ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2011

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10-5240

AMADOR COUNTY, CALIFORNIA,
Plaintiff-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,
Defendants-Appellees.

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

BRIEF OF APPELLEES

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JURISDICTIONAL STATEMENT

The County of Amador ("Amador County" or "County") sought to invoke the district court's jurisdiction pursuant to 28 U.S.C. 1331 (federal question jurisdiction) and the Administrative Procedure Act ("APA"), 5 U.S.C. 701-706, challenging approval, through inaction, by the Secretary of the Interior and Acting Principal Deputy Assistant Secretary (hereinafter "Secretary") of an Amendment to the Tribal-State Compact between the Buena Vista Rancheria of Me-Wuk Indians and the State of California ("Compact Amendment"). JA29. Amador County alleges that approval of the Compact Amendment is inconsistent with the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. 2701 *et seq.* For the reasons explained in this brief, Amador County lacks standing, and the district court therefore lacked jurisdiction.

On January 8, 2009, the district court entered an opinion (JA307-17) and order (JA318) granting the Secretary's motion to dismiss the complaint for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6). JA307-18. Amador County moved

to alter or amend the judgment, pursuant to Fed. R. Civ. P. 59(e) and, on July 12, 2010, the district court denied the motion. JA321-328.

Amador County timely filed a notice of appeal on July 16, 2010, within 30 days of entry of the final judgment. JA331-32. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether Amador County lacks constitutional and prudential standing to challenge Interior's approval of the Amendment to the Tribal-State Compact.

2. Whether, assuming the County has standing, the district court properly dismissed the amended complaint, under Federal Rule of Civil Procedure 12(b)(6), for failure to state a claim upon which relief can be granted because: (A) approval of the Compact Amendment, through inaction by the Secretary, is not reviewable agency action under the APA; and (B) the pivotal allegation underlying Amador County's claims is that the Buena Vista Rancheria is not an Indian reservation but the County is bound by a prior judgment to recognize the Rancheria as an Indian reservation.

STATEMENT OF THE CASE

Amador County filed suit to challenge the Secretary of the Department of the Interior's approval by inaction of an Amendment to a Tribal-State compact between the Buena Vista Tribe and the State of California, of which it is a political subdivision. The Compact Amendment includes provisions negotiated by the State of California specifically to benefit Amador County. Amador County seeks to have the Secretary's approval of the Compact Amendment set aside as invalid on the basis that the Buena Vista Rancheria allegedly is not an Indian reservation or other Indian lands to which IGRA applies. Amador County so alleges even though, in 1987, it entered into a stipulated judgment approved by a federal district court pursuant to which Amador Cou agreed to treat the Buena Vista Rancheria "as any other federally recognized Indian Reservation" and agreed that "all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall apply" to the Buena Vista Rancheria and the Buena Vista Tribe (JA51).

The district court concluded that Amador County had standing to bring its claims but dismissed the complaint, pursuant to Federal Rule

of Civil Procedure 12(b)(6), for failure to state a claim on which relief could be granted because the Secretary's approval by inaction is committed to agency discretion and thus not subject to judicial review under the APA. The district court thereafter denied Amador County's motion to alter or amend the judgment.

STATUTORY AND REGULATORY FRAMEWORK

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

development, self-sufficiency and self-government, and protect Indian tribes from corrupting influences such as organized crime. 25 U.S.C. 2702. (The text of IGRA is reproduced in the addendum to this brief.)

IGRA applies only to Indian tribes that are recognized as eligible for special programs and services provided by the United States to Indians because of their status as Indians (*i.e.,* "federally-recognized tribes") and that possess powers of self-government, 25 U.S.C. 2703(5), and it governs gaming only on "Indian lands." *Id.* 2702(3), 2710. IGRA defines "Indian lands" as "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." *Id.* 2703(4).

Under IGRA, gaming is divided into three classes, each subject to differing levels of state, tribal and federal regulation. *See, e.g.*, 25 U.S.C. 2703(6)-(8), 2710. Class I consists of social games with prizes of minimal value and traditional Indian games that are part of tribal ceremonies or celebrations. *Id.* 2703(6). Indian tribes are granted the

exclusive authority to regulate these activities. *Id.* 2710(a)(1). Class II gaming consists of two basic categories: (1) bingo and variants thereof, and (2) card games that are explicitly authorized by state law or are not explicitly prohibited by state law and are played in the state. 25 U.S.C. 2703(7). Tribes may conduct class II gaming in any state that "permits such gaming for any purpose by any person, organization, or entity," so long as the particular gaming activity is not otherwise specifically prohibited on Indian lands by federal law. *Id.* 2710(b)(1)(A). Class II gaming is subject to tribal regulation, *id.* 2710(a)(2), and to federal oversight by the National Indian Gaming Commission ("NIGC" or "Commission").[1] *Id.* 2710(b), (c). Class III gaming is any form of gaming that is not class I or class II. 25 U.S.C. 2703(8). Slot machines are class III games, as are casino games (such as baccarat, blackjack, roulette, and craps) and sports betting, parimutuel wagering, and lotteries. 25 C.F.R. 502.4.

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

At issue here are Class III gaming activities. Class III gaming activities on Indian lands are lawful only if: (1) authorized by a tribal ordinance or resolution approved by the NIGC (25 U.S.C. 2710(d)(1)(A); (2) located in a State that "permits such gaming for any purpose by any person, organization, or entity;" (25 U.S.C. 2710(d)(1)(B)); and (3) conducted in conformance with a Tribal-State compact, entered into by the Indian tribe and the State, which is in effect (25 U.S.C. 2710(d)(1)(C)).

A tribe desiring to conduct a class III gaming operation may initiate the compacting process by requesting the State to enter into negotiations. 25 U.S.C. 2710(d)(3)(A). Thereafter, the State is to "negotiate with the Indian tribe in good faith to enter into such a compact." *Id.* IGRA provides various mechanisms (including district court jurisdiction over specific causes of action by a Tribe, State or the Secretary) for developing a Tribal-State compact where problems arise in negotiations. *Id.* 2710(d)(7).[2]

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[2] IGRA's scheme originally provided for tribes to attempt to compel states to enter into compacts by bringing actions in federal district court against such states. *See, e.g.,* 25 U.S.C. 2710(d)(7)(A)(i). The Supreme Court determined in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that a state can assert its Eleventh Amendment immunity to

IGRA provides that, after a Tribal-State compact has been submitted, the Secretary may approve or disapprove the compact within 45 days. *Id.* 2710(d)(8)(A),(B). "The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe." *Id.* 2710(d)(8)(A). The Secretary may disapprove a compact only if the compact violates IGRA, other provisions of federal law, or the United States' trust obligations to Indians. *Id.* 2710(d)(8)(B). If the Secretary does not approve or disapprove a compact within 45 days, "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent" with IGRA. *Id.* 2710(d)(8)(C). IGRA further provides that the "Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph," *id.* 2710(d)(8)(D), and that the "compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register," *id.* 2710(d)(3)(B).

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avoid such a suit by a tribe. The process now takes place under 25 C.F.R. part 291.

