ORAL ARGUMENT NOT YET SCHEDULED

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

---

APPELLANT AMADOR COUNTY, CALIFORNIA'S PRINCIPAL BRIEF

SUBMITTED BY
DENNIS J. WHITTLESEY
(DC Bar No. 053322)
1875 Eye Street, N.W. - Suite 1200
Washington, DC 20006
Telephone: (202) 659-6928
Email: dwhittlesey@dickinsonwright.com
Counsel for Plaintiff-Appellant

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES PURSUANT TO RULE 28(A)(1)

The undersigned counsel of record certifies as follows:

A. Parties And Intervenor

The Parties to this case are Appellant Amador County and Appellees Kenneth Lee Salazar, Secretary of the Interior; George T. Skibine, Acting Principal Deputy Assistant Secretary of the Interior for Indian Affairs; and the United States Department of the Interior.

B. Rulings Under Review

Appellant seeks review of the *Memorandum Opinion and Order* rendered on January 8, 2009 (JA 307-18) (*Amador County v. Kempthorne*, 592 F. Supp. 2d 101 (D.D.C. 2009)), and the *Memorandum Opinion and Order* rendered on July 12, 2010 in the United States District Court for the District of Columbia (JA 321-28). Civil Action No. 1:05-cv-00658, Docket Nos. 43, 44 and 53.

C. Related Cases

The only case related to this appeal is the matter appealed herein.

D. Certificate Pursuant To Circuit Rule 26.1

Plaintiff-Appellant is a county government within the State of California.

s/Dennis J. Whittlesey
Dennis J. Whittlesey
Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

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

JURISDICTIONAL STATEMENT

(A) The District Court had jurisdiction over this case pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* ("APA"), in that Appellant Amador County is challenging final agency actions by the United States Department of the Interior ("Interior"). The agency action at issue is Interior's approval of an amendment to the Class III Tribal-State Gaming Compact ("Amended Compact") between the Buena Vista Rancheria of Me-Wuk Indians ("Tribe") and the State of California authorizing casino gaming on tribally-owned fee land located within the boundaries of the former Buena Vista Rancheria ("Site") in Amador County, California.

(B) The Notice of Appeal (JA 331-32) having been filed within 30 days, as required by Fed. R. App. P. 4(a), this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

(C) The District Court's Memorandum Opinion and Order granting Defendants' Motion to Dismiss was entered on January 8, 2009. JA 307-18. The Memorandum Opinion and Order denying Plaintiff's Rule 59(e) Motion to Amend or Modify was entered on July 12, 2010. JA 321-328. The Amended Notice of Appeal was filed on July 16, 2010, or within 30 days from the entry of the final judgment below. JA 331-32.

(D) This appeal is from a final order or judgment that disposes of all parties' claims. JA 318.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in this Appellant's Opening Brief at the Table of Authorities.

STATEMENT OF ISSUES

Appellant will present the following issues:

1. Whether an automatic approval of a Tribal-State Gaming Compact pursuant to a specific provision of the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA") – which is triggered 45 days from submission if the Secretary of the Interior ("Secretary") takes no action to approve or reject the Compact – constitutes a final agency action for the purpose of judicial review under the APA.

2. Whether IGRA's Section 2710(d)(8)(C) provision for an automatic approval of a Tribal-State Gaming Compact if the Secretary takes no action within 45 days immunizes such an approval from APA review when the Compact approves gaming which is illegal under IGRA.

STATEMENT OF FACTS

The Tribe is a federally-recognized Indian tribe and, accordingly, is eligible to operate Class III gaming pursuant to IGRA. It may conduct gaming (1) on "Indian lands" and (2) in conformance with a Class III gaming Compact between the Tribe and the State of California which has been approved by the Secretary of Interior.

IGRA defines "Indian lands" as (a) lands within the limits of an Indian reservation; and (b) any lands which as of October 17, 1988, were held in trust by the United States for the benefit of an Indian Tribe or owned by a tribe or Indian individual in restricted fee status over which a tribe exercises governmental power. Gaming may be conducted on land taken into trust after 1988, but only if that land qualifies for one of several exceptions not relevant to this case.

On December 20, 2004, Interior Secretary Gale Norton, acting through her Principal Deputy Assistant Secretary for Indian Affairs, approved an Amended Gaming Compact between the Tribe and the State of California. JA 32. The Amended Compact is "site specific" in that it geographically limits the land on which the Tribe is authorized to conduct Class III casino gaming to tribally-owned fee land which is within the boundaries of the former Buena Vista Rancheria ("Site") (JA 136, 181), land which concededly is not in trust and cannot be a "reservation" as a matter of federal law. The Amended Compact also recites and

incorporates IGRA's requirement that Class III gaming only be conducted on "Indian lands." JA 136.

The Indian Tribes of California lost their aboriginal title to land by an Act of Congress enacted in 1851 to deal with unique land title issues resulting from provisions of the Treaty of Guadalupe Hidalgo of 1848, through which the United States acquired from Mexico the State of California. As a result, many Indians of Northern California were forced to live wherever they could and without a permanent home. Congress attempted to address this problem in 1906, 1908 and 1914 through the annual Interior Department Appropriation Acts by appropriating funds for the federal purchase in fee title of lands for occupancy by "homeless Indians" residing in the vicinity of the purchased parcels. The resulting federal fee parcels were known as Rancherias – or "little ranches" – and one of them became the Buena Vista Rancheria. Those Rancherias – including the one at issue – were never taken into trust or restricted fee status.

The Rancheria currently is owned by the Tribe in fee simple and is the designated site for the Tribe's proposed casino. The Amended Compact (JA 132-182) specifically identified the Site as the only authorized location for casino gaming. It further authorizes the Tribe to conduct Class III gaming on the Site based on the presumption that the Rancheria is an "Indian reservation" as a matter of federal law and, thus, constitutes "Indian land" under IGRA. However, it is

beyond dispute that the Rancheria (a) has never been in trust or restricted fee status and (b) cannot be an Indian reservation under a federal law unique to California enacted in 1864. No law authorizing reservation status for the Rancheria has ever been enacted, meaning that the Site is not an Indian reservation and, thus, not "Indian land" as defined by IGRA.

On March 21, 2008, the County filed its Amended Complaint[1] for Declaratory and Injunctive Relief seeking judicial review pursuant to the APA of the approval of the Amended Compact. JA 29-45. This approval resulted from the Secretary taking no action on the Amended Compact (either to approve or disapprove) during the 45-day review period, thus triggering automatic approval. The County asked the District Court to declare the Amended Compact invalid because gaming on the Rancheria would be illegal under IGRA. JA 39-44.

The District Court ruled that the County has standing to maintain this suit but failed to state a cause of action under the APA, and then dismissed the action without reviewing the merits. JA 307-308. The District Court found that the Secretary's choice to take no action on the Amended Compact – even if the Compact is illegal – is not reviewable under the APA. JA 313-17. While the Court's rationale is murky and inconsistent with IGRA, the law itself is clear and provides that the Secretary can approve a Compact through one of two actions: (i)

[1] The County filed their initial Complaint on April 1, 2005. JA 1-12.

approving it formally or (ii) approving it by opting to take no action. However, under IGRA, either of those constitute Secretarial action, *see* 25 U.S.C. § 2710(d)(8)(C), and the law is well-established that the Secretary cannot approve an illegal Compact.

The District Court ignored the law and effectively ruled that there can be no judicial review of Compact approval following the Secretary's decision to take no action, **no matter how egregiously illegal**.

SUMMARY OF THE ARGUMENT

The APA unequivocally provides for judicial review of final agency actions.

An affirmative Compact approval by the Secretary is a final action reviewable under the APA.

A Compact disapproval by the Secretary is a final action reviewable under the APA.

IGRA provides for an automatic Compact approval when the Secretary takes no action on a Compact within 45 days of receiving it for review and decision.

Inaction by the Secretary is deemed "action" as a matter of law and, thus, subject to review under the APA.

An automatic Compact approval under IGRA is an agency action not exempted from APA review by either the APA or IGRA, and thus constitutes a final agency action reviewable under the APA.

As the predicate to its opinion below, ruling that the action is not subject to APA review, the District Court conceded that an automatic Compact approval is a final agency action.

Notwithstanding the firmly-established principle that final agency actions are subject to APA review, the District Court nonetheless ruled that the Secretary's affirmative decision to allow the Amended Compact to be approved through inaction is not subject to APA review, concluding that automatic agency action could **never** approve any illegal provision of a Compact. JA 316.

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." Simply stated, 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. Consistent with this principle is that the Secretary does not have discretion to approve an illegal Compact by taking no action, knowing that inaction on Compact review triggers the automatic approval.

Thus, by consciously electing to allow an illegal Compact to become final, the Secretary could affirmatively opt to approve an illegal Compact – an option prohibited under law. Under the District Court's rationale, the Secretary could

deliberately approve an illegal Compact and avoid judicial review by simply electing to take no action and allow the automatic approval.

The Amended Complaint plainly alleges that the Site does not qualify as "Indian lands" for gaming as defined at IGRA Section 2703(4)(A). With that definition, Congress prohibited the Secretary – the only federal official authorized to review and approve Compacts – from allowing approval of a Compact authorizing gaming on statutorily-ineligible land. Indeed, the Department of the Interior has repeatedly acknowledged that IGRA requires the Secretary to review and determine whether a Compact violates IGRA or other federal law. And the law provides clear standards by which courts can determine whether the Secretary's decision to approve a Compact – including through inaction – was arbitrary and capricious.

The District Court then asserted, without citation to competent authority, that IGRA reflects Congressional intent to preclude judicial review of Compacts approved by Secretarial inaction, no matter how transparently illegal. JA 316. In order to reach this conclusion, the Court reasoned that when approving a Compact through inaction, the Secretary is only approving the Compact to the extent it is consistent with IGRA. *Id.* Thus, the Court apparently believed that approval through inaction could **never result in approval of an illegal Compact,** as though illegal provisions contained therein somehow were scrubbed from the document

during the "no action" approval. JA 316. Using this fanciful notion as a springboard to its ultimate conclusion, the Court ostensibly ruled that a Compact approval through Secretarial inaction can never be illegal and, hence, always is beyond the scope of APA judicial review. *Id.* at 315-16.

The District Court's rationale ignores the fact that **judicial review** of Secretarial Compact approval is **the only means** by which to test whether any Compact is legal under IGRA. *Cf.* 5 U.S.C. § 704 (providing for judicial review of final agency actions "for which there is no other adequate remedy in a court"). Thus, Congress could not have intended the automatic approval provision of 25 U.S.C. § 2710(d)(8) to preclude such judicial review; to the contrary, the law makes clear that Congress intended just the opposite.

The District Court's refusal to review the legality of the Amended Compact results in a *de facto* finding that the challenged Compact authorization of a tribal casino on land where Indian gaming cannot lawfully be conducted is consistent with IGRA. That is to say, prohibiting judicial review of the Secretary's approval of the Amended Compact through inaction allows the Tribe to game on the Site – whether or not it is actually legal for the Tribe to do so.

Finally, the land at issue is the former Buena Vista Rancheria. JA 136, 181. The federal decision makers claim that the Rancheria is an "Indian reservation" and, thus, defined as "Indian lands." *See* Docket No. 33, at 3; *see also* JA 15-26.

However, as a matter of federal law unique to California, that property is not, and cannot be, Indian reservation land. Accordingly, it is not, and cannot be, "Indian land" for gaming under the statutory definition.

