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IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMADOR COUNTY, CALIFORNIA Plaintiff, vs. **GALE A. NORTON** Secretary U.S. Department of the Interior; **MICHAEL D. OLSEN**, Acting Principal Deputy Assistant Secretary for Indian Affairs; and **UNITED STATES DEPARTMENT OF THE INTERIOR**; Defendants.	CIVIL ACTION NO.: 1:05CV00658 JUDGE: Richard W. Roberts

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF UNITED STATES' MOTION TO DISMISS

Pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, defendants Gail Norton, in her official capacity as Secretary of the Interior Department ("Secretary"), Michael D. Olsen, in his official capacity as Acting Principal Deputy Assistant Secretary-Indian Affairs, and the United States Department of the Interior (collectively, "United States"),

respectfully submit this memorandum of points and authorities in support of their motion to dismiss. Plaintiff lacks standing and the claims asserted are not subject to review under the Administrative Procedure Act. Therefore, as set forth below, plaintiff's complaint is jurisdictionally deficient and fails to state any claim upon which relief can be granted. The United States therefore respectfully requests that its motion be granted and plaintiff's complaint be dismissed.

Introduction

In the Fall of 2004, the Buena Vista Rancheria of the Me-Wuk Indian Tribe ("Tribe") – a federally recognized tribe – submitted an amended version of its original gaming compact with the State of California ("Amended Compact" or "Compact") to the Secretary for her discretionary approval. Rather than act on the Amended Compact, the Secretary exercised her discretion to take no action, which resulted in the Amended Compact being deemed approved to the extent it is consistent with federal law. Under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, the Secretary has forty-five (45) days from the submission of a tribal-state compact or compact amendment to act affirmatively. Absent Secretarial approval or disapproval within the statutory time frame, IGRA provides that such compacts take effect by operation of law. 25 U.S.C. § 2710 (8)(C).

Amador County challenges the Secretary's inaction under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, notwithstanding that the Secretary's decision to take no action on the Amended Compact is a matter committed to agency discretion by law, id. at §701(a). Moreover, the County lacks standing to sue. In addition to these jurisdictional flaws, the County advances claims upon which no relief can be granted. Specifically, the County

argues that in allowing the Amended Compact to become federally effective, the Secretary violated IGRA's requirement that Class III Indian gaming take place on "Indian lands" as defined by the Act, as well as a state law timing technicality not contemplated by IGRA.

As the United States will demonstrate, the County's complaint rests on highly conjectural future injury against which the County has protection through the Amended Compact itself, and further relies on patent misreadings of the Secretary's duties under IGRA and the Act's Indian lands definition. The County's attack on the Amended Compact's effectiveness is also fundamentally at odds with the interests of the non-tribal party to the Compact, the State of California, of which the County is a political subdivision. See Complaint ¶2. Plaintiff's complaint must be rejected as contrary to Congress's policy to foster tribal economic development through federally-regulated and state-compacted – not county-compacted – Indian gaming.

Statutory Background

The Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§2701-2721, was enacted in 1988 in the wake of the Supreme Court's decision in California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). In Cabazon, the Court held that under Public Law 280, 18 U.S.C. § 1162, 28 U.S.C. § 1360, a tribe could operate games that were not generally prohibited by the state where the tribe was located, but that state laws regulating gaming could not be enforced on Indian reservations without Congress's express consent. Id. at 207-10, 221-22. Because federal law at that time did not provide "clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3), Cabazon left Indian gaming free of federal or state regulatory involvement. In response, Congress enacted IGRA in an attempt to, *inter alia*,

provide a regulatory structure for Indian gaming, promote tribal economic development, self-sufficiency and self-government, and protect Indian tribes from corrupting influences such as organized crime. Id. § 2702.

IGRA applies only to federally recognized tribes, 25 U.S.C. § 2703(5), and governs gaming on "Indian lands," which are defined as "all lands within the limits of any Indian reservation" and "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." Id. § 2703(4).

IGRA divides gaming into three classes, each subject to differing levels of state, tribal and federal regulation. Class I consists of social games with prizes of minimal value and traditional Indian games that are part of tribal ceremonies or celebrations. 25 U.S.C. § 2703(6). Indian tribes are granted the exclusive authority to regulate these activities. Id. § 2710(a)(1).

Class II gaming consists of two basic categories: (1) bingo and variants thereof, and (2) card games that are explicitly authorized by state law or are not explicitly prohibited by state law and are played in the state. Tribes may conduct class II gaming in any state that "permits such gaming for any purpose by any person, organization, or entity," so long as the particular gaming activity is not otherwise specifically prohibited on Indian lands by federal law. Id. § 2710(b)(1)(A). Class II gaming is subject to tribal regulation, Id. § 2710(a)(2), and to federal oversight by the National Indian Gaming Commission ("NIGC").[1] Id. §§ 2710(b) & (c).

[1] The NIGC was established by IGRA, 25 U.S.C. §§ 2702(3), 2704(a), and is composed of three full-time members, including a Chairman, appointed by the President with the advice and consent of the Senate, and two associate members, appointed by the Secretary of the Interior. Id.

