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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

AMADOR COUNTY, CALIFORNIA Plaintiff, vs. **DIRK A. KEMPTHORNE, *et al.*,** Defendants.	No. 1:05-cv-00658 (RWR) **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT**

Plaintiff respectfully seeks reversal of this Court's determination that there can be no judicial review of a Class III Gaming Compact which was deemed approved 45 days after its submission for review pursuant to the "no action" provision of Section 11(d)(8)(C) of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(8)(C), when the Secretary of the Interior took no action to either approve or reject it.

I. INTRODUCTION

Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, plaintiff respectfully files this motion to correct a clear legal error and to prevent a manifest injustice. This motion specifically asks the Court to alter or amend its Order and Memorandum Opinion of January 8, 2009 ("Judgment"), by reversing its ruling and denying the federal defendants' Motion to Dismiss.

The Judgment cited as precedent a non-published decision from the Northern District of Florida which is both legally erroneous and irrelevant to the matters at issue herein. This Court cited that Florida decision and, in turn, a decision from the Western District of Wisconsin; neither the Florida court nor this Court cited, and apparently did not even consider, the Seventh Circuit's review of the Wisconsin decision which implicitly rejected the core principle articuled in the Florida ruling.

The Florida decision is *PPI, Inc. v. Kempthorne,* No. 4:08cv248-SPM, 2008 WL 2705431 (N.D. Fla. July 8, 2008), and the Wisconsin decision is *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 327 F. Supp. 2d 995 (W.D. Wis. 2004) ("*Lac Du Flambeau I*"). Neither of those cases constitute binding precedent on this Court. The uncited Seventh Circuit analysis is at *Lac Du Flambeau Band of Lake Superior Chippewa Indians v Norton,* 422 F.3d 490 (7th Cir. 2005) ("*Lac Du Flambeau II*"), and it clearly expresses the conclusion that IGRA does not exempt the "no action" approval of a Compact from judicial review under the Administrative Procedure Act, 5 U.S.C. § 704 ("APA"). Both of the cited decisions concerned factual circumstances not relevant to any consideration in this case, in that they dealt with certain allegedly illegal gaming activities in existing Indian casinos which also featured some gaming that clearly was legal. In those cases, there were adequate remedies under federal law for

assessment and disqualification of the illegal gaming. By contrast, this case concerns land upon which no Indian gaming can be conducted, and the Secretary's vigorous defense of this litigation makes clear that there will be no federal activity either to determine whether as a matter of fact and law the gaming authorized by the Amended Compact would be lawful, or to enjoin it.

In the *PPI* case, the Court correctly noted that there are federal criminal laws that could be used to stop any gaming determined to be illegal. Moreover, it can be presumed that the Department of Justice would pursue criminal prosecution under those facts. However, the instant case deals with a gaming prohibition which is civil – and not criminal – in nature; short of the federal defendants reversing their current course of action, the only examination of the Amended Compact's legality which ever will occur is through this APA litigation seeking relief through this Court's ability to "hold unlawful and set aside [the] agency action." 5 U.S.C. §702. No other remedy is available to Amador County.

There is no language in either IGRA or its legislative history even remotely suggesting that Congress intended to preclude judicial review of Compact approvals under IGRA Section 11(d)(8)(C). Yet, it is adjudicated that there must be *clear and convincing* evidence of Congressional intent to preclude judicial review of the Secretary's approval of compacts. Thus, in relying on the *PPI* decision as precedent, this Court has made a clear legal error that should be altered and amended under Rule 59(e) to deny the federal defendants' Motion to Dismiss.

As the Court recognized in its Judgment, plaintiff Amador County has standing to bring this case and will suffer irreparable harm if unlawful Indian gaming is conducted on the proposed casino site. Thus, the Court's dismissal of the case constitutes manifest injustice because plaintiff is denied its day in court and has absolutely no other legal remedy. These

circumstances beckon reconsideration under Rule 59(e) to prevent a manifest injustice to the citizens of Amador County.