STANDING

That Appellant has standing to maintain this litigation is not in dispute. The District Court specifically determined Amador County's standing (JA 310-13), and the federal government did not appeal that determination.

//

//

//

//

//

//

//

//

//

//

//

//

ARGUMENT

I. Standard of Review.

This Court reviews *de novo* a district court's dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 161-62 (D.C. Cir. 2003). Pursuant to Rule 12(b)(6), a complaint should not be dismissed unless a plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *See Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979). When conducting its analysis, a court should construe the complaint liberally in the plaintiff's favor and grant plaintiff the benefit of all reasonable inferences that can be derived from the facts alleged. *Id.*

In the District Court below, the County argued that the Secretary's approval of the Amended Compact, through inaction, should be set aside because, pursuant to 5 U.S.C. § 706, it was arbitrary and capricious and otherwise not in accordance with the law. JA 30, 32 at ¶ 20, 39-44. But the District Court rejected the County's claims, finding that IGRA specifically precludes judicial review of the Secretary's "deemed approval." *See, generally*, JA 313-16. Based on that finding, the District Court held that the County failed to state a claim entitling it to relief under the APA, and granted the United States' motion to dismiss. JA 316-17. Accordingly, this Court should review *de novo* the District Court's dismissal pursuant to Rule 12(b)(6).

When conducting a *de novo* review of the legal sufficiency of an agency's action in light of the record, this Court's task is "precisely the same as the district court's." *Dr. Pepper/Seven-Up Companies, Inc. v. FTC*, 991 F.2d 859, 862 (D.C. Cir. 1993). As such, the District Court's decision is "not entitled to any particular deference" and this Court should proceed as though the County had appealed the Secretary's decision directly to this Court. *Id.*

This Court therefore should review *de novo* the District Court's dismissal of the County's suit seeking a declaration that the Secretary's inaction on, and consequent deemed approval of, the Amended Compact was arbitrary, capricious and otherwise not in accordance with the law.

II. The District Court Erred In Ruling That A Compact "Deemed Approved" Under IGRA Is Not Reviewable Under The APA.

The District Court improperly relied on *PPI Inc. v. Kempthorne*[2] and *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*[3] in order to hold that the Secretary's approval of the Amended Compact through inaction is beyond the scope of APA review. To the contrary, as the following discussion demonstrates through analysis of applicable law, the Secretary's decision to

---

[2] No. 4:08cv248-SPM, 2008 U.S. Dist. LEXIS 116703 (N.D. Fla. July 8, 2008.

[3] 327 F. Supp. 2d 995 (W.D. Wis. 2004), *aff'd on other grounds*, 422 F.3d 490 (7th Cir. 2005).

approve the Amended Compact by electing to take no action to approve or deny it is a final agency action that is properly subject to APA review.

A. The APA Provides For Judicial Review Of Final Agency Actions Allegedly Illegal Under Federal Law.

The law is well-settled that the federal courts have jurisdiction to review and reverse final agency actions:

- The APA specifically establishes the legal basis for judicial review of final agency actions for which there is no other adequate remedy in a court. 5 U.S.C. § 704.

- The courts shall hold unlawful and set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at § 706(2)(a).

- A critical element to any assessment of agency action is that there is a strong presumption in favor of APA judicial review, with the requirement that the courts exercise "a hospitable interpretation" in applying the APA's "generous review provisions." *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967) (additional quotations and citations omitted).

Judicial review of agency action is subject to two narrow exceptions, neither of which is found here. Specifically, judicial review is not available when (1) it is precluded by the relevant statute, or (2) the agency action is committed to agency discretion by law. 5 U.S.C. § 701(a). When determining the applicability of either

exception, the courts must presume that Congress did not intend to preclude judicial review. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

When evaluating whether judicial review is precluded by statute, courts should frame the question as one of prohibition rather than authorization and "only upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Labs.*, 387 U.S. at 141; *see also Dunlop*, 421 U.S. at 567 (finding statute did not preclude judicial review because there was not even the "slightest intimation" that Congress even considered preclusion of judicial review, in which case the court reasonably could conclude that preclusion was not intended).

Similarly, the Supreme Court has emphasized that the "committed to agency discretion" exception applies only in those "**rare instances**" in which a statute is drawn in such broad terms that there is "**no law to apply**." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (emphasis added). The rare case in which an agency action is committed to agency discretion occurs only when a court would have "no meaningful standard" against which to judge an agency's exercise of discretion. *Heckler v. Chaney*, 470 U.S. 821, 830 (1985).

In determining whether sufficient standards exist by which to judge an agency action, courts are not strictly limited to the language of the relevant statute. Indeed, this Court has held that it can look to both formal and informal agency

policy statements, regulations and statutes in order to discern whether there are judicially manageable standards by which to judge the exercise of agency discretion. *Padula v. Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987).

Finally, even in the absence of any clear statutory guidelines, "courts often are still able to discern from the statutory scheme a congressional intention to pursue a general goal" and must invalidate the agency action if it is not "reasonably consistent with this goal." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985).

B. An Automatic Compact Approval Is A Final Agency Action Subject To APA Review.

Secretarial approval of a Class III gaming Compact through inaction is a final agency action which is properly subject to APA review.

As stated above, 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 must be 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)(D). 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.

It is important to recognize that 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**. *Cf. Alliance to Save the Mattaponi U.S. Army Corps of Eng'r*, 514 F. Supp. 2d 1, 8-9 (D.C. Dist. 2007) (recognizing that an agency's failure to act to deny a permit was essentially a decision – or "action" – to indirectly approve a permit, thus the agency's failure to act to deny permit was reviewable under the APA). Moreover, the Supreme Court has made clear 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). Here, 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 a Compact approved through inaction, just as a Compact affirmatively approved is reviewable.

Finally, it is significant that the District Court dismissed the case on the grounds that there was no APA review for a statutory approval after conceding at the outset that the Secretary's approval through inaction was a **final agency action**:

> Assuming that the Secretary's approval by inaction is a final agency action . . . .

JA 316. With that concession, the Court then proceeded to reject any notion that the "agency action" through "inaction" could be reviewed by the federal courts. *See, generally,* JA 313-17. And, as discussed at Section II.G, *infra*, the Court then justified that astonishing and unprecedented conclusion through citation to court decisions which simply do not support that conclusion. JA 315-16.

C. IGRA Requires The Secretary To Exercise One Of Three Options In Compact Review: Disapproval Of Illegal Compacts, Affirmative Approval Of Legal Compacts, Or Allowing Automatic Approval Of Legal Compacts By Taking No Action.

IGRA establishes three options for the Secretary with respect to Compact review, and the Secretary is required to exercise one of them:

(1) The Secretary must disapprove any Compact which violates (a) IGRA, or (b) any other federal law or federal trust obligations to Indian tribes; however, the Secretary has no authority to disapprove Compacts for any other reason. *See* 25 U.S.C. § 2710(d)(8)(B); *see also, Apache Tribe of Okla. v. U.S.*, 2007 U.S. Dist. LEXIS 52437, *11 (W.D. Okla. 2007) ("a Compact may not be approved if it violates IGRA . . .").

(2) The Secretary may approve Compacts, but only those which provide for gaming **on Indian lands** and are otherwise consistent with IGRA and federal law. 25 U.S.C. § 2710(d)(8)(A).

(3) If the Secretary does not, within 45 days of its submission, disapprove or affirmatively approve of a Compact that **provides for gaming on Indian lands,** the Compact shall be considered to have been **approved by the Secretary,** but only if it is consistent with IGRA. 25 U.S.C. § 2710(d)(8)(C).

D. IGRA Does Not Give The Secretary Discretion To Either Directly Or Indirectly Take A Final Agency Action Which Is Beyond APA Review.

IGRA strictly limits the Secretary's discretion during Compact review and the decision-making process, but nowhere does IGRA preclude APA judicial review of Secretarial Compact decisions which, of course, are final actions of Interior.

As discussed above, the APA provides for judicial review of final agency actions for which there is no adequate remedy in a court. 5 U.S.C. § 704. However, the APA's generous review provisions are unavailable when review is precluded by statute or the agency action at issue is committed to agency discretion by law. *Id.* at § 701(a). Neither of those exceptions apply to this case. *Cf. Barlow v. Collins*, 397 U.S. 159, 166-67 (1970) ("judicial review of . . . administrative

action[s] is the rule, and nonreviewability an exception which must be demonstrated"). Although redundant, it is emphasized that IGRA specifically limits the Secretary to three options with respect to Compact review: disapproval of illegal Compacts, approval of legal Compacts through affirmative action, and approval of legal Compacts by taking no action within 45 days.

Although IGRA enumerates three different actions the Secretary may take, it nevertheless restricts the Secretary's discretion to elect one course of action over another. *Cf. Evangelical Lutheran Church in Am. v. I.N.S.*, 288 F. Supp. 2d 32, 43 (D.D.C. 2003) ("language allowing for discretion does not create unlimited discretion" so as to preclude APA judicial review). Moreover, nothing in IGRA or its legislative history indicates that Congress intended or even considered the possibility of precluding judicial review of Compact approval, whether accomplished affirmatively or by the Secretary's decision to approve through inaction. As such, APA judicial review of the Secretary's decision to approve through inaction is reviewable.

E. The Secretary Has No Authority To Allow Approval By Inaction Of Compacts Authorizing Gaming On Non-Indian Lands.

The District Court improperly found that IGRA lacks any standards by which to judge whether the Secretary's deemed approval of the Amended Compact was proper. Having delineated that erroneous predicate, the District Court then concluded that the Amended Compact approval was unreviewable under the APA

because approval though inaction is action committed to **agency discretion**. JA 315. The absurdity of that conclusion is shown by its practical consequence that the Secretary would be able to block APA review of **any** Compact approval through inaction, including Compacts which are blatantly and egregiously illegal **or even publicly acknowledged by the Secretary to be illegal.** That cannot be, and is not, the law.[4]

The Secretary has no authority to violate federal law with impunity. *Gray Panthers Project Fund v. Thompson*, 304 F. Supp .2d 36, 40 (D.D.C. 2004) ("to state the obvious, the Secretary has no . . . right to violate the law because he thinks he knows best . . ."). To the contrary, IGRA requires that "the Secretary review all Compacts . . . [and] amendments to insure that the terms of the Compact, as amended and considered as a whole, do not violate any provision of IGRA" or any other federal law. 73 Fed. Reg. 74005 (Dec. 5, 2008); *see also,* Letter from Interior Secretary Gale Norton to the Honorable Cyrus Schindler, Nation President, Seneca Nation of Indians (Nov. 12, 2002) (IGRA **requires** Interior to determine whether Compact violates IGRA during the Compact review process). Thus,

---

[4] *Cf. Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) ("[v]ery rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board" (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

Interior has conceded that even Compacts considered to have been approved by virtue of Secretarial inaction must have first been reviewed by the Secretary to insure the Compact's legality.

If the Secretary discovers illegal Compact provisions during Compact review, then he/she must not allow the Compact to ripen into an approved Compact by failing to disapprove it. *Cf. Apache Tribe of Okla.,* 2007 U.S. Dist. LEXUS 52437, at *11 (Compact that violates IGRA cannot be approved; since gaming may only occur on Indian lands, "before a compact may be approved, it must be confirmed that the gaming is anticipated on Indian lands").

In the instant case, the Secretary acted arbitrarily and capriciously in approving the Amended Compact because it authorizes gaming on land within the former Rancheria, which is not Indian land. *See* 25 U.S.C. § 2710(d)(1) (Class III gaming activities are only lawful on Indian lands).

