QUESTIONS PRESENTED

I. Is there a "Circuit split" between the Ninth and Second Circuits regarding the scope and application of 25 U.S.C. § 81 so as to implicate this Court's certiorari jurisdiction?

II. Does the Dictionary Act alter the plain meaning of "Indian lands," as defined in 25 U.S.C. § 81, thereby expanding the scope and application of Section 81 to include contracts where no Indian lands actually exist?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent NGV Gaming, Ltd. states that it has no parent corporation, nor is there any publicly held company that owns 10% or more of its stock or equity interest.

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STATEMENT OF THE CASE

Proceedings Below

On September 20, 2004, NGV Gaming, Ltd. ("NGV" or "Respondent") filed District Court Case No. 3:04-CV-03955 SC (N.D. Cal.) against Harrah's Operating Company, Inc. ("Harrah's" or "Petitioner") and Upstream Point Molate, LLC ("Upstream") (collectively "Developers") for intentional interference with contractual relations. NGV sought money damages to redress the tortious conduct of Developers in having induced the Guidiville Band of Pomo Indians ("Tribe") to terminate its contracts with NGV for the development and construction of a proposed gaming facility on the Tribe's not-yet-acquired (nor identified) restored trust land in Northern California. (NGV's Excerpts of Record ("ER") Vol. I, pp. 1-14).[1]

Harrah's moved to dismiss NGV's complaint arguing, *inter alia*, that the contracts between NGV and the Tribe were invalid as a matter of law in that said contracts encumbered Indian lands and were not approved by the Secretary of the Interior as required by 25 U.S.C. § 81. (ER Vol. II, pp. 239-245). Harrah's contended that such void contracts could not support a claim of tortious interference under California law. NGV argued that Section 81 had no application to a

[1] ER Vol. I and II refer to the Excerpts of Record in District Court Case No. 3:04-CV-03955 and ER Vol. III refers to the Excerpts of Record in District Court Case No. 3:05-CV-01605. *See* Sup. Ct. R. 12.7.

contract that did not implicate already existing Indian lands and otherwise pertained solely to lands yet-to-be-acquired. *Id.* On January 31, 2005, the district court denied the motion to dismiss on the grounds that Section 81 appeared to apply only to contracts that encumber *existing* Indian trust lands. (ER Vol. II, pp. 243-244).

Thereafter, on April 15, 2005, the Tribe filed District Court Case No. 3:05-CV-01605 SC (N.D. Cal.) seeking a judicial declaration that the subject contracts were invalid. (ER Vol. III, pp. 1-17). The district court ordered the actions consolidated for purposes of discovery and motion practice.

On July 28, 2005, Developers and the Tribe moved in each case, respectively, for summary judgment. On October 19, 2005, the district court entered its Order and Judgment granting declaratory relief to the Tribe in Case No. 3:05-CV-01605 and dismissing NGV's complaint in Case No. 3:04-CV-03955. The district court held that Section 81 applied in the absence of existing lands in trust, thus expanding the scope of Section 81 beyond that determined by any other court and rejecting the reasoning of its January 31, 2005 ruling. NGV timely appealed.

On June 26, 2008, the Ninth Circuit reversed the grant of summary judgment in favor of Harrah's in Case No. 3:04-CV-03955 and vacated the declaratory judgment in favor of the Tribe, dismissing Case No. 3:05-CV-01605 for lack of subject matter jurisdiction. On August 13, 2008, Harrah's petition for rehearing

and rehearing *en banc* was denied with no judge of the Ninth Circuit requesting a vote. Pet. App. 63-64.

Facts

In January, 2004 Upstream was awarded an Exclusive Right to Negotiate by the City of Richmond, California in connection with a potential sale by the City of approximately 400 acres at Point Molate for the purpose of constructing a large Indian casino, shopping mall and hotel. (ER Vol. I, p. 7, ¶19 and p. 132; Vol. II, p. 253, ¶10). Acting through intermediaries, Upstream reached out to Harrah's in late March, 2004, to serve as the gaming and financial member of the project.

In early April, 2004, Harrah's requested that the Tribe become its Indian gaming partner at Point Molate. (ER Vol. II, p. 339:3-15; Vol. III, p. 6, ¶40). From the outset, Harrah's was fully aware of the Tribe's contractual relationship with "another developer/ investor" (referring to NGV). (ER Vol. II, pp. 326:7 to 327:16; pp. 328:14 to 329:11). Despite knowledge of the pre-existing contracts, Harrah's continued its tortious interference including, but not limited to, offering the Tribe a substantially higher monthly maintenance fee than NGV was paying, finalizing negotiations with the Tribe for a management and development agreement which required the Tribe to terminate its contracts with NGV, and agreeing to guarantee a Land Disposition Agreement between Upstream and the City of Richmond for the purchase

of Point Molate. (ER Vol. I, pp. 170-186 and Vol. II, pp. 332:21 to 333:7; p. 358:6-19; pp. 370:2 to 371:9). Throughout the four months of its negotiations with Harrah's, the Tribe continued to accept approximately $40,000 per month from NGV as monthly maintenance and caused NGV to expend considerable additional expenses in obtaining land to be placed in trust upon which the casino was to be built. (ER Vol. II, p. 293, ¶¶14-16).