Class III gaming is any form of gaming that is not class I or class II. 25 U.S.C. § 2703(8). Slot machines are class III games, as are casino games (such as baccarat, blackjack, roulette, and craps) and sports betting, parimutuel wagering, and lotteries. 25 C.F.R. § 502.4. A tribe may engage in class III gaming only if (1) it has a governing ordinance approved by the NIGC; (2) the state "permits such gaming for any purpose by any person, organization, or entity;" and (3) the tribe and the state enter into a compact approved by the Secretary of the Interior to govern the conduct of such gaming. 25 U.S.C. § 2710(d). Class III gaming is regulated by the tribe, the state, and the federal government. Artichoke Joe's California Grand Casino v. Norton, 353 F.3d 712, 721-22 (9th Cir. 2003).

A tribe desiring to conduct a class III gaming operation may initiate the compacting process by requesting the state to enter into negotiations. 25 U.S.C. § 2710(d)(3)(A). Thereafter, the state is to "negotiate with the Indian tribe in good faith to enter into such a compact." Id.[2] If a state and tribe reach agreement on a compact, the compact is submitted to the Secretary who must approve or disapprove the compact within 45 days, otherwise it is deemed approved "to the extent [it] is consistent" with IGRA. Id. § 2710(d)(8)(C). The Secretary may disapprove a compact only if it violates IGRA, other provisions of federal law, or the United States' trust obligations to Indians. Id. § 2710(d)(8)(B). A gaming compact, if approved or deemed approved, takes effect when notice is published in the Federal Register

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§§ 2704(b)(1)(A) & (B).

[2] IGRA's scheme originally provided for tribes to compel recalcitrant states to enter into compacts by bringing actions in federal district court. See, e.g., 25 U.S.C. § 2710(d)(7)(A)(i). After the Supreme Court determined in Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), that a state can assert its Eleventh Amendment immunity to avoid such a suit by a tribe, the process now takes place under 25 C.F.R. part 291.

pursuant to section 2710(d)(3)(B).

Factual Background

In 1999, pursuant to IGRA, the Buena Vista Tribe sought a Class III tribal-state gaming compact with the State of California. In October of that year, the Governor of California approved the first Class III gaming compact between the Tribe and the State of California. The Secretary approved the compact effective May 15, 2000. 65 Fed. Reg. 31,189 (May 16, 2000). Five years later, the Tribe and the State negotiated mutually beneficial amendments to their original compact.

The Amended Compact was signed by the Governor of California on August 23, 2004, and ratified by the California Legislature on August 27, 2004. Thereafter, the Tribe forwarded the fully executed and validly entered compact to the Secretary for her approval. The Secretary exercised her statutory discretion neither to approve nor disapprove the Amended Compact, allowing the Compact to become effective, to the extent it is consistent with IGRA, by virtue of the running of the 45-day statutory period. As required by IGRA, on December 20, 2004, the Secretary published notice of the approved status of the Amended Compact in the Federal Register. 69 Fed. Reg. 76,004 (Dec. 20, 2004).

The Amended Compact allows the Tribe to offer expanded gaming at an as-yet-to-be-built casino, and contains provisions for increased revenue sharing of gaming profits with the State of California. The Compact also requires that the Tribe identify all potential off-reservation impacts of a proposed gaming facility and then enter into negotiations with Amador County to mitigate these impacts to the extent practicable. The proposed gaming would occur solely within the boundaries of the Buena Vista Rancheria.

Review Standards

Federal Rule of Civil Procedure 12(b)(1) provides that a defendant may move for dismissal based upon the "lack of jurisdiction over the subject matter," though the Court has an "independent duty to establish subject-matter jurisdiction." Simpson v. Socialist People's Libyan Arab Jamahiriya, 362 F. Supp. 2d 168, 175 (D.D.C. 2005). In evaluating a motion to dismiss under Rule 12(b)(1), "a court must construe the allegations in the complaint in the light most favorable to the plaintiff." Scolaro v. District of Columbia Board of Elections and Ethics, 104 F. Supp.2d 18, 22 (D.D.C. 2000).

Rule 12(b)(6) provides that a dismissal motion may be based upon a failure "to state a claim upon which relief can be granted." Generally, a complaint should not be dismissed for failure to state a claim unless it appears that the plaintiff can prove no set of facts that would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Under this standard, the Court normally accepts the allegations of the complaint as true and resolves ambiguities in favor of the pleader. Dickson v. U.S., 381 F. Supp. 893, 896 (D.D.C. 1993); Doe v. U.S. Department of Justice, 753 F.2d 1092, 1102 (D.C. Cir. 1985); Scolaro, 104 F. Supp.2d at 22.

There are, however, several exceptions to the general rule of construing allegations as true and in a manner that favors the plaintiff. The Court is not required to draw argumentative inferences in favor of the pleader, Yamaha Motor Corp. v. United States, 779 F. Supp. 610, 611 (D.D.C. 1991), and only well-pleaded facts are required to be accepted as true. Blackburn v. Fisk University, 443 F.2d 121 (6th Cir. 1971). Facts that are internally inconsistent within the pleadings, facts that run counter to facts of which the Court can take judicial notice, and conclusory allegations and unwarranted deductions of fact are not accepted as true. Gersten v.

Rundle, 833 F. Supp. 906, 910 (S.D. Fla. 1993), aff'd 56 F.3d 1389 (11th Cir. 1969), cert. denied 116 S.Ct. 924 (1996); Assoc. Builder, Inc. v. Alabama Power Co., 505 F.2d 97, 100 (5th Cir. 1974). See also Olpin v. Ideal Nat. Ins. Co., 419 F.2d 1250 (10th Cir. 1969), cert. denied 90 S.Ct. 1522 (1970) (court need not accept mere legal conclusions or factual claims at variance with express terms of instrument attached to complaint as exhibit and by reference made part thereof); Emery v. United States, 920 F. Supp. 788 (W.D. Mich. 1996) (court need not accept unwarranted factual inferences); Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987).