IGRA specifically limits Secretarial approval authority to Compacts that authorize gaming only on Indian lands. Indeed, 25 U.S.C. § 2710(d)(8)(A) only authorizes the Secretary to affirmatively approve Tribal-State Compacts that govern "gaming **on Indian lands**. . . ." (emphasis added). Conversely, the Secretary has **no authority to affirmatively approve** a Compact that purports to authorize Indian gaming on lands that do not qualify as "Indian lands." This is significant because IGRA's provision governing automatic approval through

inaction, 25 U.S.C. §2710(d)(8)(C), provides for the deemed approval of "a Compact **described in [25 U.S.C. §2710(d)(8)(A)]**" – that is, a Compact authorizing gaming on **Indian lands.** Simply stated, IGRA only authorizes Secretarial approval – either affirmatively or through inaction – of Compacts that apply to Indian land. As such, the Secretary has no authority to approve or to deem approved any Compact that authorizes Indian gaming on non-Indian lands.

It is beyond dispute that IGRA's mandate that gaming can be approved only for Indian lands provides a meaningful standard by which to judge whether the Secretary's deemed approval of the Amended Compact was arbitrary, capricious or otherwise not in accordance with law. In approving the Amended Compact and authorizing gaming on non-Indian lands, the Secretary acted outside of the authority granted to him/her by IGRA and his/her approval is subject to APA review.

1. Indian gaming can only be conducted on "Indian lands."

Both IGRA and its legislative history demonstrate the seriousness of Congress in restricting tribal gaming only to "Indian lands." 25 U.S.C. § 2710(d)(1) (providing, *inter alia*, that a tribe may only conduct Class III gaming on Indian lands over which such tribe has jurisdiction); *Id.* at § 2702(3) (stating that Congress enacted IGRA in order to declare the establishment of independent "Federal regulatory authority for gaming on **Indian lands**" and to establish

"Federal standards for gaming on **Indian lands**") (emphasis added); S. Rep. No. 100-446, 1 (Aug. 3, 1988) (Congress acknowledging that IGRA was the "outgrowth of several years of discussion and negotiations between gaming tribes, states, the gaming industry, the federal agencies and the Congress in an attempt to formulate a system for regulating gaming on **Indian lands**") (emphasis added).

The net effect of Congress' strict limitation – allowing gaming only on Indian Lands – is a correspondingly strict limitation on the Secretary's ability to authorize gaming only on those defined lands, either through action or inaction.

As discussed in the following paragraph, responding to the rigid statutory limitations on land eligible for gaming, the NIGC and Secretary have developed and implemented a comprehensive system for policing those restrictions. However, because decision-makers do not always reach correct conclusions in rendering agency actions, the APA provides the legal vehicle for rendering challenges to those actions.

The Secretary assumed that the Buena Vista Rancheria constituted Indian land solely by the collateral assumption that it was in "reservation" status when IGRA became law.[5] However, if the Site was not in reservation status at that time, then the Secretarial approval was simply illegal.

---

[5] While IGRA defines tribal land qualifying for gaming as "Indian lands" as of the October 17, 1988, the date on which IGRA became law, Congress Footnote continued on next page …

The Amended Compact specifically identifies the Rancheria Site as the land on which the Tribe will conduct Indian gaming, a factual representation directly challenged by Appellant's initial and amended Complaints.[6]

As mentioned earlier in this Subsection II.E.1, the seriousness of land qualification is demonstrated by the fact that the NIGC and Secretary have developed special procedures for review of the qualification of lands for gaming prior to their final approval for gaming. The principal product of these procedures is the promulgation of "Land Determination Decisions," and they are publicly available on the NIGC's web page at its "Indian Land Opinions" link.[7] While these

---

Continued from previous page …
recognized many tribes would acquire land after that date and some likely would want to develop gaming thereon. With that, Congress set strict guidelines for gaming on tribal land acquired after 1988 by establishing independent – but equally strict – criteria for after-acquired lands. *See* IGRA at Section 20, 25 U.S.C. § 2719 ("Gaming on lands acquired after October 17, 1988"). While not directly relevant to the ultimate issues in this litigation, it is significant that Congress was so intent on insuring that **no tribal land** – regardless of when acquired – could ever be used for gaming if it did not meet the statutory criteria.

[6] In considering whether to grant a motion to dismiss, district courts are required to accept as true all factual allegations set forth in a complaint. *Trudeau v. F.T.C.*, 456 F.3d 178, 193 (D.C. Cir. 2006). As such, the District Court was required to accept the County's factual allegations as to the land status and to assume that the Site, in fact, does not qualify as "Indian lands." Indeed, dismissal cannot be ordered unless it appears beyond doubt that plaintiff can prove no set of facts in support of its claim that would entitle it to relief. *Id.*

[7] The NIGC web page reports that these opinions have been rendered since 1990, when IGRA was a new law. The NIGC reports that 83 opinions have been
Footnote continued on next page …

decisions are neither agency actions nor even formal opinions of NIGC or Interior attorneys, they at least furnish some foundation from which the Secretary can access the eligibility for gaming of a proposed casino site. However, no such administrative assessment of land eligibility was undertaken with regard to the Amended Compact, as demonstrated by the fact that the Indian Land Opinion for this project was not promulgated until June 30, 2005 (JA 15-26)– some six months after the Compact approval on December 20, 2004 (JA 5 at ¶ 20, 32 at ¶ 20) and three months after this litigation was filed on April 1, 2005 (JA 1-12).

In a transparent attempt to cure this glaring absence of pre-decision assessment of land qualification, the federal defendants sought (Docket No. 8) and secured (Minute Order, dated June 20, 2005) an extension of time in which to respond to the Complaint so that they could defer answering the lawsuit until they had received what they had belatedly requested and knew was forthcoming: an expedited *post hoc* Indian Land Opinion prepared specifically to (1) rebut the County's allegations and (2) create an illusion that the final agency action was

---

Continued from previous page …
rendered. Fifty seven were positive, 47 were negative and two were "undetermined." However, the totals shown are not entirely accurate, because it is public record that several of the identified opinions reversed prior actions not reported on the web site. These include reversals of negative determinations for the Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians, Grand Traverse Band of Ottawa and Chippewa Indians and Mechoopda Indian Tribe of the Chico Rancheria.

based on a formal determination of "Indian land" status. While this document played **no role** in the decision process, government counsel attempted to obscure that fact by asserting: "the Court is assisted by the advisory opinion of the NIGC's Office of General Counsel," (Docket No. 11-1, at 24), and even suggesting that it has substantive relevance to the litigation because Interior's attorneys had "concurred in its conclusions." *Id.* at n. 10.[8]

2. IGRA provides mandatory standards of legality guiding any Secretarial Compact approval.

Contrary to the District Court's finding, IGRA provides meaningful standards by which to determine whether, by approving the Amended Compact, the Secretary acted arbitrarily, capriciously or contrary to federal law.

In order to find the Secretary's approval was beyond the APA's broad grant of judicial review, the District Court improperly expanded the scope of the "committed to agency discretion" exception which courts consistently have recognized as "very narrow." *Citizens to Preserve Overton Park,* 401 U.S. at 410. The Supreme Court has held that the exception only overcomes the strong presumption in favor of APA judicial review if the applicable statute "is drawn so that a court would have **no meaningful standard** against which to judge the

---

[8] The NIGC advisory opinion's abject irrelevance to the Amended Compact approval is confirmed by the opinion itself:: "The NIGC **has already approved** a site specific Tribal Gaming Ordinance for the [Buena Vista] Tribe which constitutes a recognition of the Rancheria as Indian lands." JA 15, n 2.

agency's exercise of discretion." *Heckler*, 470 U.S. at 830 (emphasis added). In other words, the exception is only triggered when there is simply "no law to apply." *Id.*

Indeed, this Court has held that even statutes that unequivocally grant broad discretion to an agency do not preclude judicial review "unless the statutory scheme, taken together with other relevant materials, provides **absolutely no guidance** as to how that discretion is to be exercised." *Robbins,* 780 F.2d at 45 (emphasis added).

As to land approvals for Indian gaming, the law furnishes legal requirements by which to judge whether the Secretary's decision was arbitrary and capricious. IGRA makes explicitly clear that gaming may only occur on Indian lands. 25 U.S.C. §2702(3) (establishing the "Federal standards for gaming on **Indian lands**") (emphasis added).

The relevant section of the law is at 25 U.S.C. § 2703(4), which defines "Indian lands" 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. These requirements are clear and concise. Thus, IGRA only permits the Secretary to affirmatively approve a Compact that provides for and governs gaming on Indian land. Moreover, only Compacts that the Secretary could have affirmatively

approved, pursuant to 25 U.S.C. § 2710(d)(8)(A), are eligible for approval through inaction. *Id.* at § 2710(d)(8)(B).

The foregoing citations to authority demonstrate Congress' intended and articulated requirement that Indian gaming can be conducted only on Indian land. The law restricts the Secretary's discretion to authorize Indian gaming to lands that qualify as Indian lands. And that Indian lands restriction provides a clear standard by which a Court can judge whether the Secretary's choice to allow approval of the Amended Compact through inaction was arbitrary and capricious. *Cf. Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986) (ruling that it is ordinarily presumed that Congress both intends the executive to obey its statutory commands and, in turn, expects the courts to conduct APA review when an executive agency violates statutory requirements). Indeed, any Secretarial decision that authorizes gaming on lands that do not fall within the statutory definition of Indian lands is contrary to the very statute that grants the Secretary authority to approve of Indian gaming.

Consequently, the District Court erred in holding that Congress granted the Secretary **unlimited** discretion to authorize gaming pursuant to IGRA. JA 317. The Secretary has no discretion to allow any approval of a Compact that provides for gaming on non-Indian lands, including approval through the inaction provision of 25 U.S.C. § 2710(d)(8)(C) (authorizing Secretary to approve, through inaction,

"a compact described in [§ 2710(d)(8)(A)]," which Section only authorizes the Secretary to approve a Compact providing for gaming on Indian lands).

In short, IGRA provides a judicially manageable standard – the Indian lands threshold requirement – by which to judge the whether the Secretary's approval and publication of the Amended Compact was arbitrary and capricious. IGRA only grants the Secretary discretion to approve (through action or inaction) Compacts for gaming on Indian lands, and the District Court's ruling to the contrary (JA 313-17) ignores that law.

3. The word "may" limits Secretarial Compact rejection to illegal Compacts, and does not authorize their approval through inaction.

The District Court's decision made much of IGRA's use of the word "may" at 25 U.S.C. § 2710(d)(8)(B), concluding that the use of the ostensibly permissive word "may" makes clear that "the Secretary can choose to . . . [but] is not obligated to disapprove any Compact." JA 315. Thus, the District Court reasoned, the Secretary has no duty to disapprove of even notoriously illegal Compacts, and in the absence of such a duty, there is no statutory standard to apply in APA review (*id.*), including whether the Secretary acted arbitrarily and capriciously in electing to do nothing.

The District Court is wrong.