Approval by the Secretary of a Tribal-State compact does not alone allow Class III gaming to proceed. Rather, IGRA requires that the Tribe have an ordinance or resolution that has been approved by the Chairman of the NIGC and published in the Federal Register. *Id.* 2710(d)(2)(C). Upon publication in the Federal Register "of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman [of the NIGC] . . . , class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect." *Id.* IGRA provides that decisions made by the Commission pursuant to Section 2710-2713 are "final agency decisions" subject to judicial review under the APA. 25 U.S.C. 2714.

STATEMENT OF FACTS

A. Historical Background of the Buena Vista Rancheria of Me-Wuk Indians

The Buena Vista Rancheria of Me-Wuk Indians of California is a federally-recognized Indian tribe (JA31, Amended Complaint), and has been listed by the Secretary as a federally-recognized Indian tribe since

1985. See 50 Fed. Reg. 6,055-6,059 (1985).[3] The Tribe occupies a small land base located approximately 40 miles southeast of Sacramento, to which it has historical ties. In 1927, the United States purchased approximately 67.5 acres of land in Amador County, California, for the use of the Me-Wuk Indians settled at Buena Vista, pursuant to Congressional appropriations acts addressed to the special circumstances of California Indians. See JA35 (Amended Complaint ¶¶ 28, 29); see also JA15-16; Act of June 21, 1906 (34 Stat. 325, 333); Act of April 30, 1908 (35 Stat. 70, 76); Act of August 1, 1914 (38 Stat. 582, 589); Act of May 10, 1926 (44 Stat. 453, 461). In 1958, as part of then-prevailing policies on Indian assimilation, Congress enacted the California Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), which authorized the termination of the federal trust relationship with many California tribes and the distribution of their rancheria lands and other assets. *City of Roseville v. Norton*, 348 F.3d 1020, 1022 (D.C. Cir. 2003). As a consequence of the enactment, residents of the rancherias were no longer dealt with as tribes by the federal government, and the federal

[3] For clarity, whenever possible, we have attempted to use the term "Tribe" when referring to the political entity and "Rancheria" when referring to the Tribe's land base.

government distributed the rancheria lands in fee to the adult Indian residents. *Id.*; *see also* Pub. L. No. 85-671, 72 Stat. 619 (1958), as amended by Pub. L. No. 88-419, 78 Stat. 390 (1964); JA16-17. In 1961, the Secretary approved a plan for distribution of the assets of the Buena Vista Tribe, pursuant to which the United States deeded approximately 67.5 acres of the Rancheria land to Louis and Annie Oliver as joint tenants. JA17.

In 1979, members of the Buena Vista Tribe joined Indians from other California Rancherias in a class action lawsuit, *Hardwick v. United States*, No. C-79-1710 SW (N.D. Ca. filed 1979). The case was settled through two stipulated judgments. The first stipulated judgment was between members of the class and the United States, and was approved by the federal court on December 22, 1983. It restored the status of class members of the Rancherias as Indians under the laws of the United States and left "for further proceedings" the question whether to restore the former boundaries of the Rancherias. JA18 (citing *Hardwick*, Stipulation and Order, Dec. 22, 1983 at 4 ¶ 5 ("'The court shall not include in any judgment entered pursuant to this stipulation any determination of whether or to what extent the

boundaries of the Rancherias listed and described in paragraph 1 shall be restored and shall retain jurisdiction to resolve this issue in further proceedings herein.'")).

The second stipulated judgment, entered as a judgment by the district court on May 14, 1987, was between members of the class from the Buena Vista Rancheria and Amador County (specifically, the defendant Tax Collector for Amador County, the Assessor for Amador County, and the Board of Supervisors of Amador County), and pertained only to the Buena Vista Rancheria and Tribe. JA18, 48. It provides, *inter alia*, that the Court shall declare that: "the plaintiff Rancheria and the Plaintiffs were never and are not now lawfully terminated under the California Rancheria Act" and that the court has authority to remedy the effects of the "unlawful termination." JA50-51 (emphasis in original). The stipulated judgment further provides that: "[t]he original boundaries of the plaintiff Rancheria * * * are hereby restored, and all land within these restored boundaries of the plaintiff Rancheria is declared to be "Indian Country" (JA51, 1987 Stipulated Order at 4 ¶2C) (emphasis in original); and that "[t]he plaintiff Rancheria shall be treated by the County of Amador . . . as any other

federally recognized Indian Reservation, and all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall apply to the Plaintiff Rancheria and the Plaintiffs." (JA51, 1987 Stipulated Order at 4 ¶D) (emphasis in original).

In its Amended Complaint, Amador County states that it is a political subdivision of the State of California (JA29 ¶2) and acknowledges that the Buena Vista Tribe is a federally recognized tribe and that the Buena Vista Rancheria is owned in fee by the Tribe. JA31-32 ¶¶ 11, 15.

B. The Buena Vista Rancheria Tribal-State Compact and Compact Amendment

In 1999, the Buena Vista Tribe sought to develop a Class III tribal-state gaming compact with the State of California. The Governor of California signed a Class III gaming compact between the Buena Vista Tribe and the State of California in October 1999, and the compact was ratified by the California State Legislature. *See* JA4 (Amended Complaint ¶¶ 16, 17); JA217-66 (original compact); *cf.* California Stat. 12012.25(d)-(f). The Secretary approved the compact on May 5, 2000, effective May 16, 2000. See 65 Fed. Reg. 31,189 (May 16, 2000); JA214-16 (Secretary's letter approving original compact). The

preamble to the original compact paragraph C states: "on or after the effective date of this Compact, the Tribe intends to develop and operate a gaming facility offering Class III gaming activities on its reservation land, which is located in Amador County of California." JA220. Pursuant to the terms of the original compact, once effective, it "shall be in full force and effect for state law purposes until December 31, 2020" (JA253); but the compact also provided opportunity for amendment and renegotiation (JA254).

The Secretary's letter affirmatively approving the original compact stated that "the Compact provides that gaming will be located on the Tribe's 'reservation land, which is located in Amador County of California.'" JA214. Amador County did not challenge the Secretary's approval of the original compact.[4]

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[4] In a 2001 appropriations act, Congress clarified that the authority to determine reservation status was delegated to the Secretary:

> Sec. 134. Clarification of the Secretary of the Interior's Authority Under Sections 2701-2721 of Title 25, United States Code. The authority to determine whether a specific area of land is a 'reservation' for purposes of sections 2701-2721 of title 25, United States Code, was delegated to the Secretary of the Interior on October 17, 1988 * * *.

115 Stat. 414, 442-43 (Nov. 5, 2001).

Five years after ratification of the original compact, the Tribe and the State negotiated an amendment. The Compact Amendment was signed by the Governor of California on August 23, 2004, and ratified by the California Legislature on August 27, 2004. JA4 (Amended Complaint); JA132-181 (Compact Amendment). Thereafter, the Tribe forwarded the fully executed Compact Amendment to the Secretary for approval. The Secretary took no action on the Compact Amendment within the 45-day statutory review period, 25 U.S.C. 2710(d)(8)(C). The Compact Amendment was deemed approved by the Secretary by operation of law upon expiration of the review period and, on December 20, 2004, notice of approval of the Compact Amendment was published in the Federal Register. *See* 69 Fed. Reg. 76,004.

