–FINAL–

NO ORAL ARGUMENT DATE HAS BEEN SET

No. 16-5327

IN THE

United States Court of Appeals for the District of Columbia

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF INTERIOR, ET AL.

Defendants-Respondents.

On Appeal from the United States District Court for the District of Columbia, No 12-cv-02039-BAH
(Honorable Beryl A. Howell)

REPLY BRIEF FOR PLAINTIFF-APPELLANT PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS

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GLOSSARY

IGRA	Indian Gaming Regulatory Act
JA	Joint Appendix
Madera Site	305-Acre Parcel of Land
North Fork	North Fork Rancheria of Western Mono Indians
Picayune	Picayune Rancheria of Chukchansi Indians
Secretary	Secretary of the United States Department of the Interior
Stand Up!	Plaintiff Stand Up For California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God-Madera and Dennis Sylvester
The Department	The Department of Interior

INTRODUCTION

In this Appeal, the Picayune Rancheria of the Chukchansi Indians ("Picayune") challenged the Secretary of the United States Department of the Interior's ("Secretary") decision under the Indian Gaming Regulatory Act, 25 U.S.C. 2701, et. seq. ("IGRA"),to take the Madera Site into trust for gaming purposes on two bases: (1) that the underlying and necessary Secretarial two-part determination was arbitrary, capricious and otherwise contrary to the law; and (2) that a California intermediate court of appeal determined the gubernatorial concurrence that was necessary to make the Secretarial two-part determination for the Madera Site effective, was invalid as a matter of California law. The Secretary and the North Fork Rancheria of Western Mono Indians ("North Fork") responded to Picayune with there primary arguments: (1) the Secretary's two-part determination for the Madera Site was reasonable because his interpretation of the applicable regulations is due controlling deference; (2) that Picayune is precluded from raising any issues concerning the invalidity of the gubernatorial concurrence with the Secretary's two—part determination; and (3) the California Fifth District Court of Appeals Decision in *Stand Up for California! v. State*, 6 Cal.App.5th 686 (Cal.Ct.App. 2016, review granted 290 P.3d 781 (2017))("*Stand Up v. State*") in which the Court ruled the governor's concurrence with the Secretarial two-part

determination was invalid is irrelevant to the Secretary's trust decision for various reasons.

SUMMARY OF ARGUMENT

The Secretary's and North Fork's claims that the Secretary's two-part determination concerning the Madera Site and his decision to take the Madera Site into trust for gaming purposes was lawful is incorrect for the following reasons:

(1) The Secretary's two-part determination for the Madera Site was based on an interpretation of the applicable regulations that is inconsistent with the language, and purpose of the regulations, and therefore was arbitrary, capricious, and contrary to the law.

(2) The Secretary's decision to take the Madera Site into trust for gaming purposes was arbitrary, capricious, and contrary to the law, because it was based on the arbitrary and capricious two-part determination and a required gubernatorial concurrence that was declared invalid in *Stand Up v. State, supra*—a case which remains binding on California and North Fork.

(3) Picayune is not precluded from raising arguments concerning the invalidity of the gubernatorial concurrence, but North Fork is precluded from asserting that the concurrence is valid.

ARGUMENT

I. The Secretary's Two-Part Determination Was Inconsistent With the Relevant Regulations.

In defense of the Secretary's September 2, 2011, Record of Decision for his two-part determination, the Secretary and North Fork make two general arguments: (1) under the Secretary's interpretation of the applicable regulations, Picayune is not part of the "surrounding community"and therefore the Secretary was not required to consider detrimental impacts on Picayune; and (2) that Secretary's determination that Picayune would not suffer detrimental harm was reasonable and based on evidence within the record. The Secretary's and North Fork's arguments misinterpret the plain language and purpose of the applicable regulations. Additionally, their arguments impermissibly supply a rationale for the Secretary's determination of the detriment that Picayune would suffer that the Secretary did not address in the portions of the Record of Decision dealing with Picayune. Finally, the Secretary and North Fork ignore that the Secretary's evaluation of the detriment to Picayune ad hoc and devoid of any identifiable standards.