A careful reading of IGRA Section 2710(d)(8)(B) – as well as exercising common sense – makes it apparent that Congress was **not** giving the Secretary authority to approve illegal Compacts. To the contrary, it states that the Secretary can **disapprove** a Compact **"only if"** it violates IGRA, another federal law or tribal trust obligations, but must approve a Compact which does not. Stated simply, a Compact satisfying IGRA's legal requirements cannot be disapproved even if it otherwise is wildly offensive violates state law or even is unfair to a tribe. The enumeration of the circumstances under which the Secretary "may" disapprove a Compact merely limits the Secretary's authority to disapprove a Compact to the reasons identified by the statute. For reasons unknown, this critical distinction was ignored by the District Court.

The District Court's derogation of the "legality" requirement imposed on gaming Compacts in favor of relying on the word "may" to totally immunize Secretarial inaction from judicial review is contrary to this Court's previous decisions. Indeed, the need for judicial review of agency action in the face of similar statutory language was directly addressed by this Court in *Dickson v. Secretary of Defense*, 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, and that courts should accordingly show deference to the agency's determination. **However, such language does not mean**

> **the matter is committed exclusively to agency discretion.** (Emphasis added.)

The *Dickson* Court went on to emphasize that language allowing for some agency discretion does not "create unlimited discretion" in the federal decision maker and does not rotely preclude APA review. *Id.*

In *Dickson*, this Court reviewed a law providing that a Defense Department Board "may" excuse a party's failure to file an action within a statutorily-defined timeframe if the Board determines it is "in the interest of justice" to do so. *Id.* at 1401. The lower court had concluded that the word "may" rendered any Board decision non-reviewable with the rationale that it gave total discretion to the Board. *Id.* at 1400-01. This Court reversed, ruling the word "may" granted the Board some **but not unlimited** discretion to reject any, and possibly all, untimely actions. *Id.* The Court found the lower court's interpretation untenable because "taken to the extreme, [such a] construction would mean that even if the Board expressly found in a particular case that it was in 'the interest of justice' to grant a waiver, it could still decline to do so." *Id.* at 1402 n. 7 (*citing Mullen v. U.S.*, 17 Cl. Ct. 578, 582 (1989)). In short, statutory use of the word "may" does not give agencies unbridled authority to take actions which defy reason or equity. And there certainly is no unlimited discretion allowing a federal decision maker to ignore the law in performing statutory duties.

Along this same line, 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. *Cf. Dickson*, 68 F.3d at 1401-02. While IGRA places limitations on the reasons why the Secretary may disapprove a Compact, such cannot be read as authority to ignore the law's requirement that Indian gaming be confined to Indian land. Any interpretation to the contrary simply defies all reason.

Similar to the lower court's interpretation in *Dickson*, "taken to the extreme," the District Court's construction of IGRA would mean that even if the Secretary expressly found that a particular Compact flagrantly violated IGRA, he still could approve the Compact through inaction and his decision would be immune from judicial review. Congress could not have intended to grant the Secretary the ability to violate with impunity IGRA's basic requirement that gaming occur on Indian lands, and this Court should not allow such a result.

F. Nothing In IGRA Or Its Legislative History Shows Congressional Intent To Preclude Judicial Review Of An Automatic Approval.

The District Court found that Congress intended Compact approval through inaction to be exempt from APA judicial review. JA 316.

However, it is well-established that APA review is precluded by statute only when the statute **specifically withholds** review. *Abbott Labs.*, 387 U.S. at 141. In

order to find preclusion of APA review, there must be a "persuasive reason to believe that such was the purpose of Congress." *Id.* at 141 n.2. The courts must presume that APA review is available unless there is "clear and convincing evidence of a contrary legislative intent." *Bowen*, 476 U.S. at 671-72. Congressional intent to withhold judicial review must be evident on the face of the statute, and a failure to provide specifically for review is "no evidence of intent to withhold" it. *Id.*

At the same time, the presumption in favor of judicial review may be overcome where evidence that Congress intended to preclude review is found in "**specific** language or **specific** legislative history that is a reliable indicator of congressional intent" or if such an intent is "fairly discernible in the detail of the legislative scheme." *Id.* at 673 (emphasis added). However, in the absence of such clear language, the presumption in favor of judicial review controls. *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984).

The District Court found that the "express terms" of IGRA evidenced Congress' intent to shield from judicial review all Compacts approved through Secretarial inaction. JA 316 (additional citation omitted). Relying on IGRA's Compact approval through inaction provision as the sole evidence of Congressional intent, the District Court reasoned that Congress intended to preclude review because Section 2710(d)(8)(C) provides a "remedy apart from

judicial review" to address illegal provisions of Compacts by deeming a Compact approved only to the extent the Compact is consistent with IGRA. JA 316 (additional citation omitted). Thus, the Court reasoned, the automatic approval could never violate IGRA because all illegal provisions would be void as a matter of law, eliminating any legal basis for APA review. *Id.*

In reaching its Pollyannaish assumption that only "good" Compact provisions are approved, and thus negating the need or opportunity for APA review, the District Court failed to cite any legislative history of IGRA supporting either that assumption or the Court's ultimate conclusion that Congress intended Section 2710(d)(8)(C) to preclude judicial review. Of course, the lack of citation to any legislative history is not surprising because there is nothing in IGRA's legislative history even remotely suggesting such Congressional intent. In search of anything supporting the District Court's surprising decision, counsel for Amador County conducted an examination of IGRA's relevant legislative history, including the following materials:

(a) S. Rep. No. 100-446 (Aug. 3, 1988;

(b) 134 Cong. Rec. 25369-25381 (Sept. 26, 1988) (House debate on S. 555, the Indian Gaming Regulatory Act);

(c) 134 Cong. Rec. 24016-24037 (Sept. 15, 1988) (Senate debate on S. 555, the Indian Gaming Regulatory Act);

(d) Gaming Activities on Indian Lands: Hearing on S. 555 and S. 1303 *Before the Select Committee on Indian Affairs* 100th

Cong. (1988) (transcript of Senate hearing and submitted written testimony and comments); and,

(e) S. Rep. No. 99-493 (Sept. 24, 1986) (report of the Select Committee on Indian Affairs to accompany H.R. 1920, regarding establishment of "Federal Standards and Regulations for the Conduct of Gaming Activities on Indian Reservations and Lands and For Other Purposes").[9]

Nothing in this legislative history even hints – let alone states – that Congress intended to exempt from APA judicial review Compacts approved through inaction. *Cf. Dunlop*, 421 U.S. at 567 (where legislative history contained "not even the slightest intimation" that Congress considered precluding judicial review, the only reasonable inference is that the possibility of foreclosing review "did not occur to the Congress"—meaning that the statute did not preclude review).

Notwithstanding the total lack of any – let alone clear and convincing – evidence indicating Congressional intent to foreclose APA review, the District Court held that Congress intended that very result. JA 316.

In addition, the District Court failed to explain or even identify what "remedy apart from judicial review" Congress contemplated and provided for when an illegal Compact is approved through inaction. *Id.* Indeed, the Court cited no authority whatsoever which shows that Congress intended to provide any such

---

[9] This bill was never enacted into law, but was IGRA's predecessor.

remedy. Instead, it proposed that approval through inaction only applies to legal Compact provisions. *Id.*

Thus, by the District Court's rationale, any illegal provisions are somehow magically scrubbed from Compacts by the automatic process. Yet, it is fact and law that no Compact provision is purged through automatic approval, meaning that the only mechanism through which an interested party can test the legality of the approval is through APA review. *Cf. Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 501 (7th Cir. 2005). Indeed, absent access to such review, Amador County would be forced to stand on the sidelines while the parties to the Amended Compact proceed with project development knowing they are immune from scrutiny. *Id.* ("*Lac Du Flambeau II*"). That is to say, even if Compact approval through inaction "may have prevented the offending provisions from becoming effective in some academic sense," (*id.*) such a theoretical exercise hardly constitutes a remedy. More importantly, the language of IGRA's approval through inaction provision does not constitute "clear and convincing" evidence that Congress specifically intended to foreclose all APA judicial review. This is especially true when the review sought focuses entirely on IGRA's foundational premise that Indian gaming may only occur on Indian lands.

G. The District Court's Reliance On *PPI, Inc. v. Kempthorne* and *Lac Du Flambeau Band v. Norton* Was Improper.

The District Court decision that there never can be APA judicial review of a Compact approval through Secretarial inaction was based on two cases: *PPI, Inc. v. Kempthorne,* No. 4:08cv248-SPM, 2008 U.S. Dist. LEXIS 116703 (N.D. Fla. July 8, 2008), and *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995 (W.D. Wis. 2004) ("*Lac Du Flambeau I*"). However, in relying on those cases, the Court ignored the Seventh Circuit's appellate review of *Lac Du Flambeau I* which impeached the lower court's holding that APA judicial review of a "no action" Compact approval is always precluded.[10]

The District Court also ignored the fact that neither *PPI* nor *Lac Du Flambeau I* considered or even concerned whether the Secretary's decision to elect approval through no action of a Compact directly violating IGRA's Indian lands requirement is immune from APA judicial review. The unique factual circumstances presented in those cases simply are not relevant here.

---

[10] *See Lac Du Flambeau II,* 422 F.3d at 501 (expressly rejecting Secretary's argument that Compact approved through inaction could only result in lawful Compact and ruling, to the contrary, that the Secretary's inactive approval only rejected illegal Compact provisions in "some academic sense"). *But see* JA 316-17 (holding, in sharp contrast to *Lac Du Flambeau II*, that Compact approved through inaction could only result in lawful Compact, thus "Secretary's approval of a compact by inaction can never violate [IGRA]" and, therefore, concluding that Congress intended to preclude judicial review of Compacts approved through inaction).

PPI considered the issue of APA review from the Secretary's "no action" approval of a Compact authorizing an Indian tribe to offer at its **existing casino** certain card games that were allegedly illegal under the Florida penal code. 2008 U.S. Dist. LEXIS 116703, at *2-3.

Lac Du Flambeau I concerned whether APA review was available for the Secretary's "no action" approval of an amendment to the Ho-Chunk Nation's Compact concerning gaming that already was occurring at an **existing casino**. In that case, the challenged amendment provided that Wisconsin would not concur with any Secretarial finding that it would be in the best interests of any other tribe to conduct off-reservation gaming unless the state first agreed to indemnify Ho-Chunk for any lost tribal gaming profits. *Lac Du Flambeau I*, 327 F. Supp. 2d at 998.

The factual circumstances present in those two cases directly lead to their outcome. With respect to *PPI*, IGRA provides that Class III gaming on Indian lands is lawful only if the gaming is legal under state law. However, the question of whether specific gaming – such as the house-banked card games at issue in *PPI* – falls within a specific classification of games under a state's criminal laws is predominately, if not exclusively, **a question of state law**. IGRA does not impose or even suggest a duty on the Secretary to ensure a Compact's legality under state law. *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995) (no right to

challenge Compact approval based on state law irregularities "because a contrary rule would compel the Secretary to consider state law before approving any compact . . . lead[ing] to endless delay," in contravention of IGRA).

Similarly, as to *Lac Du Flambeau I*, IGRA does not even hint that the Secretary has a duty to consider a Compact's potential anticompetitive impact within the state before allowing a Compact amendment to be approved through inaction.

In stark contrast to those cases, this matter turns on IGRA's statutory limitations directly restricting Secretarial authority. IGRA speaks directly to the Indian lands issue and authorizes the Secretary to approve, either through action or inaction, only Compacts that provide for gaming on Indian lands. The Indian lands mandate provides a clearly manageable standard by which to judge whether the Secretary acted in accordance therewith. Indeed, *PPI* and *Lac Du Flambeau I* are easily distinguished, in that this case concerns the Secretary's statutory duty to ensure that Indian gaming occurs only on Indian lands – **a question resolved exclusively under federal civil law**.

