheria. *See* Plaintiff's Memorandum in Support of Motion for Summary Judgment, Docket No. 76-1, pp. 18-20. Again, for the reasons cited therein, these cases, including *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003), *Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 1174 (E.D. Cal. 2003), *Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981), *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975) and *Governing Council of Pinoleville Indian Cmty. v. Mendocino Cnty*., 684 F. Supp. 1042 (N.D. Cal. 1988), are all distinguishable because they involved rancherias acquired pursuant to (a) other Appropriations Acts containing different language or (b) specific legislation in which Congress affirmatively mandated the Secretary to accept land in trust and designate it as "reservation" land. The one new authority cited by Defendants, *Big Lagoon Rancheria v. California*, merely repeats the same definition of "rancheria" from *Duncan,* which actually supports *Plaintiff's* argument that many Rancherias are not reservations: "Rancherias are numerous small Indian reservations or communities in California." 789 F.3d 947, 951 (9th Cir. 2015), *as amended on denial of reh'g* (July 8, 2015) (emphasis supplied).

Defendants also, confusingly, cite to *Table Bluff v. Watt*, 532 F.Supp 255 (N.D. Cal 1981), a breach of trust case in which the Indian plaintiffs' land had been held in trust status before termination through the California Rancheria Act. The Buena Vista Rancheria has never been held in trust status. Further, in *Table Bluff*, the relief granted by the Ninth Circuit did not restore reservation status to the Tribe, or conclude that the land had ever been an Indian reservation simply by virtue of its having been held in trust. Instead, the Court ordered that "the

land be returned to the *status quo* exactly as it existed prior to the approval of the now void distribution plan. Thus, the lands should be returned in trust, at the option of the individual owners, for the benefit of the Indian(s) or tribe that possessed it prior to the distribution...." *Id*. at 260 (emphasis supplied). *Table Bluff* is simply unavailing to Defendants' meandering argument that "Courts have found that establishment of the rancherias equated to the establishment of other reservations." Defs.' Cross-Motion at pp. 27-28.

2. The stipulated judgments in the *Tillie Hardwick* settlement did not "restore" reservation status because no such status previously existed.

Defendants urge the Court to conclude that the stipulated judgment between the *Hardwick* plaintiffs and the County (but not the United States) created reservation status for the Buena Vista Rancheria and thereby removed it from the jurisdiction of the State's gaming laws. *See* Docket No. 77 at pp. 29-30. But stipulated judgments between non-federal parties cannot create reservations.

While the County had the right to forgive tax payments owed the County by the *Hardwick* plaintiffs, it did not have the power to fundamentally alter the federal status of the property for which those taxes were owed. The question of the Rancheria's legal status as a "reservation" is a conclusion of law which may be reached only by the courts. In short, stipulated conclusions of law such as those in the *Hardwick* agreements 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). Further, the proclamation of reservation status is reserved to Congress alone and the only law of general application authorizing the Secretary to designate reservations status to Indian land is IRA Section 7. Thus, a court can only adjudicate reservation status if that status already exists as a

matter of federal law. *See* Sec. II.B.1 *supra*. Stipulated language in a settlement agreement can neither create legal reservation status nor bind the County in this unrelated litigation.

B. The Secretary Has Never Designated the Rancheria as a Reservation.

1. IRA Section 7 limits the Secretary's power to designate reservation status to land accepted into trust pursuant to IRA Section 5.

Defendants grossly mischaracterize Plaintiff's argument, stating "Plaintiff also argues that the Rancheria can only be a reservation if it is acquired in trust pursuant to the IRA." Defs.' Cross-Motion at p. 37. The Secretary is clearly authorized to determine that reservations validly created by Congress already enjoy reservation status, but the Secretary is only authorized to proclaim reservation status pursuant to Section 7 of the IRA, which unambiguously limits that authority to land taken in trust pursuant to Section 5 of that Act.[5] Although the Secretary has never purported to formally proclaim reservation status for the Rancheria, the Defendants rely on the *Hardwick* stipulations as creating purported reservation status. As a matter of the law relied on by Defendants, the Rancheria cannot be a reservation.

Section 7 of the IRA is the only law of general application authorizing the creation of new Indian reservations, and it states, in pertinent part:

> 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….