In mid-June, 2004, Harrah's and the Tribe exchanged drafts of letters of intent. Harrah's requested that the Tribe make a false representation and warranty that the proposed agreements would not interfere with its existing contracts with NGV. When the Tribe balked at having to "warrant a lie," Harrah's required instead that the Tribe warrant its belief that the NGV contracts were "void or voidable" and provide indemnification (from the Tribe's share of future gaming revenues) in the event Harrah's was sued for tortious interference. (ER Vol. II, pp. 377:1 to 378:24; pp. 382:4 to 383:18).

In an effort to build support for the position that the NGV contracts were invalid, the Tribe approached the National Indian Gaming Commission ("NIGC") and the Bureau of Indian Affairs ("BIA") in June, 2004. (ER Vol. III, p. 7, ¶48; p. 11, ¶72). At this point, Harrah's and the Tribe had already exchanged letters of intent regarding their proposed venture which required the Tribe to terminate its relationship with NGV. (ER Vol. II, p. 369:3-25; pp. 370:2 to 371:9). Upon information and belief, the Tribe approached

these agencies with the explicit intent of having the agency disapprove the Tribe's pre-existing contracts with NGV. Harrah's apparently funded this effort by the Tribe's attorneys. (ER Vol. II, pp. 364:12 to 366:25).

On August 2, 2004, in furtherance of its obligations to Harrah's, the Tribe sent a letter to NGV announcing its decision "to rescind" the NGV contracts on a variety of grounds which were entirely pretextual. (ER Vol. I, p. 216). In the same month, Harrah's and the Tribe entered into a series of management/development contracts for an Indian casino at Point Molate. Petition at 8.

In March, 2007, while this case was pending in the Ninth Circuit, Harrah's and the Tribe terminated their agreements in secret without disclosing the termination to either NGV or the Court.[2]

SUMMARY OF ARGUMENT

The only question of substance presented by this Petition involves the interpretation of 25 U.S.C. § 81, not 1 U.S.C. § 1, the Dictionary Act (the "Act"). The latter is a tool of statutory construction, not a provision of substantive law. By the very nature of the Act,

[2] The Ninth Circuit found this concealment by Harrah's "most disturbing" since it impacted upon the jurisdictional concerns surrounding the Tribe's action for declaratory relief. *See* Pet. App. 11, n. 7.

its application will vary from case to case. "It [the Act] looks first to 'context,' and only if the 'context' leaves the meaning [of the underlying statute] open to interpretation does the [Act's] default rule come into play." *Guidiville Band v. NGV Gaming, Ltd.*, 531 F.3d 767, 776 (9th Cir. 2008). [Added.] It is not remarkable then that the Act impacts different substantive statutes differently. The degree of deference afforded the Act by the Ninth Circuit in *Guidiville* and, most recently, by the Second Circuit in *Catskill Development, LLC v. Park Place*, 547 F.3d 115 (2nd Cir. 2008), hardly evinces a "Circuit split" since the cases involved wholly separate and distinct provisions of Title 25. To be sure, both *Guidiville* and *Catskill* were correctly decided and are entirely consistent with each other.

Petitioner's dilemma is apparent. It can point to no reported decision, on any level, which conflicts with the decision below regarding the scope and application of Section 81. Instead, Petitioner mischaracterizes dictum in *Catskill* regarding the Dictionary Act as a "holding" in a futile effort to establish certiorari jurisdiction. Building on this confusion, Petitioner fabricates the vagaries of the Dictionary Act into a "policy crisis" between the Second and Ninth Circuits which simply does not exist. The Ninth and Second Circuits were dealing with fundamentally different contracts which were governed by separate statutes and reviewable by separate agencies. Both cases correctly interpreted the respective statutes at issue

and are easily reconciled with or without regard to the Act.

As the *Guidiville* majority correctly noted, "[t]his appeal presents the single, seemingly straightforward question whether the word 'is' really means 'is' at least as that word is employed in 25 U.S.C. § 81." *Guidiville* at 769. The majority, relying upon the "succinct directive" in several cited Supreme Court cases regarding statutory construction, found the language used in Section 81 "specific and unambiguous" in defining the term "Indian lands." *Id.* at 774-777. The majority further observed that its interpretation of the statute (limiting its application to only those contracts pertaining to *existing* Indian lands) was fully supported by the unworkability of a contrary construction, the agency's own policy under two administrations and the legislative history of Section 81. *Id.* at 777-781.

The Ninth Circuit held that Indian lands must actually and presently exist to require compliance with 25 U.S.C. § 81 regardless of whether the Dictionary Act is read against the definition of "Indian lands" in Section 81(a)(1). This is so, according to the *Guidiville* court, because either (1) the "contextual indicators" in Section 81 preempt application of the Dictionary Act's default rule of construction which would otherwise expand the definition of Indian lands beyond that which Congress intended; or (2) the definition of Indian lands in Section 81 is clear and

unambiguous and requires no extraneous interpretive tools.[3] *Id.* at 776-777.