1. The District Court's reliance on *Lac Du Flambeau I* was improper.

As an initial matter, the District Court's reliance on *Lac Du Flambeau I* was misplaced because the cited portion of the decision is *obiter dictum*. That decision held that plaintiffs were "not challenging a final agency action" and dismissed the

complaint on that basis. 327 F. Supp. 2d at 999. That court also stated – in further *obiter dicta* – that the complaint should be dismissed for (a) failing to join indispensable parties and (b) lack of plaintiffs' standing. *Id* at 997, 1001-02. Nowhere in that opinion (*dictum* or otherwise) did the Wisconsin court directly address **whether the Secretary can approve – via action or inaction – a Compact that violates the federally-legislated Indian lands requirement.**

Moreover, *Lac Du Flambeau I* was appealed to, and decided by, the Seventh Circuit in *Lac Du Flambeau II,* 422 F.3d 490. In that appeal, the Secretary argued that since she never affirmatively ruled on the validity of the Compact at issue, it was approved through inaction only to the extent it was consistent with IGRA. *Id.* at 502. As such, the Secretary claimed that Secretarial "nonaction can approve only a lawful compact." *Id.* It cannot be ignored that this is precisely the same argument the Secretary offered in response to Amador County's challenge of the Amended Compact (JA 316) and it is the very same argument that was adopted by the District Court in this litigation. *Id.* (ruling that Secretarial approval of the Amended Compact by inaction can never violate the statute because approval applies only to lawful provisions and, thus, concluding that Congress intended to preclude judicial review).

The Secretary's argument and the District Court's finding were expressly rejected by the Seventh Circuit in *Lac Du Flambeau II.* In addressing whether the

Secretary's approval by inaction caused harm to the plaintiffs, the Seventh Circuit held that:

> the Secretary's silence was the functional equivalent of an affirmative approval. By saying nothing, the Secretary has allowed the parties to the Compact to behave as if it were lawful in all respects . . . That § 2710(d)(8)(C) may have prevented the offending provisions from becoming effective **in some academic sense** is a far cry from an explicit rejection by the Secretary.

Id. at 501 (emphasis added).

Having thus found that the Secretary's approval through inaction caused plaintiffs harm, and that a declaratory judgment voiding the allegedly unlawful Compact provision would redress that injury, the court turned to the issue of reviewability under the APA. *Id.* at 502. While the Seventh Circuit noted the Secretary's argument that the deemed approval was a discretionary decision shielded from APA review, it then stated that "[t]here may be **convincing counterarguments to the Secretary's position**, but [plaintiff] fails to make them." *Id.* (emphasis added). Consequently, the Seventh Circuit deemed the issue "forfeited," leaving it with no option but to affirm the lower court's dismissal. *Id.*

Lac Du Flambeau II, which was neither discussed nor even mentioned in the District Court's opinion, is important for two reasons. First, the case recognizes that the reviewability issue discussed in *Lac Du Flambeau I* – although under circumstances wholly different than those *sub judice* – may well be subject to

attack if properly preserved. Second, the *Lac Du Flambeau II* holding is directly contrary to the District Court's assertion that "the Secretary's approval of a [C]ompact by inaction can never violate the statute" (JA 316). *Cf. Lac Du Flambeau II,* 422 F.3d at 501.

2. The District Court's reliance on *PPI, Inc.* was also improper.

The District Court's reliance on the **unpublished** Florida district court opinion in *PPI, Inc. v. Kempthorne* was both misplaced and wrong. JA 315-16.

First, *PPI* relies upon the *obiter dictum* in *Lac Du Flambeau I* to pronounce that IGRA provides "no standards by which to judge whether the Secretary acted arbitrarily and capriciously by not acting." *Id.* at *16. Aside from lacking a proper authoritative basis, that statement is just not true with respect to the case now before this Court. In short, the standard here is "legality" and whether the Secretary violated IGRA's threshold requirement that Indian gaming **can occur only on Indian lands**. If the Secretary allows a Compact to be approved in violation of the Indian lands requirement, then the Secretary has acted arbitrarily and capriciously and in violation of IGRA.

In support of its ruling, the *PPI* Court speculated, without citation to precedent, that there might be federal criminal laws that could be used to stop a tribe from conducting specific games determined to be illegal under applicable state criminal laws. *Id.* However, the instant case deals with a gaming venue

mandate which is civil – and not criminal – in nature. Without regard to whether it might have been inappropriate for the *PPI* court in a civil case to declare certain games illegal under Florida's criminal code, there is no such concern in this case. *Cf. PPI*, 2008 U.S. Dist. LEXIS 116703, at *14-19. To the contrary, IGRA's threshold requirement that gaming be conducted only on Indian lands is civil in nature. Thus, short of the federal defendants reversing their course of civil action challenged in this litigation, **the only remedy available to the County** is to seek relief through APA judicial review invoking this Court's ability to "hold unlawful and set aside [the] agency action."[11]

Consequently, the District Court improperly relied upon *PPI* and *Lac Du Flambeau I* to find that Congress provided a remedy apart from judicial review to address illegal provisions of Compacts by deeming a Compact approved only to the extent the Compact is consistent with IGRA. JA 316. First, even assuming, *arguendo*, that *PPI* identified some "remedy" for illegal Compact provisions relating to legality of certain games within the state of Florida, the only remedy available for Secretarial approval of gaming on non-Indian lands is APA judicial review to ensure compliance with the federal "Indian lands" requirement.[12]

---

[11] 5 U.S.C. § 702.

[12] Even if it could be said that there might be some means to prohibit illegal gaming through criminal law, the mere existence of this possibility does not and Footnote continued on next page …

Moreover, the *Lac Du Flambeau II* opinion found the lower court's proposed "remedy" – that a Compact is only approved to the extent it is consistent with IGRA – is only remedial "in some academic sense." *Lac Du Flambeau II*, 422 F.3d at 501. However, Amador County's injury requires an actual remedy, not an academic or theoretical exercise in statutory interpretation.

III. This Court Should Enter A Final Judgment in Favor Of The County Because The Compact Is Illegal As A Matter Of Federal Law.

As discussed above, the District Court's conclusion that the Amended Compact approval is outside the scope of APA review is simply unsupportable as a matter of law and should be summarily adjudicated by this Court.

Once this Court has concluded that the agency action before it is subject to judicial review, it can remand the case to the District Court for further litigation. However, Amador County respectfully submits that the applicable law supporting

---

Continued from previous page ...
cannot eviscerate the Secretary's duty to carry out IGRA's Indian lands mandate. Indeed, the Secretary's wrongful approval of an illegal compact would be the very reason for any violation of federal law. Furthermore, if the Tribe pursues gaming on the Site but the Secretary or the NIGC later determines that the Site is not Indian lands, the NIGC and Secretary will be powerless to stop the Tribe from gaming, Because neither has jurisdiction over non-Indian lands. *Citizens Against Casino Gambling v. Kempthorne*, 471 F. Supp. 2d 295, 324 (W.D.N.Y. 2007) ("[i]f, by the Chairman's action or inaction, a tribe establishes a gaming operation on non-Indian lands, it follows that the NIGC has no jurisdiction thereafter to fine or close that unlawful operation").

its Causes of Action is so firmly-established that this Court should consider rendering a final decision in the County's favor on the legal merits of this litigation. 28 U.S.C. § 2106 ("any . . . court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review . . . and direct the entry of such appropriate judgment, decree, or order . . . as may be just under the circumstances").

As discussed above, the ultimate issue in this litigation is whether the former Buena Vista Rancheria is an "Indian reservation" as a matter of federal law so that it can qualify as "Indian land" for gaming. The following discussion demonstrates that it is not in reservation status and cannot attain that status under current federal law.

Interior's acceptance of the Site's status as "Indian reservation land" was the sole foundation for the Amended Compact approval.[13] Similarly, NIGC's land determination opinion, prepared solely for this litigation, purported to independently confirm the Site's status as "Indian reservation land" eligible for Indian gaming. Thus, there is no dispute that the **entire** federal review and decision process concerning the Amended Compact approval was premised on the

---

[13] That the land is in fee and not trust was affirmatively recited as a predicate for the NIGC Indian Land Opinion in this case: "The land at issue in this matter is fee land. . . ." JA 25.

conclusion that the Site is "Indian reservation land" as a matter of federal law and, thus, is "Indian land" for gaming pursuant to IGRA Section 2703(4)(A).

However, if the Site is not "Indian reservation land" as a matter of federal law, then the Secretary's approval of the Amended Compact was contrary to the strict requirements of IGRA and should be rejected as a matter of law. And, this Court can make that legal determination.

A. The Rancheria Is Not A Reservation.

Since the proposed gaming has been approved solely for land assumed to be in reservation status as stated in the NIGC Land Determination Opinion (JA 15-16), the inquiry is clearly defined. The only issue relevant to the original litigation is whether the Rancheria is a "reservation" as a matter of federal law.

This inquiry is controlled by the California Indian Reservation Act of April 8, 1864, 13 Stat. 39 ("1864 Act"), which specifically limited to four the number of Indian reservations that could be established in California:

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

The 1864 Act's four reservation limitation was confirmed in *Mattz v. Arnett*, 412 U.S. 481, 489 (1973). Moreover, the Supreme Court identified the four

reservations authorized by, and established pursuant to, that law: (a) Round Valley, (b) Mission, (c) Hoopa Valley, and (d) Tule River. *Id.* at 489-91.

Once the 1864 Act became law, the process for establishing reservations within California became strictly limited in a way **unique to that state** in that no additional Indian reservations could be established absent subsequent Congressional action authorizing them. Congress has never enacted a law extending reservation status to the Rancheria.

Given the history of this Compact review and approval, it appears that the Secretary probably **treats** rancherias as reservations for various administrative purposes and federal programs, which certainly would be within his administrative authority. However, the Secretary does not have authority to proclaim formal federal "Indian reservation status" for any land in California unless there is an applicable legislated exception to the 1864 Act. Simply stated, the Secretary cannot administratively order an exception to the statutory four reservation limitation imposed by the 1864 Act. *Volkswagenwerk Aktiengesellschaft v. Fed. Mar. Comm'n*, 390 U.S. 261, 272 (1968) ("courts are the final authorities on issues of statutory construction . . . and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute").

B. Legislated Exceptions To The 1864 Act.

There have been Congressional exceptions to the 1864 Act, but even a cursory review of them demonstrates that the establishment of additional reservations in California can only be the product of specific legislation.

There are two general statutory exceptions to the four reservation limitation of the 1864 Act: (a) the Mission Indians Relief Act of January 12, 1891, 26 Stat. 712; and (b) the Indian Reorganization Act of 1934, 25 U.S.C. § 461, *et seq.* ("IRA"). Neither applies here.

The Mission Indians Relief Act authorized the establishment of reservations for Mission Indians residing in Southern California, which were to be set aside from lands then in the public domain. The identity of Mission Indians was and is well known – they are the Indians historically residing adjacent to, or near, the Catholic missions in Southern California who were members of four tribal groups living at 42 villages and named sites: Serranos, Dieguenos, Coahuilas and San Luis Rey or San Luisenos.[14] Nowhere in the Mission Indians Relief Act is there authorization for a reservation for Indians in Amador County.