25 U.S.C. §467 (emphasis supplied).

The "authority conferred by this Act" to acquire new land for Indians is IRA Section 5, which states, in pertinent part:

> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or

[5] Other sections of the IRA authorize the acceptance of trust lands for specific tribes, *see* 25 U.S.C. §§463(a-d), but not rancherias.

> assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

25 U.S.C. §465.

The Supreme Court has explained that placing land in trust status affects the property rights of non-Indians as well, and that the Secretary has a statutory responsibility to assess conflicts that may arise:

> Section 465 is the capstone of the IRA's land provisions, and functions as a primary mechanism to foster Indian tribes' economic development. The Secretary thus takes title to properties with an eye toward how tribes will use those lands to support such development. The Department's regulations make this statutory concern with land use clear, requiring the Secretary to acquire land with its eventual use in mind, after assessing potential conflicts that use might create.

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak, 132 S. Ct. 2199, 2202 (2012).

The Secretary's authority under IGRA is expressly tied to IRA Section 7 by National Indian Gaming Commission ("NIGC") regulations implementing IGRA, which require that, for the Secretary to determine that newly acquired lands are eligible for gaming pursuant to the 'initial reservation' exception at 25 U.S.C. §2719(b)(1)(B)(ii), "The land <u>has been proclaimed to be a reservation under 25 U.S.C. 467</u> and is the first proclaimed reservation of the tribe following acknowledgment." *See* 25 C.F.R. §292.6(c) (emphasis supplied).

Defendants do not claim that the Rancheria was proclaimed to be a reservation under 25 U.S.C. §467, and no other statute confers authority to the Secretary to place the Rancheria in reservation status.

The statutory structure created by the interlocking requirements of the IRA and IGRA intentionally balanced the rights of the United States, the individual states and Indian tribes in the

regulation of Indian gaming. *See*, *e.g.,* 25 U.S.C. §2704 (creating the NIGC); 25 U.S.C. §2710(d)(1)(C) (requiring Tribes to enter Compacts with states regarding Class III gaming); 25 U.S.C. §2710(b)(1) (authorizing tribal regulation of Class II gaming). The careful balancing requires a judicial rejection of the Defendants' claim that reservation status is at the Secretary's discretion − a claim that would effectively dismantle IGRA's regulatory structure.

2. The Secretary has no general power to designate reservations outside of the IRA.

Defendants rely on what they refer to as the "Congressional [IGRA] Clarification," Defs.' Cross-Motion at p. 10, for the proposition that "Congress has expressly delegated to the [Interior Secretary] authority to interpret the statute." *Id*. at p. 12. The so-called "Clarification" was not introduced in Congress as independent legislation, but rather was the 134th section of the Interior Appropriations Act of 2001, Pub. L. No. 107–63, §134 (2001). Section 134 was not a "general" fix of anything; rather, it was a specific and limited legislative "fix" following a 2001 Tenth Circuit opinion confirming that the Secretary − and not the NIGC − has limited decision-making jurisdiction under IGRA. *See Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001).

Section 134 does make plain that the Secretary has the "authority to determine" whether a specific tract of land *already* qualifies as a "reservation" under federal law; however, it does not expand the Secretary's existing legal authority to proclaim *new* reservation status for non-reservation land. Specifically, a review of the origin of Section 134 confirms that Congress merely designated the Secretary of the Interior as the appropriate party to determine whether specific land already has lawful reservation status.

The 2001 Clarification was the inevitable product of highly controversial efforts of the Wyandotte Tribe of Oklahoma to place land adjacent to the Huron Indian Cemetery in Kansas

City, KS into trust for gaming pursuant to IGRA. On February 13, 1996, the Associate Solicitor - Indian Affairs at the Department of the Interior issued an opinion that Congress had mandated the trust acquisition and, consequently, that the land qualified for "reservation" status for the purposes of IGRA. *Sac & Fox Nation*, 240 F.3d at 1256. On June 12, 1996, the Secretary published a Notice of Intent to accept the Kansas land into trust status for the Wyandotte Tribe. 61 Fed. Reg. 29,758 (June 12, 1996). Three Kansas tribes and the Governor of Kansas sued the Secretary in opposition to the trust acquisition, and the district court dismissed the action based on the failure to join the Wyandotte Tribe, an indispensable party, which had asserted sovereign immunity and had not consented to suit. *Sac & Fox Nation of Missouri v. Babbitt*, 92 F. Supp. 2d 1124, 1128 (D. Kan. 2000), rev'd *sub nom*. *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250 (10th Cir. 2001), and rev'd *sub nom*. *Kickapoo Tribe of Indians v. Deer*, 4 Fed. App'x 728 (10th Cir. 2001).