Finally, while a court may convert a motion to dismiss into a motion for summary judgment if the court looks to matters outside the complaint, Marshall County Health Care Authority v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993), there are exceptions to this practice. When considering a motion to dismiss under Rule 12(b)(6), a court "may consider on the facts alleged in the complaint, any documents attached to or incorporated in the complaint and matters of which the [the Court] may take judicial notice." U.S. ex rel. Williams v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251, 1257 (D.C. Cir. 2004) (citing EEOC v. St. Francis Xavier Parochial School, 117 F.3d 621, 624-25 (D.C. Cir. 1997)) (alteration in original). A court may take judicial notice of matters in the general public record, including records and reports of administrative agencies, without converting a motion to dismiss into one for summary judgment. American Farm Bureau v. EPA, 121 F.Supp.2d 84, 106 (D.D.C. 2000) (citing Black v. Arthur, 18 F.Supp.2d 1127, 1131 (D. Or. 1998)). See also Covad Communications Co. v. Bell Atlantic Corp., 407 F.3d 1220, 1222 (D.C. Cir. 2005) (the Court "took 'judicial notice of facts on the public record'" in reaching its decision to deny a petition for a rehearing) (quoting Marshall

County Health Care Authority, 988 F.2d at 1228).

The mere fact that a court is provided with materials outside of the complaint for consideration on a 12(b)(6) motion does not require its conversion into a motion for summary judgment. A court may exclude such materials from consideration when ruling on a dismissal motion, and no conversion would be required. Jane Lyons Advertising, Inc. v. Cook, No. Civ. A. 97-01069, 1998 WL 164775 (D.D.C. March 31, 1998).[3]

ARGUMENT

I. THE COUNTY HAS NOT ESTABLISHED STANDING TO CHALLENGE THE IGRA SECTION 2710 (8)(C) APPROVAL OF THE COMPACT AMENDMENT

The County's complaint must be dismissed under Fed. R. Civ. P. 12(b)(1) for failure to establish standing to bring this challenge. A party invoking federal jurisdiction has the burden of demonstrating its standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992). Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies. U.S. Const. Art. III § 2. To establish Article III standing, a plaintiff must satisfy each of three requirements:

> First, he must demonstrate "injury in fact" – a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical." Second, he must establish causation – a fairly . . . trace[able]" connection between the alleged injury in fact and the alleged conduct of the defendant. And third, he must demonstrate

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[3] A court is not required to convert a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction into a motion for summary judgment, as it might be in the context of a 12(b)(6) motion. Because the factual allegations surrounding the subject matter may require closer examination in order to determine if the court has subject matter jurisdiction, a court may consider material outside the pleadings without converting the motion to dismiss to one for summary judgment. See McGarry v. Secretary of the Treasury, 656 F. Supp. 1034, 1037 (D.D.C. 1987); Pueblo of Sandia v. Babbitt, 1996 WL 808067 at *3 (D.D.C. Dec. 10, 1996).

> redressability – a "substantial likelihood" that the requested relief will remedy the alleged injury in fact. These requirements together constitute the "irreducible constitutional minimum" of standing, which is an "essential and unchanging part" of Article III's case-or-controversy requirement and a key factor in dividing the power of government between the courts and the two political branches . . . .

Vt. Agency of Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 771 (2000) (citations omitted). The analysis of standing is "a highly case-specific endeavor, turning on the precise allegations of the parties seeking relief." National Wildlife Fed'n v. Hodel, 839 F.2d 694, 703-04 (D.C. Cir. 1988). Further, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish." Lujan, 504 U.S. at 562 (citation omitted).

A. The County's speculative allegations about possible adverse impacts from a proposed casino development do not constitute injury-in-fact.

The County alleges that "if constructed," the Tribe's casino project would have significant detrimental impacts on the County. Complaint ¶ 26. The Supreme Court has noted that "[a]llegations of possible future injury do not satisfy the requirements of Article III. A threatened injury must be certainly impending to constitute injury in fact." Whitmore v. Arkansas, 495 U.S. 149, 158 (1990) (internal quotations omitted); accord Lujan, 504 U.S. at 560 (holding that Article III requires allegation of injury that is "actual or imminent, not conjectural or hypothetical") (internal quotations omitted).

The County has not asserted an injury in fact. Instead, it cites speculative future injuries that are not certain to result from the approval, by operation of law, of the Amended Compact. Fear of future injury can only form a basis for standing where injury is "certain to ensue." See Sierra Club v. Robertson, 28 F.3d 753, 758 (8th Cir. 1994). No injury advanced by the County

is certain to ensue. Rather, the complaint describes in the conditional tense the impacts a casino "would have" on the County. Complaint ¶¶ 26, 27. The County describes hypothetical impacts on public safety resources, public education, local infrastructure, the environment, traffic, and general quality of life in support of the requested relief. These impacts, however, are all contingent upon the construction and operation of a casino that does not include mitigation measures. The Amended Compact specifically contemplates mitigation of adverse impacts.[4] As the County itself acknowledges, its alleged injuries would only occur "if it [the casino project] is constructed and becomes operational." Complaint ¶ 26. Impacts that depend upon the occurrence of a future event that may not come to pass are conjectural at best and are certainly not "impending." This Court's jurisdiction cannot be sustained on the basis of allegations that plainly fall short of the "actual or imminent, not conjectural or hypothetical" harms required by standing case law. Lujan, 504 U.S. at 560.[5]

