Oral Argument Scheduled for December 8, 2011

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

No. 11-5136

NEIGHBORS OF CASINO SAN PABLO, an unincorporated association; ANDRES SOTO; ANNE RUFFINO; ADRIENNE HARRIS; TANIA PULIDO; and JULIA AREAS,
Plaintiffs/Appellants,

v.

KEN SALAZAR, in his official capacity as Secretary of the Interior; LARRY ECHO HAWK, in his official capacity as Assistant Secretary of the Interior - Indian Affairs; TRACIE STEVENS, in her official capacity as Chairperson of the National Indian Gaming Association; and NATIONAL INDIAN GAMING ASSOCIATION,
Defendants/Appellees,

LYTTON RANCHERIA OF CALIFORNIA,
Intervenor/Appellee.

On Appeal from the United States District Court for the District of Columbia
Case No. 09-cv-02384-RJL

RESPONSE BRIEF OF THE FEDERAL APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Counsel for the Federal Appellees hereby certifies as follows:

A. Parties and Amici. The parties to this appeal are the parties who appeared below. The Plaintiffs-Appellants are Neighbors of Casino San Pablo, an unincorporated association, Andres Soto, Anne Ruffino, Adrienne Harris, Tania Pulido, and Julia Areas. The Federal Defendants-Appellees are Ken Salazar in his official capacity as Secretary of the Interior, Larry Echo Hawk in his official capacity as Assistant Secretary of the Interior - Indian Affairs, Tracie Stevens in her official capacity as Chairperson of the National Indian Gaming Commission, and the National Indian Gaming Commission. The Lytton Rancheria of California is Intervenor Defendant-Appellee. The City of San Pablo, California moved to intervene as defendant in the district court but the district court denied the motion. There were no amici in the district court.

B. Rulings Under Review. The rulings under review are the Memorandum Opinion and Order dated March 30, 2011, by the United States District Court for the District of Columbia (Leon, J.) in *Neighbors of Casino San Pablo, et al. v. Salazar et al.*, Case No. 09-cv-02384, Dkt, Nos. 45 and 46, 773 F.Supp.2d 141 (D.D.C. 2011).

C. Related Cases. This case has not been before this or any other court previously, and counsel is not aware of any currently pending related case.

GLOSSARY

A___	Appendix citation
APA	Administrative Procedure Act
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act
NIGC	National Indian Gaming Commission
Section 819	Section 819 of the Omnibus Indian Advancement Act of 2000
2001 Amendment	Section 128 of the Department of the Interior and Related Agencies Appropriation Act of 2002

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STATEMENT OF JURISDICTION

Neighbors of Casino San Pablo, an unincorporated association, Andres Soto, Anne Ruffino, Adrienne Harris, Tania Pulido, and Julia Areas (collectively "Neighbors") asserted jurisdiction in the District Court under 28 U.S.C. § 1331. On March 30, 2011, the District Court granted the motion to dismiss filed by Secretary of the Interior Ken Salazar (the "Secretary"), Assistant Secretary of the Interior - Indian Affairs Larry Echo Hawk, Chairperson of the National Indian Gaming Commission ("NIGC") Tracie Stevens, and the NIGC (collectively "Federal Defendants/Appellees"). The Lessees filed a timely notice of appeal on May 27, 2011. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the Neighbors' claims that the NIGC was required, but failed, to decide whether the San Pablo Property is eligible for gaming by the Lytton Rancheria of California under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721 ("IGRA"), were correctly dismissed for failure to state a claim upon which relief can be granted because Congress mandated in 2000 that the property would be eligible for gaming.

2. Whether the Neighbors' alternative claim that any decision by the NIGC that the San Pablo Property is eligible for gaming under IGRA should be set aside

as unlawful was correctly dismissed for the same reason.

3. Whether the Neighbors' request for a declaration that the State of California has plenary jurisdiction over the San Pablo Property was correctly dismissed for failure to state any cause of action at all.

4. Whether the Neighbors' claim that the Secretary's proclamation that the San Pablo Property is part of the reservation for the Lytton Rancheria should be set aside as unlawful was correctly dismissed for lack of standing and for failure to state a claim.

5. If the Neighbors have properly presented their argument that Congress did not have the power to enact legislation in 2000 mandating that the San Pablo Property would be eligible for gaming under IGRA, whether Neighbors are correct that such legislation violates the Constitution by so mandating without a state cession of jurisdiction.

STATUTES AND REGULATIONS

Pertinent statutory and regulatory provisions are included in the Addendum to this Brief.

STATEMENT OF THE CASE

This case involves a 9.5-acre property in San Pablo, California (the "San Pablo Property") owned by the United States in trust for the benefit of the Lytton

Rancheria of California (a.k.a. the Lytton Band of Pomo Indians) (the "Lytton Band") on which the Lytton Band has operated the Casino San Pablo since 2003.

The Neighbors filed their Complaint in this action on December 17, 2009, and then filed their First Amended Complaint on March 15, 2010, asserting Eight Claims for Relief against the Federal Defendants/Appellees. A014-43. The Lytton Band, a federally recognized Indian tribe, was allowed to intervene as a defendant.

The City of San Pablo also moved to intervene as a defendant, submitting the declaration of the City Manager that the "Lytton Band of Pomo Indians and its Casino San Pablo are essential to the future of San Pablo and its residents" (A127), and the declaration of the Chief of Police that the funding through the Municipal Services Agreement with the Lytton Band "has had a profound effect on the City's ability to provide superior law enforcement, providing for significant increases in personnel, state-of-the-art equipment and community outreach services" (A207). The District Court denied the motion. A010.

Congress enacted Section 819 of the Omnibus Indian Advancement Act of 2000, Pub. L. No. 106-568, 114 Stat. 2868 ("Section 819"), which directed the Secretary to take a specified parcel of land into trust for the Lytton Band and provided that the land would be eligible for gaming under IGRA. The Secretary

took the San Pablo Property into trust for the benefit of the Lytton Band pursuant to Section 819 on October 9, 2003. The Neighbors did not challenge the taking of the land into trust.

Perhaps cognizant of the general six-year statute of limitations on claims against the United States, 28 U.S.C. § 2401(a), the Neighbors structured their claims to challenge actions the NIGC and the Secretary took (or assertedly failed to take) on or after December 17, 2003, specifically: (1) NIGC's approval on December 19, 2003 of a Lytton Band resolution temporarily licensing the existing non-Indian operator of a card room on the San Pablo Property to continue to operate the card room under state law from October 9, 2003 through November 24, 2003; (2) the Secretary's proclamation on June 29, 2004, pursuant to Section 819, that the San Pablo Property is part of the reservation of the Lytton Band; and (3) NIGC's approval on May 22, 2008 of a revised Lytton Band gaming ordinance, replacing its originally enacted 1999 gaming ordinance.

Federal Defendants moved to dismiss all eight claims on various grounds and all parties submitted briefs in support of, or opposition to, the motion. The District Court dismissed all claims in a Memorandum Opinion and Order dated March 30, 2011. A228-47.

In their First and Second Claims for Relief, the Neighbors claimed under

the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), that NIGC was required, but failed, to decide whether the San Pablo Property qualifies as "Indian lands" eligible for gaming under IGRA when it approved the Lytton Band's resolution in 2003 and its gaming ordinance in 2008. A045-48. The District Court dismissed the First and Second Claims for failure to state a claim upon which relief can be granted. A235-38. The District Court concluded that Congress in Section 819 made the determination that the San Pablo Property qualified as Indian lands eligible for gaming under IGRA: "The action Congress directed in the 2000 Omnibus Act easily meets these requirements: Section 819 not only directed the Secretary to take land into trust for the Lytton's benefit (thus immediately qualifying that property as "Indian lands"); it also *explicitly* exempted the Lytton's property from a statutory prohibition on Indian gaming on lands acquired after October 17, 1988." A236. As a secondary basis for the dismissal of these claims, the District Court also concluded that IGRA did not require NIGC to make an Indian lands determination before approving the 2003 resolution and 2008 ordinance given the nature of those approvals. A237-38.

In their alternative Third Claim for Relief, the Neighbors claimed under APA § 706(2) that, if NIGC in fact decided or should be deemed to have decided that the San Pablo Property constitutes Indian lands eligible for gaming under

IGRA, any such decision should be set aside as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. A048-50. The District Court similarly dismissed the alternative Third Claim for failure to state a claim upon which relief can be granted. Section 819 determined eligibility for gaming on the San Pablo Property and the NIGC did not make, and had no duty to make, any independent determination. A238.

The Neighbors' purported Fourth Claim for Relief is a request for a declaration that the State of California has plenary jurisdiction over the San Pablo Property but without a challenge to any specific federal action. A050-51. The District Court dismissed the Fourth Claim because it did not state an "independent cause of action." A241. Neighbors sought a declaration under the Declaratory Judgment Act, 28 U.S.C. § 2201, "that the Property remains subject to the plenary jurisdiction of the State of California." A051. The District Court explained that the Declaratory Judgment Act provides a remedy where a plaintiff properly presents a cause of action, but does not itself provide a cause of action. A241.