The district court's decision was reversed on February 27, 2001, by the Tenth Circuit, which ruled, *inter alia*, that the Kansas land was not a reservation. *Sac and Fox Nation of Missouri et al. v. Norton et al.,* 240 F.3d 1250 (10th Cir. 2001). In so holding, the court held that the NIGC, *not the Secretary*, was the sole agency responsible for the interpretation of IGRA:

> [N]either the Secretary nor the Department of the Interior in general is charged with administering IGRA. When Congress enacted IGRA, it established the National Indian Gaming Commission (Commission) and charged the Commission with the exclusive regulatory authority for Indian gaming conducted pursuant to IGRA…. Because the Secretary lacked authority to interpret the term "reservation," as used in IGRA, we owe no deference to his interpretation.

Sac & Fox Nation of Missouri v. Norton, 240 F.3d 1250, 1265 (10th Cir. 2001).

In 2001, the House and Senate submitted their appropriations bills with no reference to the Secretary's authority to interpret IGRA, but in reconciling the House and Senate bills, a

single line was added to the Appropriations Bill by a staffer for the purposes of overturning the Tenth Circuit's *Sac & Fox* holding − without introduction or debate in either chamber:

> The authority to determine whether a specific area of land is a 'reservation for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988.

147 CONG. REC. S13671-01 (daily ed. December 19, 2001).

Kansas Senator Sam Brownback argued against the inclusion of the language, stating:

> In that appropriations bill, nothing was passed regarding this issue on either side, the House side or Senate side. In the conference committee that met, there was a handwritten sentence that was written in *by a staff member* that overruled the court ruling and allowed for the creation of a casino next to this cemetery. That was done in the Interior Appropriations bill. Both [Fellow Kansas] Senator [Pat] Roberts and I are opposed to doing this. This was not brought to the Senate floor, not handled here. This was a handwritten sentence that was inserted. They declared: We are going to overrule the court case, overrule what the Kansas Senators want to do. They are going to allow them to build a casino next to the cemetery, regardless of what the local tribes and the Governor and what the people in the State of Kansas or what the two Senators say.

Id. (Statement of Sen. Brownback) (emphasis supplied).

Opposition by the Kansas tribes, Governor and congressional delegation led to an amendment which expressly excluded gaming at the Huron Cemetery land in the Appropriations Act, but which maintained the "fix" concerning the Secretary's exclusive authority to determine whether proposed gaming land already has reservation status. [6]

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[6] The Act as passed, Pub. L. No. 107–63 (2001), reads:

> SEC. 134. CLARIFICATION OF THE SECRETARY OF THE INTERIOR'S AUTHORITY UNDER SECTIONS 2701–2721 OF TITLE 25, UNITED STATES CODE. The authority to determine whether a specific area of land is a "reservation" for purposes of sections 2701–2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988: Provided, That nothing in this section shall be construed to permit gaming under the Indian Gaming Regulatory Act on the lands described in section 123 of

To summarize, the 2001 Interior Appropriation Act simply clarified that the legal authority to determine existing reservation status was held by the Secretary of the Department of the Interior rather than the NIGC, which technically is an agency within the Department. There is no indication that Congress intended to vest the Secretary with new authority as Defendants suggest. In fact, it is absurd to suggest that Congress created new legal authority for the Secretary to create new Indian reservations for gaming purposes − which would be a monumental amendment to IGRA − in a single sentence buried in a massive appropriations law. To accept this argument is to accept that a Congressional staff member unilaterally created a power which would swallow IGRA's general rule against gaming on Indian land acquired after IGRA's enactment on October 17, 1988.

It is beyond dispute that Congress has the power to legislate the Interior Secretary's right to unilaterally − and even arbitrarily − proclaim reservation status for any land. However, it did not do so in the 2001 Interior Appropriations Act.

