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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMADOR COUNTY, CALIFORNIA

Plaintiff,

v.

KENNETH L. SALAZAR, et al.

Defendants.

CIVIL ACTION NO.: 1:05CV00658

JUDGE: Richard W. Roberts

UNITED STATES' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S RULE 59(e) MOTION TO ALTER OR AMEND JUDGMENT

INTRODUCTION

Defendants Kenneth L. Salazar, in his official capacity as Secretary of the United States Department of the Interior ("Secretary"),[1] the Acting Assistant Secretary-Indian Affairs of the United States Department of the Interior, and the United States Department of the Interior

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Defendants note that Kenneth L. Salazar has been substituted for Dirk Kempthorne as Secretary of the Interior.

(collectively "United States" or "Federal Defendants"), hereby oppose Plaintiff Amador County's ("County") motion to alter or amend this Court's Order and Memorandum Opinion ("Judgment") entered on January 8, 2009. The motion should be denied because it fails to meet the rigorous standards required under Federal Rule of Civil Procedure 59(e).

Contrary to the County's attempt to re-litigate the matter, this Court correctly concluded that the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, commits to the Secretary's discretion "whether to approve, disapprove, or take no action" on tribal-state gaming compacts, and that the Secretary's election to take no action on the compact amendment at issue here is unreviewable under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. Memorandum Opinion ("Mem. Op.") at 9, 11. Rule 59(e) does not allow the County to reprise arguments on decided matters. The Court already has allowed three rounds of briefing over the course of more than three years.[2] The Court has carefully considered and correctly dismissed the County's suit, which is, after all, a challenge to the approval by operation of law of an agreement between the Buena Vista Rancheria of the Me-wuk Indian Tribe ("Tribe") and the State of California (of which the County is subdivision). There is no merit to the County's assertions that the Court committed "clear legal error" or that "manifest injustice" will result. If the County disagrees with the Court's Judgment, the proper procedure at this juncture is for the County to file an appeal.[3]

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[2] The first round of briefing was on the United States' motion to dismiss the County's original complaint filed on April 1, 2005, the second round of briefing was on the United States' motion to dismiss the County's first amended complaint filed on March 21, 2008, and yet another round of briefing occurred on the County's motion for a preliminary injunction filed in September 5, 2008.

[3] Moreover, a grant of the County's motion would frustrate the goal of an expeditious resolution of this case, since such a grant tolls the time for filing an appeal under Federal Rule of Appellate Procedure 4(a)(4)(A).

STANDARD FOR RECONSIDERATION UNDER RULE 59(e)

The County's burden is heavy. Because of the strong interests in finality and conservation of scarce judicial resources, "[r]econsideration of a court judgment after entry is an extraordinary remedy to be used "sparingly." 11 Charles Alan Wright, et al., *Federal Practice and Procedure* § 2810.1 (2d ed. 1995). This Court strongly disfavors reconsideration and amendment of a previous order. *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 28 (D.D.C. 2001) ("Motions under [Rule 59(e)] are disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances."); *see also City of Moundridge v. Exxon Mobil Corp.*, 244 F.R.D. 10, 11-12 (D.D.C. 2007); *Harvey v. Dist. of Columbia*, 949 F. Supp. 878, 879 (D.D.C. 1996). Exercise of the Court's discretionary power to grant a Rule 59(e) motion is warranted only upon a showing of an intervening change in controlling law, the availability of new evidence, or the need to correct clear error or manifest injustice. *Ciralsky v. Cent. Intelligence Agency*, 355 F.3d 661, 671 (D.C. Cir. 2004); *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996). This Court has made clear that a Rule 59(e) motion should not be employed to reargue matters already considered and decided. *Int'l Painters & Allied Trades Indus. Pension Fund v. Design Tech.*, 254 F.R.D. 13 (D.D.C. 2008); *New York v. United States*, 880 F. Supp. 37, 38 (D.D.C. 1995).

ARGUMENT

I. THE COUNTY'S MOTION SHOULD BE DISMISSED.

Pursuant to IGRA, when a compact or compact amendment is submitted to the Secretary for approval and the Secretary neither approves nor disapproves it within 45 days, it takes effect by operation of law, but only to the extent that it is consistent with IGRA. 25 U.S.C. § 2710(d)(8)(C). Whether to act within the 45-day period is wholly committed to agency

discretion, and, as this Court found, there are no clear standards by which a court could assess whether the Secretary acted arbitrarily and capriciously in electing to take no action. Mem. Op. at 9. Instead, Congress has addressed the consequences of inaction. Once the 45-day period has run, the Secretary must publish notice of the tribal-state compact "considered to have been approved" in the Federal Register. 25 U.S.C. § 2710(d)(8)(D). After completion of this ministerial duty, there are no further actions required of the Secretary by IGRA and the compact is deemed approved to the extent it comports with the statute. As such, there is no room for judicial review of the Secretary's inaction that operates to place the compact into effect. Congress has addressed the scope of that effectiveness, which is the remedy for any inconsistency with IGRA. The structure of § 2710(d)(8)(C) is such that:

> Congress left no room for any court-ordered remand for further consideration of a compact by the Secretary. The possibility of rewinding this process through APA review and sending the compact back to the Secretary for further consideration is inimical to the clearly expressed intent by Congress that the compact be deemed approved after 45 days.