The Compact Amendment allows the Tribe to offer expanded gaming at a prospective casino on the Buena Vista Rancheria, and contains provisions for increased revenue sharing with the State of California. JA132-135. The Compact Amendment also requires that the Tribe identify all potential off-reservation impacts of its proposed gaming facility, and specifically provides that the Tribe will enter into negotiations with Amador County to mitigate such potential impacts to

the extent practicable, and will participate in binding arbitration for disputes related to the negotiation. JA151-159. The Compact Amendment further specifies that an "intergovernmental services agreement" between the Tribe and the County, entered into on July 3, 2001, shall remain in effect until it expires or is superseded. JA159. Pursuant to the Amended Compact, the Tribe may operate gaming devices solely within the boundaries of the Buena Vista Rancheria as it existed on July 1, 2004, in Amador County. JA136 (Compact Amendment, Section 4.3.5); JA181 (Exh. D, Buena Vista Rancheria Boundaries).

C. Actions by the National Indian Gaming Commission

On August 6, 2001, the Buena Vista Tribe submitted a site specific ordinance to the NIGC, which the NIGC approved on September 25, 2001. A list of approved tribal gaming ordinances, including the Buena Vista Tribe's ordinance, was published in the Federal Register on August 26, 2002. 67 Fed. Reg. 54,823-54,825 (2002). That site specific approval constituted recognition by the NIGC of the Buena Vista Rancheria as Indian lands under IGRA, and approval of the Tribal

Gaming Ordinance would have been reviewable under the APA pursuant to 25 U.S.C. 2714.

In 2004, the Tribe submitted a request to NIGC for an Indian lands determination. On June 30, 2005, the NIGC Office of General Counsel issued an advisory legal opinion opining that "the lands on which the Tribe proposes to locate its gaming activities are 'Indian lands' as defined in the Indian Gaming Regulatory Act ("IGRA"), and, therefore, the Tribe may legally conduct gaming on the land." JA15. The NIGC Office of General Counsel's advisory legal opinion is not a final agency action subject to review.

D. Procedural History

On April 1, 2005, Amador County filed suit seeking declaratory and injunctive relief against the United States Department of the Interior ("Interior"), the Secretary of the Interior and other Interior officials (collectively, the "Secretary") challenging the Secretary's inaction on the Amendment to the Tribal-State Compact between the Buena Vista Tribe and the State of California ("Compact Amendment") as unlawful. Supplemental Appendix ("SA") 2 (Clerk's Record "CR" 1). On March 21, 2008, Amador County filed a first amended complaint.

SA4 (CR30); JA29-45. Although the Amended Complaint acknowledges that the Buena Vista Tribe is a federally recognized Indian tribe (JA31 ¶11), Amador County contends that the "Buena Vista Rancheria is not an Indian reservation" (*id.* ¶12) and does not "meet the requirements of 'Indian land' under IGRA – which are incorporated in both the Original Buena Vista Compact and the Amended Compact." JA32 ¶ 20. Amador County further alleges that the "proposed gaming lands at the Buena Vista Rancheria are under the County's jurisdiction and are not 'Indian lands' as required by IGRA and the Amended Compact." JA33 ¶ 25.

Amador County's complaint includes eight counts. The first count asserts that the Secretary's approval of the Compact Amendment is void *ab initio* because of a state-law timing technicality not encompassed by IGRA. JA38-39. The other seven counts allege that the Secretary's "approval" of the Compact Amendments is arbitrary, capricious, and otherwise contrary to law. The gravamen of these seven claims is that the Secretary violated IGRA by allowing the Compact Amendment to go into effect without, prior to expiration of the 45-day period, establishing: that the Buena Vista Rancheria satisfies IGRA's "Indian lands" requirement and that the Tribe had a sufficient historic

presence at the Buena Vista Rancheria. JA39-44. As relief, the complaint seeks: (A) a declaration that the "Secretary's purported approval of the Amended Compact, prior to the Amended Compact's effective date, was void *ab initio*;" (B) a declaration that the Secretary cannot approve a Tribal-State compact without first determining that the intended gaming activities will be conducted only on "Indian lands" as defined by IGRA; (C) a declaration that the Compact Amendment is null and void; (D) an injunction directing the Secretary to revoke and vacate approval of the Compact Amendment; and (E) an injunction preventing the Secretary from authorizing or sanctioning Class III gaming on the Buena Vista Rancheria. JA44.

On April 18, 2008, the Secretary filed a motion to dismiss the first amended complaint and a memorandum in support of its motion. SA4-5 (CR32, CR33). The Secretary argued that the complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) because Amador County lacks standing to challenge the validity of the Compact Amendment. The Secretary also argued that inaction on a Tribal-State compact is not subject to review under the APA and that the County's claims should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon

which relief could be granted because the Secretary's approval of a compact by inaction can never violate IGRA, as the statute provides that only those provisions that are lawful become effective through the Secretary's inaction. The Secretary also argued that: (1) the first count fails to state a claim because IGRA does not direct the Secretary to investigate state law technicalities in the compact approval process or authorize the Secretary to disapprove a compact for failure to comply with state law procedures; (2) the other counts likewise fail to state a claim because IGRA does not require the Secretary to make an "Indian lands" determination or a "historic presence" determination in the compact approval process; and (3) the County's assertion that the Buena Vista Rancheria does not qualify as "Indian lands" under IGRA is completely contrary to a stipulated judgment, of which the court could take judicial notice, and relevant case law and agency interpretation.

E. District Court Decisions

On January 8, 2009, the district court entered a memorandum opinion and order ruling that Amador County has standing but dismissing the complaint for failure to state a claim. JA307-18. The

court stated that "the Secretary's choice to take no action on the amended compact is unreviewable and the Secretary's deemed approval is lawful by the express terms of IGRA," JA307-08, which provides that a compact approved by the Secretary's inaction is approved only to the extent the compact is consistent with IGRA (JA316, quoting 25 U.S.C. 2710(d)(8)(C)). The court explained that, "[a]ssuming that the Secretary's approval by inaction is a final agency action, Congress reflected its clear intent to preclude review of such approval." JA316.

On January 23, 2009, Amador County filed a motion to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). SA6 (CR46). On July 12, 2010, the district court entered a memorandum opinion and order denying the County's motion to alter or amend the judgment. The court stated that "the limited approval by inaction under § 2710(d)(8)(C) is inherently lawful by the express terms of the statute" and explained that IGRA establishes other mechanisms for addressing unlawful gaming. JA326-27.

STANDARD OF REVIEW

The existence of subject matter jurisdiction is a question of law that this Court considers *de novo*, and the Court must ensure that it

has jurisdiction before considering the merits of a case. *See, e.g., Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 94-102 (1998); *Karst Envt'l Edu. & Protection, Inc. v. EPA*, 475 F.3d 1291, 1294 (D.C. Cir. 2007). The issue of whether a complaint fails to state a claim upon which relief can be granted, under Fed. R. Civ. P. 12(b)(6), is an issue of law subject to *de novo* review. *Holy Land Found. for Relief & Dev. v. Ashcroft,* 333 F.3d 156, 161-62 (D.C. Cir. 2003).