In their Fifth Claim for Relief, the Neighbors claim under APA § 706(2) that the Secretary's 2004 Proclamation that the San Pablo Property is part of the Lytton Band's reservation should be set aside as arbitrary, capricious, an abuse of

discretion, or otherwise not in accordance with law. A051-52. The District Court dismissed this claim on the ground that setting aside the Proclamation would not redress the Neighbors' claimed injury from gaming on the San Pablo Property, and thus Neighbors had no Article III standing to challenge the Proclamation. A243-44. The District Court explained that the Proclamation was not essential to the Lytton Band's eligibility for gaming under IGRA. The Lytton Band became eligible to game at the San Pablo Property when the Secretary took the land into trust on October 9, 2003 pursuant to Section 819. The District Court also noted that the Fifth Claim failed to state a claim that the Proclamation was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law because the controlling law – Section 819 – "mandated that the Secretary take into trust the San Pablo property and required that the Secretary issue a reservation proclamation." A243 n.22.

The District Court also dismissed for lack of prudential standing the Neighbors' Third, Fourth and Fifth Claims, to the extent they were construed as claims that the Enclave Clause or Tenth Amendment were violated, based on *City of Roseville v. Norton*, 219 F.Supp.2d 130, 144 (D.D.C. 2002), *aff'd,* 348 F.3d 1020 (D.C. Cir. 2003) (only States can assert Enclave Clause and Tenth Amendment claims). A241-43. In light of *Bond v. United States*, __ U.S. __, 131

S.Ct. 2355 (2011), Federal Appellees are not seeking affirmance on this ground.

Neighbors do not appeal from the District Court's dismissal of the Sixth, Seventh and Eighth Claims for Relief (A244-45), and those claims will not be addressed herein.

STATEMENT OF FACTS

A. Brief Historical Background on Native Americans in California[1/]

The history of native Californians since first contact with Europeans in 1542 has been one of constant adaptation in order to survive the disease epidemics that decimated their populations; the appropriation and destruction of their resource base; widespread, outright killing; and Spanish, Mexican, and United States laws which often did not protect their personal and property rights (sometimes as drafted and sometimes as enforced).[2/]

[1/] The facts discussed in this portion of the brief are not material to the issues that are properly before this Court. The Neighbors, however, have presented argument on issues that are not properly before this Court, and in support of these arguments have made factual allegations in their First Amended Complaint and briefs that we believe are selective and misleading. We offer this background solely as historical context.

[2/] *See* William Wood, *The Trajectory of Indian Country in California: Rancherías, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies and Rancherias*, 44 Tulsa L. Rev. 317 (2008) (documenting the status of Indian lands under Spanish, Mexican and United States law).

Aboriginal California. Native Americans occupied and used resources throughout the area that is now the State of California "from time immemorial." *The Indians of California v. United States* (Dkt. Nos. 31 and 37), 8 Ind. Cl. Com. 1, 31 (1959). California natives were hunter-gatherers and California was a land of diverse and abundant natural resources. Martin A. Baumhoff, "Environmental Background," in Handbook of North American Indians, Vol. 8 California 5 (Robert F. Heizer vol. ed., Smithsonian Institution, 1978).[3/] At the time of European colonization, aboriginal population densities in California were among the highest in North America. Edward D. Castillo, "The Impact of Euro-American Exploration and Settlement," Smithsonian Handbook 99. Aboriginal California was also notable for its linguistic diversity. William F. Shipley, "Native Languages of California," Smithsonian Handbook 80-90. The Pomo linguistic group was centered in the Sonoma County area. *See* Key to Tribal Territories, Smithsonian Handbook viii-ix (Addendum 19-20). A single linguistic group typically included numerous sociopolitical subdivisions, known variously as tribes, tribelets, bands, rancherias and villages. 8 Ind. Cl. Com. at 5-6.

Aboriginal Californians moved throughout their own territories during the course of the year to utilize all available resources. 8 Ind. Cl. Com. at 35-36.

[3/] Volume 8 is referred to herein as the "Smithsonian Handbook."

They also traded with other tribes and visited their territories for social gatherings. *See* Robert F. Heizer, "Trade and Trails," Smithsonian Handbook 690-93.

The Spanish and Mexican Periods. Contact greatly intensified during the Spanish mission period starting in 1769. The Spanish built 21 missions from San Diego north to Mission San Franciso de Solano in Sonoma. 8 Ind. Cl. Com. at 36; Castillo, Smithsonian Handbook 100. Indians were recruited (some would say conscripted) to live at the missions and work on mission farms and ranches. *Id*. It has been estimated that the native population was reduced from about 310,000 to about 245,000 during the six decades of the mission period, due to disease, inadequate diet and social changes. Sherburne F. Cook, "Historical Demography," Smithsonian Handbook 92.

Following Mexican independence, the missions were disestablished and the large Spanish land grants were divided into smaller Mexican ranchos. Some of the mission natives returned to their aboriginal territories, but the growing non-Indian population and disease continued to cause displacement of native settlement patterns and population decline. *Id.* at 92-93, 104-07.

The Gold Rush and Statehood. In 1848, the United States and Mexico ended the Mexican War through the Treaty of Guadalupe Hidalgo, and California

became a territory of the United States. That same year, gold was discovered at Sutter's Mill and tens of thousands of miners and settlers poured into California. California was quickly made a state in 1850. "The overwhelming assault upon the subsistence, life, and culture of all California natives during the short period from 1848 to 1865 has seldom been duplicated in modern times by an invading race." *Id.* at 93. This Court has noted the "depredation that came with the settlement of California." *City of Roseville v. Norton*, 348 F.3d 1020, 1022 (D.C. Cir. 2003).[4/]

Treaty-making and establishment of reservations. The United States commenced government-to-government relations with the native Californians immediately after California statehood. Pursuant to Congressional authorization, three commissioners entered into 18 treaties in 1851 and 1852 (including in the Pomo area) which would have set aside an estimated 8.5 million acres in California as reservations. Robert F. Heizer, "Treaties," Smithsonian Handbook 702-03. But California's new Senators opposed ratification and the treaties were not ratified. *Id.* at 703. Starting in 1853, numerous smaller reservations were

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[4/] For an overview of California Indian history, *see also* Advisory Council on California Indian Policy, Final Reports and Recommendations to the Congress of the United States Pursuant to Public Law 102-416, Executive Summary 2-7 (Sept. 1997) [available at www.standupca.org/reports/Advisory%20Council%20on%20CA%20Indians%201997.pdf].

established throughout California by statute and executive order. *See* Wood, 44 Tulsa L. Rev. at 345-52.

In 1905, attention was focused on the plight of landless Indians in California. In 1906, responding to a report by Special Agent C.E. Kelsey documenting the need for immediate relief for Indians living in small settlements in northern and central California without any rights to the lands, Congress included in the Indian Office Appropriations Act of 1906, Pub. L. No. 59-258, 34 Stat. 325, 333, an appropriation of $100,000 to purchase land for them. *See Artichoke Joe's California Grand Casino v. Norton*, 278 F.Supp.2d 1174, 1176 n.1 (E.D. Cal. 2003); Castillo, Smithsonian Handbook 118. Additional appropriations were made on an almost annual basis through 1933.

In or around 1926, the United States purchased 50 acres in Sonoma County near Lytton. *Artichoke* Joe's, 278 F.Supp.2d at 1176. In 1937, the Sacramento Indian Agency of the Department of the Interior allowed two Pomo Indians, Mary Myers Steele and John Myers, and their families, to move to the Lytton Rancheria. *Id.*[5/]

Shifts in Federal Indian Policy. The Federal Government strongly

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[5/] The history of the Lytton Band is thus similar to that of the Auburn Indian Band, considered by this Court in *City of Roseville*, 348 F.3d at 1022.

supported tribal sovereignty in the 1930s and early 1940s, most notably through Congress's enactment in 1934 of the Indian Reorganization Act, 48 Stat. 984, codified as amended at 25 U.S.C. § 461 *et seq.* ("IRA"). Among other provisions, the IRA authorized (but did not mandate) tribes to organize, or reorganize, by adopting constitutions and forming business corporations. Section 5, 25 U.S.C. § 465, authorized the Secretary to take land into trust for the benefit of Indian tribes and individual Indians, and Section 7, 25 U.S.C. § 467, authorized the Secretary to proclaim new reservations or add land to existing reservations.

From the late 1940s to the early 1960s, however, federal Indian policy shifted to supporting the assimilation of Native Americans into the dominant society and the termination of the federal trust relationship with tribes. Consistent with this policy, Congress, in 1958, enacted the California Rancheria Act, authorizing the Secretary to terminate the Federal Government's trust supervision of 41 California reservations, including the Lytton Rancheria. Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619-21; *see Amador County, California v. Salazar*, 640 F.3d 373, 375 (D.C. Cir. 2011). This act affected 1,390 Indians living on 7,617 acres of land. S. Rep. No. 85-1874, 85th Cong., 2d Sess. at 2 (1958) (Addendum 14). The Senate Report described the history of the Lytton Rancheria as follows:

> The 50 acres comprising the rancheria were purchased in 1925 at a cost of $10,000. Like most of the rancherias in California it was purchased with appropriated funds "To purchase for the use of the Indians in the State of California * * * suitable tracts of land, water, and water rights in the said State * * *." The two family groups who make their home here belong to the Pomo Tribe. The rancheria is located in the traditional homeland of these people.

Addendum 17. The termination act provided that the constitution and corporate charter of any reservation that had organized under the IRA would be revoked by the Secretary. Addendum 16. The Lytton Rancheria was reported to have "no tribal organization." Addendum 17.

