ORAL ARGUMENT SCHEDULED ON MARCH 8, 2011, 9:30 A.M.

United States Court of Appeals
For The
District of Columbia Circuit

Case No. 10-5240

AMADOR COUNTY, CALIFORNIA,

Appellant,

v.

KENNETH LEE SALAZAR, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE INTERIOR; GEORGE T. SKIBINE, IN HIS OFFICIAL CAPACITY AS ACTING PRINCIPAL DEPUTY ASSISTANT SECRETARY FOR INDIAN AFFAIRS; AND THE UNITED STATES DEPARTMENT OF THE INTERIOR,

Appellees.

Appeal from the United States District Court for the District of Columbia in Case No. 1:05-cv-00658 Richard W. Roberts, United States District Judge

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APPELLANT AMADOR COUNTY, CALIFORNIA'S REPLY BRIEF

SUBMITTED BY
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GLOSSARY OF ABBREVIATIONS

1864 Act	California Indian Reservation Act of April 8, 1864
Amended Compact or Compact	Class III Tribal Gaming Compact between Buena Vista Rancheria of Me-Wuk Indians and State of California
APA	Administrative Procedure Act
County	Amador County, California
DOI and/or Interior	United States Department of Interior
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act of 1934
NIGC	National Indian Gaming Commission
Secretary	Secretary of the U.S. Department of Interior
Site	Buena Vista Rancheria, Amador County, California
Tribe	Buena Vista Rancheria of Me-Wuk Indians

SUMMARY OF ARGUMENT

This litigation concerns efforts by the Buena Vista Rancheria of Me-Wuk Indians ("Tribe") to establish and operate a tribal casino on unincorporated lands within Amador County, California ("County"). The Tribe contends that the land formerly known as the Buena Vista Rancheria ("Rancheria"), which the Tribe now owns in fee simple, constitutes an "Indian reservation" and, as such, can be used for gaming pursuant to the Indian Gaming Regulatory Act of 1988, 25 U.S.C. ¶ 2701, *et seq.* ("IGRA").

Casino gaming under IGRA only can be conducted on land qualifying as "Indian land" as defined at IGRA Section 2703(4). In addition, casino gaming under IGRA only can be conducted if the Tribe has negotiated a Class III Gaming Compact with the State which, in turn, has been approved by the Secretary of the Interior ("Secretary").

The County is challenging the approval of the Tribe's Amended Compact because it specifically authorizes gaming at the Rancheria site based on the assumption that the Rancheria is "reservation" land, thus satisfying IGRA's Indian land requirement.

The federal Appellees' Brief in this matter ("Secretary's Brief") challenges the County's standing to litigate the matter, and asserts also that there never can be judicial review of a Compact approved through Secretarial inaction pursuant to

IGRA's provision for automatic Compact approval if the Secretary elects to take no action on a Compact within 45 days of its submission. 25 U.S.C. § 2710(d)(8)(C). In essence, the Secretary contends that he can circumvent APA review of his final agency action by doing nothing and allowing a Compact to become approved -- even if it violates federal law.

In response to the Secretary's standing challenge below, the District Court confirmed the County's standing to prosecute this action, and the County believes that its standing is beyond serious challenge. In addition, the County contends that the Secretary has no discretion to approve illegal Indian gaming -- whether that approval is direct or indirect -- because IGRA has clearly defined the elements which must be present before Indian gaming can be conducted.

ARGUMENT

I. The District Court Correctly Ruled That Amador County Has Standing To Litigate This Case.

The District Court correctly found that the County satisfies this Court's well-established requirements for Article III standing:

> First, [the plaintiff] must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. … Second, there must be a causal connection between the injury and conduct complained of – the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. … Third, it must be "likely," as opposed to merely "speculative," that the injury will be redressed by a favorable decision.

Am. Library Ass'n v. Fed. Commc'n Comm'n, 401 F.3d 489, 492-93 (D.C. Cir. 2005) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)) (internal quotations, alterations, and citations omitted).

The District Court found that the County had properly asserted each of the requirements in its First Amended Complaint. *See* County's First Am. Compl. at ¶¶ 26-28. Mem. Op. at 4-7. For purposes of the summary adjudication considered by the District Court, the District Court properly accepted as true the factual allegations of the First Amended Complaint and determined that the local government with jurisdiction over the fee title land could contest the Secretary's actions concerning that land.