SUMMARY OF ARGUMENT

I. Amador County lacks constitutional standing to bring these claims because it has not alleged any "invasion of a legally protected interest" caused by approval of the Compact Amendment. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Amador County alleges that it is harmed in various ways by the Secretary's treatment of the Buena Vista Rancheria as an "Indian reservation," and therefore as "Indian lands" within the meaning of IGRA. But Amador County has no "legally protected interest" in having the Buena Vista Rancheria treated as anything other than an Indian reservation because the County is bound by a 1987 stipulated judgment to treat the Buena Vista Rancheria "as any other federally recognized Indian reservation."

JA51. It compromised away any such interest in 1987. Moreover, the alleged injury at the core of the County's complaint is of its own making, because of its prior agreement, and therefore does not satisfy either the injury or causation requirements for standing. *National Family Planning and Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006).

In addition, Amador County lacks prudential standing because it is not within the zone of interests protected by the statutory provision at issue in the suit. *Mudd v. White*, 309 F.3d 819, 823-24 (D.C. Cir. 2002). In IGRA, Congress established a statutory scheme in which, as to Tribal-State compacts governing Class III gaming, there are two central players: the Tribe and the State. 25 U.S.C. 2710(d). It cannot reasonably be assumed that Congress intended in IGRA to permit a political subdivision of a State to undo a compact negotiated by the Governor, ratified by the State legislature and approved by the Secretary through inaction, as Amador County seeks to do here. In IGRA, Congress provided a limited (and discretionary) role for the Secretary and no role for political subdivisions, which can exercise their typical avenues of influence with the State. The prudential limitation

in IGRA cannot be overcome by reliance on Section 702 of the APA. *American Federation of Government Employees, AFL-CIO v. Rumsfeld* ("*AFGE*"), 321 F.3d 139, 144 (D.C. Cir. 2003).

II. Even assuming that Amador County can satisfy standing requirements, its challenge to the approval of the Compact Amendment by inaction is not subject to review under the APA. First, inaction is not subject to review unless an agency failed to take an action it is required to take. IGRA clearly provides that: (1) the Secretary does not need to take action to approve or disapprove a compact; and (2) failure to take any action means that "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with" IGRA. 25 U.S.C. 2710(d)(8)(C). Such a grant or approval by operation of law "does not result in reviewable agency action." *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129, 1132 (D.C. Cir. 2007).

Moreover, the Secretary's decision to take no action on a gaming compact -- even if it is considered action rather than inaction -- is action "committed to agency discretion by law," 5 U.S.C. 701(a), and is not

reviewable under the APA. IGRA grants the Secretary complete discretion to take no action on gaming compacts. 25 U.S.C. 2710(d)(8).

Finally, in addition to the APA infirmities, the complaint was properly dismissed for failure to state a claim upon which relief could be granted. Amador County's opening brief fails to address the district court's dismissal of Count 1 and has therefore waived appeal of that dismissal. Count 2 was properly dismissed because, as a matter of law, IGRA does not require the Secretary to render an Indian lands opinion in connection with compact approval. Counts 3-8 were properly dismissed because, as Amador County acknowledges, the only relevant issue is whether the Buena Vista Rancheria is an Indian reservation. Br. 46. Because of the stipulated judgment, aspects of the complaint that allege that the Rancheria is not a reservation must be disregarded and, therefore, lack the requisite allegations to survive a motion to dismiss. Accordingly, this Court should affirm the district court's dismissal of the complaint.

ARGUMENT

I. AMADOR COUNTY LACKS ARTICLE III AND PRUDENTIAL STANDING TO CHALLENGE THE SECRETARY'S APPROVAL BY INACTION OF THE AMENDMENT TO THE TRIBAL-STATE COMPACT BETWEEN THE BUENA VISTA TRIBE AND THE STATE OF CALIFORNIA.

A party invoking federal jurisdiction has the burden of demonstrating its standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).[5] Article III of the United States Constitution limits the jurisdiction of federal courts to cases and controversies. U.S. Const. art. III, § 2. To establish Article III standing, a plaintiff must show (1) "injury in fact," caused by the challenged conduct and redressable through relief sought from the court. *Lujan*, 504 U.S. at 560-61; *Shays v. FEC*, 414 F.3d 76, 83 (D.C. Cir. 2005). "The first element, 'injury in fact,' requires 'an invasion of a concrete and particularized legally protected interest.'" *Shays*, 414 F.3d at 83 (quoting *McConnell v. FEC*, 540 U.S. 93, 227 (2003)). The second element, causation, demands "'a causal connection between the injury and the conduct complained of—

[5] Contrary to Amador County's suggestion (Br. at 10), issues concerning subject matter jurisdiction have not been and, indeed, cannot be waived. Nor could the Secretary have appealed the district court's ruling on standing, as Amador County suggests (*id.*), because a party cannot appeal a favorable judgment.

the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.'" *Id.* And redressability requires that it be "'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* Since these requirements are not mere pleading requirements "but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 560-61 (citations omitted); *see also AFGE*, 321 F.3d at 142.

In addition to these constitutional requirements, "parties claiming standing under the APA must show that their claims fall 'arguably within the zone of interests to be protected or regulated by the statute in question.'" *Shays*, 414 F.3d at 83 (quoting *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (internal quotations omitted)); *see also Amgen, Inc. v. Smith*, 357 F.3d 103, 108 (D.C. Cir. 2004). Standing, whether constitutional or prudential, must be satisfied by the plaintiff "even if raised *sua sponte* by the court" and

is not a requirement that the parties can waive. *See Community First Bank v. National Credit Union Admin.*, 41 F.3d 1050, 1053 (D.C. Cir. 1994); *see also Animal Legal Defense Fund, Inc. v. Espy*, 23 F.3d 496, 499 (D.C. Cir. 1994); *American Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1357 (D.C. Cir. 2000).

A. Amador County lacks Article III standing.

Amador County lacks constitutional standing to bring these claims for several respects. First, Amador County has failed to allege an injury from an invasion of a "legally protected interest" because it has no legally protected interest in having the Secretary treat Buena Vista Rancheria as anything other than an "Indian reservation." In the stipulated judgment entered in federal district court in 1987, Amador County agreed that the Buena Vista Rancheria "shall be treated by the County of Amador * * * as any other federally recognized Indian Reservation, and all of the laws of the United States that pertain to federally recognized Indian Tribes and Indians shall apply to the Plaintiff Rancheria and the Plaintiffs." JA51 (emphasis in original). Amador County also agreed that the "original boundaries of the plaintiff Rancheria * * * are hereby restored, and all land within these restored

boundaries of the plaintiff Rancheria is declared to be 'Indian Country.'" *Ibid.*

In the *Hardwick* stipulated judgment the County bound itself without limitation for all future litigation involving the Buena Vista Rancheria. The language of the judgment does not carve out an exception for the application to the Rancheria of subsequent federal laws relating to Indians. *Cf. Passamaquoddy Tribe v. State of Maine*, 75 F.3d 784, 787 (1st Cir. 1996). The County cannot flatly disregard that legally binding judgment and assert that it has a "legally protected interest" that is violated by treating the Buena Vista Rancheria as an Indian reservation and as "Indian lands" for purposes of IGRA.[6] It compromised away any such interest in stipulating to a judgment in 1987.[7]

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[6] As the County acknowledges (Br. 23, 45), the status of the Buena Vista Rancheria as an Indian reservation is the basis for the application of IGRA. See also JA214 (May 5, 2000, approval letter of Secretary for original compact). IGRA regulates gaming on "Indian lands" which Congress defined to mean, *inter alia*, "all lands within the limits of any Indian reservation." 25 U.S.C. 2703(4)(A).

