UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TOHONO O'ODHAM NATION, Plaintiff, v. KENNETH L. SALAZAR, in his official capacity as Secretary of the United States Department of the Interior, Defendant.	No. 1:10-cv-472-JDB

GILA RIVER INDIAN COMMUNITY'S OPPOSITION TO SUMMARY JUDGMENT

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INTRODUCTION

The Gila River Indian Community ("Community"), a federally recognized Indian tribe in central Arizona, opposes the Tohono O'odham Nation's ("Nation") motion for summary judgment seeking mandamus to the Secretary of the Interior. The Secretary is responsible for administering the relevant aspects of the Indian Gaming Regulatory Act ("IGRA"), 25 C.F.R. Part 292, as well as the Gila Bend Indian Reservation Lands Replacement Act ("Gila Bend Act" or "Act"), Pub. L. No. 99-503, 100 Stat. 1798 (1986). The Nation's application to the Secretary for lands to be taken into trust implicates the interpretation and enforcement of both statutes, as well as determining their proper interrelationship, in an area of acute interest to both the agency and the Native American community broadly. The Nation itself recognized this when it originally sought not only a decision under the Gila Bend Act, but also review of the proposed trust land's eligibility for gaming under IGRA. It was only when the normal administrative processes were not proceeding to the Nation's liking that it changed its tune, and it now seeks to have a court supplant the agency's expert decisionmaking, and to do so with a tunnel-vision focus on just one statute—the Gila Bend Act—to the complete exclusion of related statutes like IGRA. Nothing in the Gila Bend Act suggests that Congress empowered courts to displace the expert agency in this way, let alone establishes a clear and indisputable entitlement to such extraordinary judicial intervention.

The Secretary should be allowed to follow the normal processes provided for in regulations not challenged here—he should be allowed to make an IGRA decision before taking the lands into trust and, as any responsible agency would, ensure that its decisionmaking complies with *all* relevant governing law, not just one statute. Although the Gila Bend Act states that lands meeting specified requirements are to be taken into trust, the Act leaves the determination of whether those requirements have been met in a particular case to the

Department of the Interior. Furthermore, foundational principles of agency law leave it to Interior in the first instance to construe the Gila Bend Act and IGRA *in pari materia* and to determine the appropriate interrelationship of their statutory terms and operation. The Nation's attempt to bypass the normal administrative process with mandamus asks this Court not only to assume a job that Congress assigned to the expert agency, but to do so piecemeal and with blinders on. To issue mandamus in these circumstances would be to put a thumb on one side of the scale without looking at what is being displaced on the other side. Nothing in either statute permits, let alone clearly and indisputably requires, this Court to stand traditional administrative law principles and rules of deference on their head. The administrative processes are taking no longer than normal, and a number of important and complex questions about the meaning and applicability of the Gila Bend Act and IGRA are still pending for decision before Interior. Such matters should be decided by the Secretary in the first instance.

BACKGROUND

In 1950, Congress enacted the Flood Control Act, Pub. L. No. 81-516, 64 Stat. 163, authorizing the construction of the Painted Rock Dam in central Arizona. Painted Rock Dam was to be built ten miles downstream from the Nation's Gila Bend Reservation, which was held in trust by the United States for the benefit of the Nation (formerly known as the Papago Tribe). H.R. Rep. No. 99-851 at 4 (1986). Before completion of the Dam, the Army Corps of Engineers (the "Army Corps" or "Corps") repeatedly attempted to obtain a flowage easement over the lands, both Indian trust lands and non-Indian fee lands, that the Corps expected the dam would intermittently flood. *Id*. at 5.

Because the Corps could not reach an agreement with the Nation or other non-Indian landowners, it eventually instituted condemnation proceedings in federal district court.[1] *Id.* Through those proceedings, the Corps obtained condemnation of fee title for the non-Indian lands and a flowage easement for all Indian (including the Nation's land within the Gila Bend Reservation) and non-Indian lands that it expected the dam would intermittently flood. *Id.*

The flowage easement was lawfully obtained by federal court decree in 1964 and included approximately 7,700 acres of the Nation's Gila Bend Reservation. *Id.* The federal court ordered the Army Corps to pay the Nation $130,000 in just compensation for the lawful condemnation of the flowage easement over that portion of the Reservation. The estimate of the land that the dam would intermittently flood was based upon established Army Corps practice and was subsequently upheld as legally appropriate as to the non-Indian landowners.[2] The Nation has never brought suit challenging the just compensation award or the scope of the flowage easement within the Gila Bend Reservation.

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[1] H.R. Rep. No. 99-851 at 5 (1986) ("Having failed to reach agreement on either an easement or acquisition of relocation lands, the United States on January 3, 1961, initiated an eminent domain proceeding in federal district court to obtain a flowage easement. In November, 1964, the court granted an easement giving the United States the perpetual right to occasionally overflow, flood and submerge 7,723.82 acres of the reservation (75 percent of the total acreage) and all structures on the land, as well as to prohibit the use of the land for human habitation. Compensation in the amount of $130,000 was paid to the Bureau of Indian Affairs on behalf of the [Nation].").