In the late 1960s, the Federal Government once again adopted a policy of Indian self-determination. Congress repudiated its policy of terminating recognized Indian tribes and actively promoted the restoration of terminated tribes. Some tribes have been restored through legislation and others have been restored (or "unterminated") through litigation. *See, e.g., Amador County*, 640 F.3d at 375-76 (discussing the 1983 stipulated order in *Hardwick v. United States*, No. C-79-1710 (N.D. Cal.), which resulted in the "untermination" of 17 rancherias); *City of Roseville*, 348 F.3d at 1022 (discussing the restoration of the Auburn Band through the Auburn Indian Restoration Act in 1994).

The Scotts Valley Band of Pomo Indians sued the United States in the U.S. District Court for the Northern District of California in 1986, claiming that it was

not lawfully terminated in 1958 and seeking reinstatement of its status prior to its purported termination. *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. United States*, No. C-86-3660 (N.D. Cal.). Indians from the former Chico, Guidiville and Lytton Rancherias joined as plaintiffs. The suit was settled as to the Scotts Valley, Guidiville and Lytton Rancherias in 1991, and the Indian groups of the three rancherias once again became "eligible for all rights and benefits extended to other federally recognized Indian tribes and their members." "Notice of Reinstatement to Former Status for the Guidiville Band of Pomo Indians, the Scotts Valley Band of Pomo Indians and Lytton Indian Community of CA," 57 Fed. Reg. 5214 (Feb. 12 , 1992); A079-92 [Stipulation for Entry of Judgment]; *see also Artichoke Joe's*, 278 F.Supp.2d at 1177 (describing the stipulated judgment).[6] The "Lytton Rancheria of California" has thereafter been listed each year in the Secretary's annual list of recognized tribal entities. *See, e.g.*, 75 Fed. Reg. 60810, 60811 (Oct. 1, 2010).[7]

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[6] The suit was settled as to the Mechoopda Tribe of the Chico Rancheria in 1992. *See* 57 Fed. Reg. 19113 (May 4, 1992).

[7] The list is published each year pursuant to the Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791, codified at 25 U.S.C. § 479a. Supporting that Act are Congressional findings that "the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs," and that "ancillary to that authority the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government

B. Legal Background on Authority to Regulate Indian Gaming in California

California v. Cabazon Band of Mission Indians. In the mid-1980s, Riverside County and the State of California sought to apply local and state laws to prohibit gaming on the reservations of the Cabazon and Morongo Bands of Mission Indians. The Supreme Court held that the County and State had no authority to enforce their gambling laws within the tribes' reservations. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).[8/]

The Supreme Court started from the premise that "Indian tribes retain 'attributes of sovereignty over both their members and their territory,' *United States v. Mazurie*, 419 U.S. 544, 557 (1975), and that 'tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States,' *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 154 (1980)." 480 U.S. at 207. The Court acknowledged, however, "that state

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relationship with those tribes, and recognizes the sovereignty of those tribes." 108 Stat. 4791. The Act defines "Indian tribe" as "any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe." California Indian "rancherias" are understood to come within this definition.

[8/] The Cabazon Reservation was first established by Executive Order in 1876 and was then confirmed as a reservation pursuant to the Mission Indian Relief Act of 1891, 26 Stat. 712. 480 U.S. at 204 n.1. The Court noted that the Cabazon Band had 25 members. *Id.*

laws may be applied to tribal Indians on their reservations if Congress has expressly so provided." *Id.* The Court analyzed whether Congress had expressly consented to state authority over Indian gaming in two federal statutes – Pub. L. No. 280, 67 Stat. 588 (1953), as amended, 18 U.S.C. § 1162, 28 U.S.C. § 1360; and the Organized Crime Control Act, 84 Stat. 937 (1970), 18 U.S.C. § 1955 – and concluded that it had not.

Notably, in Pub.L. 280, Congress had granted California "broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State," and jurisdiction over "private civil litigation involving reservation Indians in state court," but not "general civil regulatory authority." 480 U.S. at 207-08. In distinguishing between state laws that applied within Indian country and those that did not, courts had drawn a distinction between prohibitory laws and regulatory laws. *Id.* at 208-10. Because California permitted parimutuel horse race betting and hundreds of card rooms throughout the State, and actually ran its own state lottery, the Supreme Court concluded that California regulated rather than prohibited gambling, and that Pub.L. 280 therefore did not authorize it to apply its gambling regulations within Indian country. *Id.* at 211. The Court also concluded that the Organized Crime Control Act did not authorize the application of state gambling laws to the tribal gaming

operations. *Id.* at 212-14.

The Court next considered whether California could regulate Indian gaming operations even without express Congressional consent. It explained that its cases "have not established an inflexible *per se* rule precluding state jurisdiction over tribes and tribal members in the absence of express congressional consent." *Id.* at 214-15. The issue is "whether state authority is pre-empted by the operation of federal law." *Id.* at 216.

> "[S]tate jurisdiction is pre-empted . . . if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333 (1983). The inquiry is to proceed in light of traditional notions of Indian sovereignty and the congressional goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development. *Id.* at 334-335. See also *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9 (1987); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).

Id. at 216-17. Applying this standard, the Court concluded that, in this case, "State regulation would impermissibly infringe on tribal government." *Id.* at 222.

The Indian Gaming Regulatory Act. Following the *Cabazon* decision, Congress enacted IGRA, Pub. L. No. 100-497, 102 Stat. 2467 (Oct. 17, 1988), codified at 25 U.S.C. §§ 2701-2721, "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic

development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); *see also Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2006); *City of Roseville*, 348 F.3d at 1028. "IGRA created a regulatory framework for tribal gaming intended to balance state, federal, and tribal interests." *Amador County*, 640 F.3d at 376.

> A tribe may conduct gaming only on "Indian lands," defined as follows:
>
> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4)

IGRA sets forth in detail the respective authority of tribes, the federal government and states over gaming on Indian lands. Tribes may undertake "Class I" gaming (social games for minimum value prizes or traditional forms of Indian gaming engaged in as part of tribal ceremonies or celebrations) without regulation by the NIGC or the state's consent. 25 U.S.C. §§ 2703(6), 2710(a)(1).

"Class II" gaming (bingo and similar games, and "non-banked" card games) is regulated by the NIGC. 25 U.S.C. §§ 2703(7), 2710(b), 2711. Section 20 of IGRA, 25 U.S.C. § 2719, prohibits gaming on lands acquired after

the date of its enactment, October 17, 1988, unless an exception applies. One of the exceptions is that the Secretary determines that gaming "would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," and the Governor of the state concurs in that determination. 25 U.S.C. § 2719(b)(1)(A). The determination whether the factual circumstances of a post-enactment land acquisition come within the exceptions of Section 20 can require a detailed analysis. *See, e.g.,* Memorandum from the NIGC Acting General Counsel, "Whether gaming may take place on lands taken into trust after October 17, 1988, by the Mechoopda Indian Tribe of the Chico Rancheria" (Mar. 14, 2003).[9/]

"Class III" gaming (most casino games such as blackjack and roulette and slot machines) may only be undertaken with NIGC regulation and state consent (even if the land was not acquired after the date of enactment). 25 U.S.C. §§ 2703(8), 2710(d), 2711. Specifically, a tribe must enter into a compact with the state. 25 U.S.C. § 2710(d)(3). Compacts may address the application of criminal and civil laws and the allocation of civil and criminal jurisdiction over the gaming operation, among other issues. 25 U.S.C. § 2710(d)(3)(C).

[9/] The Memorandum is available at www.nigc.gov/LinkClick.aspx?link=NIGC%20Uploads/Indian%20Land%20Determinations/Mechoopda.pdf.

C. Facts Relevant to the Neighbors' Properly Presented Claims

1999 Gaming Ordinance. Following the restoration of its status as a federally recognized tribe in 1991, the Lytton Band evaluated its options and concluded that it wished to pursue economic development through gaming. A100-05 [Declaration of Margie Mejia in Support of Motion to Intervene, Dkt. No. 14-1, ¶ 6 (filed May 21, 2010)]. Toward that end, it drafted and adopted a tribal gaming ordinance, approved by the NIGC on July 13, 1999. *Id.* Because the Lytton Band had not yet identified a property on which to conduct a gaming operation, the ordinance was not specific to any site. *Id.*

Section 819. The Lytton Band thereafter identified a property in San Pablo, California on which Ladbrokes, a major non-Indian gambling company, operated a card room under California law. *See Artichoke Joe's*, 278 F.Supp.2d at 1177. The Band's investors purchased the property. *Id.*

In 2000, Congress mandated that the San Pablo Property would be "Indian lands" eligible for gaming under IGRA without regard to the otherwise applicable standards and administrative procedures for taking land into trust and for determining whether the land was eligible for gaming under IGRA. Section 819 of the Omnibus Indian Advancement Act of 2000, Pub. L. No. 106-568, 114 Stat. 2868, 2919 (Dec. 27, 2000), provides, in its entirety, as follows:

> Notwithstanding any other provision of law, the Secretary of the Interior shall accept for the benefit of the Lytton Rancheria of California the land described in that certain grant deed dated and recorded on October 16, 2000, in the official records of the County of Contra Costa, California, Deed Instrument Number 2000-229754. The Secretary shall declare that such land is held in trust by the United States for the benefit of the Rancheria and that such land is part of the reservation of such Rancheria under sections 5 and 7 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 467). Such land shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988.