[7] While it is conceivable that some other entity might be able to challenge some final agency action relating to the Compact Amendment (such as NIGC's approval of a Tribal Gaming Ordinance or approval of a management contract) on the basis that the Buena Vista Rancheria is

Second, even assuming *arguendo* that Amador County has alleged an injury to a legally protected interest, under the unique circumstances of this case the injury at the core of the County's complaint is of its own making. As this Court has explained, where an asserted injury appears to be largely of the plaintiff's own making, such self-inflicted harm does not satisfy the basic requirements for standing. *National Family Planning and Reproductive Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) (where asserted injury was largely of its own making and choosing, plaintiff lacked injury sufficient to confer standing). A self-inflicted harm "does not amount to an 'injury' cognizable under Article III." *Id.* (citing *National Treasury Employees Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996)). Because Amador County has *chosen*, and now is legally bound, to treat the Buena Vista Rancheria as an Indian reservation, and has agreed that all laws applicable to federally recognized tribes shall apply to the Buena Vista Tribe and the Buena Vista Rancheria, it cannot now

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not an Indian reservation, Amador County has bound itself not to take such a position. Accordingly, it lacks standing to make such a claim here and in other contexts.

assert that it has a legally protected interest in having the Buena Vista Rancheria treated otherwise.

Third, Amador County cannot satisfy the causation requirement of Article III standing. As this Court has explained, "even if self-inflicted harm qualified as an injury, it would not be fairly traceable to the defendant's challenged conduct" and thus would not satisfy the causation requirement. *Id.* (citing *Brotherhood of Locomotive Engineers and Trainmen v. Surface Transportation Board*, 457 F.3d 24, 28 (D.C. Cir. 2006)); *McConnell*, 540 U.S. at 228 (injury not fairly traceable to defendant where the alleged harm is a result of plaintiff's choice). Where a party has agreed to a limitation through a contract or other agreement, it cannot establish that a third party's action – rather than its own – has caused an alleged injury relating to that limitation. *Brotherhood of Locomotive*, 457 F.3d at 28. The Secretary's approval of the Compact Amendment did not cause any alleged injury relating to treatment of the Buena Vista Rancheria as an Indian reservation.

B. Amador County does not meet the requirements for prudential standing.

Amador County also cannot satisfy the requirements for prudential standing. "Prudential standing, unlike Article III standing,

is based not on the Constitution, but instead on prudent judicial administration." *AFGE*, 321 F.3d at 142 (citation and internal quotations omitted). The prudential principles that bear on the question of standing, like their constitutional counterparts, "are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society;' but unlike their constitutional counterparts, they can be modified or abrogated by Congress." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (citation omitted). Numbered among the prudential requirements is the doctrine that a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit. *Id.*; *see also AFGE*, 321 F.3d at 143.

A plaintiff must show that its asserted interest is among the group of claims that is envisioned by the relevant statute. *Mudd v. White*, 309 F.3d 819, 823-24 (D.C. Cir. 2002). A plaintiff fails this test if its "interests are so marginally related to or *inconsistent with the implicit purposes in the statute* 'that it cannot reasonably be assumed that Congress intended to permit the suit.'" *Id.* at 824 (quoting *Clarke*

v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)) (emphasis added); *AFGE*, 321 F.3d at 143 (same).

This prudential limitation on standing cannot be overcome by reliance on Section 702 of the APA as a basis for standing. *AFGE*, 321 F.3d at 144-45. Section 702 provides standing only to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. 702. If a person is not within the zone of interests of the relevant statute, the person is not aggrieved within the meaning of Section 702 and standing cannot rest on the APA. *See AFGE*, 321 F.3d at 144-45[8]; *see also National Federation of Federal Employees v. Cheney*, 883 F.2d 1038, 1043 (D.C. Cir. 1989).

Amador County's challenge to the Amendment to the Tribal-State compact is inconsistent with the purpose of IGRA. In IGRA, Congress established a statutory scheme in which, as to Class III gaming, there

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[8] In *AFGE*, the Court stated that plaintiffs-appellants "have an insurmountable hurdle" with respect to their OSHA claims because they are not arguably within the zone of interests to be protected or regulated by the statute. 321 F.3d at 143. Similarly, in *Mudd*, 309 F.3d at 823-24, the Court held that the plaintiff lacked prudential standing because he had no private cause of action under the relevant statute.

are two central players: the Tribe and the State. 25 U.S.C. 2710(d). IGRA provides that Class III gaming activities on Indian lands shall be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State," 25 U.S.C. 2710(d)(1)(C). IGRA establishes comprehensive procedures for development of such compacts, 25 U.S.C. 2710(d)(1)-(7). Congress established measures by which a Tribe may engage a State in negotiations and may establish a Tribal-State compact even where a State fails to negotiate in good faith. *Id.* It would be inconsistent with the purpose of IGRA to allow a political subdivision of the State, through an action in federal court, to invalidate the agreement negotiated by the State and Tribe, as Amador County attempts to do here.[9]

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[9] IGRA includes two references to the role of political subdivisions of the State. Neither provision supports the notion that Congress intended for a political subdivision of a State to be within IGRA's zone of interests such that it may challenge the Secretary's approval of a Tribal-State compact. Rather, in both instances Congress established that a State bears ultimate responsibility for addressing concerns of its political subdivisions. Section 2710(d)(4) provides that IGRA shall not be interpreted as "conferring upon a State or any of its political subdivisions" authority to impose any tax, fee, charge, or other assessment upon an Indian tribe. It further provides that no State "may refuse to enter into negotiations" based upon the lack of authority in the State, or its political subdivisions, to impose such a tax, fee, charge or other assessment. *Id.* Section 2719(b) establishes exceptions

The inappropriateness of such a challenge is especially clear here where: (1) the County had political means by which to exercise its dissatisfaction because in California, as in most states where Class III gaming exists, a Tribal-State compact must first be negotiated by the Governor and then ratified by the State legislature; and (2) the Compact Amendment includes numerous provisions that are specifically designed to protect and benefit Amador County. JA154-59, 168-75. Thus, Amador County had a seat at the table, with its interests represented by the Governor during the negotiations and by its legislators when the State legislature approved the Compact

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to the general prohibition in 25 U.S.C. 2719(a), on gaming by an Indian tribe on lands acquired by the Secretary in trust for the benefit of the Indian tribe after October 17, 1988. Section 2719(b) provides that

> the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.