[2] In *Pierce v. United States*, 650 F.2d 202 (9th Cir. 1981), non-Indian landowners brought suit against the government claiming that operation of the Painted Rock Dam "caused the flood waters to back up and effectively submerge large parts of [their] land" and although the government acquired a flowage easement, the appellants contended "that the easement did not permit the type of flooding that occurred here." *Id*. at 203. They claimed entitlement to further damages because the government "deviate[d] from the recommended water discharge schedule" and thus "not with the scope of the [Flood Control Act]." *Id*. at 204. The Ninth Circuit rejected this claim and held that "the Government's decision to deviate from the discharge schedule was for the purpose of enhancing its capacity to control flood waters," and was therefore "integrally related to the flood control purpose of the statute authorizing the dam." *Id*. at 205. Thus, the government was not liable for further damages or the payment of compensation because the operation of the dam was within the authorization of the Flood Control Act.

Unusually high rainfall in the late 1970s and early 1980s caused repeated flooding upstream of Painted Rock Dam, "each time resulting in a large standing body of water." *Id.* "[T]he floodwaters destroyed a 750-acre farm that had been developed at tribal expense and precluded any economic use of reservation lands." *Id*. at 5-6.

The Nation pressed its case for replacement land to Congress during this period, and in 1981, the Nation petitioned Congress "for a new reservation on lands in the public domain which would be suitable for agriculture." *Id.* at 6. In response to that petition, Congress directed the Secretary to study "which lands, if any, within the Gila Bend Reservation have been rendered unsuitable for agriculture by reason of the operation of the Painted Rock Dam." Southern Arizona Water Rights Settlement Act, Pub. L. No. 97-293, § 308 (96 Stat. 1261) (1982). The study was completed in October 1983 and found 5,962 acres of arable land within the Gila Bend Reservation to be unsuitable for agriculture, and the remaining 4,000-plus acres of little or no economic value. H. R. Rep. No. 99-851 at 6 (1986). A later study in April 1986 further concluded that certain identified land within a 100-mile radius of the reservation was not suitable "from a lands/water resource standpoint and none were acceptable to the [Nation] on a socio-economic basis." *Id.* at 6.

As a result of these studies, Congress enacted the Gila Bend Act. Section 6(c) of the Act authorized the Nation to acquire, by private purchase, not more than 9,880 acres of land to replace the Nation's Gila Bend Reservation lands if certain conditions were met. Before the Nation could exercise its rights under the statute, it was required to assign "to the United States all right, title, and interest of the Tribe in nine thousand eight hundred and eighty acres of [existing] land within the Gila Bend Indian Reservation," *id*. § 4(a), for an agreed upon price of

$30 million.[3] The Gila Bend Act was, in essence, a congressional purchase of the Nation's Reservation that directed that the proceeds be used to buy replacement land on an acre-for-acre basis.

Under Section 4(b) of the Act, the Nation retains all hunting, fishing and gathering rights on Gila Bend Reservation lands after assignment so long as the lands are in federal ownership. Section 4(c) also permits the Nation to withdraw groundwater under certain conditions from all land within the original Gila Bend Reservation that the Nation decided not to assign to the United States pursuant to Section 4(a). Further, Section 6(d) sets forth additional geographical limitations on land that can be obtained pursuant to the Act:

> The Secretary, at the request of the Tribe, shall hold in trust for the benefit of the Tribe any land which the Tribe acquires pursuant to subsection (c) which meets the requirements of this subsection. Any land which the Secretary holds in trust shall be deemed to be a Federal Indian Reservation for all purposes. Land does not meet the requirements of this subsection if it is outside the counties of Maricopa, Pinal, and Pima, Arizona, or within the corporate limits of any city or town. Land meets the requirements of this subsection only if it constitutes not more than three separate areas consisting of contiguous tracts, at least one of which areas shall be contiguous to San Lucy Village. The Secretary may waive the requirements set forth in the preceding sentence if he determines that additional areas are appropriate.

Ultimately the Nation assigned 9,880 acres of the Gila Bend Reservation to the United States under Section 6(a) of the Act and retained approximately 417 acres comprising seven distinct parcels of the Reservation.[4] The remaining seven parcels of the Gila Bend Reservation

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[3] Pub. L. No. 99-503, § 4 (1986). Congress subsequently appropriated a total of $34.7 million for payment to the Nation under the Gila Bend Act. *See* Pub. L. No. 100-202, 101 Stat. 1329 (1987); Pub. L. No. 100-446, 102 Stat. 1774 (1988); Pub. L. No. 101-121, 103 Stat. 701 (1989). It is clear from the record, however, that "the $30 million is the value [of the existing reservation land] before the flood." S. Hrg. 99-935 at 45. (July 23, 1986) (oral testimony of William Blyer, attorney for the Nation).

[4] *See* Memorandum to Acting Phoenix Area Director from Barry W. Welch, Real Estate Services, re: Review and Certification of Maps for 1990 U.S. Census (Mar. 1, 1990). Rossetti Decl. Exh. A.

are located within five miles of San Lucy Village. The San Lucy Village continues to be held in trust and used for the benefit of the Nation and its members.

On August 21, 2003, the Nation's wholly owned corporation, Rainier Resources Inc., purchased 134.88 acres of land in the City of Glendale (the "Glendale Parcel").[5] On January 20, 2009, Rainier conveyed the property to the Nation.[6] Eight days later, the Nation applied to Department to place the 134.88 acres of land in trust pursuant to the Gila Bend Act for the stated purpose of gaming activities.