And, in a case remarkably similar to this one, this Court recently has applied the same requirements for standing in confirming the right of an **individual** to challenge a decision of the Secretary to take land into trust for tribal gaming. *Patchak v. Salazar, et al.,* No. 09-5324 (D.C. Cir. Jan. 21, 2011) (citing factual allegations of harm virtually identical to those set forth in the County's First Amended Complaint).

Among the harm alleged by the County is the financial impact it will experience from providing services and infrastructure associated with the casino's presence. Apart from all of the services -- including health, fire and police --

which the County would be required to provide, a professional assessment of the costs for doing so is estimated to be in the tens of millions of dollars:

> Financial impacts would include, among others, increases in staffing, infrastructure, and related costs associated with: (i) the provision of public safety – including Sheriff's Office services, County jail operations, emergency dispatch services, Sheriff's Office administration, District Attorney's Office services, Public Defender's services, volunteer first responder services, and social and public health services; (ii) the inevitable need for expansion of public education to meet the needs of new casino employees moving to the County; (iii) necessary road, interchange/intersection, bridge, and drainage improvements; and, (iv) remediation of environmental impacts. Preliminary estimates indicate that the initial cost to the County to address the financial impacts created by construction and operation of the Indian casino would be tens of millions of dollars, as well as subsequent additional annual expenses which cannot be estimated at this time.

First Am. Compl. ¶ 26. All of these allegations "established a realistic danger of direct injury and satisfied the injury-in-fact requirement of constitutional standing." Mem. Op. at 6.

Moreover, in an effort to divert attention from the harm facing the County from the project, the Secretary asserts that the County is "essentially challenging" the State's action in making the Compact (Secretary's Brief at 36). The Secretary makes that assertion after acknowledging that while Compact negotiations involved only the Tribe and the State (*id.* at 34), the County had "a seat at the table" because its interests ostensibly were represented by the Governor. (*Id.* at 35). This point is somewhat obtrusive in any event, because while the Secretary

proposes that the County could sue the State at this time, such action is neither supported by authority nor discussed in the Secretary's Brief.

First, the County **is not challenging** the Governor's actions in negotiating the Amended Compact, but rather **is challenging**, pursuant to specific provisions of the APA, the Secretary's approval of that Amended Compact. And, second, it is beyond cavalier to suggest that the County should be suing the Governor at a time when the Amended Compact is a *fait accompli* and could be the foundation for commencement of a major construction project at any time. Although the Amended Compact may purport to protect the County, there are quality of life impacts that cannot be mitigated, even if the above-identified financial impacts somehow could be:

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

First Am. Compl. ¶ 27. *See, e.g., Haggerty v. Associated Farmers of California*, 279 P.2d 734, 740 (Cal. 1955) (in the exercise of its police power, the county has "legitimate interest in the preservation of the safety and tranquility of its citizens").

The Secretary then appears to functionally concede that the factual allegations of harm probably of establish standing, virtually ignoring these well-pleaded facts in favor of arguing that without regard to whether the requirements for Article III standing are present -- as they are -- the County cannot prosecute this litigation because it forfeited its right to challenge the reservation status of the casino site when it executed a Stipulation for Entry of Judgment, filed nearly 24 years ago in litigation known as *Tillie Hardwick v. United States*, No. C-79-1710 SW (N.D. Cal.) ("Stipulated Judgment"). JA48-54. However, the Secretary failed to note that the *Tillie Hardwick* litigation had absolutely nothing to do with Indian gaming – indeed, there **was no** Indian gaming at the time – and the Stipulated Judgment was entered 17 months before IGRA was enacted. The Secretary asserts without citation to authority that the Stipulated Judgment binds the County "without limitation for all future litigation involving the Buena Vista Rancheria." Br. at 29. However, that unsubstantiated contention is at odds with established law.

The County thus respectfully submits that the *Hardwick* litigation simply has no impact on the issues before this Court.