A. Picayune Was Part of the Surrounding Community Under CFR 292.4.

25 C.F.R. section 292.2, defines "Nearby Indian Tribe" as "an Indian tribe within a 25-mile radius of the location of the proposed gaming establishment, or, if

the tribe has no trust lands, within a 25-mile radius of its governmental headquarters." However, the regulations make clear, "a nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure, or services will directly, immediately and significantly be impacted by the proposed gaming establishment. 25 C.F.R. § 292.2. A nearby Indian tribe outside the applicable 25-mile radius that makes a requisite showing of impact will then be included in the "consultation process" along with other members of the "surrounding community." *Id.*

The Secretary and North Fork effectively admit that Picayune rebutted the 25-mile radius rule and that the Secretary, therefore, included Picayune in the consultation process.[1] However, the Secretary (at 49-50) and North Fork (at 23)

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[1] North Fork (at 23) fully admits that the Secretary granted Picayune's petition for consultation. The Secretary (at 50) is somewhat more oblique in its recognition stating that "[a]lthough Picayune did not submit did not formally file such a petition [for consultation], the Secretary nonetheless included Picayune in the consultation process. To the extent the Secretary intended to imply that a specific form of petition was necessary there are few, basic problems with the Secretary's position. Initially, although the regulations mention a "petition" for consultation, they do not specify any particular process a petitioner must follow to register its request with the Secretary. *See* 25 C.F.R. § 292.2. Likewise, outside detailing the necessary impact a petitioner will suffer from the proposed off-reservation gaming facility, the regulations do not dictate the use of a specific form for a petition for consultation. *Id.* Finally, as a matter of logic and regulatory compliance, the mere fact that the Secretary included Picayune in the consultation process means that the Secretary granted Picayune's petition for consultation after determining that Picayune

including Picayune in "consultation process" did not convert Picayune to a member of the "'surrounding community' that the Secretary must avoid detrimentally impacting ...." The Secretary's (at 51) and North Fork's (at 24) primary justification for this position is that Secretary's interpretation of the regulations to exclude petitioning Indian tribes from the "surrounding community" is reasonable and must be given deference. The Secretary and North Fork are wrong. The Secretary's interpretation was not reasonable, and it is not due deference.

An agency's interpretation of its own regulations only receives deference when the interpretation is consistent in language and intent of regulations. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994). As the Supreme Court explained:

> [A]n "agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation. In other words, we must defer to the Secretary's interpretation *unless an "alternative reading is compelled by the regulations plain language or by the indications of the Secretary's intent at the time of the regulation's promulgation.*

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successfully established that gaming at the Madera Site would "directly, immediately, and significantly impact[]" Picayune's "governmental functions, infrastructure or services[.]" *Id.* Otherwise, without a petition or the requisite finding of impact, the regulations did not allow for Picayune's inclusion within the consultation process. *Id.*

Thomas Jefferson Univ., 512 U.S. at 512 (internal quotations and citations omitted, emphasis added). Thus, the Supreme Court routinely rejects interpretations that are contrary to the statement of basis and purpose of the regulations at issue. *See e.g., Coer Alaska, Inc. v. Se: Alaska Conservation Council*, 557 U.S. 261, 287-291; *Talk America, Inc. v. Michigan Bell Telephone Co.*, 564 U.S. 50, 59-64 (2011).

Here, the Secretary's interpretation of the IGRA implementing regulations so as to exclude Picayune from the definition of "surrounding community" is inconsistent with the regulations and the Department of Interior's explanation of the purpose of the regulations. Therefore, for the reasons discussed immediately below, the Secretary's interpretation of the regulations such that the regulations allowed him to exclude Picayune from the "surrounding community" and "accorded lesser weight" the detrimental impacts Picayune would suffer receives no deference. *Thomas Jefferson Univ.*, 512 U.S. at 512. Rather, the Secretary's ad-hoc result driven interpretation must be rejected because it is arbitrary, capricious, and contrary to law.