25 U.S.C. 2719(b); *see also Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 468 (D.C. Cir. 2007). It would be contrary to the overall statutory scheme to allow a political subdivision to undo a Tribal-State compact that a State legislature has ratified.

Amendment. The California legislature's approval of the Compact Amendment binds the State and its political subdivisions to adhere to the terms of the agreement. *See* California Stat. 12012.45(a)(1) (ratifying "[t]he amendment of the compact between the State of California and the Buena Vista Rancheria of Me-Wuk Indians, executed on August 23, 2004.").[10] It is implausible that Congress intended to allow a political subdivision of a State to render ineffective a compact submitted by the State, and approved by the Secretary through inaction. Amador County is not within the zone of interests of IGRA and, therefore, is not aggrieved within the meaning of Section 702.[11]

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[10] The County's status as a political subdivision of the State indicates a further question regarding its burden to establish standing. The County has not shown that it has the power, consistent with State law, to pursue this challenge. The County is a political subdivision of the State. Yet here it is essentially challenging the State's decision, with the legislature's approval, to enter into the Compact Amendment. *Cf. Sherwin-Williams Co. v. City of Los Angeles*, 844 P.2d 534, 536-37 (Cal. 1993) (limits on local authority where matter is exclusively of State concern); *American Financial Services Ass'n v. City of Oakland*, 104 P.3d 813, 820-21 (Cal. 2005) (considering whether State legislature intended to exclude local regulation); *Kickapoo Tribe of Indians v. Babbitt*, 827 F.Supp. 37 (D.D.C. 1993) (whether Governor has authority to enter into Tribal-State compact is a matter of State law, citing *Kansas v. Finney*, 836 P.2d 1169 (1992)), rev'd on other grd's, 43 F.3d 1491 (D.C. Cir. 1995).

[11] Other cases involving the interpretation of IGRA, in which this Court has concluded it had subject matter jurisdiction, have involved

II. EVEN ASSUMING AMADOR COUNTY HAS STANDING, THE DISTRICT COURT PROPERLY DISMISSED THE CLAIMS.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, "plausibly suggesting (not just consistent with)" a showing of entitlement to relief. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).[12] When considering a motion to dismiss under Rule 12(b)(6), a court may consider "the facts alleged in the complaint, any documents attached to or incorporated in the complaint and matter of which [the Court] may take judicial notice." *United*

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challenges to decisions by Interior to take land into trust under 25 U.S.C. 465, not challenges to approval of a Tribal-State compact under 25 U.S.C. 2710. *Butte County, California v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010) (challenging Interior's decision to take land into trust and NIGC's approval of the Tribe's gaming ordinance); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 25, 27 (D.C. Cir. 2008); *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 463 (D.C. Cir. 2007); *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 855 (D.C. Cir. 2006). Similarly, *City of Roseville v. Norton*, 348 F.3d 1020, 1022-23, 1031 (D.C. Cir. 2003), involved IGRA claims in the context of a challenge to Interior's decision to take land into trust pursuant to the Auburn Indian Restoration Act, 25 U.S.C. 1300 *l et seq*., not a challenge by a political subdivision of a State to the approval of a Tribal-State compact or compact amendment.

[12] Amador County asserts (Br. 11) that a complaint should not be dismissed unless a plaintiff can prove no set of facts in support of its claim. But the Supreme Court in *Twombly* rejected that standard stating that it had, "after puzzling the profession for 50 years, * * * earned its retirement." 550 U.S. at 563.

States ex rel. Williams v. Martin-Baker Aircraft Co., Ltd., 389 F.3d 1251, 1257 (D.C. Cir. 2004). In reviewing *de novo* the dismissal of a complaint, the Court generally must "'accept as true all material allegations in the complaint,' *AFGE*, 321 F.3d at 142. But it need not accept as true, or construe in a manner that favors plaintiff, facts that run counter to facts of which the Court can take judicial notice[13] or legal conclusions. *Iqbal*, 129 S. Ct. at 1949-50; *Twombly*, 550 U.S. at 555 (assertion that agreement unlawful is a legal conclusion not entitled to assumption of truth); *In re Interbank Funding Corp. Securities Litigation v. Radin Glass & Co., LLP*, 2010 WL 5299882 (D.C. Cir. 2010) *5, *7. Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S. Ct. at 1950.

A. The approval of the Compact Amendment through inaction by the Secretary is not agency action subject to review under the APA.

The district court properly dismissed Amador County's complaint because the Secretary's inaction on the Compact Amendment, which led

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[13] *Associated Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974).

to approval of the Compact Amendment through operation of law, is not an agency action subject to review under the APA. Thus, even assuming, *arguendo*, that the County could establish standing to maintain this suit, the district court properly dismissed the complaint.[14]

1. Agency inaction is not reviewable except where a statute mandates an agency to act.

The district court's dismissal of the County's challenge to the Secretary's approval (through inaction) of the Compact Amendment by operation of law is consistent with the Supreme Court's decision in *Norton v. S. Utah Wilderness Alliance ("SUWA")*, 542 U.S. 55 (2004) and this Court's precedent. *SUWA* held that a claim to compel agency action under the APA can only be maintained where the agency failed to take action that it is *required* to take. *Id.* at 63 (emphasis in original); *Enterprise National Bank v. Vilsack*, 568 F.3d 229, 234 (D.C. Cir. 2009) ("Under section 706(1), the plaintiff must 'assert[] that an agency failed to take a *discrete* agency action that it is *required to take*.'") (quoting *SUWA*, 542 U.S. at 65, emphasis in *SUWA*). IGRA

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[14] This Court has held that satisfaction of the APA's requirements is not jurisdictional, but failure to establish that a claim meets the requirements of the APA warrants dismissal for failure to state a claim. *See Oryszak v. Sullivan*, 576 F.3d 522, 525 (D.C. Cir. 2009).

expressly provides the Secretary authority to take no action on a compact and provides that such inaction will be considered approval by operation of law to the extent the compact is consistent with IGRA. 25 U.S.C. 2710(d)(8)(C). Because IGRA does not mandate the Secretary to take any action, the Secretary's inaction is not subject to review under the APA.

The County asks the Court to order the Secretary "to revoke and vacate" approval of the Amended Compact, and to prohibit the Secretary from "authorizing or sanctioning the conduct of Class III gaming activities on the Buena Vista Rancheria." JA41-42, 44 (Amended Complaint ¶¶ 76, 81, 91). In other words, the County seeks an injunction directing the Secretary to disapprove the Compact Amendment.[15] But the Court could not order a disapproval of the Amended Compact without directly contravening IGRA, which plainly gives the Secretary the authority to take no action at all. IGRA provides that the Secretary is not required to affirmatively approve or

[15] A mere prohibition on any affirmative approval by the Secretary would simply result in another approval by operation of law because, under IGRA, failure by the Secretary to take any action on the Compact Amendment results in it being considered approved to the extent the compact is consistent with IGRA.

disapprove a compact amendment, hence the Secretary's inaction at issue here should be protected from "undue judicial interference" as an exercise of "lawful discretion." *SUWA*, 542 U.S. at 66.