The County's complaint completely ignores the protections afforded by the Amended Compact itself. Specifically, the new Compact contemplates that the County and Tribe will negotiate with each other regarding the nature and scope of the casino project. The revised Compact calls for the Tribe to identify all negative off-reservation impacts of a gambling operation and to negotiate mitigation measures with the County. Section 10.8 of the Amended Compact requires that the Tribe draft a Tribal Environmental Impact Report ("TEIR") that lists

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[4] Section 10.8.8 of the Amended Compact. The Amended Compact is available at http://www.cgcc.ca.gov/compacts/buena_vista%20compact.pdf

[5] There is presently no guarantee that the casino project will be built or that once built it will result in injury to the County. For example, the Tribe may lose funding, decide not to proceed with the project or construct a smaller project. Given the uncertainties and potential for changed circumstances, the County's assertion of injury is mere speculation rather than injury-in-fact.

all significant off-reservation impacts of the casino project, including all feasible mitigation measures. Pursuant to Section 10.8.8, the Tribe must then offer to negotiate with the County, and upon the County's acceptance of the offer, the Tribe must enter into an enforceable written agreement respecting possible adverse impacts on the County. Impacts required to be resolved in the negotiations include the increased utilization of public safety resources, such as law enforcement, fire protection and emergency medical services, increased need for public services such as education, heightened demand for infrastructure, environmental effects, traffic increases and increased frequency of gambling addiction.[6] Thus, the Amended Compact already adequately provides for thorough mitigation of the feared injuries advanced by the County. The requirement that the Tribe include the County in negotiations covering the scope and impacts of a future casino project completely contradicts the County's contention of certain injury.

The County cannot rely on its request for declaratory relief to avoid establishing injury-

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[6] Pursuant to the mitigation and negotiation requirements of the Amended Compact, the County will have an opportunity to negotiate with the Tribe for the mitigation of potential off-reservation impacts. The Tribe submitted to the County a Notice of Preparation of a draft TEIR on January 7, 2005 (available at http://www.co.amador.ca.us/EIRs/BVCP/BV_TIER.pdf), to which the County responded with an 18-page letter on February 3, 2005, outlining areas of concern, including all the future impacts the County outlined in the Complaint, that the County wanted addressed in the draft TEIR (available at http://www.co.amador.ca.us/EIRs/BVCP/NOP-020405-Final.pdf). The Tribe then submitted a draft TEIR to the County on May 11, 2005 (available at http://www.co.amador.ca.us/EIRs/BVCP/BVTEIR/Buena_Vista_Draft_TEIR.htm), and the County responded on June 24, 2005 with a detailed 65-page letter containing comments for the County to address in the TEIR, including, once again, all of the concerns over future injuries raised in the Complaint (available at http://www.co.amador.ca.us/EIRs/BVCP/documents/DTEIRCountyResponse062405.pdf). Given these ongoing negotiations, the status, design, scope and impact of the casino project is speculative at best. In addition, the County is currently involved in shaping the future of the potential casino project to minimize the injuries it fears will occur. The County's feared injuries have not yet materialized, and the County's own role in shaping the direction of the project underscores the uncertainty and conjectural nature of its alleged injuries.

in-fact or the other requisites of standing. To survive a motion to dismiss in a declaratory judgment action, which the instant action is in part, the complaint must identify a case or controversy under Article III of the Constitution involving the defendant. Public Service Comm'n v. Wycoff Co., 344 U.S. 237, 239-40 (1952). Courts must dismiss declaratory actions for failing to state a case or controversy when the plaintiff presents no more than "[t]he mere possibility or even probability that a person may be adversely affected in the future by official acts." Dawson v. Department of Transportation, 480 F. Supp. 351, 352 (W.D. Okla. 1979) (granting Rule 12(b)(6) dismissal of declaratory judgment action seeking to declare proposed landfill a hazard when no permit had yet been issued) (citing Garcia v. Brownell, 236 F.2d 356, 358 (9th Cir. 1956)). See also Norvell v. Sangre de Cristo Development Co., 519 F.2d 370, 375-78 (10th Cir. 1975) (finding trial court lacked jurisdiction over declaratory judgment action related to lease when status of lease was in "limbo"); Lippi v. Thomas, 298 F. Supp. 242, 245-56 (M.D. Pa. 1969) (granting 12(b)(6) dismissal of declaratory action when "no substantial controversy of sufficient immediacy and reality exist[ed]").

B. The County's alleged injury is not traceable to the Secretary's inaction within the statutory period.

An alleged injury satisfies the causation element of standing only if the plaintiff shows "a causal connection between the injury and the conduct complained of." Lujan, 504 U.S. at 560. This element is not satisfied when the asserted injury is the result of an independent action. Cf. Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976). Here, the County cannot satisfy the causation element because its alleged future injuries are not fairly traceable to any action of the Secretary allowing the Amended Compact to be approved by operation of law. If,

at some future time, actions taken pursuant to the Compact cause injury to the County, such injuries principally would be traceable either to the parties to the Compact, namely, the State of California and the Tribe, or to potential future actions by the United States.