Congress clarified the following year that the provisions of IGRA, other than those relating to the land's eligibility for gaming, apply to gaming on the San Pablo Property. Section 128 of the Department of the Interior and Related Agencies Appropriation Act of 2002, Pub. L. No. 107-63, 115 Stat. 414, 442 (Nov. 5, 2001) (the "2001 Amendment"), provides as follows:

> The Lytton Rancheria of California shall not conduct Class III gaming as defined in [IGRA] on land taken into trust for the tribe pursuant to Public Law 106-568 except in compliance with all required compact provisions of section 2710(d) of [IGRA] or any relevant Class III gaming procedures.

Artichoke Joe's Challenge to Section 819. Shortly after the Secretary published a 30-day notice that it was going to take the San Pablo Property into trust for the Lytton Band of Pomo Indians pursuant to Section 819, a group of California card clubs sued the Secretary on August 7, 2001 claiming that the Secretary's recognition of the Lytton Band as an Indian tribe was contrary to law,

that the Secretary's actions pursuant to Section 819 did not comport with IGRA, and that Section 819 violates the Enclave Clause (U.S. Constitution, art. I, § 8, cl. 17), the Tenth Amendment and the Equal Protection Clause of the Fifth Amendment. *Artichoke Joe's*, 278 F.Supp.2d 1174. They sought to enjoin the Secretary from taking the land into trust. The district court denied the plaintiffs' motion for preliminary injunction on August 6, 2003. 278 F.Supp.2d at 1188. The case was dismissed without further rulings by the court.

Interior Takes the Land into Trust. Following the denial of a preliminary injunction in *Artichoke Joe's*, the Secretary accepted the deed for the San Pablo Property in trust for the Lytton Band on October 9, 2003. A015.

The Lytton Band Commences Gaming. During the pendency of the *Artichoke Joe's* litigation, the card club on the San Pablo Property was being operated by SF Casino Management, L.P. ("SF Casino") under California state law. Although the Lytton Band had an NIGC-approved general gaming ordinance, it was not immediately prepared to take over operations on the San Pablo Property as soon as the property was taken into trust. A232 n.6. Pursuant to 25 U.S.C. § 2710(b)(4)(B), the Band issued a temporary license to SF Casino to continue to operate under state law. *Id.* The Band revoked that license as of November 24, 2003, when it assumed full ownership and operational control of

the Casino San Pablo. *Id.* Due to an inadvertent error in the drafting of the temporary license revocation resolution, the Band adopted a corrected resolution on December 13, 2003 (Resolution No. 121303-1) and submitted that resolution to NIGC, which approved it on December 19, 2003. A058-60.

Reservation Proclamation. It is Interior's practice under its internal guidelines for processing proclamation requests to provide a 30-day advance notice of a reservation proclamation. However, because Section 819 mandated the San Pablo Property Reservation Proclamation, Interior simply made the Reservation Proclamation on June 29, 2004 and thereafter published it in the Federal Register. "Proclaiming Certain Lands as Reservation for the Lytton Rancheria of California," 69 Fed. Reg. 42066-67 (July 13, 2004) (Addendum 10).

NIGC's Approval in 2008 of the Lytton Band's Revised General Gaming Ordinance. The Band operated the Casino San Pablo under its 1999 Tribal Gaming Ordinance until 2008. The Band adopted an amended Tribal Gaming Ordinance on January 30, 2008, which was approved by the NIGC on May 22, 2008. A062-72, 233.

SUMMARY OF ARGUMENT

Resolution of this case begins and ends with the text of Section 819. Congress unambiguously directed the Secretary to take the San Pablo Property

into trust for the benefit of the Lytton Band and to proclaim it to be part of the Band's reservation. In so directing, Congress legislated against the backdrop of federal Indian law in general and IGRA in particular. Congress plainly intended to allow the Lytton Band to exercise jurisdiction over the San Pablo Property and to make the property eligible for gaming under IGRA.

In providing that the Secretary "shall accept for the benefit of the Lytton Rancheria of California" the San Pablo Property and "shall declare . . . that such land is part of the reservation of such Rancheria," Section 819 relieved the Secretary of the need to proceed by means of the administrative procedures for taking land into trust and for proclaiming a reservation. Further, by deeming the land "to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988," Section 819 also relieved the Secretary and the NIGC of the need to make an independent administrative determination of whether the land was eligible for gaming under IGRA. The NIGC only had to ensure that the Lytton Band complied with IGRA and the regulations promulgated thereunder in other respects.

The Neighbors' argument that Congress only intended to transfer title to the San Pablo Property to the United States without effecting any change in the sovereignty/jurisdiction of the United States, State of California and Lytton Band

over the Property is refuted by the plain language of Section 819. It appears that the Neighbors' true argument is that, while Congress intended to transfer sovereignty/jurisdiction to the Lytton Band to allow it to game on the San Pablo Property under IGRA, Section 819 violated the Constitution. Their fundamental premise is that a state has "plenary jurisdiction" over property owned by the Federal Government unless the Federal Government reserved jurisdiction upon the state's admission to the Union or the state affirmatively ceded jurisdiction thereafter. The Neighbors' problem, however, is that they did not file suit until almost nine years after Congress enacted Section 819 and would have been barred by the six-year statute of limitations of 28 U.S.C. § 2401(a) had they clearly stated such a claim. They thus tried to present their argument as claims under the APA challenging three administrative actions that the Secretary and NIGC took in the six years before they filed suit.

The Neighbors were unsuccessful in repackaging their argument into claims that the District Court could adjudicate. For the reasons stated by the District Court, the Neighbors fail to state any claim in their First Amended Complaint entitling them to any relief.

The Neighbors' First and Second Claims, asserting that NIGC failed to make an Indian lands determination when it approved the Lytton Band's

ordinances in 2003 and 2008, fail to state a claim under the APA, 5 U.S.C. § 706(1), because the NIGC had no duty to make such a determination. The Neighbors' Third Claim, asserting that NIGC either made, or should be deemed to have made, an Indian lands determination, fails to state a claim under the APA, 5 U.S.C. § 706(2), because NIGC did not make an Indian lands determination and cannot be deemed to have made a determination it was not required to make. The Neighbors' Fourth Claim is defective because it asserts no cause of action at all. The Neighbors lack Article III standing to litigate their Fifth Claim because setting aside the Reservation Proclamation would not render the San Pablo Property ineligible for gaming under IGRA. In addition, the Fifth Claim fails to state a claim because the Reservation Proclamation cannot be contrary to law – it is an act mandated by Section 819, which statute has not been, and cannot now be, held unconstitutional or otherwise invalid.

In addition, even if the Neighbors had properly presented their argument that Section 819 violates the Constitution, which they did not, the Neighbors' fundamental premise is incorrect. The Neighbors ignore that federal law preempts state authority to the extent that the exercise of state authority interferes with the purpose for which the Federal Government holds property. Section 819, in conjunction with IGRA, preempts the application of California law to the San

Pablo Property with respect to the matters IGRA covers.

STANDARD OF REVIEW

This Court reviews a district court's dismissal for failure to state a claim under Fed. R. Civ P. 12(b)(6) and for lack of standing *de novo*. *Amador County*, 640 F.3d at 377-78. While a court must accept as true the material factual allegations of the complaint, a court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation and citation omitted).

ARGUMENT

A. The First and Second Claims for Relief Were Correctly Dismissed for Failure to State a Claim Because Congress Mandated in Section 819 that the San Pablo Property Would Be Indian Lands Eligible for Gaming Under IGRA

1. Congress's Intent that the San Pablo Property Would Be Indian Lands Eligible for Gaming under IGRA is Clearly Expressed in Section 819

Disregarding the plain language of Section 819, the Neighbors argue (Br. 27-31) that Congress intended in Section 819 to transfer title to the San Pablo Property to the United States but not to affect the jurisdiction/sovereignty over the property. Thus, they argue that NIGC was required to make an administrative determination whether the San Pablo Property was eligible for

gaming under IGRA's generally applicable standards and procedures. Contrary to their assertion (Br. 28) that the "District Court's opinion reflects a fundamental misunderstanding of IGRA," it is the Neighbors who misunderstand IGRA and Section 819. Congress plainly intended in Section 819 to make the San Pablo Property eligible for gaming by the Lytton Band under IGRA.

As set forth above (at 19), IGRA's definition of "Indian lands," 25 U.S.C. § 2703(4), includes two subsections. A property qualifies as "Indian lands" if it satisfies either subsection. Subsection (A) is "all lands within the limits of any Indian reservation." The Neighbors ignore the fact that Section 819 specifically directed the Secretary to declare "that such land is part of the reservation of such Rancheria," bringing the San Pablo Property within Subsection (A). *See City of Roseville*, 348 F.3d at 1029 ("the Auburn Tribe's 49.21 acres are part of the Tribe's reservation by operation of law under [the Auburn Indian Restoration Act]").