The applicable regulations define "nearby Indian tribe" as:

> … an Indian tribe with tribal lands located within a 25-mile radius of the location of the proposed gaming establishment, or if the tribe

> has no trust lands, within a 25-mile radius of its governmental headquarters.

25 C.F.R. § 292.2. The Department explained that the definition of "nearby Indian tribe" was intended to be consistent with the definition of "surrounding community." It stated:

> The definition of "nearby Indian tribe" was made consistent with the definition of "surrounding community" because we believe that the purpose of consulting with nearby Indian tribes is to determine whether a proposed gaming establishment will have detrimental impacts on a nearby Indian tribe that is party of the surrounding community under 20(b)(1)(A) of IGRA. *See* discussion of the term "surrounding community" below.

See 73 Fed. Reg. at 29357.

Under the regulations the "surrounding community" includes:

> ... local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. *A local government beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.*

25 C.F.R. § 292.2 (emphasis added). As the Department further explained the reason it gave for adopting this definition was as follows:

> Ultimately, our objective in the regulation is to identify a reasonable and consistent standard to define the term "surrounding community" and we believe it is reasonable to define the surrounding community as the geographical area located within a

> 25-mile radius from the proposed gaming establishment. Based on our experience, a 25-mile radius best reflects those communities whose governmental functions, infrastructure or services may be affected by the potential impacts of a gaming establishment. The 25-mile radius provides a uniform standard that is necessary for the term "surrounding community" to defined in a consistent manner. *We have, however, included a rebuttable presumption to the 25-mile radius. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.*

73 Fed. Reg. at 29357 (emphasis added).

As the regulations indicate, the "rebuttable presumption to the 25-mile radius" limitation appears in the definition of the "surrounding community" because the definition was intended to be flexible. Moreover, the Department made clear that the purpose of making the definition flexible was because determining the actual detrimental impacts of a proposed off-reservation casino is more important than the distance an impacted tribe or community is from the proposed location. *See* 73 Fed. Reg. 29357.

From an interpretive standpoint, the fact that the rebuttable presumption language appears in the definition of "surrounding community" should be enough to show that a tribe that rebuts the presumption is within the "surrounding community." However, if the plain language of the regulation is not sufficient, the

definition coupled with the Department's explanation of the definition are conclusive.

Importantly, in the September 1, 2011, Record of Decision, the Secretary necessarily determined that Picayune rebutted the 25-mile radius limitation. (JA 1533). Neither the Secretary, nor North Fork disputes the Secretary's determination on this point. Therefore, because the Secretary found the Picayune had rebutted the 25-mile radius limitation, Picayune was part of the "surrounding community." Consequently, as discussed below, the Secretary was obligated to consider the detrimental impacts of Picayune and accord them the same weight accorded to every other member of the "surrounding community."

B. Because Secretary was Required to Consult He Was Required to Determine and Consider and Determine the Detrimental Impacts That Picayune Would Experience due to North Fork's Off-Reservation Gaming Enterprise.

The Secretary (at 49-50) and North Fork (at 23) attempt to minimize the implications of the Secretary's finding the Picayune successfully rebutted the 25-mile radius limitation by arguing that rebutting the 25-mile limitation presumption "only extends to 'consultation.'" This, as discussed above, is contrary to the plain language of the regulation. Moreover, it ignores the purpose of the "consultation"

process and the context in which the Department used "consultation" in the definition of "surrounding community."

"Consultation" has more significance than the Secretary and North Fork suggest. Indeed, regarding determining the full scope of detrimental impacts, and avoiding or mitigating them, the "consultation" phase of the two-part process is the most critical. In explaining prior changes to the definition of "surrounding community" in the Departmental "Checklist" used as guidance for two-part determinations, the Department noted that it made the modifications "because the purpose of consultation . . . is to assess detrimental to the surrounding community." 73 Fed. Reg. at 29,357. To be sure, even a cursory glance at the regulations reveals the primary purpose of "consultation" is to determine the detrimental impacts of the proposed gaming enterprise on the "surrounding community." *See* 25 C.F.R. §§ 292.19-292.21.