The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-2721, provides that, subject to certain enumerated exceptions, "gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a). Under one such exception that the Nation expressly invoked in its filings with Interior, the Secretary may authorize gaming if, "after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes," he "determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community," provided the governor of the relevant state concurs. *Id.* § 2719(b)(1)(A).

That the Nation intends to use the property at issue for the purpose of conducting casino gaming is not in dispute. The Nation's letter conveying its fee-to-trust application unequivocally states, "[t]he Nation intends to use portions of the property for gaming purposes pursuant to

[5] *See* General Warranty Deed filed in Maricopa County Recorder Office (Aug. 21, 2003). AR 004302-11.

[6] See General Warranty Deed filed in Maricopa County Recorder Office (Jan. 20, 2009) AR 004312.21.

IGRA."[7] Furthermore, Resolution No. 09-049, passed by the Nation's Legislative Council on January 27, 2009, states, "BE IT FURTHER RESOLVED that the Tohono O'odham Legislative Council hereby requests that the office of Indian Gaming of the Department of the Interior issue an opinion that the Settlement Property was acquired under the settlement of a land claim, and thus is excepted from IGRA's general prohibition on gaming on lands acquired after the date of enactment of IGRA."[8]

On April 7, 2009, the City of Glendale adopted Ordinance No. 4246 to officially oppose the Nation's application to place the 134.88 acres of land in trust and its efforts to construct a gaming facility on the lands. On June 23, 2009, the City adopted Ordinance No. 2688 to acknowledge the invalidity of the City's attempt in 2002 to abandon an annexation of land that occurred in 2001. As a result of that ordinance approximately one third of the 134.88 acres of land has been annexed by the City of Glendale.

On July 22, 2009, the Nation sued the City of Glendale in Maricopa County Superior Court, challenging the validity of Ordinance No 2688. *Tohono O'odham Nation v. City of Glendale*, No. 2009-023501. On August 18, 2009, the Nation amended its January 28th fee-to-trust application to exclude the land in dispute in the Superior Court action, and requested that the Department place in trust 53.54 acres of land, the westernmost parcel of the original 134.88 acres.[9] The Nation subsequently changed this request by letter dated September 8, 2009, and requested that the Department place the entire 134.88 acres in trust.

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[7] Letter from Chairman Ned Norris to Allen Anspach, BIA Western Regional Director, at 3 (Jan. 28, 2009). AR 000788.

[8] Resolution of the Tohono O'odham Nation Legislative Council, Resolution 09-049 (Jan 27, 2009). AR 001290-92.

[9] Letter from Chairman Ned Norris to George Skibine, Deputy Assistant Secretary for Policy and Economic Development, Office of the Assistant Secretary – Indian Affairs (Aug. 18, 2009). AR 000355-56.

On March 10, 2010, the Maricopa County Superior Court held that the City of Glendale's 2001 annexation was proper. On March 12, 2010, the Nation requested that Interior take immediate action to place the 53.54 acres of land in trust by close of business March 19, or the Nation would file suit to compel the Secretary to do so. AR 001444-48. On March 18, the Department assured the Nation that it was analyzing the Nation's application to evaluate compliance with the requirements in Section 6(d) of the Gila Bend Act, and requested that the Nation reconsider its decision to file suit, so as to allow the Department to review the application thoroughly. (Sibbison Decl. Ex. P.) The Nation filed suit on March 22, 2010.

ARGUMENT

To obtain a writ of mandamus, a plaintiff must show a legal entitlement to relief that is "clear and indisputable" and "appropriate under the circumstances." *Cheney v. U.S. District Court*, 542 U.S. 367, 381 (2004). "[C]onsideration of any and all mandamus actions starts from the premise that issuance of the writ is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act." *In re Bluewater Network*, 234 F.3d 1305, 1315 (D.C. Cir. 2000). "Courts generally hesitate to interfere in matters prior to final agency action in order to allow the expert agency to complete its work and to allow senior officials to authoritatively rule on issues." *Boivin v. U.S. Airways, Inc.*, 446 F.3d 148, 154 (D.C. Cir. 2006). Here, the plaintiff falls well short of the mandamus standard in multiple respects. This case involves not only the construction and application of two statutes for which Congress has assigned the agency primary responsibility, but it involves the need to construe those statutes *in pari materia* and to address and define their interrelationship. Indeed, the ordering of decisionmaking and the impact of IGRA on the Gila Bend Act lie at the heart of this dispute. Given the factual complexities of this case, the contours of the agency record and prior land applications by the Nation under the Gila Bend Act, the vital importance of ensuring that the two

interrelated statutory schemes be construed harmoniously and as Congress designed, and the difficulties of navigating their interlocking operations, it is vital that the ordinary rules of deference to agency expertise be respected in this case.

I. THE SECRETARY SHOULD BE ALLOWED IN THE FIRST INSTANCE TO DETERMINE WHETHER THE GLENDALE PARCEL SATISFIES THE GILA BEND ACT

Contrary to the Nation's attempt to characterize the Gila Bend Act as virtually self-executing, it has no clear right to relief at this stage. A number of issues should be addressed in the first instance by the Agency, and a fuller record developed, before a Court can prudently weigh in on the matter. "Congress is presumed to delegate to expert agencies, and not to the judiciary, the authority to reasonably define and apply less than precise statutory terminology." *Reporters Comm. for Freedom of the Press v. U.S. Dep't of Justice*, 816 F.2d 730, 734 (D.C. Cir. 1987).