The case of *Red Lake Band v. United States*, 607 F.2d 930 (Ct. Cl. 1979), is particularly instructive. There, the Court of Claims found that a stipulation made in an action 40 years earlier, at a time when the law as to Indian claims was quite

different, did not bind the parties in a later action even though the stipulation was not expressly limited to the first action. Citing the Restatement (Second) of Judgments § 68, the Court explained: "As a general rule, ... an issue is not 'actually litigated' for purposes of collateral estoppel unless the parties to the stipulation manifest an intent to be bound in a subsequent action." *Red Lake Band*, 607 F.2d at 930. *See also, id.* at 934. And this same principle was confirmed by this Court in *Otherson v. Dep't of Justice*, 711 F.2d 267, 274 (D.C. Cir. 1983):

> Generally speaking, when a particular fact is established not by judicial resolution but by stipulation of the parties, that fact has not been "actually litigated" and thus is not a proper candidate for issue preclusion.

An application of the general rule noted in *Red Lake Band* compels the conclusion that the *Tillie Hardwick* Stipulated Judgment has no preclusive effect here in the context of a challenge to the Secretary's approval of the Amended Compact.

II. The Stipulated Judgment Must Be Viewed In The Context Of The *Hardwick* Litigation And The Issues Resolved; It Cannot Support A Legal Conclusion Concerning A Subsequent Act of Congress.

The *Hardwick* Stipulated Judgment provides in pertinent part:

> The original boundaries of the plaintiff Rancheria ... are hereby restored, and all land within these restored boundaries of the plaintiff Rancheria is declared to be "Indian Country."
>
> and
>
> The plaintiff Rancheria **shall be treated** by the County of Amador and the United States of America, **as any other federally recognized**

> **Indian Reservation**, and all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall apply to the Plaintiff Rancheria and the Plaintiffs.

Stipulated Judgment at ¶¶ 2.C-D (underscored emphasis in original) (bold face emphasis added). JA51.[1]

The Secretary presents no analysis as to why or how the Stipulated Judgment has any legal significance to this case. Instead, he simply assumes that it constitutes a binding judicial determination of the legal status of the Rancheria and that the above-quoted language established the lands within the Rancheria's former boundaries as an "Indian reservation" as a matter of federal law for all purposes, **including Indian gaming**. Plainly stated, the Secretary overstates the nature and effect of the Stipulated Judgment.

In scope and substance, the Stipulated Judgment concerned only the County's ability to assess property taxes on the former Rancheria lands.[2] It is of no

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[1] Although the parties' intent is arguably discernable, some aspects of the Stipulation are less than clear because essentially the same template stipulation form was used for all of the California counties affected by the litigation.

[2] The operative provisions and intent of the Stipulated Judgment, **to which neither the Tribe nor the United States was a party**, concerned real property tax issues between the individual property owners of the land within the former Rancheria boundaries and the County. The principal matters involved under the master *Hardwick* Stipulation, to which the United States **but not Amador County** was a party, relate to implementation of the California Rancheria Act – confirming and restoring the federal status of individual Indians and authorizing certain property conveyances to the United States to be accepted into trust **for the**

consequence in the context of this litigation challenging the Secretary's approval of the Amended Compact, because this type of negotiated stipulation can be a defense only through application of *res judicata* and/or collateral estoppel. Neither is applicable here.

A. *Res Judicata* and Collateral Estoppel Overview.

Although the concepts of *res judicata* and collateral estoppel are often intermingled, the distinctions are clear. "Under the doctrine of *res judicata* **[claim preclusion]**, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979) (citations omitted) (bracketed language added).

Collateral estoppel **[issue preclusion]**, on the other hand, prohibits relitigation of issues "actually and necessarily determined by a court of competent jurisdiction … in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). An application of this doctrine requires that (1) there was a prior suit involving the same issue, (2) the issue was actually litigated, (3) there was a final, valid decision on the merits, and (4) resolution of the issue was necessary to the outcome of the

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individual Indian property owners. No tribes were party to the *Hardwick* litigation.

litigation. *See e.g.*, *Parklane Hosiery Co.*, 439 U.S. at 322, and *generally* 18 C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4416.

Res judicata – or "claim preclusion" – is limited to claims specifically at issue and to which the parties stipulated in *Hardwick*: that is, **whether the County can impose taxes on the Rancheria land**. And, even then, the condition precedent precluding the imposition of property taxes never has been met because the former Rancheria lands never have been placed into trust (First Am. Compl. ¶ 13), let alone within the time period agreed to in the Stipulated Judgment at ¶ 2.E:

> E. All real property taxes heretofore paid to the County of Amador by Plaintiffs for the tax year 1979 and any subsequent tax year for **Indian parcels** shall be refunded in full to Plaintiff or the estate of the Plaintiff, if the plaintiff makes an election to return said parcel to trust status **no later than December 31, 1988**. [Emphasis supplied.] JA51-52.