The IRA gives the Secretary discretion to proclaim reservations at 25 U.S.C. § 467. However, such reservation proclamations can only be extended to lands

---

[14] S. Rep. No. 74, 50th Cong., 1st Sess.(1890) at 1-4.

already accepted into trust by the Secretary pursuant to Section 5 of the IRA, 25 U.S.C. § 465. The IRA is the only federal law of general application authorizing the Secretary to take Indian land into trust status, and it makes clear that the Secretary cannot use IRA authority to proclaim reservation status for the Rancheria until, and unless, it first is taken into trust under that same law.

There are some individual California tribes which have successfully petitioned Congress to legislate reservation status for their lands, but those private laws have been enacted on a case-by-case basis. No such legislation has been enacted on behalf of the Buena Vista Rancheria.

C. Congress Appropriated Funds To Purchase Rancheria Lands For Occupancy By Individual Indians But Did Not Authorize Reservation Status For Such Lands.

As discussed in the Statement of Facts, *supra*, the Indian Tribes of California lost their aboriginal title to land by an Act of Congress enacted in 1851[15] to deal with unique land title issues resulting from provisions of the Treaty of Guadalupe Hidalgo of 1848 through which the United States acquired California from Mexico.[16] As a consequence, many Indians of Northern California were forced to live wherever they could and without a permanent home. Congress

---

[15] Act of March 3, 1851, 9 Stat. 631, entitled "An Act to ascertain and settle the private land claims in the State of California."

[16] *Indians of California v. U. S.*, 98 Ct. Cl. 583 1942 WL 4378, *6 (1942).

attempted to address this problem in 1906, 1908 and 1914 through the annual Interior Department Appropriation Acts by appropriating funds for the federal purchase in fee title of lands for occupancy by "homeless Indians" residing in the vicinity of the purchased parcels.[17] Nowhere in these Acts is there any provision purporting to legislate "reservation status" for the federal fee lands to be purchased with the appropriated funds.

These Interior Appropriations Acts allowed the purchase of federal fee parcels which became known as Rancherias – or "little ranches." One of them became the Buena Vista Rancheria, and – as already noted – it is conceded by the federal government that the Rancheria is in fee and not trust status.

Neither the Interior Appropriations Acts nor any other federal law has ever legislated reservation status for the Buena Vista Rancheria.

IV. CONCLUSION

The District Court dismissed this litigation on the grounds that Secretarial "no action" approval of a Tribal-State Gaming Compact is exempted from APA judicial review by the language of IGRA Section 2710(d)(8)(C) (JA 317), regardless of how transparently the Compact might violate IGRA or other federal laws. That conclusion proposes a loophole in the Compact process through which

---

[17] Indian Appropriation Act of June 21, 1906, 34 Stat. 333; Indian Appropriation Act of April 30, 1908, 35 Stat. 76-77; Indian Affairs Appropriation Act of August 1, 1914, 38 Stat. 582, 589.

the Secretary could approve even overtly-illegal Compacts by selecting the "no action" approval solely for the purpose of avoiding judicial scrutiny of the approval process or the legality of the document itself. Such is simply contrary to established law.

With that, Amador respectfully submits that this Court should summarily reject the District Court's opinion.

First, there is nothing in IGRA even hinting, let alone stating, that a "no action" Compact approval is exempt from APA judicial review. The District Court's finding to that effect simply is unsupported by the very law upon which it relied. Absent a statutory exemption of judicial review, then that review is available to a party with standing to challenge an agency action. As already noted, the District Court affirmatively confirmed the County's standing in this matter.

Second, it is axiomatic that the Secretary has no authority and no discretion to take illegal actions in the performance of his/her duties. And that rule precludes Secretarial approval of Indian gaming on land which legally does not qualify for that gaming.

Third, since IGRA mandates that gaming can be conducted only on "Indian land" as defined by IGRA Section 2703(4), the Secretary can neither ignore that limitation nor elect a "no action" approval in derogation of the law.

Indeed, IGRA neither precludes APA judicial review nor grants the Secretary unlimited discretion to approve a Compact that authorizes gaming on non-Indian lands. Thus, the District Court's ruling that the Secretary's no action approval of the Amended Compact is shielded from judicial review was improper and this Court should reverse.

Furthermore, this litigation unequivocally challenges the Amended Compact as illegal because it authorizes gaming at a site which is not "Indian land." The only vehicle for this challenge is through APA judicial review, a vehicle that the District Court remarkably concluded - without citation to competent authority - does not exist. The issues presented here are matters of federal law. Unlike the cases relied on by the District Court, there is no issue of state law in this litigation and IGRA charges the Secretary with the duty to ensure that Compacts only authorize gaming on Indian lands. **In this case, that means that the land must be in "Indian reservation" status.**

Finally, the Act of 1864 limited the number of Indian reservations that could be established in California to four. While subsequent Acts of Congress have authorized additional reservations within the state, no legislation has authorized reservation status to the Buena Vista Rancheria. Since this land is not an Indian reservation as a matter of federal law, it cannot and does not qualify as "Indian reservation land" for Indian gaming. This is a legal issue upon which this Court

can render a decision disposing of the entire case. The County respectfully requests that it do so.

Dated this 13th day of December 2010.

s/Dennis J. Whittlesey
Dennis J. Whittlesey (DC Bar No. 053322)
DICKINSON WRIGHT PLLC
1875 Eye Street, NW - Suite 1200
Washington, DC 20006
Tel: (202) 659-6928
dwhittlesey@dickinsonwright.com

Of Counsel

Scott R. Knapp
DICKINSON WRIGHT PLLC
215 S. Washington Square
Suite 200
Lansing, MI 48933
Tel: (517) 371-1730
sknapp@dickinsonwright.com

Martha J. Shaver
COUNTY COUNSEL
Amador County
810 Court Street
Jackson, California 85642
Tel: (209) 223-6366

Erin E. Gravelyn
DICKINSON WRIGHT PLLC
200 Ottawa Avenue, NW
Suite 1000
Grand Rapids, MI 49503
Tel: (616) 458-1300
egravelyn@dickinsonwright.com

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 12,046 words, excluding parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

s/Dennis J. Whittlesey
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the APPELLANT AMADOR COUNTY, CALIFORNIA'S PRINCIPAL BRIEF has been served via ECF upon counsel of record, on this 13th day of December 2010.

Susan L. Pacholski, Attorney
U.S. Department of Justice
(DOJ) Environment and Natural Resources Division
PO Box 23795, L'Enfant Plaza Station
Washington, DC 20026-3795
Tel: 202-514-2000
Email: susan.pacholski@usdoj.gov

Kathryn E. Kovacs, Attorney
U.S. Department of Justice
(DOJ) Environment and Natural Resources Division
PO Box 23795, L'Enfant Plaza Station
Washington, DC 20026-3795
Tel: 202-514-2000
Email: kathryn.kovacs@usdoj.gov

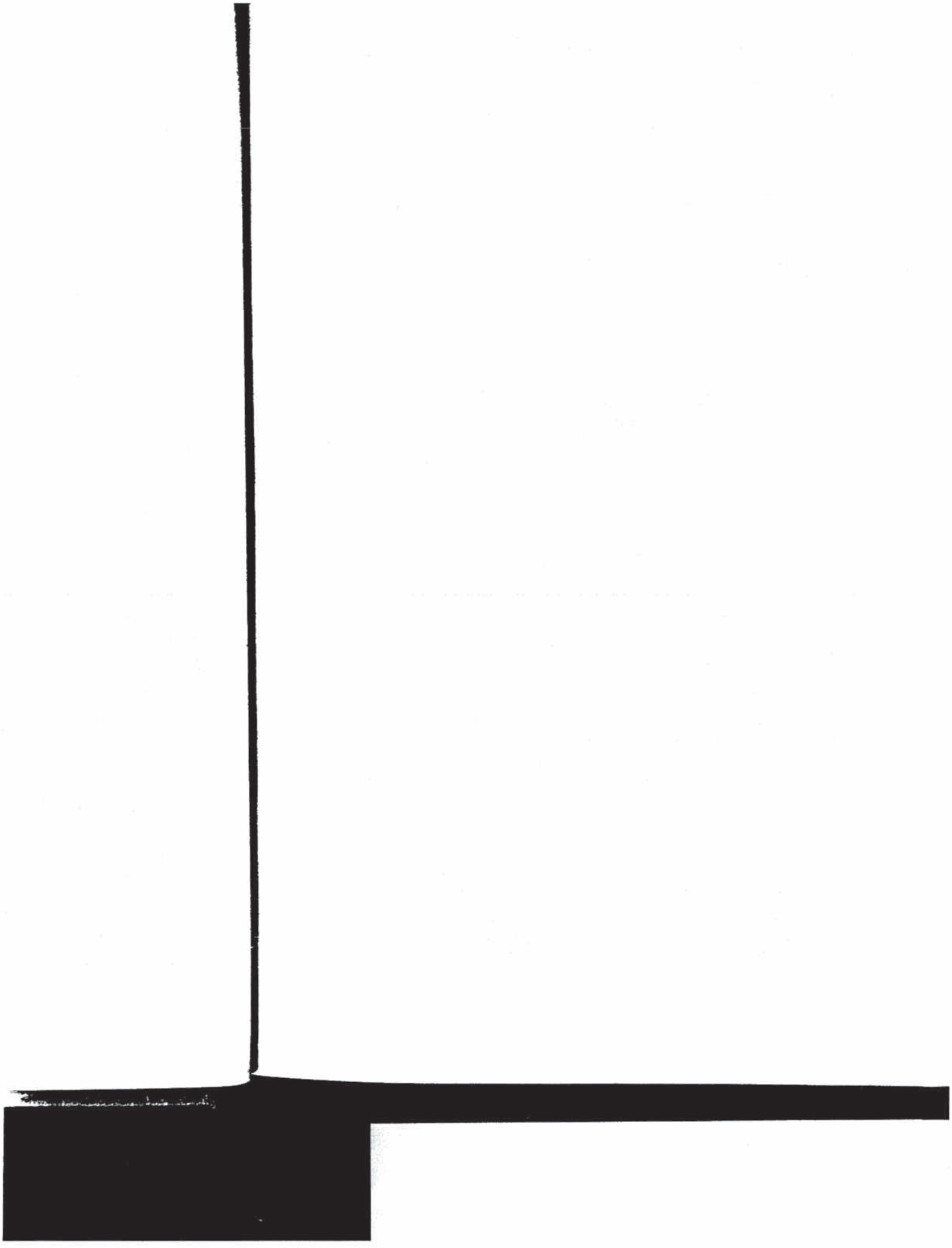
R. Craig Lawrence
U.S. Attorney's Office
(USA) Civil Division
555 4th Street, NW
Washington, DC 20530
Tel: 202-514-7159
Email: craig.lawrence@usdoj.gov