A. The Secretary Has Not Yet Rendered a Final Decision Under the Gila Bend Act

The Nation argues that the Secretary has already decided that the Glendale Parcel meets the requirements of the Gila Bend Act. Pl's Mem. of Law in Supp. of Mot. for Summary Judgment (Dkt. 4-1) at 11-12. Each of the three letters from which it selectively quotes actually refute that proposition. The first letter states, immediately following the sentence quoted by the Nation: "We can assure you that the final decision to take land into trust for gaming will be made by the Assistant Secretary - Indian affairs only after an exhaustive and deliberative review of all relevant criteria, factual information, and legal arguments." Sibbison Decl. Ex. E. at 2. The second letter states that the "application is *under review* at the Bureau of Indian Affairs' Western Regional Office." Sibbison Decl. Ex. E. at 4-8 (emphasis added). And the third letter contains the following passage (omitted by the Nation in its brief): "Due to the Nation's stated intent to use the lands for gaming, the Assistant Secretary will be the final decision maker for the

Department."). Sibbison Decl. Ex. F. Each of these pieces of correspondence dispels the notion that any final decision has been rendered under the Gila Bend Act.

B. The Glendale Parcel Is Within the Corporate Limits of the City of Glendale and Is Therefore Not an Eligible Acquisition Under the Act

One of the requirements of the Gila Bend Act is that land not be "within the corporate limits of any city or town." Pub. L. No. 99-503, § 6(d). The City of Glendale's brief on this issue shows that Interior should be allowed to interpret this provision of the Gila Bend Act in the first instance. Mandamus is not appropriate to decide such disputes.

C. The Secretary Must Determine Whether a Water Management Plan Can Be Developed Before the Glendale Parcel Can Be Taken into Trust

The Gila Bend Act requires the Secretary to establish a water management plan for all parcels acquired in trust for the benefit of the Nation under its authority. Pub. L. No. 99-503, § 6(e). The Glendale Parcel is located within the Salt River Valley Water Users' Association ("SRVWUA") water district area. Under the Association's articles of incorporation and other documents through which the Glendale Parcel would become member lands within the Association and be entitled to receive stored and developed water from the Salt River Federal Reclamation Project, such lands would be subject to a lien for the payment of annual assessments to cover the Association's operating costs. If the lien issue cannot be resolved, the Nation will be unable to enter into a service agreement with the SRVWUA and will have to find an alternative method of receiving water at the Glendale Parcel. This is significant for the Secretary because the Act expressly requires that a water management plan be established for the property if taken into trust. The problem here, however, is that factual and legal circumstances may make this a practical impossibility, potentially putting the Secretary in an untenable legal position if the land is taken into trust but no water management plan can be developed.

The Nation faced a similar issue in *Tohono O'odham Nation v. Phoenix Area Director*, 22 IBIA 220 (1992), Rossetti Decl. Ex. D., when it acquired the San Lucy Farms Property under the Gila Bend Act. In that case, the Central Arizona Irrigation and Drainage District also required that a lien be placed on all member property (those with service agreements) to secure payment of all charges assessed by the District for water delivery. *Id*. at 223. The Board concluded that the Gila Bend Act prohibited such restrictions on lands obtained under its authority and required the Nation to resolve the lien issue before the United States could take the land into trust. *Id*. at 235-237.

The Secretary (in coordination with the Nation) should be allowed to address and resolve such issues before the Glendale Parcel can be taken into trust under the Act. *See e.g., Danielsen v. Dole*, 746 F. Supp. 160, 170 (D.D.C. 1990).

D. The Secretary Should Be Allowed to Determine in the First Instance the Validity and Effect of Its May 31, 2000, Waiver Decision in the Context of the Glendale Parcel

On May 31, 2000, in connection with the Nation's attempt to purchase a parcel of property contiguous to the San Lucy Village under the Gila Bend Act, the Department purported to grant the Nation a broad waiver of the requirements that at least one area of land must be contiguous to San Lucy Village (increasing the number of parcel permitted under the Act from three to five) and that at least one parcel be contiguous to San Lucy Village.[10] The Community has engaged the Department in discussions regarding the validity of such a waiver, contending that the waiver's enormous breadth renders it invalid as a matter of law. Interior has yet to decide this issue.

[10] *See* Letter from Barry Welch, Acting Regional Director, to Edward Manuel, Chairman Tohono O'odham Nation (May 31, 2000). AR 000865-73.

Moreover, the number of parcels taken into trust under the Gila Bend Act is still in dispute at Interior. The Nation has made several purchases of land pursuant to the authority provided by the Gila Bend Act. First, in 1988, the Nation purchased Schramm Ranch (approximately 3,200 acres located in Pinal County), now known as San Lucy Farms, for $6.5 million.[11] On May 3, 1988, two warranty deeds were filed in the Pinal County Recorder's office for Schramm Ranch conveying the property to the "United States in trust for the Tohono O'odham Nation."[12] In 1991, the Nation submitted its first land-into-trust application under the Gila Bend Act for Schramm Ranch.[13] Several years later, after completing its evaluation of the Schramm property, the Department determined that the land met the provisions of the Act and placed it into trust.