II. ARGUMENT

A. Legal Standard For Altering Or Amending Judgment Under Rule 59(e).

It is clear that a Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is the need to correct a clear legal error or prevent manifest injustice. *Messina v. Krakower*, 439 F. 3d 755, 758-59 (D.C. Cir. 2006). To summarize, this means that there are four circumstances when a Rule 59(e) motion is appropriate: (1) to incorporate an intervening change in the law, (2) to reflect new evidence not available at the time of trial, (3) to correct a clear legal error, and (4) to prevent a manifest injustice. Plaintiff respectfully proposes that it is entitled to relief under the third and fourth bases for Rule 59(e) consideration.

B. This Court's Judgment Should Be Reversed To Correct A Clear Legal Error And To Prevent A Manifest Injustice.

This Court correctly noted that the Secretary has three options under IGRA Section 11(d)(8)(C) (approve, disapprove or take no action). Judgment at 9. The Court continued, however, to state that "the statute provides no clear standard by which the Secretary must decide his course of action." *Id.* Thus, the Court concluded that there exist "no standards by which to judge whether the Secretary acted arbitrarily and capriciously by not acting." *Id.* (quoting *Lac Du Flambeau I,* 327 F. Supp. 2d at 999.

This Court's reliance upon *Lac Du Flambeau I* is misplaced. As an initial matter, the quoted portion of the Wisconsin district court decision is *obiter dictum*. In *Lac Du Flambeau I*, the court held that plaintiffs were "not challenging a final agency action," and thus dismissed the complaint on that basis. 327 F. Supp. 2d at 999. That court also found (though such findings are

also *obiter dicta*) that the complaint should be dismissed for failing to join indispensable parties, and for lack of plaintiffs' standing. *Id.* at 997, 1001-02. But nowhere in that opinion (*dictum* or otherwise) did the court directly address the issue presented to this Court: *Can the Secretary approve – via action or inaction – a compact that clearly violates the federal statute?*

Moreover, *Lac Du Flambeau I* was appealed to the Seventh Circuit. *See Lac Du Flambeau II*, 422 F.3d 490. Of significant import, the Seventh Circuit first expressly rejected one of the two holdings by this Court, *i.e.*, this Court's holding that the Secretary's approval of a compact by inaction can never violate the statute because the Secretary's approval applies only to those portions of a compact that are lawful. Judgment at 10. In addressing whether the Secretary's approval by inaction caused harm to the *Lac Du Flambeau* plaintiffs, the Seventh Circuit held:

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

Lac Du Flambeau II, 422 F.3d at 501 (emphasis added).

Having thus found that the Secretary's inaction caused plaintiffs harm, *and* that a declaratory judgment voiding the allegedly unlawful compact provision would redress that injury, the court turned to the issue of reviewability under the APA. *Lac Du Flambeau II*, 422 F.3d at 502. The court acknowledged the Secretary's argument that the discretionary decision is unreviewable. However, the Seventh Circuit then stated that "[t]here may be convincing counterarguments to the Secretary's position, but [plaintiff] fails to make them." *Id.* at 502. The Seventh Circuit thus deemed the issue "forfeited," and affirmed the lower court. *Id.*

Accordingly, *Lac Du Flambeau II,* which is not discussed in this Court's opinion, is important in two respects. First, the case recognizes that the reviewability issue discussed in *Lac Du Flambeau I* – an issue nonetheless wholly different than the issue *sub judice* – may well be subject to attack (if properly preserved). Second, *Lac Du Flambeau II* holds directly contrary to this Court's assertion that "the Secretary's approval of a compact by inaction can never violate the statute." Judgment at 10; *cf. Lac Du Flambeau II*, 422 F.3d at 501.

This Court's reliance upon *PPI, Inc. v. Kempthorne*, an unpublished Florida district court case, is likewise misplaced. Judgment at 9-10. First, *PPI* relies upon the *obiter dictum* in *Lac Du Flambeau I* to pronounce that IGRA provides "no standards by which to judge whether the Secretary acted arbitrarily and capriciously by not acting." 2008 WL 2705431 at *5 (*quoting Lac Du Flambeau I*, 327 F. Supp.2d at 999). Aside from lacking a proper authoritative basis, that statement is just not true. In short, the standard is "legality." If the Secretary allows an illegal compact to become effective, then the Secretary has acted arbitrarily and capriciously.[1]