REASONS FOR DENYING THE WRIT

The decision below regarding the scope and application of Section 81 does not conflict with any decision of this Court, any Court of Appeals or any state court of last resort. Moreover, Petitioner does not allege that the case involves an important question of federal law that has not been, but should be, settled by this Court. In essence, Petitioner merely argues that "the asserted error consists of . . . the misapplication of a properly stated rule of law" (*i.e.*, the Dictionary Act), a basis upon which a petition "is rarely granted." *See* Sup. Ct. 10. The Petition fails to establish "compelling reasons" for this Court to grant further review and, thus, the Petition for Writ of Certiorari must be denied.

[3] The outcome is the same whether the Dictionary Act is not considered at all because the statutory definition of "Indian lands" is clear on its face or the Act is considered but the contextual indicators in § 81 preempt the Act's default rule of construction.

I: There Is No Circuit Split Between The Ninth And Second Circuits To Support Certiorari Jurisdiction

Petitioner claims that the decision below is in "irreconcilable conflict" with the Second Circuit Court of Appeals decision in *Catskill Development, LLC v. Park Place*, 547 F.3d 115 (2nd Cir. 2008). (Petitioner is the consolidated defendant in *Catskill*.). Petitioner argues that the *Catskill* decision creates the requisite "Circuit split" with the case at bar upon which this Court's certiorari jurisdiction may be predicated. *See* Sup. Ct. Rule 10. Petitioner is flat-out wrong. A full and fair examination of *Catskill* and the Ninth Circuit's decision in this case completely negates any claim of a Circuit split. Both cases were correctly decided and are entirely consistent with one another.

A. *Guidiville* and *Catskill* Involved the Interpretation of Different Statutes

It must be underscored that *Catskill* did *not* involve the interpretation of 25 U.S.C. § 81 which requires Secretarial approval of those contracts that encumber Indian lands for seven or more years. It is the interpretation of Section 81, an issue not reached in *Catskill*, and not the Dictionary Act, that is at the core of this case. The Ninth Circuit held that absent existing Indian lands, Section 81 by its very terms simply does not apply. *Guidiville Band v. NGV Gaming,*

Ltd., 531 F.3d 767, 783 (9th Cir. 2008).[4] *Catskill*, on the other hand, involved the interpretation of the governing statutes relating to gaming management contracts, 25 U.S.C. §§ 2710(d)(9), 2711. The net effect of the governing statutes and the NICG's implementing regulations[5] is to require that agency's approval for management contracts[6] as a precondition to their validity without any consideration as to whether "Indian lands" exist. *See Catskill*, Pet. App. 81 *et seq.*

Unlike Section 81, on which the instant case turns, neither the governing statutes nor the implementing regulations for management contracts make any reference to Indian lands. This critical point was recognized by the Second Circuit:

> "To begin with, the NIGC's authority to approve management contracts does not appear to hinge on whether the contract relates to Indian lands. Neither the governing statutes relating to gaming management contracts, 25 U.S.C. §§ 2710(d)(9), 2711, nor the NIGC's implementing regulations, 25 C.F.R. §§ 533.1, 533.7* expressly require that a gaming contract relate to Indian lands for it to be

[4] References hereinafter to the *Guidiville* and *Catskill* opinions will be to the page in Petitioner's Appendix.

[5] *See* 25 C.F.R. §§ 533.1, 533.7 set forth in full at Pet. App. 81, n. 15.

[6] All agreements collateral to a management agreement must be approved by the NIGC as well. This would include all of Petitioner's agreements with the Tribe but *exclude* NGV's contracts. *See* 25 C.F.R. §§ 502.5, 502.15.

> subject to NIGC approval. Indeed, the absence of any mention of "Indian lands" in §§ 2710(d)(9) or 2711 stands in contrast to many of the surrounding statutory provisions, which are *expressly* limited in some way to Indian lands." [*Note omitted.]

Catskill, Pet. App. 81-82. Despite the different statutory provisions at issue in *Guidiville* and *Catskill*, Petitioner claims *Catskill* "conflicts" with *Guidiville* so as to trigger certiorari jurisdiction. In support, Petitioner relies solely upon qualified dictum in a footnote in *Catskill* regarding the Dictionary Act which was an alternative and non-essential basis for its holding.[7]

A more comprehensive review of the *Catskill* footnote upon which Petitioner relies reflects the acknowledgement by the Second Circuit that *Guidiville* involved a distinctly different statutory provision and, therefore, is readily distinguishable from *Catskill*. In that regard, the Second Circuit stated as follows:

[7] The *Catskill* court premised its holding, correctly, on the absence of any statutory requirement of there being "Indian lands" as a predicate to the operation of §§ 2710(d)(9) and 2711. The court then made cursory reference to the Dictionary Act in response to a hypothetical "Indian lands" requirement in the governing statutes at issue. All told, the Second Circuit devoted less than a dozen lines to a tangential discussion of the Dictionary Act. *Catskill*, Pet. App. 82. In contrast, the *Guidiville* majority committed nine full pages to a detailed and thorough analysis of the Act in the context of § 81. Pet. App. 15-24.