Subsection (B) provides an additional definition of "Indian lands": "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." Contrary to the Neighbors' position, the San

Pablo Property qualifies as "Indian lands" under this definition as well. Pursuant to Section 819, the Secretary took title to the San Pablo Property in trust for the benefit of the Lytton Band, satisfying the first clause of Subsection (B). With respect to the second clause – "over which an Indian tribe exercises governmental power" – the Neighbors are correct (Br. 28-29) that "'a necessary prelude to the exercise of governmental power is the existence of jurisdiction.'" *Kansas v. United States*, 249 F.3d 1213, 1219 (10th Cir. 2001) (citing *Miami Tribe of Okla. v. United States*, 927 F.Supp. 1419, 1422 (D. Kan. 1996)). But the Neighbors fail to acknowledge that the Lytton Band obtained jurisdiction over the San Pablo Property when the Secretary took it into trust. At that point it became "Indian country,"[10/] and tribes are presumed to possess jurisdiction within "Indian

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[10/] "Indian country" is broadly defined to include:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151. Although this definition is codified in the criminal code, it applies to civil jurisdiction as well. *Cabazon*, 480 U.S. at 208 n.5.

country." *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 518, 527 n.1 (1998); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Cabazon*, 480 U.S. at 207; *see generally* Cohen's Handbook of Federal Indian Law 182-96 (2005 ed.).

In general, the test for what constitutes "Indian country" is whether the land in question has been "set aside by the Federal Government for the use of the Indians as Indian land" and is "under federal superintendence." *Native Village of Venetie*, 522 U.S. at 527. The definition is not limited to formally designated reservations. *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123-25 (1993); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991) ("Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation'"). In *United States v. John*, 437 U.S. 634, 649 (1978), the Supreme Court held that lands purchased for Mississippi Choctaws pursuant to a 1918 congressional appropriation, which lands were later declared to be trust land and a reservation for the Mississippi Choctaws pursuant to a 1939 act, were Indian country even though the Mississippi Choctaws were not organized under the IRA at the time. And in *United States v. McGowan*, 302 U.S. 535, 537, 539 (1938), the Supreme Court held that the Reno Indian Colony – 28 acres purchased pursuant to 1916 and 1926

appropriations "to provide lands for needy Indians scattered over the State of Nevada" – was Indian country. *See also United States v. Pelican*, 232 U.S. 442, 449 (1914) (individual Indian allotments are Indian country); *United States v. Sandoval*, 231 U.S. 28 (1913) (Pueblo Indian lands are Indian country even though the fee is held by the Pueblo).[11/] There is no question that Congress intended the San Pablo Property to be "Indian country." Therefore, the Lytton Band's jurisdiction over the San Pablo Property was established by Section 819 directing that the land be taken into trust.[12/]

Meeting Subsection (B)'s requirement that "an Indian tribe exercise[] governmental power" over the land "does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority."

[11/] A variety of labels are applied to small reservations in California, including "rancherias." *Artichoke Joe's*, 278 F.Supp.2d at 1176 n.1; *see also* Wood, 44 Tulsa L. Rev. at 362-63 (explaining that a variety of different words, including rancheria, have been, and are still, used to describe Indian country in California).

[12/] The Neighbors point (Br. 30) to a provision in the restoration legislation for the Pokagon Band of Potawatomi Indians in which Congress expressly provided that the "Band shall have jurisdiction to the full extent allowed by law over all lands taken into trust for the benefit of the Band by the Secretary." 25 U.S.C. § 1300j-7. This was in contrast to the Band's more limited jurisdiction within its larger "Service Area," as to which the Band had jurisdiction over its members under the Indian Child Welfare Act of 1978. *Id.* This express confirmation of jurisdiction over Pokagon Band trust lands is no evidence that Congress did not intend to transfer jurisdiction to the Lytton Band because it did not use the word "jurisdiction" in Section 819.

State of Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 702-03 (1st Cir. 1994). In *Narragansett*, the First Circuit concluded that "[t]he inquiry into [the exercise of] governmental power need not detain us." *Id.* at 703. That is certainly the case here. Congress understood in 2000 that the Lytton Band had made plans to exercise governmental power over the San Pablo Property once it was taken into trust, and it is undisputed that the Lytton Band has in fact been exercising governmental power over the property since then.

The San Pablo Property thus qualifies as "Indian lands" under both Subsections (A) and (B) of 25 U.S.C. § 2703(4).

The argument that Congress intended in Section 819 to transfer title without affecting regulatory authority can be summarily rejected. This Court has expressed its understanding, consistent with the body of federal Indian law, that the Secretary's taking land into trust affects regulatory authority. *See, e.g., Patchak v. Salazar*, 632 F.3d 702, 707 (D.C. Cir. 2011) (noting that states and municipalities have standing to sue to enjoin the Secretary from taking land into trust under the Indian Reorganization Act because they may "lose some regulatory authority"); *Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1341 (D.C. Cir. 1998) ("Federal recognition and federal land trusteeship ordinarily have the effect of making tribal land 'Indian country'

subject to federal law, not state law. *See* F. Cohen, Handbook of Federal Indian Law 35-36, 348-49 (1982).").

In addition, the last sentence of Section 819 – "Such land shall be deemed to have been held in trust and part of the reservation of the Rancheria prior to October 17, 1988." – made the San Pablo Property eligible for gaming by exempting it from IGRA's prohibition on gaming on lands acquired after October 17, 1988, 25 U.S.C. § 2719. Under the Neighbors' suggested interpretation, this sentence would have no meaning. A court must "give effect, if possible, to every clause and word of a statute." *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). The Neighbors' "title transfer only" reading would also deprive the 2001 Amendment of meaning. Congress there clarified that, while Section 819 made the San Pablo Property eligible for Class II gaming, the Lytton Band was still subject to IGRA's additional requirements for Class III gaming, including the need for a compact with the State. Congress's only possible intent in Section 819 and the 2001 Amendment was to make the San Pablo Property eligible for gaming under IGRA. Congress plainly intended to affect jurisdiction/sovereignty with respect to that property.

IGRA applies to all property that comes within IGRA's definition of "Indian lands" unless specific legislation makes the lands subject to state gaming

laws. *See Narragansett Indian Tribe*, 158 F.3d at 1341 (the settlement acts of the Narragansett, Catawba Indians and some other tribes specifically provide for state jurisdiction over tribal lands). There is of course no such special legislation here, and the Neighbors are incorrect in reading Section 819 as authorizing the application of state gaming law to the San Pablo Property.

2. Because Congress Mandated in Section 819 that the San Pablo Property Would Be Indian Lands Eligible for Gaming under IGRA, NIGC Was Not Legally Required to Make an Independent Administrative Indian Lands Determination

The Neighbors claim that NIGC was required, but failed, to determine that the San Pablo Property was "Indian lands" eligible for gaming under IGRA before approving the Band's temporary license to SF Casino in 2003 (First Claim) and before approving the Band's amended Tribal Gaming Code in 2008 (Second Claim). A045-48. Under the APA, 5 U.S.C. § 706(1), a court shall "compel agency action unlawfully withheld or unreasonably delayed." Courts may compel agency action only where the action is "legally *required*." *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-65 (2004) ("*SUWA*") (emphasis in original). The District Court correctly determined that NIGC was not required to make an independent administrative Indian lands determination because Congress had already determined the status of the land in 2000. A236.

Section 819 specifically mandated that the San Pablo Property would be eligible for gaming under IGRA by directing that the property be taken into trust as a reservation for the Lytton Band and by making 25 U.S.C. § 2719 inapplicable to it. There can be no question that Congress intended to relieve the Lytton Band of the need to go through the administrative procedures for taking land into trust, for determining whether the San Pablo Property was "Indian lands," and for determining whether any of the exceptions to the prohibition on gaming on land acquired after October 17, 1988 applied.

The Secretary's procedures and policies governing the acquisition of land in trust for Indians are set forth at 25 C.F.R. Part 151. While the Secretary has discretion under the IRA to decide whether to take land into trust, the Secretary has a nondiscretionary duty to accept an identified parcel where, as here, Congress specifically mandates acquisition. *See Sac and Fox Nation of Missouri v. Norton,* 240 F.3d 1250, 1261-62 (10th Cir. 2001) (rejecting the argument that the Secretary had to comply with 25 C.F.R. Part 151 because, "notwithstanding the provisions of the IRA, Pub.L. 98-602 imposed a nondiscretionary duty on the Secretary").[13/]

[13/] *See also Churchill County v. United States*, 199 F.Supp.2d 1031, 1033-34 (D. Nev. 2001) (when Secretary accepted land into trust on behalf of the Fallon Paiute-Shoshone Indian Tribes pursuant to a congressional settlement act that

When an Indian tribe requests that the Secretary take land into trust to be used for gaming, a determination is typically made in connection with the discretionary land-into-trust decision whether the land qualifies as "Indian lands" within the meaning of 25 U.S.C. § 2703(4) and whether any of the exceptions in 25 U.S.C. § 2719 applies. But here, the Secretary did not need to make such determinations before accepting the deed to the San Pablo Property in trust for the Lytton Band on October 9, 2003 because Congress had already made them.