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[1] Indian gaming can only be conducted on land that qualifies as "Indian lands" under IGRA Section 4(4), 25 U.S.C. § 2703(4). The Amended Compact at issue specifically approved gaming on a single identified site, but plaintiff has challenged its qualification for gaming under IGRA Section 4(4). The statutory restriction on land status is so firmly established that it applies not only to Class III casino gaming under an approved Amended Compact (IGRA Section 11(d)(1), 25 U.S.C. § 2710(d)(1)), but also to Class II gaming which can be offered without a Compact. IGRA Section 11(b)(1), 25 U.S.C. § 2710(b)(1). The allegations of the Amended Complaint clearly challenge the land's qualification for gaming. Those allegations are deemed true for the purposes of Rule 12(b)(6) consideration, which means that this Court must here accept that the Secretary has ignored the legality standard in approving the Amended Compact and is now defending that approval. In addition, IGRA Section 11(d)(8)(C) deems the "no action" approval to be an action of the Secretary:

> [T]he compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of [IGRA]. (emphasis supplied).

Second, *PPI* espouses an ostensible remedial scheme that, in actuality, provides no remedy. Citing IGRA Section 11(d)(8)(C), the *PPI* court asserted that "any provisions of the compact that are contrary to the [IGRA] are not in effect . . ." 2008 WL 2705431, *5. But the *PPI* court stated that "it would not be appropriate for a court to issue a declaratory judgment stating that [a tribe] is conducting gaming activities that are not consistent with federal law." *Id.* at *6. The court then recognized that an injunction against the tribe would be "the only effective remedy," but only if the tribe was subject to suit, which, of course, it is not. *Id.* Thus, the *PPI* court effectively concluded that a non-party to the deemed-approved compact, even with actual injury, has no remedy in the courts.

Consequently, this Court's reliance upon *PPI* to assert that "Congress provided a remedy apart from judicial review to address illegal provisions of compacts by deeming a compact approved only to the extent the compact is consistent with [IGRA]," Judgment at 10 (quotations omitted), is belied by both the *PPI* opinion itself (revealing no effective remedy), and the *Lac Du Flambeau II* opinion, which rejected that statutory construction as an effective remedial tool only "in some academic sense." *Lac Du Flambeau II*, 422 F.3d at 501.

Significantly, in a non-APA case seeking declaratory and injunctive relief, this Court concluded that a compact which the court deemed approved pursuant to IGRA Section 11(d)(8)(C) was void because it was illegal. In *Kickapoo Tribe of Indians v. Babbitt*, 827 F. Supp. 37 (D.D.C. 1993), *rev'd on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995), the Secretary took no action on a compact and the court deemed it approved by law even though the Governor of Kansas lacked authority to enter into the compact. With this, the court made clear that even though a compact is deemed approved, it may still be enforceable, this Court held:

> Since § 2710(d)(8)(C) states that the compact is deemed approved "only to the extent the compact is consistent with the provisions of this chapter [i.e., IGRA],"

> if the compact conflicts with any provision of IGRA, the fact that the Secretary failed to act within the forty-five day approval period is irrelevant; the compact still would be void.

827 F.Supp. at 44 (emphasis supplied).

C. There Is No Clear And Convincing Evidence That Congress Intended To Preclude Judicial Review Of IGRA Section 11(d)(8)(C) Compact Approvals.

The APA provides at 5 U.S.C. § 704 for judicial review of final agency actions for which "there is no other adequate remedy in court." *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967). Congress intended for a broad spectrum of administrative actions to be reviewable under the APA, and the courts have consistently held that there is a "strong presumption in favor of judicial review of administrative actions." *Evangelical Lutheran Church in America v. I.N.S.*, 288 F.Supp.2d 32, 43 (D.D.C. 2003) (citing *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 670 (1986)).[2]

The strong presumption of reviewability of final agency actions under the APA can be overcome only if a statute (a) specifically withholds APA judicial review or (b) commits the agency action to agency discretion. *See Abbott Laboratories*, 387 U.S. at 141; *see also Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 138 (D.C. Cir. 1970) (preclusion of judicial review should not to be "lightly inferred").

1. Neither IGRA nor its legislative history plainly precludes judicial review of the Secretary's inaction.

The Court's finding that Congress intended IGRA Section 11(d)(8)(C) to preclude judicial review of the Secretary's approval was a clear error of law.

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[2] *See also Abbott Laboratories*, 387 U.S. at 141 (affirming the court's well established position that the APA's "'generous review provisions' must be given a 'hospitable interpretation'").