> "In *Guidiville*, the Ninth Circuit addressed the meaning of "is" in the context of 25 U.S.C. § 81's definition of Indian lands. The majority opinion concluded, in that context, that "is" should be given its literal meaning and that the Dictionary Act did not apply because the "context" in which the term was used appeared to indicate that Congress did not intend "is" to mean "will be." *Guidiville* is distinguishable insofar as it was interpreting § 81, which expressly pertained to encumbrances of "Indian land," rather than to management contracts. Moreover, in *Guidiville*, no land had yet been acquired or even identified for gaming purposes by either of the contracting parties. *To the extent these differences are not material to the Ninth Circuit's majority opinion*, we nevertheless agree with Judge Smith's dissenting view that transactions involving land that 'will be' held in trust trigger the agency's review authority, especially where specific land to be taken into trust is identified in the operative agreements." [Citations omitted.]

Catskill, n. 16, App. 82-83 [Emphasis added.]

Read in its full context, the footnote merely says that the Second Circuit *would* disagree with the *Guidiville* majority regarding the inapplicability of the Dictionary Act's default rule should the Ninth Circuit's opinion with respect to the scope of Section 81 be read to require existing Indian lands as a predicate to the NIGC approval requirement in

Sections 2710(d)(9) and 2711 for management contracts. However, the Ninth Circuit expressed no such opinion. *To the contrary*, the Ninth Circuit applied the *same* rule of law adopted in *Catskill* in determining that the management contract between Petitioner and the Tribe was void for lack of NIGC approval, despite the absence of Indian lands.[8] The Ninth Circuit held that the Tribe lacked subject matter jurisdiction to pursue its action for declaratory relief against Respondent where such jurisdiction had been premised on an indemnification obligation contained in its unapproved, and thus void, management contract with Petitioner. *See Guidiville*, Pet. App. 10-12.

The harmony between the Ninth and Second Circuit views is spelled out in the following footnote in *Guidiville*:

> "Because the Tribe's agreement with Harrah's was subject to a different statutory provision from the section [referring to § 81] applicable to the Tribe's agreement with NGV, such Section 2705(a)(4) [which refers back to §§ 2710(d)(9) and 2711] invalidity did not extend to the latter." [Added.]

Guidiville, n. 6. App. 10-12. Thus, it is evident that the Ninth Circuit would have concurred with the outcome in *Catskill* in voiding an unapproved management

[8] No Indian lands ever existed which were pertinent to either NGV's non-management contract or Petitioner's management contract with the Tribe.

contract regardless of whether Indian lands existed. Accordingly, the Second Circuit's explicitly contingent support for the dissent in *Guidiville* is of virtually no consequence.[9]

In sum, nothing in *Catskill*, by way of either its holding or essential reasoning, gives rise to any conflict with the Ninth Circuit's decision in *Guidiville*. Similarly, *Guidiville* is entirely consistent with, and supportive of, the outcome in *Catskill*. As this Court has often stated, "[w]e sit, after all, not to correct errors in dicta; 'this Court reviews judgments, not statements in opinions.'" *Bunting v. Mellon*, 541 U.S. 1019, 1023 (2004). [Citation omitted.]

B. There is No "Contractual or Regulatory Uncertainty" Arising From the Decisions of the Ninth and Second Circuits

Petitioner has made a transparent attempt to mislead this Court by using the functionally distinct contractual relationships identified in *Guidiville* and *Catskill* to confuse two entirely separate statutory

[9] Only the result and those portions of an opinion necessary for that result are binding; the rest is mere *obiter dicta*. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 (1996). *Catskill's* conditional support for the dissent in *Guidiville* is even less compelling than dicta since it was premised on an apparent misreading of the majority's view regarding management contracts. *Guidiville*, as well as *Catskill*, holds that management contracts not approved by the NIGC are invalid irrespective of whether trust lands exist. *Guidiville*, Pet. App. 10-11 and n. 6, 7.

schemes.[10] Petitioner ignores the fundamentally different character and focus of Section 81 from that of Sections 2710(d)(9) and 2711. The former provision governs the Interior Secretary's review and approval of contractual encumbrances upon Indian trust land, without regard to gaming. The plain language of the statute makes clear that such trust lands must be in existence as a predicate to such review. The latter provisions, which make no reference to trust lands, govern the authority and obligation of the NIGC to review Indian gaming management contracts without regard to whether "Indian lands" exist. *See Catskill*. Pet. App. 81-82.

The respective provisions are administered by entirely separate federal entities. In the case of Section 81, it is the Secretary of the Interior; in the case of Sections 2710 and 2711, it is the NIGC which is outside the jurisdiction of the Department of Interior.