The District Court, after holding that Section 819 "easily meets" the Indian lands requirement (A236), also held (correctly) that NIGC had no duty to make an Indian lands determination in connection with approving the 2003 resolution and 2008 ordinance because they were not the type of site-specific approvals that required NIGC to make an Indian lands determination. A236-38. The Neighbors devote many pages of their Brief (14-27) to contesting this secondary holding. But this Court need not address whether NIGC would have had a duty to make an Indian lands determination in 2003 and/or 2008 in the absence of Section 819 because Section 819 so clearly relieved the NIGC of the duty to make an Indian

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mandated that the lands be held in trust, the Secretary was not required to follow the procedures of 25 C.F.R. Part 151); 25 C.F.R. § 151.3 (the specified conditions for taking land into trust are "[s]ubject to the provisions contained in the acts of Congress which authorize land acquisitions"); 25 C.F.R. § 151.10 (criteria apply where "the acquisition is not mandated" by legislation).

lands determination.[14/]

B. The Third Claim for Relief Was Correctly Dismissed Because No Administrative Decision Regarding Eligibility for Gaming Was Made By NIGC or Should Be Deemed to Have Been Made by NIGC

The Neighbors' Third Claim for Relief (A048-50), asserts, in the alternative, that NIGC either made, or should be deemed to have made, a determination that the Casino Property is eligible for gaming in connection with its approval of the 2003 resolution and 2008 ordinance. They request, pursuant to the APA, 5 U.S.C. § 706(2), that such determination be set aside as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. The District Court properly dismissed this Third Claim for failure to state a claim upon which relief can be granted. A238.

Neighbors argue (Br. 54-55) that the District Court could not make a factual determination prior to discovery as to whether the NIGC made an Indian lands determination. This argument is absurd. The District Court properly relied on NIGC's representation to it that it did not draft an Indian lands determination for the San Pablo Property. *See* United States' Reply Memorandum of Points and

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[14/] If this Court were to accept the Neighbors' argument that Congress intended Section 819 only to transfer title and not to make the San Pablo Property eligible for gaming under IGRA, contrary to the Secretary's and NIGC's consistent understanding, Federal Appellees assume that the Secretary or NIGC would now be required to take some form of administrative action.

Authorities in Support of its Motion to Dismiss, Dkt. No. 31, 10 (filed Aug. 13, 2010). The Neighbors provide no justification for believing that NIGC misrepresented that fact.

The Neighbors' legal assertion that the NIGC should be deemed to have made an Indian lands determination must likewise be rejected on the ground that NIGC was not legally required to make one. Congress had already made that determination in Section 819. There is simply no agency action by NIGC – whether actual or deemed – that supports a claim under the APA, 5 U.S.C. § 706(2).

The Third Claim also includes an assertion (in ¶ 94) that the Secretary's October 9, 2003 acceptance of the San Pablo Property deed violated the IRA because, it asserts, the Lytton Band was not a "recognized Indian tribe under federal jurisdiction." However, the Neighbors carefully avoided pleading, under 5 U.S.C. § 706(2), that the District Court should set aside the Secretary's action of October 9, 2003 taking the land into trust as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Any such claim would have been held barred by the six-year statute of limitations of 28 U.S.C. § 2401(a). The District Court thus could not have decided a claim that the Secretary's land-

into-trust action violated the IRA had Neighbors made one, which they did not.[15/]

The Third Claim also includes an assertion (in ¶ 96) that Section 819 is unconstitutional (without identifying a specific constitutional provision in this paragraph or elsewhere in the First Amended Complaint) to the extent it purported to give the Lytton Band jurisdiction over the San Pablo Property upon the Secretary's taking the land into trust (which it plainly did). But the Neighbors needed to present a proper claim that Section 819 violated a particular constitutional provision, and they did not. Indeed, in the District Court, the Neighbors expressly disavowed making such a constitutional claim: "Neighbors assert neither an Enclaves Clause nor a Tenth Amendment claim in the Third, Fourth and Fifth Claims for Relief." Plaintiffs' Opposition to Defendants' Motion to Dismiss First Amended Complaint, Dkt. No. 27, 32 (filed July 7, 2010). The District Court so acknowledged. A242 n.21.

A claim that Section 819 is unconstitutional would be barred by the six-year statute of limitations of 28 U.S.C. § 2401(a). "A constitutional claim can become time-barred just as any other claim can." *Block v. North Dakota*, 461

[15/] In any event, the claim has no merit because Section 819 directed the Secretary to take the land into trust "[n]otwithstanding any other provision of law." The Secretary did not have to determine whether the land could permissibly be taken into trust under the IRA's generally applicable standards and procedures. *Sac and Fox Nation,* 240 F.3d at 1261-62.

U.S. 273, 292 (1983).[16/] One looks to the "gravamen of the complaint" to determine when the "right of action first accrues." *Mason v. Judges of the United States Court of Appeals for the District of Columbia Circuit*, 952 F.2d 423, 425 (D.C. Cir. 1991). A right of action against the Secretary based on the asserted unconstitutionality of Section 819 first accrued on the day that statute was enacted.

This is not the case of some general federal action only having a specific effect upon application through some subsequent administrative action. For example, in *North County Community Alliance v. Salazar*, 573 F.3d 738 (9th Cir. 2009), the Ninth Circuit addressed the application of 28 U.S.C. § 2401(a) to a claim against NIGC for failure to determine the eligibility of a property for Indian gaming in different circumstances. The plaintiffs in that case were neighbors of an Indian casino that the Nooksack Tribe began constructing in 2006. The Ninth Circuit held that their 2007 suit challenging the NIGC's failure in 1993 to determine whether the parcel on which the tribe later built the casino was eligible

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[16/] The Neighbors argue (Br. 52-53) that a plaintiff may bring nonstatutory claims to enjoin an executive branch official from implementing a statute that violates the Constitution. That may be true. Artichoke Joe's and other card clubs filed such claims (asserting violations of the Tenth Amendment, Enclave Clause and Equal Protection Clause) in 2001 to enjoin the Secretary from implementing Section 819. But the Neighbors did not properly plead such a nonstatutory claim, and have waited too long to file one.

for gaming was not time-barred (although ultimately not meritorious). The court relied on the reasoning of *Wind River Mining Corp. v. United States*, 946 F.2d 710 (9th Cir. 1991), in which the court held that the mining company's 1989 suit challenging the Bureau of Land Management's 1979 designation of one of several Wilderness Study Areas as ultra vires was not time-barred because no one "actually took an interest in that particular piece of property" until the mining company subsequently staked a claim. *Id.* at 742. The *North County* court also noted the district court's decision in *Artichoke Joe's* that the plaintiffs' challenge to the Lytton Band's 1991 federal recognition was not time-barred because "'in 1991, plaintiffs could have had no idea that Lytton's tribal status would affect them [by leading to tribal gaming nearby].'" *Id.* at 743, quoting 278 F.Supp.2d at 1183. In contrast, the Neighbors were on notice immediately upon enactment of Section 819 that the San Pablo Property specified in the act would be eligible for gaming under IGRA. A claim that Section 819 violated the Constitution thus accrued on the day of enactment and would have been time-barred had the Neighbors made one.

C. The Fourth Claim for Relief Was Correctly Dismissed For Failure to State a Claim

The District Court correctly dismissed the Neighbors' Fourth Claim, which

seeks declaratory relief under 28 U.S.C. § 2201 but fails to assert any cause of action, for failure to state a claim upon which relief can be granted. A050-51, 241. The Declaratory Judgment Act, 28 U.S.C. § 2201, provides a remedy, not a cause of action. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950); *C&E Services, Inc. of Washington v. District of Columbia Water & Sewer Authority*, 310 F.3d 197, 201 (D.C. Cir. 2002).

The allegations of the purported Fourth Claim reiterate those assertions of the Third Claim directed to the Secretary's accepting title to the San Pablo Property for the benefit of the Lytton Band on October 9, 2003 (First Amended Complaint ¶¶ 96, 98). As explained above, a properly stated cause of action – a challenge to the Secretary's action of October 9, 2003 under APA § 706(2) – would have been time-barred under 28 U.S.C. § 2401(a).

D. The Fifth Claim for Relief Was Correctly Dismissed Because Granting the Relief the Neighbors Seek – Setting Aside the Secretary's 2004 Reservation Proclamation – Would Not Make the Casino Property Ineligible for Gaming In the Specific Circumstances of this Case and Fails to State a Claim

The Neighbors' Fifth Claim seeks to set aside the Secretary's June 29, 2004 Reservation Proclamation (Addendum 10) under the APA, 5 U.S.C. § 706(2), as arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. A051-52. The District Court correctly concluded that setting aside the

Proclamation would not redress the Neighbors' claimed injury from Indian gaming on the San Pablo Property and thus properly dismissed the Fifth Claim for lack of Article III standing. A243-44.

In the specific circumstances of this case, the Secretary's Proclamation that the San Pablo Property is part of the reservation for the Lytton Band was not a prerequisite to gaming eligibility. The District Court correctly held that the San Pablo Property became eligible for Indian gaming as soon as the Secretary took the land into trust for the Lytton Band on October 9, 2003. A243. As explained above, the San Pablo Property became "Indian lands" under 25 U.S.C. § 2703(4)(B) as soon it was taken into trust, and Section 819 avoided the need to determine whether any of the exceptions to the prohibition of gaming on lands acquired after October 17, 1988 (such as the "initial reservation" exception of 25 U.S.C. § 2719(b)(1)(B)(ii)) applied. With respect to gaming eligibility, the direction in Section 819 to declare the land a "reservation" for the Lytton Band appears to be a "belt and suspenders" provision confirming Congress's intent to make the land eligible for gaming. This Court does not have to decide whether the San Pablo Property became "Indian lands" as a "reservation" under 25 U.S.C. § 2703(4)(A) at the moment the land was taken into trust, or whether it qualified as Indian lands under Subsection (A) only when the Secretary effected the

formality of issuing the Reservation Proclamation.[17/]

The District Court also held that the Fifth Claim failed to state a claim upon which relief can be granted because Section 819 "required that the Secretary issue a reservation proclamation." A243 n.22. Contrary to the Neighbors' argument (Br. 57), the District Court did not "miss[] the point of this Claim." Based on their patently incorrect position that, in Section 819, Congress intended to transfer only title, not sovereignty, the Neighbors argue (Br. 57) that the Proclamation was "not authorized by Section 819." They are wrong. As a matter of law, the Proclamation could not be arbitrary, capricious, an abuse of discretion, or contrary to law because Section 819 is the controlling law and the Proclamation stated exactly what Section 819 directed.