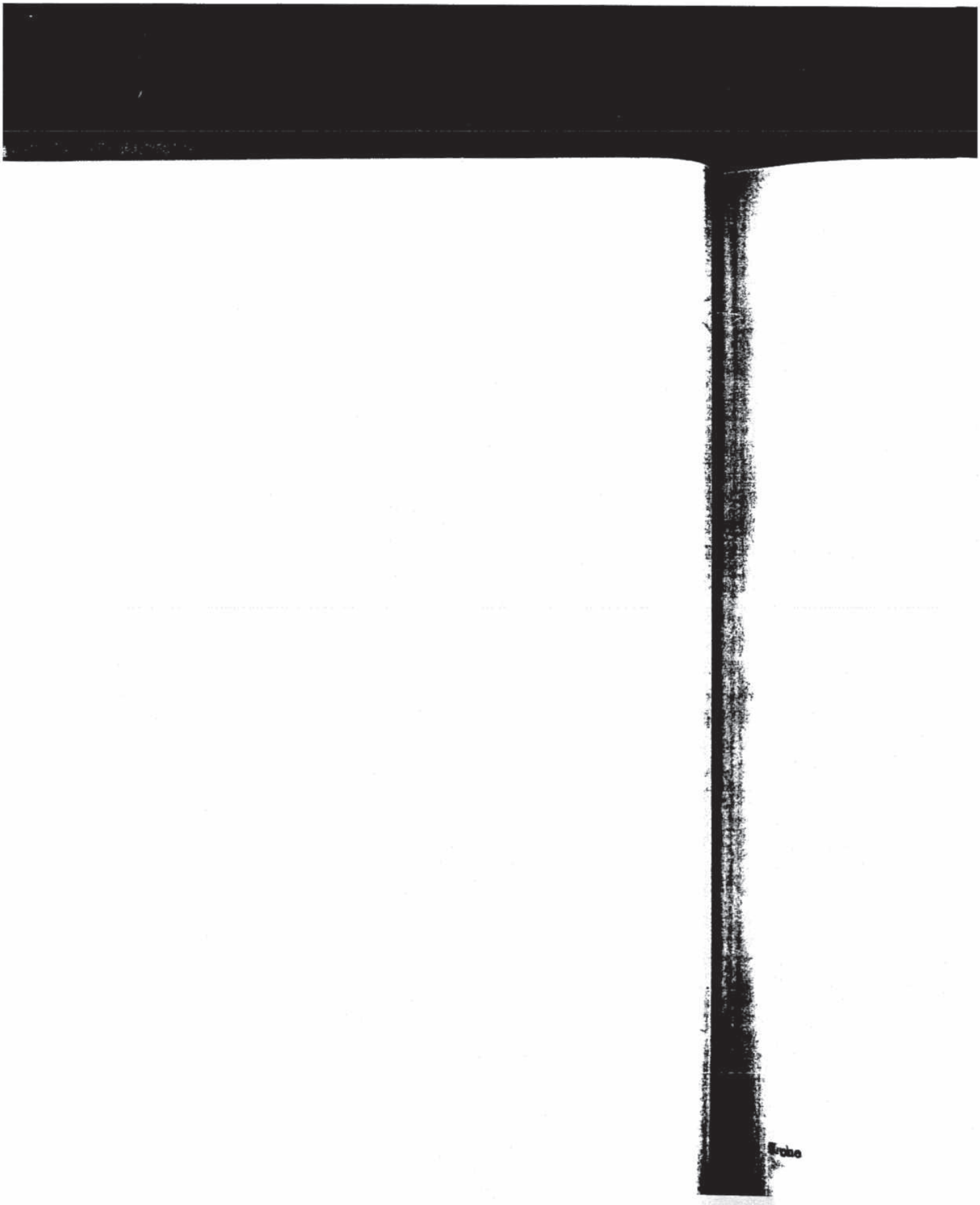
s/ Dennis J. Whittlesey
Dennis J. Whittlesey
(DC Bar No. 053322)
DICKINSON WRIGHT PLLC
1875 Eye Street, NW - Suite 1200
Washington, DC 20006
Tel: (202) 659-6928
dwhittlesey@dickinsonwright.com

ADDENDUM

ADDENDUM TO PRINCIPAL BRIEF OF APPELLANT AMADOR COUNTY, CALIFORNIA

TABLE OF CONTENTS





committee can make a report to the House and insist upon a vote by the House without allowing amendment, then the committee is attempting to impose upon the House the action of the committee without the judgment of the body which created the committee, notwithstanding the fact that the committee is simply the servant of the House and makes a report subject to the order and action of the House.

I say, therefore, with reference to all committees that when a report is made to the House upon any topic the committee has performed the function with which the House invested it and has no right to go beyond that and demand the action of the House upon the proposition without giving the House and the individual members of the House the right to amend it. If the report is such as the House is not willing to adopt; if the House wishes to adopt another and different report or to amend it, then I submit to the Chair that the House has the right to do so; and that is the motion I have made.

Mr. MCKINLEY. I desire to occupy only a single moment. The reference of this subject to the select committee named is simply following the rules adopted by this House. Further, I want to say I did not expect this proposition would excite any debate at all. Therefore, as I am acting under the courtesy of the gentleman from Kansas [Mr. PERKINS], who had this day set apart for the consideration of business of the Committee on Indian Affairs, I will, in order that I may keep faith with him, move that the committee do now rise.

Mr. HOOKER. I object, Mr. Chairman, to that course being pursued, for whatever may be the importance of the business of the committee represented by the gentleman from Kansas [Mr. PERKINS] this is a far more important question.

The CHAIRMAN. The gentleman from Ohio has the floor and moves——

Mr. HOOKER. The gentleman from Ohio avails himself of the floor on his own report to cut off discussion on the very subject-matter which he has brought before the House.

The CHAIRMAN. The gentleman from Mississippi is hardly in order. The gentleman from Ohio moves that the committee rise.

Mr. BLAND. I rise to a question of order.

The CHAIRMAN. The gentleman will state it.

Mr. BLAND. My point is this: We have gone into Committee of the Whole for the purpose of considering this report, and no gentleman can move that the committee rise and report the matter to the House as long as any member offers to amend it. We are now in Committee of the Whole for the purpose of amending it, and no gentleman can cut off amendments by moving that the committee rise.

The CHAIRMAN. The gentleman from Missouri is wrong in his understanding of the motion. It is simply that the committee rise and make no report whatever.

Mr. BLAND. I understand, then, no report is to be made?

The CHAIRMAN. There will be a report made, of course, that the resolution was under consideration, but that no final action was taken upon it. The question is on agreeing to the motion of the gentleman from Ohio.

The question was taken; and on a division there were—ayes 104, noes 57.

Mr. BLAND and Mr. HOOKER demanded tellers.

Tellers were ordered.

Mr. BLAND and Mr. MCKINLEY were appointed tellers.

The committee again divided; and the tellers reported—ayes 99, noes 62.

Mr. PERKINS. Pending the report of the tellers can I ask unanimous consent to make a statement?

Mr. HOOKER. I object to that.

The CHAIRMAN. The motion of the gentleman from Chio is agreed to on the report of the tellers.

The committee accordingly rose; and Mr. PAYSON having taken the chair as Speaker *pro tempore*, Mr. ALLEN, of Michigan, reported that the Committee of the Whole House on the state of the Union having had under consideration the resolution for the distribution of the President's message had come to no resolution thereon.

CHANGE OF REFERENCE.

Mr. ENLOE. Mr. Speaker, I rise to make a request of the House.

The SPEAKER *pro tempore*. For what purpose does the gentleman rise?

Mr. ENLOE. I wanted to ask the transfer of a bill from the Union Calendar to the House Calendar, a bill which has been improperly referred. The bill H. R. 7009 has been placed on the wrong Calendar.

The SPEAKER *pro tempore*. The present occupant of the chair would state that he is informed the Speaker is considering the propriety of the request made by the gentleman from Tennessee. The Chair hopes, therefore, that the gentleman will withhold the request for the present.

Mr. ENLOE. I thought the Speaker had already decided.

ORDER OF BUSINESS.

Mr. PERKINS. Mr. Speaker, I move that the House resolve itself into Committee of the Whole House on the state of the Union for the consideration of such measures as may be brought up by the Committee on Indian Affairs under the special order.

The motion was agreed to.

The House accordingly resolved itself into Committee of the Whole House, Mr. BURROWS in the chair.

MISSION INDIANS, CALIFORNIA.

Mr. PERKINS. I desire to bring up for consideration the bill (S. 2783) for the relief of the Mission Indians in the State of California.

The bill was read, as follows:

Be it enacted, etc., That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.

SEC. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior. They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws or the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by said commissioners. In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed. And the said commission is hereby authorized to employ a competent surveyor and the necessary assistants.

SEC. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect and declare that the United States does and will hold the land thus patented, subject to the provisions of section 4 of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever: *Provided*, That no patent shall embrace any tract or tracts to which existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time thereafter. Any such person shall be permitted to exercise the same right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent, in similar form, may be issued for any tract or tracts at any time after the appraised value of the improvements thereon shall have been paid: *And provided further*, That in case any lands shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine: *And provided further*, That said patents declaring such lands to be held in trust as aforesaid shall be retained and kept in the Interior Department, and certified copies of the same shall be forwarded to and kept at the agency by the agent having charge of the Indians for whom such lands are to be held in trust, and said copies shall be open to inspection at such agency.

SEC. 4. That whenever any of the Indians residing upon any reservation patented under the provisions of this act shall, in the opinion of the Secretary of the Interior, be so advanced in civilization as to be capable of owning and managing land in severalty, the Secretary of the Interior may cause allotments to be made to such Indians, out of the land of such reservation, in quantity as follows: To each head of a family not more than 640 acres nor less than 160 acres of pasture or grazing land, and in addition thereto not exceeding 20 acres, as he shall deem for the best interest of the allottee, of arable land in some suitable locality; to each single person over twenty-one years of age not less than 80 nor more than 640 acres of pasture or grazing land and not exceeding 10 acres of such arable land.

SEC. 5. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State of California, and that at the expiration of said period the United States will convey the same by patent to the said Indian or his heirs as aforesaid in fee, discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: *Provided*, That these patents, when issued, shall override the patent authorized to be issued to the band or village as aforesaid and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in each of the village patents.

SEC. 6. That in cases where the lands occupied by any band or village of Indians are wholly or in part within the limits of any confirmed private grant or grants, it shall be the duty of the Attorney-General of the United States, upon request of the Secretary of the Interior, through special counsel or otherwise, to defend such Indians in the rights secured to them in the original grants from the Mexican Government and in an act for the government and protection of Indians passed by the Legislature of the State of California, April 22, 1850, or to bring any suit, in the name of the United States, in the circuit court of the United States for California, that may be found necessary to the full protection of the legal or equitable rights of any Indian or tribe of Indians in any of such lands.

SEC. 7. That each of the commissioners authorized to be appointed by the first section of this act shall be paid at the rate of $8 per day for the time he is actually and necessarily employed in the discharge of his duties, and necessary traveling expenses; and for the payment of the same, and of the expenses of surveying, the sum of $10,000, or so much thereof as may be necessary, is hereby appropriated out of any money in the Treasury not otherwise appropriated.

Mr. PERKINS. Mr. Speaker, as I briefly stated on Saturday when this bill was called up for consideration, this measure has passed the

speculators expect

the administration of the criminal laws of said State and the service of civil process therein.

Open space.

The building shall be unexposed to danger from fire by an open space of at least forty feet on each side, including streets and alleys.

Approved, January 12, 1891.

January 12, 1891.

CHAP. 65.—An act for the relief of the Mission Indians in the State of California.

Mission Indians, Cal. Settlement upon reservations.

Appointment of commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That immediately after the passage of this act the Secretary of the Interior shall appoint three disinterested persons as commissioners to arrange a just and satisfactory settlement of the Mission Indians residing in the State of California, upon reservations which shall be secured to them as hereinafter provided.

Duties of commissioners.

Selection of reservations.

SEC. 2. That it shall be the duty of said commissioners to select a reservation for each band or village of the Mission Indians residing within said State, which reservation shall include, as far as practicable, the lands and villages which have been in the actual occupation and possession of said Indians, and which shall be sufficient in extent to meet their just requirements, which selection shall be valid when approved by the President and Secretary of the Interior.