C. The County's claims are not redressable.

Since the County's asserted injuries are conjectural and speculative rather than actual or imminent, they also are non-redressable. Redressability hinges on whether relief from the court "will likely alleviate the particularized injury alleged by the plaintiff." Florida Audubon Society v. Bentsen, 94 F.3d 658, 663-664 (D.C. Cir. 1996). As the District Court of Wisconsin observed in deciding a similar case, "[b]ecause plaintiffs cannot demonstrate an actual or imminent injury, they cannot show they are entitled to any redress for it." Lac Du Flambeau v. Norton and Ho-Chunk Nation, 327 F.Supp. 2d 995, 1002 (D. Wis. 2004) (dismissing rival Tribes' challenge to approval of tribal-state compact amendment through Secretary's inaction within 45-day statutory period on grounds, *inter alia*, of lack of standing). In this connection, the Lac Du Flambeau court further stated that, "[w]hen Congress says expressly that it wants [compact] amendments not approved within 45 days to be deemed approved, it has provided a remedy and left nothing for a court to review. The court cannot send the matter back to the agency for further consideration without interfering with the Congressional scheme." Id. at 999.

The County here would have this Court set aside the Secretary's inaction and ignore Congress's express determination that the Secretary has discretion to take no action on a tribal-state compact and provision as to what will happen in that circumstance. The Supreme Court in Seminole found that Congress had established an intricate scheme in IGRA that courts should avoid second guessing. Seminole Tribe of Florida v. Florida, 517 U.S. 44, 74-76 (1996). This

Court, therefore, should reject plaintiff's effort to rewrite the manner in which Congress chose to address Secretarial inaction in the compact approval process.

II. THE COUNTY'S CLAIMS ARE NOT REVIEWABLE UNDER THE APA

Even assuming, *arguendo*, that the County could establish standing to maintain this suit, the Secretary's decision to take no action on the Amended Compact was committed to her discretion by law and thus not subject to review under the APA. Where no specific statute provides for review of an agency's actions, the APA authorizes review of "final agency action for which there is no other adequate remedy in court." 5 U.S.C. § 704. Final agency action is not reviewable if "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a); Drake v. FAA, 291 F.3d 59, 70 (D.C. Cir. 2002). If a statute's delegation of decision-making authority to an agency is so complete that courts "have no legal norms pursuant to which to evaluate the challenged action, and thus no concrete limitations to impose on the agency's exercise of discretion," there is a lack of jurisdiction to review the agency's decision under the APA. Id. In such circumstances, §701(a)(2) of the APA "encodes the principle that an agency cannot abuse its discretion, and thus violate § 706 (2)(A)," where the conferral of discretion is so broad "as to essentially rule out the possibility of abuse." Drake, 291 F.3d at 70. This Court looks to the nature of the agency action and the language and structure of the statute to determine whether a matter has been committed solely to agency discretion. Id. (citing Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs, 104 F.3d 1349, 1353 (D.C.Cir. 1997)).

Assuming *arguendo* that the decision to take no action on a gaming compact is "final agency action," it is committed to agency discretion by law and, therefore, is not reviewable

under the APA. IGRA broadly authorizes the Secretary to approve gaming compacts, 25 U.S.C. § 2710(d)(8)(A) ("The Secretary is authorized to approve any Tribal-State gaming compact..."), and provides that the Secretary "may disapprove a compact" only if it violates IGRA, another federal law, or the United States' trust obligations to Indians. Id. § 2710(d)(8)(B). However, the statute does not require the Secretary to approve or disapprove a compact. If, for example, the Secretary has policy or legal issues concerning a compact that she wishes to reserve, or she simply cannot find the time to review the compact and takes no action within 45 days, IGRA provides that "the compact shall be considered to have been approved" to the extent it is consistent with IGRA. Id. § 2710(d)(8)(C). In other words, IGRA grants the Secretary discretion to take no action on gaming compacts while providing no standard by which the Secretary or a court can measure her conduct in exercising that discretion. Thus, "the statute at issue gives virtually unfettered discretion," to the Secretary to act as she did. See Drake, 291 F.3d at 71.

Viewed against the brief 45-day period to review the compacts, it is clear that Congress's intent was not to embroil the Secretary in lengthy investigations into whether the compact violated federal law, IGRA, or trust obligations. Rather, as the Court observed in Kickapoo Tribe of Indians v. Babbitt, 827 F. Supp. 37, 43 (D.D.C. 1993) (later reversed for the separate procedural issue of failure to join an indispensable party under Fed. R. Civ. P. 19), "Congress was greatly concerned that the Secretary might not pass on the compacts quickly" and therefore allowed for the compact to be deemed approved if the Secretary took no action in 45 days.[7] In

[7] The sole congressional report in IGRA's legislative history does no more than describe the provisions of section 2710(d)(8). S. Rep. No. 446, 100th Cong., 2d Sess. 19 (1988), reprinted in 1988 U.S.C.C.A.N. 3071, 3089. However, the report shows that Congress "concluded that the

addition, IGRA preserves the ability of parties to challenge subsequent agency action relating to Indian gaming, when a compact approved by operation of law violates IGRA. By stating that the compact will be approved "only to the extent the compact is consistent with the provisions of this Act," IGRA provides a check on compacts that are effectively approved by the Secretary through non-action but that are inconsistent with IGRA. The Secretary, however, has no duty to disapprove a compact in such an instance.