The District Court had to assume that Section 819 was a valid exercise of Congress's authority as it had not been ruled unconstitutional and the time for challenging the statute had passed. The Neighbors argue (Br. 57) that the

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[17/] The Neighbors take issue (Br. 48-49) with the District Court's statement that "issuing a declaration that California still retains plenary jurisdiction over the San Pablo property would not nullify the Lytton's gaming eligibility." A243. Taken out of context, this statement is somewhat puzzling. But when read in context it is apparent that the District Court was simply reiterating that setting aside the Proclamation would not nullify the Lytton Band's gaming eligibility because, pursuant to Section 819, the land became eligible for gaming as soon as it was taken into trust on October 9, 2003.

Proclamation is not authorized by the Constitution, but the "gravamen" of the claim, *Mason*, 952 F.2d at 425, is that Congress exceeded its constitutional powers when it enacted Section 819, which mandated the Proclamation. They cannot bootstrap their untimely challenge to the statute onto an APA challenge of a non-discretionary administrative action specifically mandated by the statute.

E. If This Court Concludes That the Neighbors Have Properly Presented the Question Whether Section 819 Violates the Constitution, Their Argument That the Constitution Requires State Consent to the Lytton Band's Gaming Fails As a Matter of Law

1. The Neighbors' Fundamental Premise That There Is Either Exclusive Federal Jurisdiction or Exclusive State Jurisdiction Is Incorrect

It appears that the true thrust of the Neighbors' case is that Congress violated the Constitution when it enacted Section 819 in 2000. The Neighbors' basic premise, untethered to any specific constitutional provision,[18] is that "[t]he

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[18] The Neighbors are not clear about which provision of the Constitution they believe Congress violated. The First Amended Complaint does not refer to any specific constitutional provision. The Enclave Clause is identified in their Brief's Table of Authorities (along with the Indian Commerce Clause which is the provision to be limited, not the limiting provision). They mention the Enclave Clause, the Admissions Clause and the Tenth Amendment as claims that other plaintiffs have made in challenging land-into-trust actions, but say that they are not making similar claims. Br. 31-32. They argue that they have standing "to the extent these claims implicate the Tenth Amendment" (Br. 44) but never say whether they do implicate the Tenth Amendment. They also argue that they have standing "to the extent these claims implicate the Enclaves Clause," but emphasize that they do not assert any violation of the Enclave Clause. Br. 47.

federal government can obtain jurisdiction over land within state borders in only three ways: (i) by reserving jurisdiction over the affected property upon admission of the state into the Union; (ii) pursuant to the Enclaves Clause of the United States Constitution, Art. I, § 8, cl. 17, whereby a state consents to exclusive federal jurisdiction when the federal government purchases property for certain specified uses; and (iii) by state cession of jurisdiction, exclusive or partial, to the federal government." Br. 32-33 (citations omitted). They assert that California has "plenary" jurisdiction over all land within the State absent one of these three circumstances. Br. 50-51.

The Neighbors' premise is simply wrong. They have stated the three ways in which the Federal Government may obtain exclusive jurisdiction over land. But the options are not exclusive federal jurisdiction or exclusive state jurisdiction. The Neighbors ignore, or misinterpret, the vast body of federal law addressing the boundaries of federal, state and tribal authority where there is concurrent jurisdiction over land owned by the United States, including land held in trust for an Indian tribe like the San Pablo Property. While there is room for the application of non-conflicting state laws, state regulation of property owned by the United States is preempted to the extent that it interferes with the purpose for which the Federal Government is holding the title.

In *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976), for example, the Supreme Court distinguished the acquisition of exclusive federal legislative jurisdiction pursuant to the Enclave Clause from the United States' authority to protect federal lands under the Property Clause through the enactment of federal legislation that may preempt inconsistent state law. While state consent is required to establish a federal enclave, there is no requirement of state consent where Congress enacts legislation pursuant to its enumerated powers. A different rule would undermine the Supremacy Clause:

> Absent consent or cession, a state undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause . . . . A different rule would place the public domain of the United States completely at the mercy of state legislation.

Kleppe, 426 U.S. at 543 (citations and internal quotations omitted).

The same is true with respect to Congress's exercise of other enumerated powers, including the authority to legislate under the Indian Commerce Clause, U.S. Const., art. I, § 8, cl. 3, for the protection of Indians and their lands. The Supreme Court has repeatedly stated that Congress possesses plenary authority under the Indian Commerce Clause over Indian affairs. *See, e.g., Cotton*

Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."). The Neighbors rely on *Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001) as one of their principal authorities, but ignore the Tenth Circuit's most salient point: "Congress . . . has the power to create tribal rights within a State without the State's consent," *id.* at 1229. When Congress extends tribal sovereignty to a particular parcel by taking the land into trust for an Indian tribe, that legislation preempts conflicting state laws under the Supremacy Clause.

One must look to current federal law to determine whether a particular application of state law would interfere with the Federal Government's purpose in owning land. The Neighbors' argument (Br. 35-38) completely ignores IGRA, which preempts any exercise of state jurisdiction regarding eligibility for Indian gaming it does not authorize. In this case, Section 819 clearly established the San Pablo Property as Indian lands eligible for gaming under IGRA despite the absence of any federal reservation of jurisdiction upon California's admission to the Union in 1850 or state cession thereafter.

The Supreme Court cases the Neighbors rely on in support of their "three ways" premise (Br. 32-35) do not hold that, absent a federal reservation of

jurisdiction or subsequent state cession, a state may assert plenary jurisdiction over lands owned by the United States for the benefit of Indians in a way that would frustrate that purpose. The Neighbors misplace reliance on *dicta* in *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 527 (1885). In holding that Kansas could tax railroad property within the Fort Leavenworth Military Reservation, the Supreme Court suggested that, in the absence of a federal reservation of jurisdiction at the time of statehood, the United States had "only the rights of an ordinary proprietor" in federally owned land. However, the Court also stated that, as to that part of the property actually used as a federal military post, the state had no authority "as would defeat its use for those purposes." *Id.* And the Supreme Court later observed in *Kleppe* that the *Fort Leavenworth dicta* "fail[ed] to account for a raft of cases in which the [Property] Clause has been given a broader construction." 426 U.S. at 539.

In *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930), the Supreme Court specifically rejected the contention that states had plenary authority over federal land held for the benefit of Indians. The Supreme Court held in that case that Arkansas could not tax personal property within Camp Pike, a federal enclave subject only to federal jurisdiction. The Court distinguished federal enclaves from other land owned by the United States and used for public

purposes, "which remain within the operation of [a state's] laws, save that the latter cannot affect the title of the United States or *embarrass it in using the lands* or interfere with its right of disposal." *Id.* at 650 (emphasis added). As an illustration, the Court explained that private property within Indian reservations is subject to taxation under state laws but that state laws "have only restricted application to the Indian wards." *Id.* at 651.

Nor does *Silas Mason Co. v. Tax Comm'n of Washington*, 302 U.S. 186 (1937), support their argument. *Silas Mason* addressed whether Washington could tax the income of federal contractors building the Grand Coulee Dam on lands acquired by the United States from the state and from private individuals, as well as of federal contractors working on Indian tribal lands. The Court concluded that it could, citing *Surplus Trading Co*., which, as explained above, does not avail the Neighbors. 302 U.S. at 207-08.[19/] The Neighbors' fundamental

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[19/] The two other Supreme Court cases cited by the Neighbors do not address jurisdiction within Indian country. *James v. Dravo Contracting Co.*, 302 U.S. 134, 142 (1937) (West Virginia could permissibly tax a federal contractor constructing locks and dams in the Kanawha River on land acquired by the United States for the project); *Humble Pipe Line Co. v. Waggonner*, 376 U.S. 369, 371 (1964) (Louisiana could not tax private property within Barksdale Air Force Base because it qualified as a federal enclave).

The lower court decisions the Neighbors cite (Br. 33) similarly do not address Indian country with the exception of the district court's decision in *Arizona v. Manypenny*, 445 F. Supp. 1123 (D. Ariz. 1977) (holding that the state had criminal

premise is refuted by the cases on which they rely.

At one point in their Brief (at 35), the Neighbors seem to acknowledge the preemptive effect of federal law protecting "inherent tribal sovereignty" against state assertions of jurisdiction that would infringe on that sovereignty, but argue (Br. 35 n.10) that it does not apply here because, they assert, the "Lyttons have no aboriginal or inherent sovereignty over the Casino site." As explained above, however, the Federal Government recognizes the Lytton Band as an Indian tribe with whom it has a government-to-government relationship, and the Neighbors have not challenged that recognition. Nor have the Neighbors properly presented any claim that Congress exceeded its Indian Commerce Clause power in establishing a reservation for the Lytton Band in a location that appears to be outside the Band's aboriginal core settlement area.