This Court addressed an analogous situation of approval through operation of law in *Sprint Nextel Corp. v. FCC*, 508 F.3d 1129 (D.C. Cir. 2007), and held that there was no reviewable agency action. In *Sprint*, the FCC had failed to take action on a petition within the statutory deadline. The FCC's failure to issue an order on the petition meant that the petition was deemed granted by operation of law. *Id.* at 1131. The Court held that the FCC's inaction was not subject to review under the APA. As the Court explained, the FCC "did not engage in any 'circumscribed, discrete' act. * * * It did nothing, which is why the 'deemed granted' provision kicked in." *Id.* (quoting *SUWA*, 542 U.S. at 62, citation omitted). Under the relevant statute at issue in *Sprint*, Congress had "spelled out the legal effect" of the agency's failure to grant or deny a petition within the specified time: the petition "shall be deemed granted." *Id.* at 1132 (citing 47 U.S.C. 160(c)). As the Court explained: "The grant does not result in reviewable agency action. Congress, not the Commission, 'granted'" the petition. *Id.*

Likewise, here, Congress spelled out the legal effect of the Secretary's failure to approve or disapprove a compact within 45 days of its submission: "the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions" of IGRA. 25 U.S.C. 2710(d)(8)(C). Such approval does not result in reviewable agency action. Moreover, here, as in *Sprint*, there is nothing more than a result. *Id.* at 1132 ("If we found reviewable action in this case, where would we find the Commission's reasoning?"). There was no decision by the Secretary, and there is no reasoning by the agency for the Court to review.

The Court in *Sprint* rejected arguments similar to those the County makes here (Br. 20, 29). Amador County contends that approval by operation of law must be reviewable under the APA or else the agency could, by simply not acting, evade judicial review of a compact it wants to grant. As the Court explained in *Sprint*, "that is the consequence of the system Congress mandated." *Id.* at 1133. Even if this means that the Court will "lack jurisdiction in what may be the hardest cases" – that is a result of the statutory scheme enacted by Congress, and there is no basis for judicial review of the approval by

operation of law. *Id.* As the Court noted in *Sprint*, review might not be foreclosed if there were allegations of bad faith or abuse of the provision. *Id.* But absent such evidence (and Amador County has not made any such allegations here), it is appropriate to assume that the agency acted properly and that the approval through inaction is not subject to review. *Id.* Accordingly, the district court properly dismissed the County's claims.

2. In addition, the Secretary's approval by inaction is committed to agency discretion.

Even if the approval of a compact through inaction is considered an action by the Secretary, it is action committed to agency discretion by law, and therefore is not subject to judicial review under the APA. See 5 U.S.C. 701(a) ("agency action committed to agency discretion by law" is not subject to judicial review under the APA); *Webster v. Doe*, 486 U.S. 592, 599 (1988) (Section 701(a) "limits application of the entire APA"); *Drake v. FAA*, 291 F.3d 59, 70 (D.C. Cir. 2002). Agency action is "committed to agency discretion when there is a lack of judicially manageable standards to guide meaningful review." *Menkes v. Dep't of Homeland Sec.,* 486 F.3d 1307, 1311 (D.C. Cir. 2007). This Court looks to the nature of the agency action and the language and structure of the

statute to determine whether a matter has been committed solely to agency discretion. *Drake*, 291 F.3d at 70 (citing *Legal Assistance for Vietnamese Asylum Seekers v. Dep't of State, Bureau of Consular Affairs*, 104 F.3d 1349, 1353 (D.C.Cir. 1997)).[16]

IGRA broadly authorizes the Secretary to approve gaming compacts, 25 U.S.C. 2710(d)(8)(A) ("The Secretary is authorized to approve any Tribal-State gaming compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe"), and provides that the Secretary "*may* disapprove a compact" only if it violates IGRA, another federal law, or the United States' trust obligations to Indians. *Id.* 2710(d)(8)(B) (emphasis added). However, the statute does not require the Secretary to approve or disapprove a compact. If, for example, the Secretary has policy or legal

[16] *See also Lincoln v. Vigil,* 508 U.S. 182 (1993) (rejecting challenge to administrative agency's allocation of funds from lump-sum appropriation, finding that action was committed to agency discretion to adapt to changing circumstances and meet its statutory responsibilities in most effective way); *Webster v. Doe*, 486 U.S. 592 (1988) (refusing to review merits of determination by Director of Central Intelligence Agency to terminate an employee in interests of national security); *ICC v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270 (1987) (deciding agency refusal to entertain union's petition for review of administrative order exempting participants in rail consolidation from protection afforded railroad employees was committed to agency discretion).

concerns with a compact that he wishes to reserve, or was too burdened to complete review and act within 45 days, IGRA provides that "the compact shall be considered to have been approved" to the extent it is consistent with IGRA. *Id.* 2710(d)(8)(C). In other words, IGRA grants the Secretary discretion to take no action on gaming compacts while providing no standard by which a court can measure the exercise of that discretion. Thus, "the statute at issue gives virtually unfettered discretion" to the Secretary to act as s/he did. *See Drake*, 291 F.3d at 71.

Viewed against the brief 45-day period to review the compacts, it is clear that Congress's intent was not to embroil the Secretary in lengthy investigations into whether the compact violated federal law, IGRA, or trust obligations. Rather, as the District Court for the District of Columbia observed in *Kickapoo Tribe of Indians v. Babbitt*, 827 F. Supp. 37, 43 (D.D.C. 1993), *rev'd*, 43 F.3d 1491 (D.C. Cir. 1995) (reversed for the separate procedural issue of failure to join an indispensable party under Fed. R. Civ. P. 19), "Congress was greatly concerned that the Secretary might not pass on the compacts quickly" and therefore allowed for the compact to be deemed approved if the

Secretary took no action in 45 days.[17] By stating that the compact will be approved "only to the extent the compact is consistent with the provisions of this Act," IGRA provides a check on compacts that are effectively approved by the Secretary through inaction but that are inconsistent with IGRA. 25 U.S.C. 2710(d)(8)(C). The Secretary, however, has no duty under IGRA to disapprove a compact in such an instance.[18]

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[17] The sole congressional report in IGRA's legislative history does no more than describe the provisions of § 2710(d)(8). S. Rep. No. 100-446, at 19 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3089. However, the report shows that Congress "concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of complex gaming enterprises." *Id.* at 13. "The legislative history thus shows that Congress looked to the compacting process primarily as a means of balancing state and tribal interests." *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 726 (9th Cir. 2003). The Secretary's role in the compact process is limited, and Congress's decision to allow the Secretary to simply pass on approving or disapproving a compact is consistent with the overall statutory scheme.