3. The term "Reservation" has a narrow meaning in IGRA.

Defendants cite *Arizona Public Service Co. v. EPA*, 211 F.3d 1280 (D.C. Cir. 2000), for the proposition that the term "reservation" has "no rigid meaning." Defs.' Cross-Motion at p. 27. The D.C. Circuit's analysis of the *EPA's* broad interpretation of the word "reservation" in the context of the 1990 amendments *to the Clean Air Act* cannot be transplanted onto IGRA's rigid statutory structure regulating Indian gaming. Under IGRA, reservation status has a very specific and narrow meaning, as one of only two types of land eligible for the operation of Indian gaming:

> Public Law 106–291 [the Huron Cemetery] or any lands contiguous to such lands that have not been taken into trust by the Secretary of the Interior.

> 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).

All Indian gaming under IGRA must be, as a threshold matter, conducted on Indian Lands. *See* 25 U.S.C. §2710(b)(1) ("An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction.…"); 25 U.S.C. §2710(d)(1) ("Class III gaming activities shall be lawful on Indian lands…."). In the gaming context, "reservation" status not only has a "rigid" meaning – it is a principal key to unlocking the right to conduct Indian gaming. The Secretary does not possess unfettered discretion to use that key to avoid federal law governing reservation status.

In *Arizona Public Service Co.*, the primary issues before the court were (1) whether Congress had delegated authority to Indian tribes to regulate air quality in the 1990 Amendments, and (2) "whether EPA has properly construed 'reservation' to include trust lands and Pueblos." *Id*. at 1283-84. EPA's disputed rule had defined the term to include reservations as well as "trust lands that have been validly set apart for the use of a tribe even though the land has not been formally designated as a reservation." *Id*. at 1292. Noting that the IRA does not specifically define the term, the court reviewed dictionary definitions "as well as the context in which the term is used." *Id*. None of the definitions of "reservation" in the federal statutes reviewed by the court dealt with Indian gaming. The court determined that "'reservation' as used in the 1990 Amendments to the [Clean Air] Act" is not limited to the formal reservations proclaimed by the Secretary pursuant to 25 U.S.C. §467. *Id*. at 1293. Accordingly, the court

found that the term "reservation" was ambiguous, and applied the second step of the Chevron test to hold that the agency's broad interpretation of reservations in the context of the Clean Air Act Amendments was reasonable. *Id*. at 1294.

First, it is plain that the *Arizona Public Service Co.* Court's determination that "reservation" includes trust lands holds no relevance to this Court's inquiry of that term's meaning under IGRA. IGRA's definition of "Indian Lands" plainly distinguishes between reservation land and trust land, and any interpretation of IGRA conflating those two terms would conflict with the statute. *See* 25 U.S.C. §2703(4).

Second, EPA's loose, broad definition of "reservation" (as the *Arizona Public Service Co*. Court accepted in the context of the Clean Air Act) is at odds with IGRA's narrow and strict usage of the term. Despite that court's finding that the term "reservation" has "no rigid meaning" in the environmental context, it is beyond dispute that the term does have a rigid meaning under IGRA – *i.e.*, those lands expressly designated to be "reservations" by Congress or by the Secretary through her congressionally delegated power pursuant to 25 U.S.C. §467, and which qualify as one form of "Indian Lands" pursuant to IGRA Section 4(4), 25 U.S.C §2703(4). If Congress or the Secretary had validly created the reservation before IGRA's enactment on October 17, 1988 (which they did not), then the tribe would have been able to conduct Class II gaming on the land, or Class III gaming once a Tribal-State Class-III Gaming Compact has been executed. 25 U.S.C. §§2710(b)(1), (d)(1). Otherwise, IGRA Section 20, 25 U.S.C. §2719, applies, and prohibits Indian gaming with only narrow exceptions.