In any event, the Supreme Court held long ago that "Indian country" "cannot now be confined to land formerly held by the Indians, and to which their title remains unextinguished." *Donnelly v. United States*, 228 U.S. 243, 269

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jurisdiction where a federal immigration officer shot and injured a fleeing alien on either the Organ Pipe National Monument or Papago Indian Reservation). The district court there cited *United States v. McBratney*, 104 U.S. 621 (1881) (holding that Colorado had jurisdiction over a crime by a non-Indian against a non-Indian on the Ute Reservation), 445 F. Supp. at 1125, but did not address the applicability of federal Indian law preemption analysis in other contexts.

(1913). Moreover, Congress's enactment of Section 819 is appropriately viewed in the context of the history of native Californians. The Indian Claims Commission, for example, allowed the "Indians of California" to make a group claim even though Indian tribes ordinarily were required to file separate claims. Ind. Cl. Com. (Dkts. No. 31 and 37). It did so because, "[a]fter the cession of California to defendant, a great influx of white people entered California and occupied lands formerly possessed and used by the Indian groups, killing many of them and driving a great many more of them from their places of abode and scattering them throughout the state." 8 Ind. Cl. Com. at 3-4.[20/]

With the repudiation of the termination policy, a number of Indian bands that maintained their ties despite all obstacles have been restored to recognition, including the Lytton Band. This Court has recognized that federal statutes have given the Secretary "discretion to accept lands into trust within a wide geographical range." *City of Roseville*, 348 F.3d at 1031. Implicit in this recognition is the assumption that Congress has the authority to establish reservations within a wide geographical range (although this Court was not asked

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[20/] The Indian Claims Commission found that the Indians of California had demonstrated aboriginal use and occupancy of the entire claimed area, although it concluded that the United States did not have to pay compensation for the lands included in the Spanish and Mexican land grants because Spain and Mexico had taken those lands before the United States had sovereignty. 8 Ind. Cl. Com. at 39.

in *Roseville* to address Congress's underlying constitutional authority).

2. The California Admission Act Is Not Relevant to the Question Whether Section 819 Is a Permissible Exercise of Congressional Authority

As a general matter, preemption analysis determines the boundaries of federal, state and tribal regulatory jurisdiction within Indian country without regard to the wording of a state admission act. In *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), the Court considered whether the Alaska Statehood Act, Pub. L. No. 85-508, 72 Stat. 339 (1958), precluded state regulatory jurisdiction over fishing by Alaska natives.[21/] That act, similar to thirteen other statehood acts, provided that Alaska disclaimed all right and title to land and other property held by Alaska natives or held by the United States in trust for them, and that such property was to "be and remain under the absolute jurisdiction and control of the United States." *Metlakatla*, 369 U.S. at 58. The Court read the word "absolute" in the statehood acts to mean "undiminished," not "exclusive." *Kake*, 369 U.S. at 71. The Court discussed its recent decision in *Williams v. Lee*, 358 U.S. 217, 220, 223 (1959), in which it addressed the application of state law to the Navajo

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[21/] The Neighbors cite (Br. 36) these cases, but apparently failed to appreciate their significance.

Reservation in Arizona, which had a similar statehood act, and stated that "the test of whether a state law could be applied on Indian reservations there was whether the application of that law would interfere with reservation self-government." *Kake*, 369 U.S. at 67-68. The Court concluded that the same preemption test applied in Alaska as well.[22/]

Prior to *Kake*, the Supreme Court had rejected the argument that the absence of any federal reservation of jurisdiction in the California Admission Act of 1850, 9 Stat. 452, precluded federal jurisdiction over crimes committed within Indian country by or against Indians. *Donnelly*, 228 U.S. at 271-72. And in *Cabazon*, the Supreme Court applied its preemption analysis without any need to address the wording of the California Admission Act.

As a general matter, the Supreme Court does not tailor its analysis of whether a state may exercise regulatory authority within Indian country in that

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[22/] In *Metlakatla*, the Court concluded that the Secretary had authority to regulate fishing by the Metlakatla under an 1891 statute relating specifically to the Metlakatla Reserve, and remanded the matter to the Secretary for him to exercise that authority. 369 U.S. at 59. The Court did not decide whether the federal authority excluded state authority (presumably because the preemptive effective effect of the Secretary's action could not be determined until he acted). The Court concluded in *Kake* that state regulation of off-reservation fishing by the villages of Kake and Angoon would not be an impermissible interference because the fishing was off-reservation and Congress had not authorized the fishing, either directly or through the Secretary. 369 U.S. at 75-76. Here in contrast, Congress expressly authorized Indian gaming on the San Pablo Property.

state to reflect differences in the wording of state admission acts.[23/] Consistent with that view of the law, Congress similarly does not tailor its legislation governing Indian affairs, such as IGRA, to address differences in the wording of state admission acts.

3. Section 819 Did Not Have to Provide for State Consent to Indian Gaming

The Neighbors are similarly incorrect that a state cession has ever been considered a constitutional prerequisite to the exercise of federal/tribal jurisdiction within Indian country. The cases the Neighbors cite (Br. 37-38) regarding tribal and state cessions of jurisdiction after statehood do not avail them. A tribal cession may be relevant to determining whether or not a parcel of land is Indian country, and a court will certainly consider an affirmative state cession of jurisdiction in a jurisdictional analysis, but none of the cases holds that

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[23/] The Neighbors' argument in this case may be rejected without the need to decide that a provision in a state admission act is never relevant to a question of state authority over Indians. For example, in *United States v. Rickert*, 188 U.S. 432, 440 (1903), the Supreme Court considered a specific provision that "no taxes shall be imposed by the [States of North Dakota and South Dakota] on lands or property therein belonging to, or which may hereafter be purchased by, the United States, or reserved for its use." And in *The Kansas Indians*, 72 U.S. 737, 740-41 (1866), the Supreme Court considered provisions of the 1861 Kansas Admission Act that were to govern during the period before treaties were negotiated with the Indians in that state.

a parcel may only become Indian country through a state cession.[24/] In *Cabazon*, the Supreme Court applied its preemption analysis without any need to consider the lack of an affirmative state cession. We are unaware of any case holding that a state has plenary jurisdiction over land acquired by the United States for Indian purposes in the absence of a state cession.

United States v. Lewis, 253 F. 469 (S.D. Cal. 1918), cited by Neighbors (Br. 37-38), is instructive. The issue before the federal district court in that case was whether it had criminal jurisdiction over the prosecution of two Indians and a

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[24/] The Neighbors point (Br. 38) to a 1911 California statute granting to the United States for the use of the Soboba Indians California's "right, title and interest" in specified lands in Riverside County. The Soboba Indians had sued the title holder in California state court and succeeded in confirming their right of occupancy to this property under Spanish and Mexican law. *Byrne v. Alas*, 74 Cal. 628, 16 P. 523 (Cal. 1888). This appears to be the single case in which a court recognized the native Californians' right of occupancy under Spanish/Mexican law. *See* Wood, 44 Tulsa L. Rev. at 349-50. This unique cession of state rights with respect to this parcel does not support the Neighbors' contention that California has plenary authority over Indian country in the absence of such a cession.

The Neighbors also rely (Br. 38) on a June 19, 1912 memorandum from the Assistant Commissioner of Indian Affairs advising the Superintendent of the Round Valley School that he should report to state authorities "one Fox Burns breaking into the school house at Laytonville, California." Addendum 12. Whatever the Assistant Commissioner believed a century ago about the relevance of state cession to criminal jurisdiction under the extant federal criminal statutes (it is not clear from the memorandum whether or not Fox Burns was an Indian), his view has little if any significance to the question of state jurisdiction over the Lytton Band's gaming today.

non-Indian accused of murdering an Indian on her homestead allotment. The court considered two sections of the extant federal criminal code. It first concluded that it had no jurisdiction under section 328 of the Penal Code, which provided for jurisdiction over crimes by Indians within Indian reservations, on the ground that the homestead allotment was not an Indian reservation within the meaning of that section. Whether or not that conclusion was correct, the court next considered whether it had jurisdiction under section 272 for crimes "committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." 253 F. at 471. The court concluded that the Indian homestead did not come within this definition because it was not such an area of exclusive federal jurisdiction. It discussed *United States v. Bateman*, 34 F. 86 (9th Cir. 1888), in which the court held that it did not have jurisdiction over a murder committed within the Presidio military reservation. The *Bateman* court had reasoned that "when California was admitted to the Union, no reservation was made by the national government of jurisdiction over any property," and that "the federal court could only acquire jurisdiction to

punish crime in any territory within the state by cession of the state." 253 F. at 472-73. As the *Lewis* court recognized, however, state cession was only relevant in the context of section 272, not section 328 (applicable to Indian reservations).

Where federal jurisdiction is not asserted to be exclusive, preemption analysis applies without regard to any state cession. Congress properly applied IGRA to the San Pablo Property through Section 819, and IGRA preempts conflicting state laws.

CONCLUSION

For the reasons set forth above, the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,900 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32(a)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X3 in 14-point Times New Roman font.

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Dated: October 25, 2011

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2011 I electronically filed the foregoing Response Brief of the Federal Appellees with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the registered CM/ECF users listed below:

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I further certify that, pursuant to Circuit Rule 31(b), 8 paper copies are being hand-delivered to the Clerk of the Court.

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