The question of whether Congress intended a statute to provide for APA review is "phrased in terms of prohibition rather than authorization" for the specific reason that judicial review should not be precluded unless there is a "persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories*, 387 U.S. at 140. Moreover, the APA's legislative history evidences Congress' clear intent for APA judicial review of final agency action pursuant to any statute unless "on its face [the statute] give[s] *clear and convincing evidence* of an intent to withhold it." *Abbott Laboratories*, 387 U.S. at 141 n.2. (citing H.R. Rep No. 1980, 79th Cong. 2d Sess., 41 (1946)).

A statute's failure to explicitly provide for APA judicial review is not evidence of an intent to withhold it. *Id.* To this end, counsel for Amador County has conducted an examination of IGRA's relevant Legislative History, consisting of the following:

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

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

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

(d) Gaming Activities on Indian Lands: Hearing on S. 555 and S. 1303 *Before the Select Committee on Indian Affairs* 100th Cong. (1988) (transcript of Senate hearing and submitted written testimony and comments).

(e) S. Rep. No. 99-493 (Sept. 24, 1986) (report of the Select Committee on Indian Affairs to accompany H.R. 1920, regarding establishment of "Federal Standards and Regulations for the Conduct of Gaming Activities on Indian Reservations and Lands and For Other Purposes"). This bill was never enacted into law but is the predecessor to IGRA.

There is nothing in this Legislative History even suggesting – let alone stating – that Congress intended to exempt the approval process of IGRA Section 11(d)(8)(C) from judicial review.

Nevertheless, this Court found that "no action" approvals are beyond the scope of APA review no matter how overtly illegal various compact terms may be. This, the Court concluded, leads aggrieved parties to seek a "remedy apart from judicial review to address illegal provisions of compacts" without explaining what that remedy possibly could be. Judgment at 10. In reaching this conclusion, this Court ignored the Seventh Circuit's rejection of this very contention in *Lac du Flambeau II*, while relying on the lower court's decision in that same case and while conceding that Amador County would suffer injury from the gaming which would be possible under the Amended Compact. Significantly, government counsel in *Lac du Flambeau II* unsuccessfully advanced the very argument accepted by this Court: *that approval through inaction is valid only to the extent that the Compact terms are consistent with IGRA,and thus any "no action" approval could only result in a lawful compact.* The *Lac du Flambeau II* Court noted the absurdity of that contention:

> [T]he Secretary's silence was the functional equivalent of an affirmative approval. By saying nothing, the Secretary has allowed the parties to the compact to behave as if it were lawful in all respects... . That § 2710(d)(8)(C) may have prevented the offending provisions from becoming effective in some academic sense is a far cry from an explicit rejection by the Secretary. Because the Secretary's silence enabled the injury, it is fairly traceable to her.

(422 F.3d at 501)

2. There is no clear and convincing evidence of Congressional intent to give unlimited discretion to the Secretary under IGRA Section 11(d)(8)(C) so as to preclude judicial review.

This Court's finding that the Secretary's choice – whether to approve, disapprove, or take no action on a gaming compact – is committed to the Secretary's discretion and thereby is unreviewable was clear error. As discussed above, only upon a showing of "clear and convincing evidence of contrary legislative intent" may APA judicial review be denied.

The comprehensive review of IGRA's relevant Legislative History by plaintiff's legal counsel demonstrates an absence of any suggestion that Congress intended that IGRA Section 11(d)(8)(b) should foreclose judicial review of "no action" approval of a Compact. Contrary to this Court's finding, IGRA does provide meaningful judicial standards to guide the Court's review. Moreover, the fact that the Secretary may have some discretion in determining whether to approve, disapprove or approve a compact by inaction does not bestow on him unlimited discretion in such matters. To interpret IGRA as suggested by this Court would cause an absurd result that Congress could not have intended: the Secretary could intentionally allow clearly illegal Compacts to become approved, yet remain immune from any judicial review of that deliberate violation of law.

(a) IGRA provides meaningful judicial standards by which to judge the Secretary's action.