Second, a defense based on collateral estoppel – or "issue preclusion" – applies to a given issue only if it was intended to do so. The lack of application here is straightforward: the County's express and limited agreement to treat the Rancheria property as a "reservation" and "Indian country" **for purposes of property tax assessments** could **not** have been intended also to encompass "Indian lands" upon which gaming may be conducted under IGRA, because IGRA did not become law until October 17, 1988, some 17 months after the *Hardwick* Stipulation was executed. **Simply stated, when the County entered into the *Hardwick* Stipulation, the Indian gaming now proposed for the Rancheria was**

neither contemplated nor legal. The Stipulated Judgment therefore could not, and did not, authorize or waive a challenge to future illegal conduct.

Furthermore, the Stipulated Judgment includes both findings of fact and conclusions of law, directly contradicting the general rule that parties may not stipulate to legal conclusions to be reached by a court, and, even if they do, any such stipulation does not bind a court as to controlling questions of law. *Red Lake Band,* 607 F.2d at 930, 934. So viewed, the sole relevance of the *Hardwick* Stipulated Judgment is that it merely set forth certain agreed facts in a manner that fit within the parameters of applicable law in order to resolve the tax issues at hand. Even if the parties had intended to stipulate to legal conclusions for that case, the County should not now be bound by those conclusions in this dispute concerning issues arising under a law which was not then in existence.

The Secretary's argument that the Stipulated Judgment is an adjudication constituting **a legal determination** of reservation status also cannot withstand scrutiny. The Secretary cites the land determination opinion concerning the Rancheria's reservation status, written by attorneys for the National Indian Gaming Commission,[3] as some sort of authority, even while conceding that it is merely advisory and not a final agency action. Secretary Brief at 17. In either case, no deference is owed the Secretary's argument or the NIGC land determination.

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[3] The NIGC land determination is at JA15-26.

B. The Limited Preclusive Effects of the *Hardwick* Stipulated Judgment Are Not Here Relevant.

In determining their preclusive effects, stipulations generally are treated the same as consent judgments. And the contractual nature of consent judgments has led to general agreement that any preclusive effects should be measured by the intent of the parties.

> In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. Thus consent judgments ordinarily support claim preclusion but not issue preclusion.

18 C. WRIGHT, A. MILLER AND E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4443 at 384. *See also, e.g., Bandai Am., Inc. v. Bally Midway Mfg. Co.*, 775 F.2d 70, 74 (3rd Cir. 1985) ("Settlement agreements involve claim preclusion not issue preclusion").

The bulk of the *Hardwick* Stipulated Judgment was not drafted to address facts, circumstances and legal issues specific to the County and the Rancheria. To the contrary, it was a form document written by the *Hardwick* plaintiffs' attorneys in which the parties – but not the operative provisions – were changed to separately address the needs of the **named plaintiffs** (individual residents of 17 rancherias) represented in the *Hardwick* litigation. The Stipulated Judgment's language makes it clear that the parties' sole purpose was to address the County's right to assess real estate taxes on property within the former Rancheria owned and occupied by

individual Indians, unless the land was taken into trust by the stipulated December 31, 1988 deadline.[4] So viewed, the general stipulations regarding "reservation" status and "Indian country" must be limited to just that – general stipulations that supported the resolution of the counties' claims (*i.e.*, property tax assessments).

Accordingly, if *res judicata* applies, it should be limited to the basic issue resolved by the *Hardwick* litigation, which was the County's right to impose real property taxes on fee simple parcels comprising the Rancheria unless taken into trust status by a date certain: December 31, 1988. As already discussed, the land was not taken into trust by that date which was a central element to the entire Stipulated Judgment; indeed, the parties agree that the land remains in fee status even now. Am. Compl. ¶15; Secretary's Brief at 13. The failure of the landowner(s) to meet the **stipulated deadline** for moving the Rancheria into trust unquestionably allows the County's to resume taxing it. In short, the failure to satisfy this critical element to the Stipulated Judgment means that **the Rancheria today is nothing more than land owned in fee subject to County taxation**.