Each agency has already interpreted the statutes within its jurisdiction in a manner fully supportive of

[10] Petitioner misstates the record when it says, referring to *Catskill* and *Guidiville*, that "[e]ach case involved contracts that implicated Indian trust lands." Pet. App. 13. By their nature, management contracts do *not* implicate trust lands but nonetheless require NIGC approval under §§ 2710(d)(9) and 2711. This was the holding in both *Guidiville* and *Catskill*. Non-management, development contracts may implicate Indian lands and require Secretarial review under § 81 but only if such Indian lands presently exist, as *Guidiville* held and *Catskill* did not contradict.

the decisions in *Guidiville* and *Catskill*.[11] No "uncertainty for the pertinent federal agencies" exists as alleged by Petitioner. *See* Petition at 15. Nor is there any basis for Petitioner to allege that contracting tribes and developers will labor under "contractual uncertainty" in the wake of *Catskill* without intervention by this Court. *See* Petition at 14. Neither *Guidiville* nor *Catskill* suggest, let alone hold, that management contracts require approval by the NIGC only if "Indian lands" actually exist. In fact, *both* cases hold just the opposite. As a practical matter, management contracts are almost always drafted and executed in advance of Indian lands being obtained and routinely acknowledge the necessity of NIGC approval as a condition precedent to their enforceability. Petitioner's own management contract with the Tribe for the ill-fated Point Molate project is a perfect example. *See* Pet. App. 10-11 and n. 6, 7. By its terms, Petitioner's management contract acknowledged the need for NIGC approval even though no land in trust existed. *Id.*; Appellant's Reply Brief pp. 3-4.

[11] In a letter dated April 13, 2005, the BIA set forth its policy that a § 81 review occurs only when there is actual land in trust as opposed to "the possibility of acquiring actual trust lands." *Guidiville*, Pet. App. 81. This policy was confirmed by the Affidavit of Kevin Gover, the former Assistant Secretary for Indian Affairs. *Id.*; *see also* n. 17, *infra*. Management contracts and agreements collateral to such management contracts are reviewed by the NIGC without regard to whether trust lands currently exist. *Catskill*, Pet. App. 85, 90-94. *Guidiville*, Pet. App. 10.

Petitioner's concern about "unscrupulous developers [attempting] to evade federal agency review and take advantage of Indian tribes . . . " is entirely overwrought. Petition at 16. As the *Guidiville* majority noted:

> "[A]ny concern that NGV was trying to game the system by executing its contract with the Tribe before transferring land into trust is wholly unfounded. Instead any *later* effort to take lands into trust triggers an extensive review process by the Secretary – a review that is far more meaningful than any Section 81 proceeding that would deal with not-yet-identified lands that might be taken into trust in the future, because a Section 465 proceeding addresses the suitability of a *specific* parcel of land in *all* respects, rather than a totally speculative process that is necessarily involved when a presently unknown future acquisition is sought to be made the subject of an attempted analysis."[12]

Pet. App. 21 [emphasis in original]; *see also* n. 17, *infra*.

Petitioner's concern about unscrupulous developers is also hypocritical. Petitioner was sharply chastised by the Ninth Circuit for concealing from both

[12] 25 C.F.R. § 84.004(a) states that "contracts and agreements otherwise reviewed and approved by the Secretary under this title or other federal rule or regulation – do not require Secretarial approval under this part [the regulations referring to Section 81]." [Added.]

the Court and Respondent the fact that it had terminated its original agreement with the Tribe some seven months prior to oral argument. *See* Pet. App. 11, n. 7. As the Court noted, it was the terminated contract (containing the "indemnification obligation covering NGV's claims against Harrah's," *Id.* at 10) which served as "the peg on which the Tribe sought to hang its jurisdictional hat." *Id.* at 11, n. 7. The Court went on to reject any jurisdictional bootstrapping by a "new indemnification obligation as part of an agreement to terminate [the Tribe's] already void contract with Harrah's – *an indemnification promise that is wholly lacking in consideration and is hence itself invalid.*" *Id.* at 11. [Emphasis added.] The real irony is that although NGV has fully released the Tribe from any liability, Harrah's continues to hold the Tribe hostage to an invalid indemnification agreement. *Id.* at 10-11.

II: The Dictionary Act Does Not Alter The Plain Meaning Of "Indian Lands" As Used in 25 U.S.C. § 81

The *Guidiville* court correctly determined that the Dictionary Act does not alter the meaning of 25 U.S.C. § 81 with respect to the definition of the term "Indian lands." The Act states, *inter alia*, that "[i]n determining the meaning of any Act of Congress, *unless the context indicates otherwise* . . . words used in the present tense include the future as well as the present." [Emphasis added.] Petitioner focuses on the word "is" in Section 81(a)(1): "Indian lands means

lands the title to which *is* held by the United States in trust for an Indian tribe. . . ." [Emphasis added]. In effect, Petitioner argues that the word "is" should be construed to mean the future tense as well, so as to expand the definition of Indian lands to include lands the title to which *may, in the future, be held* by the United States in trust for an Indian tribe.

In light of Section 81's unambiguous definitional language and its "contextual indicators" under *Rowland v. California Men's Colony*, 506 U.S. 194, 211 (1993), such an expansion is neither permissible nor practical.[13]

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[13] Contrary to Petitioner's hyperbolic claim that the opinion below "essentially reads out of existence the Dictionary Act's present-tense-equals-future-tense rule," *see* Petition at 14, the majority carefully applied the "unless-the-context-indicates-otherwise-qualification" contained in the Act in reaching its conclusion. *See Guidiville*, Pet. App. 15-24. In its original brief to the Ninth Circuit, Harrah's failed to even cite the Dictionary Act as grounds to expand the scope of § 81. The Court of Appeals raised the issue *sua sponte* and requested both sides submit supplemental briefs on the application of the Act. *Id.* at 15, n. 8. The majority then devoted nine pages of its opinion to discussing the Act and the relevant "contextual indicators." Surely, it cannot be said that the majority ignored or failed to apply the Act; instead, the Court applied the Act's directive to first consider the "context" of the statutory language at issue before deciding whether to apply the Act's default rule of construction. *See id.* at 15-24.