This Court previously has recognized the Secretary's discretion to take no action during the 45-day approval period. In Pueblo of Sandia v. Babbitt, 47 F. Supp. 2d 49 (D.D.C. 1999), the Court acknowledged that the Secretary was not under an obligation to disapprove a compact, even though the compacts at issue in that case appeared to violate IGRA's revenue sharing and regulatory fees provisions. In dismissing the challenge to the Secretary's approval on other grounds (failure to join an indispensable party), the Court noted that the Secretary "declined to disapprove the compacts" despite the compacts' apparent violation of IGRA. Id. at 56-57. While the Court expressed disagreement with the Secretary's inaction, which resulted in the compacts being deemed approved, it described this approval by inaction as "unreviewable" given the Secretary's statutorily-provided discretion to avoid taking action altogether. Id.

Here, the Secretary took no action and produced no administrative record for review. If the Court were to remand to the Secretary, it could not order her to approve or disapprove the

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use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." Id. at 13. "The legislative history thus shows that Congress looked to the compacting process primarily as a means of balancing state and tribal interests." Artichoke Joe's Ca. Grand Casino v. Norton, 353 F.3d 712, 726 (9th Cir. 2003). The Secretary's role in the compact process is limited, and Congress's decision to allow the Secretary to simply pass on approving or disapproving a compact is consistent with the overall statutory scheme.

Amended Compact without directly contravening IGRA, which plainly gives her the authority to take no action at all. Therefore, because IGRA's mechanism for compacts taking effect by operation of law provides no meaningful standard to review the Secretary's inaction, the County's claims are not reviewable under the APA.

III. THE COUNTY HAS FAILED TO STATE ANY CLAIM UNDER IGRA

Counts I-IV of the County's complaint allege various violations of IGRA. All, however, are amenable to dismissal under Rule 12(b)(6) for failure to state a claim. IGRA does not direct the Secretary to investigate state law technicalities in the compact approval process, nor does it require that an Indian lands determination be made in connection with compact approval. Moreover, the County's assertion that the Buena Vista Rancheria does not qualify as "Indian lands" under IGRA is completely contrary to both case law and relevant agency interpretation.

A. The Secretary cannot violate IGRA by allowing a compact to become effective by operation of law.

The County's assertion that the Secretary violated IGRA in approving the Amended Compact before it was technically in effect under California law, Complaint ¶ 30, finds no support in the text of IGRA. IGRA does not require that a compact be effective under state law before the Secretary can take action. Instead, IGRA requires only that a compact be "entered into" between the tribe and the state before the Secretary can approve it:

> [a]ny State and any Indian tribe may enter into a Tribal-State compact governing the conduct of gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

25 U.S.C. § 2710(d)(3)(B). The Secretary's approval authority is therefore confined only to

compacts that have been "entered into" by a state and tribe, with no reference to effectiveness dates at either the state or tribal level. As the Sandia court concluded, the "entered into" language in IGRA refers to a "contractual formation of the compact by the tribe and the state," without reference to the date the parties have agreed to make that contractual formation effective. Sandia, 47 F. Supp.2d at 53. The text of IGRA makes no mention of a requirement that the compact be in effect pursuant to state law before the Secretary can take action. The statute's only reference to the effectiveness of a compact relates to Secretarial approval and publication, not state or tribal effectiveness. Nothing in IGRA suggests that Secretarial approval of a compact is somehow superceded by, or is contingent upon, technical state rules regarding effectiveness. Indeed, the backdrop to the Secretary's no-action approach in the Lac Du Flambeau litigation discussed above was that the Governor and legislature of Wisconsin were battling in court over the effectiveness of the tribal-state compacts. Issues of a compact's compliance with substantive state law, if actionable, like issues regarding consistency with IGRA, are subject to subsequent challenge.

The County does not dispute that the Amended Compact was validly entered into by the State of California and the Tribe prior to its being deemed approved by operation of law. Moreover, in addition to both the Governor and the Tribe executing the Amended Compact, the California State Legislature ratified it before it was submitted to the Secretary for approval. Thus, there can be no argument that Amended Compact did not satisfy IGRA's "entered into" requirement. The fact that the Amended Compact was deemed approved 11 days before it became effective under state law is immaterial as IGRA contains no requirement that a compact must be in effect under state law before it can be approved either affirmatively or by running of

the statutory period.

B. Disapproval of a compact based on a state law technicality is contrary to the intent of IGRA.

IGRA provides the Secretary with a brief 45-day window to examine gaming compacts in order to avoid needlessly delaying the process for tribes and states. As the court observed in Rhode Island v. The Narragansett Indian Tribe, No. Civ.A.94-0619-T, 1995 WL 17017347 (D.R.I. Feb. 3, 1995), the "manifest purpose of those provisions [the 45-day approval period] is to insure that gambling activity authorized by the proposed compacts is consistent with federal law and that the compacts are in the best interests of Indian tribes." The short time frame Congress gives the Secretary, coupled with the automatic approval mechanism for non-action, underscores the desire of Congress to avoid forcing the Secretary to investigate state law technicalities such as the effective date of state legislative actions.