This Court found that the IGRA provides "no clear standard" by which the Secretary must decide his course of action and therefore concluded that the Court was without standards by which to judge the Secretary's conduct. Judgment at 9. Consequently, the Court ruled that the Secretary's approval by inaction is committed to agency discretion and thus unreviewable. *Id.* The Court's ruling improperly expands this narrow exception to APA judicial review and ignores the fact that even the Supreme Court has called the "agency discretion" exception a "very narrow one." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971); *see also Local 1219, American Federal of Government Employees v. Donovan*, 683 F.2d 511, 515 (D.C. Cir. 1982). Indeed, the exception only applies in "those rare instances" when statutes are drawn in such broad terms that in a given case there is no law to apply and thus no meaningful standard by which to judge the agency's discretion. *Evangelical Lutheran Church in America, supra,* 288 F.Supp.2d at 43-44.

Further, the D.C. Circuit Court of Appeals has explained that the absence of clear statutory guidelines by which to judge an agency's action does not always restrain judicial review. Instead, the Court concluded that judicial review is only precluded if the "statutory scheme, taken together with other relevant materials, provides absolutely no guidance as to how that discretion is to be exercised." *Robbins v. Reagan*, 780 F.2d 37, 45 (D.C. Cir. 1985) "([e]ven when there are no clear statutory guidelines, courts often are still able to discern from the statutory scheme a congressional intention to pursue a general goal").

In addition, it is generally accepted that the agency itself can provide standards for judicial review in announcements of policies once it declares that a given course is the most effective way to implement a statue. *Robbins v. Reagan, supra,* 780 F.2d at 45-46 (citing *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 40-44 (1983)). However, the courts are entitled to closely examine agency action that departs from any such policy. *Id.* at 46. Moreover, the D.C. Circuit has stated that "courts have a clear role to play in ensuring that an agency's practical implementation of its program is consistent with its own declared intentions and goals [and therefore] [c]ourts have invalidated agency action because it simply did not comport with standards of rational decision-making given the agency's uncontested goal." *Id.* (remarking further that the court "must consider whether factors the agency considered could lead a reasonable person to make the judgment that the Agency has made"). Both IGRA itself and its legislative history, as well as Interior's interpretation of the law, provide sufficient statutory guidelines by which to judge the Secretary's action.

In light of those standards, the Secretary's action is not consistent with rational decision-making. During its consideration of IGRA, Congress acknowledged that the statute was the "outgrowth of several years of discussion and negotiations between gaming tribes, states, the

gaming industry, the federal agencies, and the Congress in an attempt to formulate a system for regulating gaming on *Indian lands*." S. Rep. No. 100-446 (Aug. 3, 1988). As discussed above, IGRA's definition of Indian lands and restriction of Indian gaming to lands satisfying the statutory restrictions is clear. The Secretary is the only federal official statutorily charged with reviewing (for, *inter alia,* their legality) and approving of Class III gaming compacts. Clearly Congress intended that the Secretary's actions would preserve and not contravene IGRA's limitation of gaming to land qualifying as Indian lands. .

Consistent with the law and internal policies implementing IGRA, Interior usually propounds correspondence accompanying Secretarial decisions on compacts explaining the rationale for the Secretary's action. However, no letter apparently was written here with regard to the approval of the Amended Compact. The absence of such an explanatory letter is particularly striking in light of what customarily has been defined as criteria applied by the Secretary in Compact review letters.[3]

The Secretary has repeatedly acknowledged that "IGRA *requires* the Department of the Interior to determine whether a Compact violates the IGRA, any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands or the trust obligations of the United States to Indians." Letter from Secretary Gale Norton to the Honorable Cyrus Schindler, Nation President, Seneca Nation of Indians (Nov. 12, 2002) (approving the Seneca-New York Compact through inaction because "[i]n enacting IGRA, Congress provided limited reasons for Secretarial approval or disapproval . . . [h]owever, because I want to express my views on

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[3] Those letters are public record and are available at http://www.nigc.gov/; they can be be accessed by going to the referenced website and selecting (1) "Reading Room" and then (2) "Compacts." The letters accompany the Compacts and the following letters can be found by following the above process.

important policy concerns regarding the Compact, concerns that fall outside of the limited reasons in IGRA for Secretarial disapproval, I must avail myself of the opportunity to do so"). Another relevant letter was addressed to the Honorable John P. Froman, Chief, Peoria Tribe of Indians of Oklahoma from Acting Assistant Secretary- Policy and Economic Development, U.S. DOI (Jan. 6, 2006) ("IGRA requires the Department. . . . determine whether the Compact violates. . . IGRA . . . Federal law. . . or trust obligations"). And a third illustrative letter went to the Honorable Tony Salazar, Chairman, Kickapoo Tribe of Oklahoma (Jan. 6, 2006), which also states that IGRA requires the Secretary to make such a determination.