Second, in early 2000, the Nation tried to fulfill the Act's requirement that it acquire at least one parcel of land contiguous to the San Lucy Village. The property sought, known as the "O'Brien Property," was owned by the Gila Bend Investment Group, Ltd. ("Group") and consisted of 1,181 acres. Because of a dispute over the fair value of the land, the Nation requested a waiver from the Secretary of the requirements in Section 6(d) of the Act, seeking permission to increase the number of parcels permitted under the Act and to waive the requirement that at least one parcel be contiguous to San Lucy Village.[14] On May 31, 2000, the

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[11] *Tohono O'odham Nation v. Phoenix Area Director*, 22 IBIA 220, 224 (Aug. 14, 1992). Rossetti Decl. Ex. B.

[12] *See* Memorandum from Field Solicitor to Area Director, Trust Status and Liability for Irrigation Assessments on San Lucy Farms (Formerly Schramm Ranch), at 5 (April 15, 1991). AR 000914.

[13] Nation Trust Application at 8. AR 000812.

[14] Letter from Chairman Edward D. Manuel to Secretary of the Interior, Bruce Babbitt (Jan. 25, 2000). Hereinafter "TO Waiver Request." AR 004130-38.

an Acting Regional Director purported to grant the waiver.[15] Subsequently, however, the Acting Assistant Secretary of Indian Affairs advised the Nation that questions had arisen about whether the Secretary had the authority to waive the contiguity requirement and whether the official who purported to waive the requirement had the delegated authority to do so.[16]

Third, in 2002 the Nation acquired contiguous parcels of land in Maricopa County that collectively constitute the "Painted Rock Property."[17] Following an unsuccessful effort to self-effectuate the United States' acquisition of that property in trust, the Nation formally requested that the Department place the Painted Rock Property in trust under the Gila Bend Act.[18]

Fourth, in October 2003 the Nation purchased 642.27[19] acres of land in Pima County, near Why, Arizona ("Why Property"), and although the land has ostensibly been taken into trust, the statutory basis for doing so is still unclear, and may ultimately depend on the Gila Bend Act. The Nation initially applied to the Department to place the Why Property in trust under the general authority in the Indian Reorganization Act, 25 U.S.C. § 465 ("IRA").[20] But while the application was pending, a statutory prohibition on such exercises of general authority to take lands into trust for the Nation became effective. *See* Title III of the Arizona Water Settlements Act ("AWSA"), Pub. L. No. 108-451, 118 Stat. 3536 (2004). Yet the United States proceeded to

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[15] *See* Letter from Barry Welch, Acting Regional Director, to Edward Manuel, Chairman Tohono O'odham Nation (May 31, 2000). AR 000865-73.

[16] Email from George Skibine to Heather Sibbison, Attorney for the Nation (Feb. 9, 2009). AR 004268-69.

[17] The parcels are known as the "Painted Rock Property" because they are along Painted Rock Road, just west of the Gila Bend, Arizona.

[18] Letter from Chairwoman Vivian Juan-Saunders to Superintendent, Papago Agency (March 31, 2006). AR 004264-66.

[19] By letter dated Sept. 24, 2007, Rosalynde Alexander, the Nation's Assistant Attorney General corrected the acreage of the Why Property from 635.18 to 642.27 acres.

[20] Letter from Vivian Juan-Saunders to BIA Papago Superintendent (Sept. 20, 2006). AR 004274-75.

accept title to the Why Property on February 24, 2009.[21] The acceptance and the subsequent filing of the deed both occurred more than a year after the enforceability date of Title III of AWSA. The Community has raised with Interior the issue of whether the Why Property trust acceptance rests on the Gila Bend Act rather than the IRA. If so, the Why Property may be the second parcel of land taken into trust under the Act, making the Glendale Parcel potentially the third. In that circumstance, the Secretary would have to determine whether the 2000 waiver (waiving the requirement that at least one parcel must be contiguous to the San Lucy Village) was and remains effective.

This Court should permit Interior to consider and resolve these issues through normal procedures. As the Nation's own recitation of the procedural history of its land-into-trust applications makes clear, periods longer than 14 months to decide such applications are hardly out of the ordinary. For example, according to the Nation (Br. at 9 & n.2), its pending application under the Gila Bend Act for the Painted Rock property was filed in 2006, and in February 2009 was still pending when the Nation asked Interior to defer action on the application. Pl's Mem. of Law in Supp. of Mot. for Summary Judgment (Dkt. 4-1) at 9 & n.2.[22] The Nation should not be allowed to short-circuit the normal processes at Interior as a means of thwarting the procedural rights of the Community and others to present legitimate challenges to its proposed gaming activities.

[21] *See* Memorandum from Papago Superintendent to Regional Director (Feb. 24, 2009). Rossetti Decl. Ex. C.

[22] See Letter from Ned Norris, Chairman Tohono O'odham Nation, to Western Regional Director (Feb. 13, 2009). AR 000703-04.