As the regulations require during the "consultation" process, the Secretary must solicit "consultation" comments from members of the "surrounding community" on the following areas:

(1) Information regarding environmental impacts on the surrounding community and plans for mitigating adverse impacts;

(2) Anticipated impacts on the social structure, infrastructure, services, and land use patterns of the surrounding community;

(3) Anticipated impact on the economic development, income, and employment of the surrounding community;

(4) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(5) Anticipated costs, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment; and

(6) Any other information that may assist the Secretary in determining whether the proposed gaming facility would or would not be detrimental to the surrounding community.

25 C.F.R § 292.20(b). After the Secretary receives the "consultation" comments, he must provide them to the applicant tribe to allow the applicant tribe sixty (60) days to respond to, or resolve, issues raised through the "consultation" comments.

25 C.F.R. § 292.19(c)-(d). After the applicant tribe responds, the regulations require the Secretary to:

> [C]onsider all the information submitted under §§ 292.16-292.19 in evaluating whether the proposed gaming establishment is in the best interests of the tribe and its members and whether it is detrimental to the surrounding community.

25 C.F.R. § 292.21(a).

Notably, the "consultation" phase is strictly limited to members of the "surrounding community." This completely undermines the Secretary's and North Fork's position that including Picayune in the "consultation" process did not likewise include them in the "surrounding community." However, even if rebutting the 25-mile radius did not make Picayune part of the "surrounding community" including it in the "consultation" process necessarily required the Secretary to fully consider the impacts North Fork's proposed off-reservation gaming enterprise would have on Picayune and include them in his analysis of the impacts on the "surrounding community." 25 C.F.R. § 292.21(a). Thus, if the Secretary's and North Fork's contention was correct, and rebutting the 25-mile radius limitation "only relates to consultation" the regulations require the Secretary to consider all the impacts identified during the "consultation" process, including those identified by tribes that rebutted the 25-mile radius limitation.

C. The Regulations did not Allow the Secretary's to Accord Lesser Weight to Picayune's Consultation Comments or the Detrimental Impacts that North Fork's Proposed Off-Reservation Gaming Facility Would Have on Picayune.

In their final effort to justify the Secretary's failure to fully consider the detrimental impacts Picayune would suffer due to North Fork's proposed off-reservation gaming enterprise, the Secretrary (at 50-51) and North Fork (at 25) argue that Secretary properly accorded those impacts less weight due to the fact that Picayune's trust lands are more beyond the 25-mile radius limitation. However, they do not identify any authority for giving different weight to impacts in regulations. Rather, the Secretary (at 51) and North Fork (at 24) argue that the Secretary interpreted the regulation such that he was not required to give equal weight to all comments and that his interpretation is due controlling deference.

As discussed above, an agency's interpretation of its own regulations is not given deference when that interpretation is inconsistent with the regulations. *Thomas Jefferson Univ.*, *supra*, 512 U.S. at 512. Here, again, under the regulations an Indian tribe that rebuts the 25-mile radius limitation is part of the "surrounding community." 25 C.F.R. § 292.2. Moreover, nothing in the regulations purports to allow Secretary to discount or "accord lesser weight" to the consultation comments of, or detrimental impacts to, an Indian tribe that is within the "surrounding

community" because it rebutted 25-mile radius presumption. Rather, the consideration of the role distance plays concerning detrimental impacts relates only to whether an Indian tribe can make the showing necessary to rebut the presumption.

To rebut the 25-mile radius limitation, an Indian tribe has to prove that it will suffer a direct, immediate, and significant harm to its governmental functions, infrastructure or services. 25 C.F.R. § 292.2. As the distance between an Indian tribe or community and the proposed off-reservation enterprise increases, one would expect that detriment the Indian tribe or community will suffer would correspondingly decrease. Consequently, the farther the Indian tribe is from the proposed off-reservation casino likely it will be that the Secretary will determine there are sufficient detrimental impacts to trigger his "consultation" obligations.