PPI, Inc. v. Kempthorne, 2008 WL 2705431, at *5 (N.D. Fla. July 8, 2008) (citations omitted). The *PPI* court's conclusion comports with the applicable canon of statutory construction. "'[I]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.' In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981) (citations omitted).

A. The County Has Not Met the Rule 59(e) Standard.

The County's bid to have yet another chance to convince the Court of its erroneous position on reviewability must be rejected. *Fox v. Am. Airlines, Inc.*, 295 F. Supp. 2d 56, 59-60 (D.D.C. 2003) (rejecting plaintiff's reassertion of legal arguments raised in their original

opposition to a motion to dismiss as an inappropriate attempt at reargument). Plaintiff's assertion that "there is no language in [IGRA] even remotely suggesting that Congress intended to preclude judicial review of Compact approvals under IGRA Section 11(d)(8)(C)," Plaintiff's Memorandum in Support of Rule 59(e) Motion ("Pl.'s Mem.") at 3, squarely has been rejected by this and other courts, and has not, as the County's contends, Pl.'s Mem. at 2, been differently decided by the Seventh Circuit. *See Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490 (7th Cir. 2005) (affirming district court's dismissal due to plaintiff's forfeiture of claim that APA affords judicial review of Secretary's decision).[4] Notwithstanding, and without reference to any intervening change in law or facts that would warrant reconsideration of the Judgment here, the County devotes at least ten pages of its memorandum to rehashing the argument that it is entitled to judicial review under the APA. *See Sieverding v. Am. Bar Ass'n,* 239 F.R.D. 288, 291 (D.D.C. 2006) (denying plaintiffs' Rule 59(e) motion containing no new facts or arguments).

1. There Is No Showing of Clear Legal Error.

The County has not demonstrated clear error in the Court's decision. Instead, the County suggests that the Court erred in citing cases from the district courts of Florida and Wisconsin because they do not "constitute binding precedent on this Court." Pl.'s Mem. at 2. Nowhere in its decision did this Court make the claim it was bound by either of these decisions, appropriately cited as relevant authority from sister courts. Further, and without citation to authority, the County suggests that the Court improperly cited the *PPI* case because it is unpublished. As Rule

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[4] The *Lac Du Flambeau* court did not "clearly express[] the conclusion that IGRA does not exempt the 'no action' approval of a Compact from judicial review under the Administrative Procedure Act." Pl.'s Mem. at 2. Instead, the court stated that there "may" be counterarguments to the Secretary's position on the matter. This is a far cry from a conclusion on APA reviewability.

32.1 of the Federal Rules of Appellate Procedure makes clear, even parties may properly cite to unpublished decisions. Indeed, Rule 32.1 provides that courts "may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions" issued after January 1, 2007 that are designated as unpublished. Fed. R. App. P. 32.1(a). Plainly, it was appropriate for this Court to cite to the *PPI* opinion issued in July of 2008.

According to the County, the *PPI* decision is "legally erroneous" and "irrelevant" to the instant case. Pl.'s Mem. at 2. Contrary to Plaintiff's conclusory assertions, the *PPI* decision is highly relevant to this case and is, moreover, consistent with a body of case law concluding that the Secretary's election to take no action on a tribal-state compact is a matter committed to agency discretion by law and thus unreviewable. The court in *PPI* addressed the very question of judicial review presented here:

> With respect to the federal defendants' decision to take no action on the compact between the Seminole Tribe and the State of Florida, the Indian Gaming Regulatory Act provides clear and convincing evidence that Congress intended to preclude judicial review. The Act expressly provides, under 25 U.S.C. § 2710(d)(8)(C), for a compact to be deemed approved if the Secretary fails to approve or disapprove the compact within 45 days. Thereafter, in accordance with 25 U.S.C. § 2710(d)(8)(D), the Secretary is required to publish the compact in the Federal Register. The Secretary may not hold off deemed approval or publication of the compact if he is uncertain about whether the compact complies with applicable laws.
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> * * *
>
> The express terms and structure of the Indian Gaming Regulatory Act provide clear and convincing evidence of Congressional intent to preclude APA review as sought by PPI. Specifically, Congress has mandated that a compact be deemed approved within 45 days, and published in the Federal Register.

PPI, 2008 WL 2705431, at *5-*6 (citations omitted).