II. THE SECRETARY MUST RENDER AN IGRA ELIGIBILITY DETERMINATION BEFORE TAKING THE GLENDALE PARCEL INTO TRUST

"[G]aming regulated under IGRA may not be conducted on lands the Secretary acquired in trust for a tribe after October 17, 1988, unless one of the exceptions applies." *Citizens Exposing Truth About Casinos v. Kempthorne* ("*CETAC*"), 492 F.3d 460, 462 (D.C. Cir. 2007). And "the Secretary and the National Indian Gaming Commission, which administers IGRA, 25 U.S.C. § 2706(b)(10), [have] agreed that the Secretary is to determine whether a tribe meets one of IGRA's exceptions *when the Secretary decides to take land into trust for gaming.*" *Id.* at 462-63 (emphasis added). The act of taking lands into trust is not ministerial when those lands are to be used for gaming, because the Secretary must determine whether an IGRA exception applies. The Secretary's regulations accordingly require an assessment of the gaming eligibility of newly acquired lands in connection with land-into-trust applications. The Secretary is required to make such a determination in conjunction with his assessment of whether the Nation's land acquisition satisfies the requirements of the Gila Bend Act. Indeed, this matter was referred to the Assistant Secretary for Indian Affairs' Central Office in Washington, D.C. precisely because the Nation also was requesting an Indian lands determination under IGRA and its implementing regulations. This Court should not use its mandamus authority to facilitate the Nation's attempt to subvert the process of considering IGRA in applying the Gila Bend Act.

A. Interior Regulations Provide for the Orderly Coordination of IGRA Determinations and Land-Into-Trust Applications

The Secretary must make an IGRA determination under 25 C.F.R. § 292.3(b) before the Glendale Parcel is taken into trust. Section 292.3(b), the validity of which the Nation has not challenged, requires that the Nation make a request for a gaming determination in conjunction with ruling on the Nation's trust application for the Glendale Parcel. 25 C.F.R. § 292.3(b) provides, in pertinent part, that "[i]f the tribe seeks to game on newly acquired lands that require

a land into-trust application . . . the tribe must submit a request for an opinion to the Office of Indian Gaming." The regulation ensures that the Department's final agency action would provide litigants who seek judicial review with a meaningful opportunity to challenge final agency action based upon a complete record of administrative decision-making, including gaming eligibility, which would be critical to parties who could otherwise be foreclosed from challenging gaming eligibility determinations made after the trust acquisition.

The Department's land-acquisition guidelines also provide for the same process: "When the application indicates that the proposed acquisition falls within one of these [IGRA] exceptions, the Regional Director must provide documentation that the particular exception is applicable to the case. Copies of the enabling acts or legislation such as the settlement act, the restoration act, the reservation plan, the final determination of federal recognition and other documentary evidence relating to the tribe's history and existence must be included as part of the acquisition package. A legal opinion from the Office of the Solicitor concluding that the proposed acquisition comes within one of the above exceptions must be included."[23]

The Nation's attempt to withdraw its gaming determination request is nothing more than an attempt to circumvent these regulations. The Nation's stated purpose from the outset has been to acquire the Glendale parcel for gaming, and it should not be permitted to manipulate the agency process to avoid the regulations.

B. An IGRA Decision Is Needed to Prevent a *Fait Accompli*

The unmistakable purpose of the Tohono O'odham Nation's attempt to mischaracterize the Gila Bend Act as requiring only ministerial action is to make gaming on the Glendale parcel a *fait accompli* once lands are in trust. By purporting to withdraw its application for an IGRA

[23] Office of Indian Gaming, Checklist for Gaming Acquisitions, Gaming Related Acquisitions and IGRA Section 20 Determinations at 7 (Sept. 2007).

determination and seeking mandamus with respect to the trust lands decision, the Nation has telegraphed its intention to commence gaming on the parcel the moment it is in trust, without first being granted eligibility to do so under IGRA. This would have the effect, likely intended by the Nation in devising its procedural maneuvers, of impairing the Community's procedural recourse to prevent illegal gaming by the Nation. It would have the immediate effect of preventing interested parties from raising legitimate questions about the land's gaming eligibility *before* gaming commences. And, once gaming is ongoing, interested parties may have no forum to which they can go to obtain a legal determination on the gaming eligibility of the land. The Nation would almost certainly raise the defense of sovereign immunity to any action by a third party challenging the Nation's gaming activity. Indeed, the Nation can be expected to argue that after gaming has commenced, enforcement power under IGRA is the exclusive province of the Executive Branch through the Chairman of the Nation Indian Gaming Commission ("NIGC") and that no party could compel that agency to enforce IGRA. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (recognizing a "general unsuitability for judicial review of agency decisions to refuse enforcement"). Although the Community does not necessarily agree with such arguments, as a practical matter its ability to prevent gaming violative of IGRA would be seriously impaired by an order from this Court effectively severing the trust lands determination from IGRA considerations.

By contrast, if the normal process is followed, and Interior is allowed to make an IGRA determination at the same time it makes a decision on taking the land into trust, the Community's procedural rights would be preserved. In particular, the Community has consultation rights as a "nearby Indian tribe," as defined in 25 CFR § 292.2, with respect to the Glendale parcel. The mandamus order the Nation seeks would unjustifiably impair those rights.

C. The Secretary Has Not Yet Made an IGRA Determination

The Nation incorrectly cites non-authoritative statements by persons at Interior in an attempt to represent to the Court that Interior has already made an official determination that Gila Bend Act lands are exempt from IGRA's gaming prohibition under the "settlement of a land claim" exception. None of the statements the Nation cites support that proposition.