A. By Its Own Terms, The Dictionary Act Does Not Impact Section 81

The Dictionary Act excludes from the operation of its rules any Act of Congress where the "context [of such Act] indicates otherwise." The term "context" means "the text of the Act of Congress surrounding the word at issue, or the text of other related Congressional Acts, and this is simply an instance of the word's ordinary meaning. . . ." *Rowland* at 199.

The use of the word "indicates" as contemplated by the Dictionary Act broadens the meaning of "context." *Id.* at 200. "The Dictionary Act's very reference to contextual 'indication' bespeaks something more than an express contrary definition, and *courts would hardly need direction where Congress had thought to include an express, specialized definition for the purpose of a particular Act. . . .*" *Id.* [Emphasis added.] The true purpose of the "qualification 'unless the context indicates otherwise' . . . [is] in excusing the court from forcing a square peg into a round hole." *Id.* The term "indicates," according to *Rowland*, "certainly imposes less of a burden than, say, 'requires' or 'necessitates.'" *Id.* No more is needed "to excuse the poor fit" of the rule than "a contrary 'indication' [which] may raise a specter short of inanity, and with something less than syllogistic force." *Id.* at 200-01.

Section 81(b) states: "[n]o agreement or contract with an Indian tribe that encumbers Indian lands for a period of 7 or more years shall be valid unless that agreement or contract bears the approval of the

Secretary. . . ." Thus, the statute requires at least two threshold elements be established: first, the existence of an "Indian tribe" with which the agreement or contract was made and, second, the existence of "Indian lands" which the agreement or contract encumbers for 7 or more years.

Section 81(a)(2) incorporates by reference 25 U.S.C. § 450b(e) which defines "Indian tribe" as "any Indian tribe, band, nation, or other organized group or community . . . which *is recognized* as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." [Emphasis added.] Certainly, no credible argument can be made that any such band or group which lacks present federal recognition would qualify as an Indian tribe under Section 450b(e) or Section 81(a)(2). It would be a tremendous regulatory burden to require oversight of contracts with groups not having status as a federally recognized tribe.

By using the present tense, "is recognized," Congress made explicitly clear that such tribal status must presently exist as a predicate to the application of Section 81(b) regarding an "agreement or contract with an Indian tribe." Similarly, in Section 81(a)(1), Congress chose to use the same present tense in defining "Indian lands" as "lands the title to which *is held* by the United States in trust for an Indian tribe. . . ." [Emphasis added.] This similarity is telling. Where "Congress used the *same* tense in both elements, we give both the same temporal reach, absent some reason to do otherwise." [Emphasis in

original.] *United States v. Jackson*, 480 F.3d 1014, 1020-21, n. 11 (9th Cir. 2007) ("conjoined use of present tense verbs informs statutory interpretation").[14] There is no reason to alter the temporal reach of the term "is held" (referring to Indian lands) from the obvious temporal reach of the term "is recognized" (referring to Indian tribes) both of which appear in the same subsection of Section 81. Both elements must presently exist before requiring compliance with Section 81(b). "We should not read in a temporal distinction Congress failed to make." *Id.* at 1021.

The issue of when such Indian lands must exist has been addressed in another section of Title 25. 25 U.S.C. § 2710(d)(3)(A) is a "related congressional Act" under *Rowland* and, therefore, its text is relevant in determining the context of the language at issue in Section 81.[15] That section provides that "[a]ny Indian tribe having jurisdiction over Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the state in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State Compact governing the conduct of gaming activities." Should

[14] This Court has recognized that verb tense as used by Congress is important in construing statutes. *See, e.g. United States v. Wilson*, 503 U.S. 329, 333 (1992); *Otte v. United States*, 419 U.S. 43, 49-50 (1974); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 63-64, n. 4 (1987).

[15] Unlike §§ 2710(d)(9) and 2711 which deal with gaming management contracts and which were at issue in *Catskill*, § 2710(d)(3)(A) specifically references "Indian lands" as does § 81.

the state fail to enter into such negotiations, Section 2710(d)(7) provides the tribe with a series of remedies, including the right to initiate an action against the state in the district court. In order to bring such an action, however, the tribe must show that it has Indian lands at the time of filing. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616 (6th Cir. 2002). The rights and remedies under Section 2710(d) do not apply in the absence of existing Indian lands. *Id.* at 617-18. Similarly, Section 81 does not apply in the absence of existing Indian lands.