Congress established the 45-day approval period precisely to avoid the delay that would occur should the Secretary decide to undertake a full-scale investigation of state law matters. The Kickapoo court noted that "[i]f the Secretary was allowed to postpone action every time there was uncertainty as to some issue in IGRA or in a compact, the Secretary would be able to forestall approval of compacts indefinitely." Kickapoo, 827 F. Supp at 44, FN12. The Santa Ana court faced an analogous situation involving the Secretary's duty under IGRA to investigate the state law granting a governor authority to enter into a gaming compact. Santa Ana, 104 F.3d at 1556. The court concluded that Congress could not have expected the Secretary "to resolve state law issues regarding that authority in the 45-day period given to him to approve a compact." Id. at 1557. If Congress did not intend for the Secretary to use the 45-day period to

investigate important state law matters such as a governor's authority to execute a compact, it clearly did not contemplate that the Secretary would investigate a state law technicality regarding the effective date of a validly entered into, legislatively ratified, and fully executed compact. The Secretary's decision to avoid taking action on the Amended Compact was therefore wholly consistent with the purpose of the 45-day approval period. A disapproval based on the state law effectiveness technicality would have undermined the purpose of IGRA and needlessly delayed federal approval of the Amended Compact for both the Tribe and the State of California.

C. IGRA does not require the Secretary to render Indian lands opinions in connection with compact approval.

Without citation to a particular provision of IGRA, the County baldly asserts that the Secretary is precluded from approving a tribal-state compact without first making a determination that the "site is 'Indian land' within the meaning of IGRA."[8] Complaint ¶ 33. While § 2710(8)(A), dealing with compact approval through an affirmative determination, authorizes the Secretary to approve any tribal-state compact governing gaming on "Indian lands of such Indian tribe," it does not mandate that the Secretary undertake an analysis of whether the gaming will take place on Indian lands. In the instant case, the Amended Compact took effect by virtue of the Secretary's inaction within the statutory period. If the Secretary has discretion to

[8] We note that many compacts are approved in advance of a final casino site being settled upon. Additionally, compacts may be approved for site-specific gaming about which there is no Indian lands status dispute requiring analysis. Such dispute arises principally in connection with lands acquired in trust by the Secretary after the passage of IGRA (October 17, 1988) as such lands must meet one of IGRA's Section 20 exceptions in order to qualify as gaming-eligible. 25 U.S.C. § 2719.

take no action at all on a submitted compact, it follows *a fortiori*, that the Secretary has no duty to render an Indian lands opinion in connection with such inaction. Moreover, the County's claim ignores the fact that compact approval by operation of law is only approval "to the extent the compact is consistent with the provisions of this chapter [IGRA]." 25 U.S.C. § 2710(8)(C). In other words, the Secretary's inaction here resulted in the Amended Compact becoming effective, but only to the extent it does not violate IGRA. If, hypothetically, the County were correct that the Buena Vista Rancheria did not qualify as Indian lands under IGRA, then the geographic component of the Compact would not be in effect and any subsequent agency actions relating to gaming on such lands would likely be subject to challenge. The County, however, is incorrect in its assertion that the Rancheria does not meet IGRA's Indian lands definition.

D. The Buena Vista Rancheria qualifies as Indian lands under IGRA.

The County's complaint sets forth the IGRA definition of "Indian lands," which expressly includes "all lands within the limits of any Indian reservation." Complaint ¶ 10; 25 U.S.C. § 2703(4)(A). The County goes on, however, to assert that the Buena Vista Rancheria is not an Indian reservation. Complaint ¶ 12. Contrary to the County's erroneous claim, it has long been established that California Indian rancherias are the functional equivalent of Indian reservations. The Court of Appeals for this circuit has accepted this proposition as have many other courts. See City of Roseville v. Norton, 348 F.3d 1020, 1021 (D.C. Cir. 2003) (describing the federal government's provision to the Auburn Tribe of "a small 20-acre reservation, which was expanded to 40 acres in 1953, known as the Auburn 'Rancheria.'"); see also Artichoke Joe's Cal. Grand Casino v. Norton, 278 F. Supp. 2d 1174, 1176 n.1 (E.D. Cal. 2003) (describing rancherias as "small Indian reservations"); Duncan v. United States, 667 F.2d 36, 41, 229 Ct. Cl.

120, 128 (1981), cert. denied, 463 U.S. 1228 (1983) (finding with respect to the Robinson Rancheria that "Congress clearly contemplated that th[e] land have the same general status as reservation lands."); Santa Rosa Band of Indians v. Kings County, 532 F.2d 655, 657 (9th Cir. 1975) (equating California rancherias with Indian reservations); Governing Council of Pinoleville Indian Community v. Mendocino County, 684 F.Supp. 1042, (N.D. Cal. 1988) (finding against a termination and restoration history parallel to that of the Buena Vista Tribe, an intent "to restore all land within the original Rancheria as Indian Country and [ ] to treat the entire Rancheria as reservation.")[9]; see also NIGC Buena Vista Op. at 10 and n.8 (citing Solicitor's Opinions and Federal Indian Law Treatise). Indeed, the Supreme Court settled long ago in connection with the Reno Indian Colony that the reservation designation is not dispositive of reservation-like status:

> The fundamental consideration of both Congress and the Department of the Interior in establishing this colony has been the protection of a dependent people. Indians in this colony have been afforded the same protection by the government as that given Indians in other settlements known as 'reservations.' . . . it is immaterial whether Congress designates a settlement as a 'reservation' or 'colony.'