On the issue of collateral estoppel, the *Red Lake Band* decision is particularly instructive. As noted above, the Court of Claims held that a stipulation made in an action 40 years earlier, at a time when the law as to Indian claims was quite different, did not bind the parties in a later action even though the stipulation

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[4] Again, it is emphasized that the Tribe was not a party to the *Hardwick* litigation or the Stipulated Judgment.

was not expressly limited to the first action. Citing the Restatement (Second) of Judgments § 68, the Court explained: "As a general rule ... an issue is not 'actually litigated' for purposes of collateral estoppel unless the parties to the stipulation manifest an intent to be bound in a subsequent action." *Red Lake Band*, 607 F.2d at 930. The court concluded:

> The circumstances of the prior litigation, and the prevailing law at the time ... suggest strongly that the parties did not consider the possibility of subsequent action by the Band challenging the adequacy of compensation paid for the land sold. Based upon the available evidence, therefore, there is no indication that the Band intended to be bound by the stipulation of value in a subsequent action.

Id. at 934. And, as noted *supra,* this Court specifically stated that a **stipulated fact** is not "actually litigated" and, thus, not a "proper candidate for issue preclusion." *Otherson*, 711 F.2d at 274.

An application of the general rule noted in *Red Lake Band* compels the conclusion that the Stipulated Judgment should not have preclusive effect in the context of a challenge to the Secretary's approval of the Amended Compact. Indeed, the parties could **not** have meant for their agreement to cover "Indian lands" under IGRA because the Stipulated Judgment was executed and filed a year and a half prior to IGRA's enactment. *See, e.g., Washington Hosp. v. White*, 889 F.2d 1294, 1301 - 1303 (3rd Cir. 1989) (in construing stipulation, court may properly consider circumstances surrounding formation of the stipulation which may explain the meaning of words used by the parties).

Simply stated, construction, interpretation or modification of a stipulation is subject to the law of contracts, *In re Willauer,* 192 B.R. 796, 800 (Bankr. D. Mass. 1996), and the rights of a party pursuant to a contractual agreement are determined by law existing when the contract was made. *Jackson v. People's Republic of China*, 550 F. Supp. 869, 872 (N.D. Ala. 1984). *See also, e.g., Gates v. Gomez,* 60 F.3d 525, 530 (9th Cir. 1995) (contracts are interpreted to give effect to mutual intention of the parties as it existed at the time the contract was made); *Mendes, Jr. Intern. Co. v. M/V Sokai Maru,* 758 F. Supp. 1169, 1176-1177 (S.D. Tex. 1991) (where differences in contract interpretation arise, the meaning each party attaches at the time the contract was made prevails); *Stone and Michaud Ins., Inc. v. Bank Five for Sav.*, 785 F. Supp. 1065, 1070 (D.N.H. 1992) (interpretation of contract focuses upon parties' intent at the time of contracting).

Further, the conclusions of law agreed to in the Stipulated Judgment should not bind the County in unrelated litigation challenging the Secretary's approval of the Amended Compact. *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); *In re Lawson Square, Inc.*, 816 F.2d 1236, 1240 - 1241 (8th Cir. 1987) (stipulations are generally not considered binding as to issues of law); *Koch v. Dep't of the Interior*, 47 F.3d 1015, 1018 (10th Cir. 1995) (federal court of appeals is not bound by stipulations as to questions of law); *TI*

Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995) (parties may not stipulate to legal conclusions to be reached by the court and, accordingly, courts are not bound to accept as controlling the stipulations as to questions of law).

Based on the authority discussed above, it is clear that the Stipulated Judgment has no preclusive effect in the context of a judicial challenge to the Secretary's approval of the Amended Compact. Any *res judicata* effect should be limited to the County's ability to assess real property taxes on Rancheria lands, and established collateral estoppel principles teach that the stipulations should be construed and interpreted in light of the issues being litigated and existing law at that time.

III. The Secretary Has No Discretion To Approve Any Indian Gaming Which Violates IGRA, Including Gaming On Non-Indian Lands.

A. Compact Approval By Inaction Is A Final Agency Action Subject To APA Review.

The APA provides for review of final agency actions for which there is no other adequate remedy in court. 5 U.S.C. § 704. An agency action is final when (1) it marks the "consummation" of the agency's decision-making process and must be more than tentative or of an interlocutory nature, and (2) the action is one by which rights or obligations have been determined, or from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

Notice of the Amended Compact approval was published in the *Federal Register* pursuant to IGRA's mandate at 25 U.S.C. § 2710(d)(8)(C). 69 Fed. Reg. 76004 (Dec. 20, 2004). Thus, the Amended Compact approval constituted Interior's final agency action establishing the Tribe's right to conduct Indian gaming on the Site. *See* 25 U.S.C. § 2710.