Guidiville quoted with approval the decision and reasoning of the Sixth Circuit in *Match-E-Be* as to why Indian lands must actually exist at the time of the action, as opposed to in the future:

> "Under § 2710(d)(3)(A), it is clear that the State does not have an obligation to negotiate with an Indian tribe until the tribe has Indian lands. The purposes of this requirement appear to be to ensure that the casino will be inside the borders of the State, to give the State notice of where it will be, and to require the tribe to have a place for the casino that has been federally approved. If the Indian tribe does not have any land in the State that can be used for a casino, why should the State waste its time negotiating about such a casino? In the absence of a location, the State would have no way to assess the environmental, safety, traffic, and other

problems that such a casino could pose." 304 F.3d at 618.

Guidiville, Pet. App. 22.

This analysis was also adopted in *Mechoopda Indian Tribe of Chico Rancheria, California v. Schwarzenegger*, 2004 U.S. Dist. LEXIS 8334 (E.D. Cal. 2004). There, unlike the case at bar, the tribe already owned in fee simple a 645 acre parcel for which a fee-to-trust application was pending before the Secretary. Nonetheless, the case was dismissed on the grounds that the tribe failed to establish the existence of Indian trust lands at the time of filing its action. "The statute's use of the present tense denotes current jurisdiction over Indian lands." *Id.* at *15. The same bright line exists in Section 81 which shares a common operational predicate of existing "Indian lands" with Section 2710(d)(3)(A).[16]

Here, the Secretary would be faced with an even greater difficulty in reviewing a contract allegedly encumbering land where no Indian land had ever been acquired or identified, let alone taken into trust. It would require the Secretary to make a determination as to whether to approve such a contract in the absence of any information regarding, for example, the size and cost of the parcel, its character and location, financing considerations, the demographics

[16] In contrast, § 2710(d)(9), which governs management contracts, and which was the focus in *Catskill*, does *not* require there to be existing "Indian lands" as an operational predicate.

and needs of the community as well as critical environmental issues. *See generally*, 25 C.F.R. Part 151.

The National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370, and its supporting regulations, 40 C.F.R. Parts 1500-1518, mandate that federal agencies consider the environmental impact of their decisions. NEPA requires that "to the fullest extent possible . . . all agencies of the Federal Government shall . . . include in every recommendation or report on proposals for . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on . . . the environmental impact of the proposed action." 42 U.S.C. § 4332(C); 40 C.F.R. § 1502.3; *see Concerned Rosebud Area Citizens v. Babbitt and Gover*, 34 F. Supp. 2d 775 (D.D.C. 1999) (Section 81 approval is "major federal action" requiring Secretary's compliance with NEPA). It would be impossible for the Secretary to discharge her obligations under federal environmental law in the absence of any information concerning the "hypothetical parcel" to which the subject contracts pertained. *Mechoopda* at *19.

The fact that Section 81 is entirely silent as to how the Secretary might go about these enigmatic tasks in a vacuum of information about the unidentified parcel "indicates that Congress simply was not thinking in terms of" such an expanded definition of "Indian lands." *Rowland* at 207 (failure of Congress to address how courts are to determine the "inability to pay" standard applicable to artificial entities is

indicative of congressional intent to limit *in forma pauperis* status to natural persons).

In deciding whether a statute's contextual indicators should preempt application of the Dictionary Act's default rule, Justice Kennedy stated that it is "permissible to ask whether the broad Dictionary Act definition is compatible with a workable construction of the statute." *Rowland* at 212 (Kennedy, J., *dissenting*). Ignoring the contextual indicators and robotically applying the Act's default rule of construction would result in a totally unworkable construction of Section 81. Petitioner invites the regulatory nightmare that would surely ensue if Section 81 were to apply in the absence of identified or presently existing Indian lands. In such a circumstance, the Secretary could not make an informed judgment about whether to approve such a contract nor could she comply with her obligations under NEPA.

As the Ninth Circuit observed, "given these very practical concerns, it is no wonder that the Bureau's policy has been to review contracts under Section 81 only when they involve lands currently held in trust by the United States." *Guidiville*, Pet. App. 23.[17]

[17] The NGV contracts would be reviewed by the Secretary as part of the fee-to-trust process under 25 C.F.R. Part 151 as to whether her discretion should be exercised in accepting the subject property in trust for the benefit of the petitioning tribe pursuant to 25 U.S.C. § 465. Under 25 C.F.R. § 151.11, the Secretary is authorized to undertake a comprehensive review "in evaluating tribal requests for the acquisition of lands in trust

(Continued on following page)

B. Dictionary Act Does Not Apply To An Explicit And Unambiguous Statutory Definition

The Act is a "default" rule of construction which applies in the absence of a statute-specific definition.

status when the land is located outside of and non-contiguous to the tribe's reservation . . . " During that process, "where the land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use." 25 C.F.R. § 151.11(c).

The interplay between § 81 and Part 151 is set forth in the Affidavit of Professor Kevin Gover, who served as Assistant Secretary for Indian Affairs under President Clinton, which the Ninth Circuit quoted with approval: "Gover attests that during his tenure from late 1997 to early 2001, 'it was not the [Bureau's] policy or practice to review contracts to determine whether such contracts fall within the scope of 25 U.S.C. § 81(b) . . . in the absence of the existence of trust lands.' Instead, in cases 'where the purpose of the contract between a developer and a tribe [was] to assist the tribe in acquiring real property, and petitioning the United States to accept title to such property in trust for the benefit of the tribe,' the Bureau's review would be done pursuant to the regulations implementing Section 465. As Gover put it: '[t]he Secretary's acceptance of title to the subject property in trust for the petitioning tribe subsumes all approvals required under Federal law.'" *Guidiville*, Pet. App. 23-24.