The *Arizona Public Service Co*. Court stated that "[i]f Congress had wanted to limit the term 'reservation' as petitioners suggest, it could have done so." 211 F.3d. at 1293. In the case of IGRA, Congress absolutely has "done so" − by defining the one path through which the

Secretary could designate a new tribe with "reservation status." "Initial Reservation" status is one of the narrow and well-defined exceptions to the general prohibition on gaming on land acquired after October 17, 1988. *See* 25 U.S.C. §§2719(b)(1)(A) and 2719(b)(1)(B)(i-iii). Under IGRA, the Secretary may determine that land is eligible for gaming as "lands are taken into trust as part of… the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. §2719(b)(1)(B)(ii). That process is rigidly regulated by NIGC regulations at 25 C.F.R. §292.6, which expressly provide that Initial Reservation status may not be designated by the Secretary unless the land has been "proclaimed to be a reservation under 25 U.S.C. 467 and [be] the first proclaimed reservation of the tribe following acknowledgment." 25 C.F.R. §292.6(c). Moreover, Tribes without legally-proclaimed reservations seeking "initial reservation" status must satisfy a rigid set of requirements, including demonstration of historical and modern connections to the land. 25 C.F.R. §292.6(d). Only after the Secretary has concluded and approved this process may she publish a Record of Decision which is a final agency action subject to judicial review.

An Indian tribe's "murky" claim of reservation status is insufficient to render land eligible for gaming pursuant to IGRA. *Michigan Gambling Opposition (MichGO) v. Norton*, 477 F. Supp. 2d 1, 9 (D.D.C. 2007). The rigid requirements of IGRA require that, before gaming can occur, land must qualify as Indian Lands by having held that status prior to the passage of the Act. The Secretary's Section 20 right to designate "Initial Reservation" status is inapplicable in this case because the tribal recognition did not come through the federal acknowledgement process. The applicable laws disprove Defendants' claim that reservation status is a "murky" term which may be deployed to mean whatever the Secretary says it does.

4. BIA regulations could not, and did not, create reservation status for rancherias.

Defendants place great stock in their own regulations in seeking to support the proposition that all rancherias are reservations. But those regulations are qualified and stop short of equating the two. Defendants write: "the Department adopted a definition of 'reservation' in the Part 292 regulations that expressly includes rancherias, including those restored by judicial action." Defs.' Cross-Motion at p. 24. But the NIGC regulations give a four-part definition of "reservation," only one of which is relevant here:

> Reservation means: **** (2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland….

25 C.F.R. §292.2. The limitation of the term "rancherias" to those "rancherias restored by judicial action" shows that the Buena Vista Rancheria, which never enjoyed reservation status, and therefore was never *restored* to that status, is not included in the definition. Moreover, Defendants have failed to explain how and when stipulated judgments become a "judicial action."

The 292 C.F.R. §292.2 definition does not apply in this case because the Buena Vista Rancheria land was not set aside in the 1914 Act "for the permanent settlement of the Indians as its homeland." Rather it was purchased simply "for the homeless Indians in California." Nothing in the 1914 Act or any other federal law indicates that the Rancheria was ever set aside as a "permanent settlement," much less as a "reservation."

C. The *Post Hoc* NIGC Opinion Could Not and Did Not Create Reservation Status for the Rancheria.

The June 20, 2005, NIGC Opinion does not appear in the Administrative Record because it was not drafted until after the December 20, 2004, Compact Approval decision, and then only

in response to this litigation. As a result, it cannot form the basis for this Court's judicial review of the Compact Approval. *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*, 463 U.S. 29, 43 (1983). This should be the end of the inquiry, but Defendants argue that the NIGC Opinion is entitled to limited deference pursuant to the ruling of *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Defs.' Cross-Motion at p. 25. Under *Skidmore* deference, an agency's statutory interpretation remains "eligible to claim respect according to its persuasiveness." *United States v. Mead Corp*., 533 U.S. 218, 221 (2001).

In *Skidmore*, the Supreme Court reasoned that deference was due the agency's interpretation because "[g]ood administration of the [Fair Labor Standards] Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons." *Skidmore*, 323 U.S. at 140. In *Mead*, the Supreme Court stated that the value of *Skidmore* deference to even informal agency interpretations is the promotion of "uniformity in its administrative and judicial understandings of what a national law requires." *Mead*, 533 U.S. at 234.