The Secretary's approval of a Compact – whether accomplished through affirmative approval or an election to allow the automatic approval – is nonetheless exactly that: **approval of a Compact**. The Supreme Court has directed that "when administrative inaction has precisely the same impact on the rights of the parties as [an affirmative agency action], an agency cannot preclude judicial review by casting its decision in the form of inaction rather than in the form of an [affirmative] order." *Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987). In this case, the Secretary's approval through inaction is the functional, if not actual, equivalent to affirmative approval and the consequence of both are the same. As such, APA judicial review must be available for the Compact approved through inaction, just as a Compact affirmatively approved is reviewable.

The Secretary argues that agency inaction is not reviewable unless discrete agency action is mandated by statute. *See* Secretary's Brief at 39 (citing *Norton v. S. Utah Wilderness Alliance* ("*SUWA*"), 542 U.S. 55 (2004); *Enter. Nat'l Bank v. Vilsack*, 568 F.3d 229 (D.C. Cir. 2009); and *Sprint Nextel Corp. v. FCC*, 508 F.3d

1129 (D.C. Cir. 2007)). The Secretary's position and its reliance on those cases is misplaced.

As an initial matter, *SUWA* and *Vilsack* both involve actions brought under Section 706(1) of the APA, asking the reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. §706(1). The Secretary correctly notes that in order to sustain a claim under Section 706(1), a plaintiff must assert that an agency failed to take a discrete action that it is required to take. However, this requirement is of no consequence in a 706(2) action, which seeks to have an unlawful agency action set aside. Unlike 706(1) claims, which are designed to prompt agency action where none has been taken as required, 706(2)(a) claims (such as the County's claim in this case) are advanced when improper or illegal agency action **already has occurred**, and therefore such claims logically do not require a showing of a statutory mandate for agency action.

The *Sprint* decision likewise is factually and legally inapposite for several reasons, not the least of which is that the agency action in *Sprint* was not alleged to have been contrary to law as is the Secretary's action in the present case. *Sprint* involved a request by Verizon that the Federal Communications Commission ("FCC") forbear from applying certain regulatory requirements. The FCC considered the petition but was deadlocked with a 2-2 vote on a proposed order. Because the FCC was unable to issue an order within the statutorily prescribed

amount of time, the petition was deemed granted by operation of law. Petitioners sought judicial review, contending that the "deemed grant" constituted agency action that was arbitrary and capricious. *Sprint*, 508 F.3d at 1131. In finding that the deadlocked vote and resulting "deemed grant" did not constitute agency action, the Court referenced the FCC's inability to reach consensus as evidence that the FCC had not engaged in a discrete action subject to judicial review. Rather, the FCC could not and did not make a decision, resulting in a grant of the petition by operation of law. *Id.*

In contrast, the Secretary here made a decision not to act on the amended Compact, resulting in approval of the Compact under 25 U.S.C. § 2710(d)(8)(C). In so doing, the Secretary exercised one of the three available options established by IGRA with respect to Compact review -- disapproval of Compacts which violate IGRA or federal law or trust obligations to Indian tribes; approval of Compacts, but only those which provide for gaming **on Indian lands** and are otherwise consistent with IGRA and federal law; and inaction relative to Compacts that provide for gaming on Indian lands, resulting in deemed approval only to the extent consistent with IGRA. The Secretary made a decision to take no action which, under IGRA, constituted approval of the Compact. Such decision is, as discussed herein, a final agency action subject to judicial review.

B. The Secretary Has No Discretion To Approve Compacts That Violate Federal Law.

The Secretary asserts that under IGRA he has the discretion to approve or not approve a Compact and therefore such action is not reviewable. However, as discussed below, this amounts to little more than the remarkable assertion that he has discretion to violate federal law without accountability to either the federal government or the federal courts. While it is true that the Secretary has discretion to approve a Compact either explicitly or implicitly, IGRA does **not** give him authority to violate federal law in the process.