The detrimental impacts the Indian tribe or community must show to qualify for "consultation" as part of the "surrounding community" are not hypothetical impacts it would suffer if it were with a 25-mile radius of the proposed off-reservation casino. They are the real impacts it will suffer even though it is beyond the 25-mile radius limitation. The regulations provide that one of the principle responsibilities of the Secretary when considering an application for off-reservation gaming is to identify and address the real and verifiable detrimental impacts of a proposed

facility. 25 C.F.R. §§ 292.19-292.21. Accordingly, the regulations leave no room for "according lesser weight" to the detrimental impacts of Indian tribe or communities that have rebutted the 25-mile radius limitation.

Under the regulations, once the Secretary determined that he was obligated to consult with Picayune, he was required to fully consider all of the detrimental impacts Picayune would suffer. 25 C.F.R. §§ 292.19-292.21. His interpretation of the regulations to allow him to "accord lesser weight" to the consultation comments of, and detrimental impacts on Picayune were not consistent with the language and purpose regulations. Therefore, the Secretary's interpretation of the regulations is not due any deference. *Thomas Jefferson Univ.*, *supra*, 512 U.S. at 512. Rather, because the interpretation is contrary to the regulations, the Secretary's action based on that improper determination was necessarily arbitrary, capricious, and contrary to the law. *Id.*

A secondary problem that arises from the Secretary's decision to "accord lesser weight" to the impacts Picayune would suffer is that it makes it impossible to know if his decision would have been different if he had given those impacts their proper weight. The Secretary (at 51) expressly recognized this when it argued "[n]or is it clear that giving Picayune's comments less weight made any difference in the Secretary's analysis." Thus, as the Secretary admits, it is impossible to

determine whether the Secretary's decision would have been different had he accorded full weight to the detrimental harm he acknowledged Picayune would suffer due to North Fork's proposed off-reservation casino. That is a problem that neither the Secretary, nor North Fork, can address.

Because the Secretary's interpretation and implementation of the regulations was inconsistent their language and purpose, the Secretary's decision to grant a favorable two-part determination for the Madera Site was arbitrary, capricious and contrary to the law. Thus, it should be vacated and remanded to the Secretary for reconsideration utilizing the proper standards. As the Secretary acknowledges, that is the only way to determine whether the detrimental impacts to Picayune will change the Secretary's decision.

II. The Secretary's Decision to Accept the Madera Site Into Trust for Gaming Purposes was Arbitrary, Capricious, and Otherwise Contrary to the law.

As addressed in the Introduction section above, in addition to challenging the Secretary's Record of Decision concerning the favorable two-part determination for the Madera Site, Picayune also challenges the Secretary's later decision to acquire the Madera Site for the purpose of allowing North Fork to conduct gaming there. Specifically, Picayune argues that the Secretary's decision to acquire the Madera Site in trust for gaming purposes is arbitrary and capricious and otherwise

contrary to the law because the decision is based equally on the arbitrary and capricious two-part determination and necessary gubernatorial concurrence California's Fifth District Court of Appeal ruled was invalid in *Stand Up v. State*, 6 Cal.App.5th 686 (Cal.Ct.App. 2016)(review granted 390 P.3d 781.) The Secretary (at 34-37) and North Fork (at 51-59) defend against Picayune's challenge with three basic arguments: (1) Picayune is precluded from raising any issues concerning the invalidity of the concurrence because District Court found that California was a "required" party as to those claims under Federal Rule of Civil Procedure 19 and Picayune abandoned any challenge to that ruling; (2) *Stand Up v. State*, *supra*, is not "in effect"; and (3) even if *Stand Up v. State*, *supra*, was in effect the invalidity of the concurrence under state law is immaterial.

As discussed below, the Secretary's and North Fork's arguments miss the mark.