Consequently the Secretary has acknowledged that the Department has a duty pursuant to IGRA to determine whether a Compact violates IGRA. In doing so, the Secretary has established standards by which the Court can judge whether or not the "no action" approval in this case is consistent with rational decision-making in light of the statutory restriction of Indian gaming to Indian lands.

(b) The word "may" in IGRA Section 11(d)(8)(b) does not grant the Secretary unlimited discretion with respect to Compact approval.

In reaching its decision this Court relied heavily on IGRA's use of the word "may" at Section 11(d)(8)(b) and concluded that "use of the permissive 'may'. . . makes clear . . . the Secretary can choose to . . . [but] is not obligated to disapprove any compact." Judgment at 9. The Court then further concluded that IGRA provides no clear standard by which to judge the Secretary's action, leaving the issue exclusively within his discretion. However, the law in the D.C. Circuit is to the contrary:

> When a statute uses a permissive terms such as may rather than a mandatory term such as shall, this choice of language suggests that Congress intends to confer some discretion on the agency, and that courts should accordingly show deference to the agency's determination.

> However, such language does not mean the matter is committed exclusively to agency discretion.

Evangelical Lutheran Church in America, supra, 288 F.Supp.2d at 45 (quoting *Dickson v. Secretary of Defense*, 68 F.3d 1396 (D.C. Cir. 1995) (emphasis supplied).

The fact that a statute contains discretionary language does not in and of itself render an agency's action unreviewable as a matter committed to agency discretion. *Id.* In other words, language that *allows* for agency discretion does not "create unlimited discretion" in the federal decision-maker. *Id.* (quoting *Appalachian Power Co. v. EPA*, 135 F.3d 791, 807 (D.C. Cir. 1998)); *see also Dickson v. Secretary of Defense, supra,* 68 F.3d at 1402 ("intent to preclude judicial review 'cannot be found in the mere fact that a statute is drafted in permissive rather than mandatory terms'") (quoting *Environmental Defense Fund v. Hardin,* 428 F.2d 1093, 1098 (D.C. Cir. 1970)).

While this Court's finding that the Secretary's choice – whether to approve, disapprove, or take no action on a gaming compact – is committed to the Secretary's discretion is correct, it does not logically follow that once the Secretary makes his choice, that choice is not subject to judicial review under the APA. For example, if the Secretary disapproved a compact for a reason other than those enumerated at IGRA Section 11(d)(8)(B) – violations of IGRA, any other federal law, or the trust obligations of the United States to Indians – certainly such a disapproval would be subject to judicial review under the APA because Congress has provided standards by which to determine if the Secretary's disapproval is lawful. Similarly, if a compact becomes approved by inaction, as here, the Court is correct that it is approved only to the extent "those portions of a compact that are lawful under the statute." Judgment at 10. Thus, Congress has provided a clear legal standard by which to guide judicial review to determine which portions of the Amended Compact are lawful.

Contrary to this well established rule of law, this Court essentially has ruled that the Secretary has unfettered discretion to make illegal decisions and avoid judicial scrutiny. The Court even goes so far as to state that the Secretary is not obligated to disapprove any compact – even if unequivocally illegal. The Secretary most certainly has a duty under IGRA to make a rational decision based on the facts before him. But the Court's rationale would protect such egregious administrative conduct as Secretarial approval of a Compact which he affirmatively finds to be in flagrant violation of IGRA as well as other federal laws. Any ruling which would sanction such a result cannot possibly be acceptable under the APA. Yet, this Court seems to suggest that Congress intended to both vest the Secretary with such a power and to shield such actions from APA judicial review, leaving illegal compact terms in place until another day, and for some other unknown venue and where the parties to the compact are immune from suit.