"The power of an administrative agency to administer a Congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) [citation omitted]. "[T]he courts must respect the interpretation of the agency to which Congress has delegated the responsibility for administering the statutory program," *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987) [citations omitted], unless that interpretation is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron* at 844.

Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 470 (2002) (Stevens, J., *dissenting*).[18] The term "Indian lands," however, is specifically defined in the amended version of Section 81, a notable difference from the prior version which contained no definition. "[O]rdinary rules of construction would prefer the specific definition over the Dictionary Act's general one." *Rowland* at 200. No claim is made by Petitioner that Section 81's definition of Indian lands is ambiguous or that its literal interpretation would lead to "absurd results." *Id.*

Despite Petitioner's attempt to expand Section 81 beyond its literal meaning, it is clear that "the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Barnhart* at 450 [citations omitted]. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 461-62 [citations omitted].

"[T]he rules of construction contained in 1 U.S.C. § 1 are to be applied only 'where it is necessary to carry out the evident intent of the statute.'" *Sears, Roebuck v. Charles W. Sears Real Estate, Inc.*, 686

[18] The *Barnhart* majority eschewed the dissent's resort to such default rules in construing the similarly explicit statutory definition at issue there. 534 U.S. at 461-62.

F. Supp. 385, 387 (N.D.N.Y. 1988), *quoting First Nat'l Bank v. Missouri*, 263 U.S. 640, 657 (1924). The "evident intent" behind Section 81, as amended, and its predecessor, is clear. Section 81 "is predicated upon the trust relationship between Indian Tribes and the federal government" and to extend the statute "to land that was not trust land 'would force the Secretary to exercise a trust responsibility with respect to lands over which Congress' has no trust obligation." *Forrest Associates v. Passamaquoddy Tribe*, 719 A. 2d 535, 539 (Me. 1998), *quoting Penobscot Indian Nation v. Key Bank of Maine*, 112 F.3d 538, 553 (1st Cir. 1997); *see also United States ex rel. Yellowtail v. Little Horn State Bank*, 828 F. Supp. 780, 787 (D. Mont. 1992) (government's only interest in overseeing certain land related agreements with Indians flows from its duty as trustee of existing tribal lands).

C. Legislative History Supports Literal, Non-Expansive Interpretation of Section 81

Congress was undoubtedly aware of the case law applying Section 81 to contracts which related to *existing* Indian lands at the time of the March, 2000 amendment. Nothing in the legislative history[19]

[19] While not strictly a part of the "context" of a congressional act under *Rowland's* analysis of the Dictionary Act, 506 U.S. at 199, legislative history is a time-honored tool of statutory construction. *See generally Guidiville*, Pet. App. 24 *et seq.*

suggests that Congress was broadening the statute to encompass contracts pertaining to non-existent, hypothetical future trust lands. In fact, the opposite is true as observed by the *Guidiville* majority in limiting its interpretation of the word "is" in Section 81 to its literal, present tense meaning. "Our literal reading of Section 81 is further corroborated by the statute's legislative history." *Guidiville*, Pet. App. 24. According to the Committee Reports, the amendment's "definition of Indian lands is intended to circumscribe the scope of this statute to those lands where title *is held* in trust for a tribe or a restraint on alienation *exists* as a result of the principle, dating from the Revolutionary War Era, that the federal government *must hold* title to Indian lands in furtherance of the federal-tribal trust relationship." 1999 Committee Reports, September 8, 1999, 106 S. Rpt. 150, p. 7 (1999). [Emphasis added.][20] "[C]ertainly, the most recent amendment to that statute makes clear that Congress now considers self-determination – not paternalism – to be in the Indians' best interests. And that goal is more directly advanced by a literal rather than a non-literal reading of Section 81." *Guidiville*, Pet. App. 27.

Clearly, if Congress had intended to expand the reach of Section 81 at the time of the amendment, "it

[20] The Committee Reports note that the amendment "would reduce the number of contracts the department has to review each year [and] . . . would reduce costs for BIA. . . ." 106 S. Rpt. 150, p. 12 (1999).

could have used language more obviously targeted to addressing the temporal reach of that section," *Martin v. Hadix*, 527 U.S. 343, 354 (1999), and not merely relied upon the Dictionary Act. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006) [citation omitted].

Petitioner has not given this Court sufficient reason to deviate from the wisdom of Oliver Wendell Holmes: "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004), *quoting Roschen v. Ward*, 279 U.S. 337, 339 (1929) (Holmes, J.).

In sum, the Act has no effect upon the interpretation of Section 81 with respect to the word "is" or the definition of "Indian lands." As the Ninth Circuit correctly concluded, there is no reason to resort to the "Dictionary Act's default rules of statutory construction [where] the context here clearly indicates that Section 81 is limited only to reviewing those contracts involving presently held trust lands." *Guidiville*, Pet. App. 24.

CONCLUSION

Petitioner has not met its burden to establish any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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