In January and February 1992, the Acting Realty Officer, Branch of Real Estate Services and the Field Solicitor summarily concluded, without analyzing the required factors under IGRA and relevant case law for Indian land determinations, that any lands acquired under the Gila Bend Act would qualify for gaming under IGRA. The January Memorandum from the Realty Office simply states:

> we believe that the Nation would not be restricted in establishing and conducting gaming activities because the land so acquired (to replace the Gila Bend Indian Reservation lands that were destroyed due to the construction and operation of Painted Rock Dam) would be considered to be part of 'a settlement of a land claim' of the exceptions to [IGRA].[24]

The February letter from the Field Solicitor is a one paragraph statement "concurring" in the Realty Office's conclusions without further analysis or explanation.[25] These cursory, conclusory statements by low-level agency officials are not authoritative or persuasive. Neither the Acting Realty Officer nor the Field Solicitor are authorized to make final gaming eligibility determinations. "All requests to acquire land in trust for gaming purposes" must have the

[24] Memorandum from Acting Area Realty Officer to Area Tribal Operations Officer at 3 (Jan. 24, 1992). AR 000937.

[25] Memorandum from Field Solicitor to Bureau of Indian Affairs Area Director at 1 (Feb. 10, 1992). AR 000939.

"approval/disapproval by BIA's Central Office after discussion with the Secretary of the Interior."[26]

Nor do these statements survive the new IGRA Section 20 regulations published by the Department late last year. *See* 73 Fed. Reg. 35,579 (June 24, 2008) (codified at 25 C.F.R. § 292). The so-called grandfather clause in the new Section 20 regulations provides:

> (a) These regulations do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations.
>
> (b) These regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw, or modify such opinions.

25 C.F.R. § 292.26 (a)-(b). Neither exception applies to the Nation's acquisition of the Glendale Parcel. The Nation admits that the Field Solicitor memoranda are not "final agency actions" as contemplated by the first part of the grandfather clause.[27] Rather, the Nation claims that the documents fall within the second part of the grandfather clause because the Nation has relied upon the legal opinion that the subject land is eligible for gaming. *Id.* That argument defies the plain text of the regulation, which specifically states that it applies only to previous agency opinions "for a *particular* gaming *establishment*." 25 C.F.R. § 292.26(b) (emphases added). As the Nation readily concedes, the 1991 and 1992 opinions were requests for land that "ultimately

[26] Memorandum from Secretary of the Interior to Assistant Secretary – Indian Affairs, Re: Policy for Placing Lands in Trust Status for American Indians at 2 (July 19, 1990). Rossetti Decl. Ex. D.

[27] Nation Trust Application at 16. AR 000820.

was never purchased."[28] That does not remotely qualify as a "particular" gaming "establishment."

Thus, neither this Court nor the Department can consider any previous memoranda on this subject as "grandfathered decisions" that have already decided the matter. In any event, the Department has the inherent authority to revisit the matter and analyze the matter under the new regulations.[29]

D. Interior Should Be Allowed to Address in the First Instance the Community's Argument that the Gila Bend Act Does Not Constitute Settlement of a Land Claim under IGRA.

The Community has argued before Interior that the IGRA exception the Nation has sought to invoke here—for "settlement of a land claim"—does not apply. Interior should be allowed to resolve this issue. The question before the Secretary is one of first impression: whether the term "land claim" in IGRA is limited to contested title claims, or whether it also includes compensation for flooding pursuant to a lawful flow easement. The Secretary should be allowed to decided this pending issue in the first instance, as it has been entrusted with the administration of the Gila Bend Act.

As the Community has argued before Interior, the hallmark of an Indian land claim is one in which an Indian tribe claims a right to a parcel of land, either by title or possession, against an adverse claim of title. *See*, 25 U.S.C. Chapter 19, §§ 1701-1778h (enacting 13 "land claim" settlements, each of which arose out of claims filed or asserted by Indian tribes alleging the illegal dispossession of their land and a possessory interest based upon superior title); *see also*

[28] Nation Trust Application at 16. AR 000820.

[29] The regulations also provide that the Department and the NIGC retain full discretion to qualify, withdraw, or modify any opinions that are deemed to fall within the grandfather. *See* 25 C.F.R. § 292.26(b). Even if the grandfather provisions were somehow applicable, the Department still would have the discretion to review the application *de novo* given its significant implications for the State of Arizona.

Wyandotte Nation v. Nat'l Indian Gaming Comm'n, 437 F. Supp. 2d 1193, 1208 (D. Kan. 2006) (a land claim must "include[] an assertion of an existing right to the land"); *Citizens Against Casino Gambling in Erie County (CACGEC) v. Hogen*, 2008 WL 2746566 (W.D.N.Y. July 8, 2008) (settlement of a land claim exception not satisfied because no enforceable claim to the land existed; "[t]he most that can be said is that the agreement . . . remedied an acknowledged unfairness"). The question is whether Congress has settled a claim of infringement of the *title* to the land founded on the premise that the Indian tribe has been *unlawfully* deprived of title to or dispossessed of its land.

Here, by contrast, the Nation was not unlawfully dispossessed of title to the Gila Bend Reservation. The government constructed a flood control project pursuant to Congressional authority and lawfully acquired a flowage easement over portions of the Gila Bend Reservation. Accordingly, the Gila Bend Act is not the enactment of a settlement of a land claim as contemplated by Section 20 of IGRA. Thus, an acquisition of 134 acres of land in Glendale under this Act would not qualify the land for gaming pursuant to this exception. Rather, to conduct gaming, the Nation would have to satisfy the "two-part" determination in Section 20, which requires the Secretary to conclude that the proposed gaming establishment would be in the best interests of the Nation and the Governor of the State of Arizona to concur.