IGRA charges the Secretary with approval of compacts to ensure they comply with IGRA, other federal laws and do not violate the trust relationship between the federal government and Indian tribes. The fact that IGRA limits the reasons that the Secretary can disapprove of compacts does not mean the Secretary has unfettered discretion to shirk his statutory obligations by allowing gaming to be conducted under illegal compact provisions. *Cf. Mulloy v. United States*, 398 U.S. 410, 414-15 (1970) (finding that although a statute's permissive language provided that the Selective Service board "may reopen" a draft classification, the board could not arbitrarily refuse to reopen such a draft classification; when an applicant presented a "*prima facie* case for a new classification, a board must reopen to determine whether he is entitled to that classification").

(c) Pragmatic considerations weigh in favor of judicial review of the Secretary's approval through inaction.

The D.C. Circuit has also identified several "pragmatic considerations" that should be taken into account when determining whether an agency decision is committed to agency discretion by law and, as such, weigh in favor or against APA judicial review. These factors include:

(1) the need for judicial supervision to safeguard the interests of the plaintiffs;

(2) the impact of review on the effectiveness of the agency in carrying out its congressionally assigned role; and

(3) the appropriateness of the issues raised for judicial review.

Armstrong v. Bush, 924 F.2d 282, 293-94 (D.C. Cir. 1991) (quoting *American Friends Service Committee v. Webster*, 720 F.2d 29, 57 (D.C. Cir. 1983)).

It is well-settled that after reviewing these factors, "the court must inquire whether the considerations in favor of nonreviewability thus identified are sufficiently compelling to rebut the strong presumption of judicial review." *Texas Gray Panthers v. Thompson*, 139 F.Supp.2d 66, 74 (D.D.C. 2001), *vacated and remanded on other grounds*, 2002 WL 1359464 (D.C. Cir. May 17, 2002). All of these factors weigh in favor of judicial review of the Secretary's approval of the Amended Compact, yet in finding the approval to be unreviewable, this Court failed to consider whether these factors favored judicial review or even to concede that they should be given consideration. This was clear error.

With regard to the first consideration, plaintiff Amador County clearly has an interest that should be safeguarded through judicial review because it is the only remedy available to the County. Indeed, this Court recognized that Amador County established a "realistic danger of direct injury" and therefore satisfied the injury-in-fact requirement of constitutional standing.

Judgment at 6. The Court also found that the County's injury was caused by the Secretary and could be redressed by declaratory and injunctive relief. *Id.* Accordingly, it is clear that the County's interest would be safeguarded by judicial review.

As discussed above, the Secretary is charged with reviewing compacts to determine whether they are consistent with IGRA and other federal law, and do not abrogate the federal government's trust relationships with Indian Tribes. Furthermore, this Court stated in an earlier case that by "including the forty-five day limitation, Congress clearly was attempting to ensure that the Secretary would not be able to delay approval of Tribal-State compacts indefinitely, thus frustrating Congress' intent with IGRA." *Kickapoo*, 827 F.Supp. at 44 n. 12 (remarking that "Congress has all too often seen its goals left unobtained due to dilatory action on behalf of individuals in the executive branch"). Similarly, the Court should not allow the Secretary to shirk his responsibilities under IGRA or frustrate Congress' intent that Indian gaming only occur on Indian land simply by hiding behind the inaction provision. The approval through inaction provision was designed to make the Secretary act with expediency, not impunity.

Finally, the County's request for judicial review questions whether the Secretary's action conformed with IGRA. This is precisely the type of question that courts review every day. *See, e.g., Armstrong*, 924 F.2d at 294 (ruling the issue was "clearly appropriate for judicial review" because "[c]ourts review the adequacy and conformity of agency regulations and guidelines with statutory directives everyday"). Indeed, "[i]t is the job of the courts to consider such questions." *See Texas Gray Panthers*, 139 F.Supp.2d at 75.

III. CONCLUSION

This motion and memorandum of law present the rare circumstance when the court should reexamine its Judgment within the context of Rule 59(e). The dismissal of this case was based on two district court decisions which are discussed in detail above. They do not stand for the principle stated by this Court. Reversal of the Judgment would correct a clear legal error and prevent a manifest injustice, and those are criteria upon which Rule 59(e) action is appropriate. The harsh result of the rule set forth in the Judgment is both inconsistent with prior court decisions and the principles of APA review. This Court should Alter and Amend the Judgment and order its reversal.

Respectfully submitted this 23rd day of January 2009.

AMADOR COUNTY, CALIFORNIA

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