The County's further contention that the lack of citation to the Seventh Circuit's *Lac Du Flambeau* decision is evidence of clear legal error on the part of both the *PPI* court and this Court, is unavailing. We note that a ruling of the Seventh Circuit is no more binding on this

Court than *PPI* or the district court *Lac Du Flambeau* decision, which Plaintiff argues cannot be relied on because they are not precedential. As explained, the Seventh Circuit affirmed the Wisconsin district court's dismissal based, *inter alia*, on the ground that there was no APA review of an approval by virtue of the Secretary's inaction on a tribal-state compact amendment. The Seventh Circuit did not overrule the district court or render any holding on that question as is made clear in the court's summary of its decision:

> Appellees argue that dismissal was proper because: (i) [the Lac Du Flambeau Band] lacks standing; (ii) the APA does not afford judicial review of the Secretary's action; and (iii) Ho-Chunk is a necessary and indispensable party which cannot be joined due to its sovereign immunity. As we explain below, LDF has standing to bring this suit. We hold however, that plaintiff has forfeited any claim that the APA affords judicial review of the Secretary's decision. Accordingly, we do not address whether the suit must be dismissed under Civil Rule 19(b).

Lac Du Flambeau, 422 F.3d at 495.

Similarly lacking in merit is the County's assertion that this Court improperly relied on the district court's *Lac Du Flambeau* decision because it did not address the issue presented to the Court. Pl.'s Mem. at 5. Plainly, the district court there addressed the availability of judicial review:

> Plaintiffs contend that defendant Secretary's inaction is action under the third possibility set out in *Thomas*: "effectively final action not acknowledged." Although this category comes a little closer to describing defendant's lack of action, it does not come close enough to fit. The inaction at issue was not unacknowledged and therefore, left no one in a state of limbo. Plaintiffs do need the court's assistance in determining what happened.
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> More of an obstacle than the lack of a category, however, is the unsuitability of judicial review to the kind of inaction at issue. When Congress says expressly that it wants amendments not approved within 45 days to be deemed approved, it has provided a remedy and left nothing for a court to review. The court cannot send the matter back to the agency for further consideration without interfering with the congressional scheme. Moreover, the court would have no standards by which to judge whether the Secretary acted arbitrarily and capriciously by not acting. The statute says nothing about what she is to consider in making her decision.

Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton, 327 F. Supp. 2d 995, 999 (W.D. Wis. 2004). Thus, it is the County, rather than the Court, that has engaged in erroneous legal analysis. Plaintiff's burden to establish clear legal error under Rule 59(e) has not been met.

2. There Is No Showing of Manifest Injustice.

The County also fails to demonstrate that manifest injustice will result from the Court's Judgment. It complains that the Court must reconsider its ruling because "the only examination of the Amended Compact's legality [as to the "Indian lands" status of the land under IGRA 25 U.S.C. § 2703(4)] which will ever occur is through this APA litigation . . ." Pl.'s Mem. at 3. This assertion ignores the National Indian Gaming Commission's ("NIGC" or "Commission") ongoing oversight and enforcement responsibilities pursuant to IGRA. *See* 25 U.S.C. § 2713.

"The NIGC is charged with the development of regulations and administrative enforcement of IGRA." *United States v. Seminole Nation of Okla.*, 321 F.3d 939, 941 (10th Cir. 2002); *see also* 25 U.S.C. §§ 2706(b)(10), 2713. More specifically, IGRA requires the Commission to monitor class II gaming "on a continuing basis," 25 U.S.C. § 2706(b)(1), and NIGC regulations afford the Commission a specific opportunity to ensure the gaming-eligible status of facility locations. 25 C.F.R. § 559. IGRA also authorizes the Commission to issue temporary and permanent closure orders when IGRA is violated. 25 U.S.C. §§ 2706(a)(1), 2706(a)(5), 2713(b); 25 C.F.R. § 573.6. "IGRA unambiguously authorizes the NIGC Chairman" to close entire tribal casinos that violate IGRA, *Seminole Nation of Oklahoma,* 321 F.3d at 944-45, which would include violation of IGRA's eligible-lands requirements. *See* 25 U.S.C. §§ 2710(b), 2710(d), 2716(b), 2719.

Moreover, the Attorney General of the United States, in consultation with NIGC, has broad authority to enforce IGRA, including seeking enforcement of NIGC closure orders in federal court. 25 U.S.C § 2716(c); *United States v. Seminole Tribe of Fla.*, 45 F. Supp. 2d 1330, 1331 (M.D. Fla. 1999): *United States v. Santee Sioux Tribe*, 135 F.3d 558, 562-563 (8th Cir. 1998). Accordingly, there are ongoing opportunities for assurance of the IGRA compliance of any gaming conducted under the compact amendment at issue, and the County has failed to show that manifest injustice will result if its motion is denied.

CONCLUSION

For the foregoing reasons, the County's motion to amend or alter the Judgment should be denied.

Respectfully submitted this 6th day of February, 2009.

/s/ Judith Rabinowitz

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