In the legislative process leading to enactment of the Gila Bend Act, Congress made important changes to the bill that demonstrate that it went out of its way to prevent its being construed as a settlement of legal claims against the United States. Originally, the draft bill was titled the "Papago-Gila Bend Settlement Act," and the findings stated that "[i]t is the policy of the United States, wherever possible, to settle Indian land and water claims . . . ."[30] Before

[30] *See* S. 2105 and H.R. 4216, the prior legislative versions of what became the Gila Bend Act. AR 001524-39.

enactment, the bill's title was changed to the "Gila Bend Indian Reservation Lands Replacement Act," omitting any reference to settlement.[31] In like manner, the findings in the bill were revised to make no mention of land claims or of settlement of such claims; rather, the enacted findings provide that "[t]his Act will facilitate replacement of reservation lands with lands suitable for sustained economic use . . . ."[32]

The final House report accompanying the Gila Bend Act makes clear Congress's purpose in so modifying the findings section of the bill: "These findings replace those in the original bill which stressed the need to settle prospective O'odham legal claims against the United States as well as to provide alternative lands for the tribe. As such, they did not adequately reflect the principal purpose of the legislation – to provide suitable alternative lands and economic opportunity for the tribe." H.R. Rep. No. 99-851 at 9 (1986).

Further, Interior has issued regulations construing the statute, and it should be allowed to apply those regulations to the present case before any court review. With regard to the settlement of a land claim exception set out in Section 20(b)(1)(B)(i) of IGRA, the Secretary's regulations define a "land claim" as:

> any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:
>
> (1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;
>
> (2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and
>
> (3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

[31] Gila Bend Act § 2(4).

[32] Gila Bend Act § 2(4).

25 C.F.R. § 292.2.[33]

A recent application of this regulatory language to a claim of the Seneca Nation provides a stark contrast to the Tohono O'odham Nation's situation here. On January 20, 2009, the NIGC, with the specific concurrence of the Solicitor of the Department of the Interior, approved a site-specific gaming ordinance of the Seneca Nation based, in part, on the satisfaction of the settlement of a land claim exception under the new Section 20 regulations.[34] Although the primary focus of the opinion was that the land at issue was not subject to the Section 20 prohibition at all because the land was "restricted fee" and not "trust" land, the Department noted that the settlement of a land claim exception would nonetheless be satisfied because the Settlement Act in question resolved claims based upon 99-year leases that had been forced upon the Seneca Nation. In addition, the leases that were set to expire would have led to potential claims under the Trade and Intercourse Act for unlawful possession of Seneca Nation land.

According to the Department, "[w]hile the claims against the United States would seek monetary relief rather than actual possession of the lands, the claims are founded on the premise that the government *unlawfully* deprived the Seneca Nation of the possession of its land."[35] The Department also acknowledged that such dispossession clearly violated federal treaties with the Seneca Nation. *Id.* The Seneca decision is particularly instructive, because it is the only agency decision interpreting the new Section 20 regulations.

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[33] These new regulations, which became effective in August of 2008, are the Department's first regulations interpreting Section 20 of IGRA.

[34] *See* Letter from Philip N. Hogen, Chairman of the NIGC, to Barry Snyder, President of Seneca Nation of Indians (Jan. 20, 2009). AR 000943-64.

[35] Letter from David Longly Bernhardt, Solicitor, U.S. Department of the Interior (Jan. 19, 2009) (emphasis added). Rossetti Decl. Ex. E.

Thus, the key determination regarding whether a particular claim satisfies the definition of "land claim" in the Section 20 regulations (as well as the intent of Congress in enacting the exception) does not turn on whether Congress has addressed a situation in which an Indian tribe has suffered injury to its lands as a result of a lawful action by the federal government. Rather, the question is whether Congress has settled a claim founded on the premise that the Indian tribe has been *unlawfully* deprived or dispossessed of its land. This is an important distinction because it shows that 25 C.F.R. § 292.2 is not intended to encompass all claims relating to land, such as ones for injury to the land; rather, it encompasses only claims relating to the title or loss of possession thereof. At a minimum, it is far from clear and indisputable that compensation for injury to land is a "land claim" as Congress has employed that term of art in IGRA.

Here, the Nation was never unlawfully dispossessed of title to the Gila Bend Reservation, and its title to the Gila Bend Reservation was never in conflict with the United States' use and occupation of that land. Acting pursuant to a Congressional authorization to construct a flood control project, the Army Corps *lawfully* acquired a flowage easement over portions of the Gila Bend Reservation and never exceeded the scope of that easement in its operation of the dam. While flooding impaired a particular economic use of the land, the Nation had no claim to title that was in conflict with the right of the United States to take possession of the land in the form of a flowage easement. An injury to the Nation's land as a result of the lawful use of the flowage easement does not equate to unlawful loss of title or possession to the land. This is also evident in the limited waivers required in the Act. The Nation was required to waive only "claims of *water rights* or *injuries to land or water rights*." Gila Bend Act, § 9(a) (emphasis). The Act by its terms does not include claims to land or loss of land.

For these reasons, the Community has argued before the Secretary that the Gila Bend Act does not constitute a settlement of a land claim under IGRA and its regulations, 25 C.F.R.

§ 292.2. This Court should not deprive the Secretary of the opportunity to address these arguments in the first instance.

CONCLUSION

The Nation's motion for summary judgment should be denied.

/s/ James P. Tuite
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