Here, Defendants do not seek to promote uniformity in the law but instead urge this Court to defer to the agency's unique interpretation that the word "reservation" (notwithstanding IGRA's rigid statutory scheme) has no "no rigid meaning." Defs.' Cross-Motion at p. 27. An agency's interpretation of a statutory term as (a) virtually meaningless and (b) subject to total agency discretion defeats the Supreme Court's purpose of promoting uniformity in the law and thus is due no judicial deference (even under *Skidmore*).

The Secretary's task of determining whether a particular rancheria has legal reservation status is not one of statutory interpretation. It is instead a fact-based inquiry into how (or <u>if</u>) Congress granted that status to a particular parcel of land. Defendants argue, "[c]ourts have also

found that establishment of the rancherias equated to the establishment of other reservations." Defs.' Cross-Motion at p. 27. But each of the cases cited by Defendants to support their argument (that all California rancherias are reservations) reflects the court's undertaking of a historical and statutory inquiry specific to the rancheria at issue in each given case. That same work cannot be accomplished by the shortcut of simply "interpreting" all rancherias to have reservation status.

Finally, the NIGC Opinion simply lacks the requisite persuasive power to be afforded *Skidmore* deference. Whether an agency interpretation should be accorded *Skidmore* deference depends on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140. Here, the NIGC opinion literally "got the law wrong" in its haste to belatedly bolster the Secretary's Compact Approval, citing to the Indian Appropriation Acts of June 21, 1906 (34 Stat. 325-328) and April 30, 1908 (35 Stat. 70-76). As discussed at length in Plaintiff's Memorandum in Support of Summary Judgment, Doc. No. 76-1 at pp. 34-35, those Acts are irrelevant to the Buena Vista Rancheria, which was purchased with funds appropriated in the 1914 Act which did not use the word "reservation" in appropriating funds for one purpose only: "For the purchase of lands for the homeless Indians in California." Plaintiff's Memorandum details numerous other problems with the NIGC Opinion, including several misleading statements which wrongly assume the pre-existing reservation status of the Buena Vista Rancheria. *Id*. at pp. 33-36. The NIGC Opinion is flawed and cannot withstand the scrutiny required for this Court to accord it any deference whatsoever.

D. The Secretarial Approval of a Compact Cannot Authorize Gaming on Land that Does Not Lawfully Qualify for Gaming Pursuant to IGRA.

Defendants make two arguments relating to the relief available to the County upon this Court's determination that the Rancheria is not a reservation and is therefore ineligible for gaming.

First, the Defendants urge that, rather than setting aside the Compact, this Court should declare that the Rancheria is not "Indian Lands" and order that no gaming may commence on the land until it is taken into trust or restricted fee status. Defs.' Cross-Motion at pp. 40-41. But it is important to note that simply placing the Rancheria land in trust status would not allow the Tribe to conduct gaming thereupon. Because the land would be acquired subsequent to October 17, 1988, gaming is prohibited unless one of the limited exceptions to gaming on after-acquired lands applies pursuant to IGRA Section 20, 25 U.S.C. §2719. And there is only one exception provided in Section 20 available to this Tribe, which is a "two-part determination" requiring (1) the Secretary's determination that gaming would be in the "best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community;" and the concurrence of the California governor in that determination. 25 U.S.C. §2719(b)(1)(A).

Second, the Defendants argue that there is no need to set aside the Compact because the "deemed approval" approved the Compact "only to the extent the compact is consistent with the provisions of this chapter." 25 U.S.C. §2710(d)(8)(C). The D.C. Circuit has already rejected the argument that "deemed approvals" are beyond the scope of judicial review: "To be sure, [Section §2710(d)(8)(C)] provides that only lawful compacts can become effective, but someone—*i.e.*, the courts—must decide whether those provisions are in fact lawful." *Amador Cty., Cal. v. Salazar*, 640 F.3d 373, 380 (D.C. Cir. 2011). "[J]ust 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*. at 381.

An order in this litigation declaring that the land is not Indian Land is appropriate, and the County prayed for such an order in its Amended Complaint. *See* Doc. No. 30 at p. 16. Moreover, as the D.C. Circuit has made plain, this Court is bound (by IGRA and the law of this case) to set the Compact aside should it find that the Rancheria is not "Indian Lands."

III. CONCLUSION

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

DATED this 21st day of December 2015.

AMADOR COUNTY, CALIFORNIA

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