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[9] Like the Pinoleville Tribe, the Buena Vista Tribe was subject to termination pursuant to the California Rancheria Act, Pub. L. No. 85-671 (1958). That Act authorized termination of the trust relationship between the United States and the residents of the many California rancherias and resulted in distribution of rancheria land to individual Indians. In 1979, however, the residents of seventeen rancherias, including the Buena Vista Rancheria, filed a class action seeking restoration of the reservation status of their lands based upon the United States' unlawful, and thus ineffective, termination efforts. Hardwick v. United States, No. C-79-1710 SW (N.D. Cal. filed 1979). The Hardwick litigation was settled through discrete stipulated judgments. As the NIGC Buena Vista Opinion points out, the Hardwick Stipulation for Entry of Judgment concluded between Amador County and Indians of the Buena Vista Rancheria expressly states both that the Rancheria is "Indian country," and that the Rancheria "shall be treated by the County of Amador and the United States of America, as any other federally recognized Indian reservation." NIGC Buena Vista Op. at 11 (citing Hardwick Stipulation and Order, April 21, 1987) (emphasis added).

United States v. McGowan, 302 U.S. 535, 538-39 (1938).

On this point, the Court is assisted by the recently issued advisory opinion by the NIGC's Office of General Counsel. Attachment A.[10] The Office of General Counsel issued its analysis of the "Indian land" status of the Buena Vista Rancheria in response to the Tribe's request for such a determination. NIGC Op. at 1. In this regard, the Tribe's request was consistent with other tribal requests to both the Interior Department[11] and the NIGC, in advance of substantial tribal investment in controversial casino developments. As explained by the Opinion:

> The NIGC has already approved a site specific Tribal Gaming Ordinance for the Tribe which constitutes a recognition of the Rancheria as Indian lands. Further, a written Indian lands opinion is not required before a Tribe may conduct gaming. However, the Tribe requested the Office of General Counsel to provide an opinion because of the controversy surrounding the proposed gaming operation.

NIGC Op. at 1, n.2. In concluding that the Buena Vista Rancheria is Indian lands under IGRA, the Opinion finds that the Rancheria is a reservation and that the Tribe's proposed gaming facility is sited within the Rancheria. Id. at 10-12. In the course of arriving at these conclusions the Opinion explains that because the Buena Vista lands qualify as reservation lands there is no additional requirement that they be taken into trust by the United States. Id. at 11. Further, the Opinion rejects the notion implicit in the County's complaint, Complaint ¶¶ 13-15, that

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[10] The NIGC Buena Vista Indian Lands Opinion is publicly available on the NIGC's website. As previously discussed, the Court may take judicial notice of matters in the general public record, including reports of administrative agencies, without converting this motion to dismiss into one for summary judgment. American Farm Bureau v. EPA, 121 F. Supp. 2d 84, 106 (D.D.C. 2000).

[11] The Department of the Interior, Office of the Solicitor, concurred in the NIGC's opinion respecting the Indian lands status of the Buena Vista Rancheria. NIGC Buena Vista Op. at 12. Thus, the two federal agencies charged with IGRA authority and steeped in Indian law expertise do not question the IGRA qualification of the Tribe's lands.

subsection (B)[12] of IGRA's Indian lands definition should be applied to the analysis of the Buena Vista Rancheria's status: "The Indian lands definition is subject to the requirements of subsection (B) only if subsection (A) does not apply. Because subsection (A) does apply (the Rancheria is a reservation), we need not address subsection (B)." NIGC Buena Vista Op. at 11.

The NIGC's opinion, while not a formally adopted opinion, is, at a minimum, "'entitled to respect' under [the Court's] decision in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944)." Christensen v. Harris County, 529 U.S. 576, 587 (2000) (finding that interpretations such as opinion letters lacking the force of law are not entitled to full Chevron-style deference). Under Skidmore, informal agency interpretations are "'entitled to respect' . . . to the extent that those interpretations have the 'power to persuade.'" Id. (quoting Skidmore, 323 U.S. at 140). The degree of deference in such situations will "vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position." United States v. Mead Corp., 533 U.S. 218, 228 (2001). The NIGC's opinion is at least entitled to the broadest respect available under Skidmore as a thoroughly analyzed and carefully reasoned legal opinion.

In light of the overwhelming authority in the case law and agency interpretation, together with the explicit terms of the Hardwick Stipulated Judgment to which the County is a signatory, the County's Indian lands claim, like its other IGRA claims, is unavailing and must be rejected

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[12] 25 U.S.C. § 2703(4)(B) includes as Indian lands, "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."

under Rule 12(b)(6).

IV. THE COUNTY IS NOT ENTITLED TO DECLARATORY OR INJUNCTIVE RELIEF

The County seeks several forms of declaratory relief that essentially reargue its first through fourth causes of action. This Court should deny such relief for the reasons stated above. The County also seeks mandatory injunctive relief "[d]irecting the defendants to revoke and vacate the Secretary's approval of the Amended Compact," and "[e]njoining the defendants from authorizing or sanctioning the conduct of Class III gaming activities on the Buena Vista Rancheria." Complaint, Requested Relief ¶¶ E., F. Because the matter at issue is committed to agency discretion by law, the Court lacks jurisdiction to entertain the County's requested relief.

CONCLUSION

For the foregoing reasons, the United States requests that its motion be granted and that plaintiff's complaint be dismissed pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

Respectfully submitted this 22nd day of July, 2005.

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