As discussed in detail in the County's initial brief, IGRA furnishes clear and explicit criteria which must be met before Indian gaming can be approved. Gaming may only occur **on Indian lands** (25 U.S.C. § 2702(3)), defined as (1) all lands within the limits of any Indian reservation; and (2) any lands title to which is either held in trust by the United States for a tribe or Indian individual or held in restricted status by a tribe or Indian individual. 25 U.S.C. § 2703(4). Congress alone has the authority to change these criteria. Thus, the Secretary's approval (by inaction) of the Amended Compact, which would permit Indian gaming on a site that does **not** qualify for gaming as "Indian lands" as defined at IGRA Section 2703(4)(A), violates federal law and is subject to judicial review pursuant to APA Section 706(2).

The Secretary argues that IGRA's use of the permissive word "may" in 25 U.S.C. § 2710(d)(8)(B) means that the Secretary is not required to approve or disapprove a Compact (and has no duty to disapprove even notoriously illegal Compacts), and in the absence of such a duty, there is no statutory standard to apply for purposes of APA review. Secretary's Brief at 44-46. However, a careful reading of the operative section of the law shows that the Secretary's **only** discretion in the Compact approval process is (1) to approve **legal** Compacts affirmatively, or (2) to allow legal compacts to be approved through operation of law. The Secretary has **no** discretion – either under IGRA or established federal law – to approve (whether through action or nonaction) Compacts that violate federal law, such as the Compact at issue here.

IGRA provides at 25 U.S.C. § 2710(d)(8)(B) that the only circumstance in which the Secretary **may disapprove** a Compact is when it is contrary to IGRA or any other federal law and, thus, "illegal." In other words, while the Secretary may not reject a Compact for any reason other than illegality, he/she **must** disapprove an illegal Compact since it is axiomatic that he/she cannot violate federal law. *A fortiori,* the Secretary does not have discretion to approve an illegal Compact by electing to take no action.

The fact that Congress specifically enumerated the circumstances under which the Secretary "may" disapprove a Compact does not grant the Secretary

unlimited discretion to choose to approve (through action or inaction) a Compact. *See Dickson v. Sec'y of Def.*, 68 F.3d 1396, 1401-02 (D.C. Cir. 1995) ("[w]hen a statute uses a permissive term such as 'may' rather than a mandatory term such as 'shall,' this choice of language suggests that Congress intends to confer some discretion on the agency…[h]owever, such language does not mean the matter is committed exclusively to agency discretion.").

Accordingly, while IGRA places limitations on the reasons why the Secretary may disapprove a Compact, such cannot be read as authority to ignore IGRA's requirement that Indian gaming be confined to Indian land. Any interpretation to the contrary defies all reason and is contrary to law.

IV. CONCLUSION

The District Court found, and the Secretary here argues, that there never can be judicial review under the APA when the Secretary approves a Tribal-State Gaming Compact through the "no action" approval language of IGRA Section 25 U.S.C. § 2710(d)(8)(C).

This case involves the Amended Compact which the County alleges authorizes gaming at a specific site in violation of IGRA's requirement that Indian gaming only can be conducted on "Indian land" as defined at 25 U.S.C. §§ 2702(3), 2710. If one follows the Secretary's argument to its logical conclusion, the Secretary could -- with immunity from judicial review -- similarly utilize the

"no action" provision to approve a Compact authorizing gaming by a tribe without formal federal recognition in violation of 25 U.S.C. § 2703(5). Other "no action" Compact approvals which the Secretary argues would be outside the scope of judicial review could include provisions for state taxation of casino revenues in violation of 25 U.S.C. § 2710(d)(4) and even involvement in a tribal casino of organized crime in violation of 25 U.S.C. § 2702(2). The reader might find some of these examples to be nothing short of absurd, and he/she would be right. But, if the law is as argued by the Secretary, any of them could become reality.

The redeeming element to these questions is the established principle that the Secretary cannot violate federal law. That fundamental principle -- and the procedural mechanism by which to ensure its sustenance -- is at the heart of this case.

Dated this 1st day of February 2011.

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CERTIFICATE OF COMPLIANCE TO FEDERAL RULE OF APPEAL PROCEDURE 32(a)(7)(B)

The undersigned counsel of record certifies as follows:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5623 words, excluding parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the APPELLANT AMADOR COUNTY, CALIFORNIA'S REPLY BRIEF has been served via ECF upon counsel of record, on this 1st day of February 2011.

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