Appraisal of improvements.

They shall also appraise the value of the improvements belonging to any person to whom valid existing rights have attached under the public-land laws of the United States, or to the assignee of such person, where such improvements are situated within the limits of any reservation selected and defined by said commissioners subject in each case to the approval of the Secretary of the Interior.

Removals from confirmed private grants.

In cases where the Indians are in occupation of lands within the limits of confirmed private grants, the commissioners shall determine and define the boundaries of such lands, and shall ascertain whether there are vacant public lands in the vicinity to which they may be removed.

Surveyor and assistants.

And the said commission is hereby authorized to employ a competent surveyor and the necessary assistants.

Report.

SEC. 3. That the commissioners, upon the completion of their duties, shall report the result to the Secretary of the Interior, who, if

Issue of reservation trust-patents in common.

no valid objection exists, shall cause a patent to issue for each of the reservations selected by the commission and approved by him in favor of each band or village of Indians occupying any such reservation, which patents shall be of the legal effect, and declare that the

Terms of trust.

United States does and will hold the land thus patented, subject to

Post, p. 713.

the provisions of section four of this act, for the period of twenty-five years, in trust, for the sole use and benefit of the band or village to which it is issued, and that at the expiration of said period the United States will convey the same or the remaining portion not previously patented in severalty by patent to said band or village, discharged of said trust, and free of all charge or incumbrance whatsoever:

Provisos.

Provided, That no patent shall embrace any tract or tracts to which

Existing valid rights.

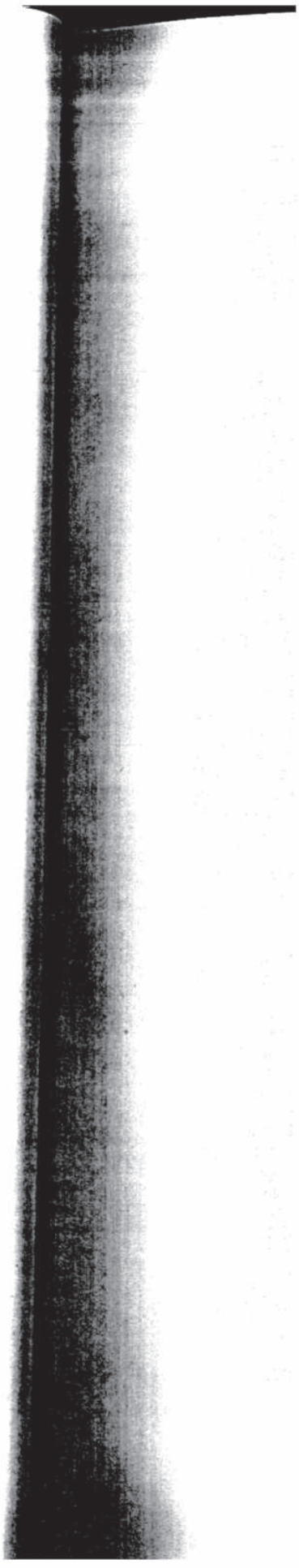
existing valid rights have attached in favor of any person under any of the United States laws providing for the disposition of the public domain, unless such person shall acquiesce in and accept the appraisal provided for in the preceding section in all respects and shall thereafter, upon demand and payment of said appraised value, execute a release of all title and claim thereto; and a separate patent, in similar form, may be issued for any such tract or tracts, at any time thereafter.

Lieu-lands to accepting settlers.

Any such person shall be permitted to exercise the same

Settlers' rights.

right to take land under the public-land laws of the United States as though he had not made settlement on the lands embraced in said reservation; and a separate patent, in similar form, may be issued for



July 31, 1914.
[H. R. 15116.]
[Public, No. 159.]

CHAP. 220.—An Act Authorizing the Secretary of the Treasury to accept conveyance of title to certain land between the post-office site and Madison Street in the city of Thomasville, Georgia.

Thomasville, Ga. Public building site, to be known as Roddenbery Park.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the post-office site, except where buildings, further addition, and approaches are now or may hereafter be located, may, in the discretion of the Secretary of the Treasury, be used as a public park, to be known as Roddenbery Park, to be maintained by the city of Thomasville, under regulations prescribed from time to time by the Secretary of the Treasury.

Acceptance of additional land.

That the Secretary of the Treasury be, and he is hereby, authorized, in his discretion, to accept conveyance of title to the land between the post-office site and Madison Street, in the city of Thomasville, Georgia, and the said land so acquired shall thereupon become part of said post-office site: *Provided*, That the said enlarged post-office site, except where buildings, further additions, and approaches are now or may hereafter be located, may, in the discretion of the Secretary of the Treasury, be used as a public park, to be known as Roddenbery Park, to be maintained by the city of Thomasville, under regulations to be prescribed from time to time by the Secretary of the Treasury.

Proviso. Added to park.

Approved, July 31, 1914.

August 1, 1914.
[H. R. 12579.]
[Public, No. 160.]

CHAP. 222.—An Act Making appropriations for the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and fifteen.

Indian Department appropriations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and they are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the purpose of paying the current and contingent expenses of the Bureau of Indian Affairs, for fulfilling treaty stipulations with various Indian tribes, and in full compensation for all offices the salaries for which are provided for herein for the service of the fiscal year ending June thirtieth, nineteen hundred and fifteen, namely:

Surveying, allotting in severalty, etc.

For the survey, resurvey, classification and allotment of lands in severalty under the provisions of the Act of February eighth, eighteen hundred and eighty-seven (Twenty-fourth Statutes at Large, page three hundred and eighty-eight), entitled "An Act to provide for the allotment of lands in severalty to Indians," and under any other Act or Acts providing for the survey or allotment of Indian lands, $150,000, to be repaid proportionately out of any Indian moneys held in trust or otherwise by the United States and available by law for such reimbursable purposes and to remain available until expended: *Provided*, That hereafter no part of said sum shall be used for the survey, resurvey, classification or allotment of any land in severalty on the public domain to any Indian, whether of the Navajo or other tribes, within the State of New Mexico and the State of Arizona, who was not residing upon the public domain prior to June thirtieth, nineteen hundred and fourteen: *Provided further*, That the surveys shall be made in accordance with the provisions for the survey and resurveys of public lands, including traveling expenses and per diem allowances in lieu of subsistence to those employed thereon.

Vol. 24, p. 388.

Repayment.

Provisos. Use in New Mexico and Arizona restricted.

Surveys.

Irrigation, drainage, etc. Available until expended.

For the construction, repair, and maintenance of ditches, reservoirs, and dams, purchase and use of irrigation tools and appliances, water rights, ditches, lands necessary for canals, pipe lines, and reservoirs for Indian reservations and allotments, and for drainage and protec-

rights,
deter-
and
provi-
hun-
Provided,
tion
made
under
irrigation,
inspec-
or

desig-
That not
shall be
upon water
Provided
temporary
made
; and
of
paid as he
maintaining the
t, all
shall
the
and
Provided
and
nstructed

August twenty-fourth, nineteen hundred and twelve: *Provided further*, That not to exceed $10,000 of this amount may be used for providing necessary drainage and equipment for fruit raising, and for the construction of a new barn and for repairs at the Oneida boarding school at Oneida, Wisconsin. Oneida School, Wis.

For collection and transportation of pupils to and from Indian and public schools, and for placing school pupils, with the consent of their parents, under the care and control of white families qualified to give them moral, industrial, and educational training, $72,000: *Provided*, That not to exceed $5,000 of this amount may be used in the transportation and placing of Indian youths in positions where a remunerative employment may be found for them in industrial pursuits. The provisions of this section shall also apply to native pupils of school age under twenty-one years of age brought from Alaska. Transporting, etc., pupils. Proviso. Industrial employment. Alaska natives.

All moneys appropriated herein for school purposes among the Indians may be expended, without restriction as to per capita expenditure, for the annual support and education of any one pupil in any school. No per capita restriction.

To conduct experiments on Indian school or agency farms designed to test the possibilities of soil and climate in the cultivation of trees, grains, vegetables, and fruits; for the purposes of preserving living and growing timber on Indian reservations and allotments, and to advise the Indians as to the proper care of forests; for the employment of suitable persons as matrons to teach Indian women and girls housekeeping and other household duties, and for furnishing necessary equipments and supplies and renting quarters for them where necessary; for the employment of practical farmers and stockmen, in addition to the agency and school farmers now employed; and to superintend and direct farming and stock raising among Indians, $450,000: *Provided*, That the foregoing shall not, as to timber, apply to the Menominee Indian Reservation in Wisconsin: *Provided further*, That not to exceed $25,000 of the amount herein appropriated may be used to conduct experiments on Indian school or agency farms to test the possibilities of soil and climate in the cultivation of trees, cotton, grains, vegetables, and fruits: *Provided also*, That the amounts paid to matrons, foresters, farmers, and stockmen herein provided for shall not be included within the limitation on salaries and compensation of employees contained in the Act of August twenty-fourth, nineteen hundred and twelve. Agricultural experiments, etc. Matrons. Farmers and stockmen. Provisos. Menominee Reservation, Wis. Testing soils, etc., for cultivation. Allowance to matrons, etc. Vol. 37, p. 521.

For the purchase of goods and supplies for the Indian Service, including inspection, pay of necessary employees, and all other expenses connected therewith, including advertising, storage, and transportation of Indian goods and supplies, $300,000: *Provided*, That after the passage of this Act, no part of the sum hereby appropriated shall be used for the maintenance of to exceed three permanent warehouses in the Indian Service. Supplies, purchases, etc. Proviso. Warehouses limited.

For telegraph and telephone toll messages on business pertaining to the Indian Service sent and received by the Bureau of Indian Affairs at Washington, $10,000. Telegraphing, etc.

For witness fees and other legal expenses incurred in suits instituted in behalf of or against Indians involving the question of title to lands allotted to them, or the right of possession of personal property held by them, and in hearings set by the United States local land officers to determine the rights of Indians to public lands, $2,000: *Provided*, That no part of this appropriation shall be used in the payment of attorneys fees. Legal expenses in allotment suits. Proviso. No attorneys fees.

For expenses of the Board of Indian Commissioners, $10,000. Citizen commission.

For payment of Indian police, including chiefs of police at not to exceed $50 per month each and privates at not to exceed $30 per month each, to be employed in maintaining order, and for the purchase of equipments and supplies and for rations for policemen at Indian police.

the purchase of
other equipment
porting: *Provided*,
to be prescribed
to the United
undred and twenty-
Secretary of the Interior
onday in December
the purpose of en-
also That not to
be expended
of Indians.

pupils at
tendent, $35, 00,
all, $38,900.
Indian pupils at the
superintendent,
500, for con-
and the East
of the city of

t the Indian
superintendent,
$3,000 in all,

Treasury
$25,000, and
be necessary
at or near
direction
the money
of the
obtained
County
arantine
the cost
tates
and
urther,
pro
ns of
of bridges over
hundred
nstructed
tion,
of any
umping
and
wate
uthern
the pro-
eighteen
Navajo
eighteen
to pro-
Indians
funds
schools
Navajo
immediately
ursable out
under
Indian
expended: Pro-
m trust
of Feb-
-fourth
ended
June
tutes at
tribal
appro-
Indian
Engineer Officers
hundred
February
Documen Num-
Congress, second
vailable water
maximum and
including