[18] In *Pueblo of Sandia v. Babbitt*, 47 F. Supp. 2d 49, 56-57 (D.D.C. 1999), the court acknowledged that the Secretary was not under an obligation to disapprove a compact, even though the compacts at issue in that case appeared to violate IGRA's revenue sharing and regulatory fees provisions. In dismissing the challenge to the Secretary's approval on other grounds (failure to join an indispensable party), the court noted that the Secretary "declined to disapprove the compacts" despite the compacts' apparent violation of IGRA. *Id.* While the court disagreed with the Secretary's inaction, which resulted in the compacts being deemed approved, it described this approval by inaction as

IGRA does not provide that "[t]he Secretary shall disapprove a compact….if such compact violates any provision of this Act." Congress could have written the statute in that manner but did not. In sharp contrast to the permissive language actually used in IGRA, the statute immediately uses mandatory language if the Secretary takes no official action to approve or disapprove within the 45 days. As contrasted with the "may" language used to allow the Secretary to disapprove a compact if s/he does not act within 45 days, IGRA provides that the "compact *shall* be considered to have been approved by the Secretary." 25 U.S.C. 2710(d)(8)(C) (emphasis added). The statute again adds mandatory language by requiring that the Secretary "shall publish in the Federal Register" any compact "that is approved, or considered to have been

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"unreviewable" given the Secretary's statutorily-provided discretion to avoid taking action altogether. *Id.* Similarly, other district courts have held that a court cannot review the Secretary's approval through inaction. *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995, 999 (W.D. Wis. 2004) ("[A] court would have no standards by which to judge whether the Secretary acted arbitrarily and capriciously by not acting."), *aff'd*, 422 F.3d 490 (7th Cir. 2005) (affirmed on basis that plaintiff waived appeal of district court's ruling that Secretary's approval of compact by inaction is not subject to APA review); *PPI, Inc. v. Kempthorne*, No. 4:08cv248-SPM, 2008 WL 2705431, at *5 (N.D. Fla. July 8, 2008) (concluding that IGRA "provides clear and convincing evidence that Congress intended to preclude judicial review" of the Secretary's decision to take no action).

approved." 25 U.S.C. 2710 (d)(8)(D). It is clear that Congress expressly gave the remedy for inaction by the Secretary under Section 2710 (d)(8)(C) – approval of a compact.

Moreover, an APA suit seeking review of the Secretary's inaction, with the objective of obtaining an affirmative approval or disapproval of the Compact Amendment, is contrary to the statutory scheme adopted by Congress in IGRA and would simply engender delay. Such a result would be contrary to the language and structure of a statute that gives high priority to placing the compacts in effect whether the Secretary has acted or not, irrespective of the reasons for inaction. Such features are common in statutes in which matters are committed to agency discretion by Congress. *See* R. Pierce, Administrative Law Treatise, [Section] 17.6, 1262 (4th ed. 2002), and cases cited therein.

Section 2714, a specific judicial review provision in IGRA, and Section 2710(d)(7)(A), which is a grant of jurisdiction to federal courts, also support the district court's conclusion that approval of a compact through inaction is not subject to review under the APA. Section 2714 provides that decisions made by the Commission pursuant to Section 2710 of IGRA "shall be final agency decisions" for purposes of the APA.

But Section 2714 does not expressly provide that decisions made (or not made) by the Secretary pursuant to Section 2710 shall be subject to review under the APA. See 25 U.S.C. 2714. Likewise, the claims in this case are outside the jurisdictional grant set forth in Section 2710. Because IGRA's mechanism for compacts to take effect by operation of law allows the Secretary discretion to not act, and gives effect to a compact only to the extent it is consistent with the requirements of IGRA, the County's claims are not reviewable under the APA.

B. Even assuming that the Secretary's inaction is reviewable under the APA, the district court properly dismissed the complaint for failure to state a claim.

1. Count 2 fails to state a claim.

Contrary to Amador County's assertion, IGRA does not require the Secretary to render an Indian lands opinion in connection with compact approval. Amador County alleges that the Secretary violated IGRA by approving the Compact Amendment without first making a determination that the site is "Indian land" within the meaning of IGRA. JA39 ¶ 62 (Count 2). Section 2710(d)(8)(A), concerning affirmative compact approval, authorizes the Secretary to approve any Tribal-State compact governing gaming on "Indian lands of such Indian

tribe" but, even for an affirmative approval, IGRA does not mandate that the Secretary undertake a land status analysis. Indeed, presuming such a requirement is incongruent with the 45-day time limit Congress imposed.

Moreover, pursuant to Section 2710(d), the Secretary has discretion to take no action at all on a submitted compact. It follows, *a fortiorari*, that the Secretary has no duty to render an Indian lands opinion in connection with such inaction. Count 2 therefore fails to state a claim on which relief could be granted and was properly dismissed.

2. Counts 3 through 8 fail to state a claim.

The remainder of Amador County's claims (Counts 3-8) also were properly dismissed. The gravamen of Counts 3-8 is that the Buena Vista Rancheria is not an "Indian reservation" or "Indian lands" within the meaning of IGRA and, therefore, that approval by the Secretary of the Compact Amendment was arbitrary and capricious. Amador County itself states that "the only issue relevant to the original litigation is whether the Rancheria is a 'reservation' as a matter of federal law." Br. 46.

Because of the 1987 stipulated judgment, Amador County must treat the Buena Vista Rancheria as an Indian reservation. The County therefore is precluded from claiming that the Buena Vista Rancheria is not an Indian reservation. Aspects of the complaint which so allege, therefore, should be disregarded. Thus, even assuming that Amador County has standing, and that the APA provides a cause of action, absent a viable allegation that the Buena Vista Rancheria is not an Indian reservation to which federal Indian laws apply, Amador County's complaint fails to state a claim for a violation of IGRA.[19]

Moreover, accepting, as Amador County must, that the Buena Vista Rancheria is an "Indian reservation," the County's claim that the Rancheria nonetheless is not "Indian lands" for purposes of IGRA is plainly wrong. Congress clearly provided that "all lands within the limits of any Indian reservation" are "Indian lands" for purposes of IGRA. 25 U.S.C. 2703(4)(A). No requirement exists under federal

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[19] Amador County's contention that the Buena Vista Rancheria is not an Indian reservation also is at odds with Interior's (and the State of California's) consistent recognition of the Buena Vista Rancheria as an Indian reservation. *See, e.g.*, JA214 (May 5, 2000, Interior Letter); JA26 (noting Interior's concurrence in NIGC Office of General Counsel's advisory legal opinion), available at http://www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx.

statutory or decisional law that reservation lands be held in trust. *See, e.g., Indian Country, U.S.A. v. Oklahoma*, 829 F.2d 967, 975-76 (10th Cir. 1987) (noting fee title is "not an obstacle to …reservation…status"). Accordingly, the district court correctly dismissed the complaint for failure to state a claim.[20]

C. If this Court does not affirm dismissal, it should remand for further proceedings.

Amador County argues that this Court should "summarily adjudicate[]" the claims, rather than remanding to the district court for further proceedings. Br. 44. The Secretary urges the contrary course. If this Court determines that Amador County has standing, and has properly pled claims sufficient to survive a motion to dismiss for failure to state a claim, it should remand for further proceedings.

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[20] As noted *supra* at 25, Amador County has waived review of the dismissal of Count 1 by failing, in its opening brief, to challenge the district court's ruling.

CONCLUSION

For the foregoing reasons, the district court's judgment dismissing the complaint should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Circuit Rule 32(a)(1), the brief contains 10,988 words.

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CERTIFICATE OF SERVICE

I hereby certify that on January 18, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. The following were served by first class mail, postage prepaid.

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