A. Picayune is not Precluded from Raising Issues Concerning the Invalidity of the Concurrence.

The Secretary (at 34-37) and North Fork (at 51) argue that Picayune cannot raise issues concerning the invalidity of the gubernatorial concurrence required under 25 U.S.C. § 2719(b)(1)(A) because Picayune did not expressly challenge: (1) the District Court's holding that Picayune had abandoned those claims or (2)

the District Court's finding that California was a "required" party under Federal Rule of Civil Procedure 19. (U.S. Br. at 35, citing *Flynn v. Comm'r*, 269 F.3d 1064, 1068-1069 (D.C. Cir. 2001).) The abandonment/waiver rule is not so harsh. This Court has the discretion to decide the issues Picayune raised concerning the concurrence.

As *Flynn* recognized, there are circumstances under which this Circuit exercises discretion to hear arguments raised for the first time on appeal. *Id.* These include cases "involving uncertainty in the law; important and recurring questions of federal law; intervening change in the law; and extraordinary situations with the potential for miscarriages of justice." *Id.*

This case presents at least two of those "exceptional" circumstances.

First, the decision in *Stand Up v. State, supra*, represents a significant change in the relevant law. That case makes clear that the concurrence at issue was never valid under California law. *Stand Up v. State, supra*, 6 Cal.App.5th 686, 705, review granted 390 P.3d 781). Moreover, as discussed in detail immediately below the change of law resulting from that case eliminated any further Rule 19 concerns. Second, the IGRA requires a state's agreement with a Secretarial two-part determination before off-reservation lands can be converted to gaming lands, the

decision to take lands into trust for gaming purposes is necessarily dependent upon valid state action. The *Stand Up v. State* Court specifically held that the concurrence in the two-part determination for the Madera Site was invalid. *Id.*

Thus, this case presents precisely the type of unique circumstances that militate in favor of addressing all of Picayune's claims relating to the concurrence. To hold otherwise would not only ignore a significant change in the relevant law but would also allow North Fork and the Secretary to make an end-run around California law with a technical argument, giving the rise the possibility of a significant miscarriage of justice.

As an additional consideration, unlike in most cases where an issue first raised on appeal is essentially a surprise to the parties, the issues concerning the invalidity of the concurrence are not a surprise here. No one can dispute that even though Picayune did not fully pursue those claims in the District Court, Stand Up did. Thus, the arguments, although made by a different party, are not new to either the Secretary or North Fork. There is no surprise or prejudice that would justify avoiding the issue on appeal.

B. Rule 19 Considerations are not Applicable to This Case After *Stand Up v. State*.

In their Rule 19 arguments the Secretary (at 34-37) and North Fork (at 51) blatantly ignore that in the period between the District Court's August 6, 2016, Order and Picayune's Opening Brief here, in *Stand Up v. State*, *supra*, California's Fifth District Court of Appeal unanimously held determined that the gubernatorial concurrence at issue here invalid. *Stand Up v. State*, *surpa*, 6 Cal.App.5th at 705. That decision has important implications for the Secretary's and North Fork's Rule 19 arguments. Most importantly, the Fifth District Court of Appeal's decision mooted the District Court's determination that the State of California was an indispensable party under Rule 19.

To be sure, at the time of the District Court's Order, the validity of the gubernatorial concurrence concerning the Madera Site was undecided and therefore unsettled. At that point, therefore, the determination that the State of California was an indispensable party was arguably reasonable. So too was the District Court's determination that claims concerning the gubernatorial concurrence could not "in equity and good conscience" proceed without the State of California. After all, as the District Court opined, at that point, the State of California, or at least the Governor of California, arguably had an interest in the validity of the concurrence and his ability to protect that interest would have been

impaired or impeded if the District Court decided the issue in the Governor's absence.

Every concern the District Court expressed regarding the State of California's interests changed once the Fifth Appellate District unanimously agree that the gubernatorial concurrence concerning the Madera Site was invalid. At that point, both the Governor's authority to concur and the invalidity of the concurrence at issue were decided. Moreover, that decision binds this Court and would have bound the District Court had the Fifth Appellate District issued it before August 6, 2016.

To be a "required party" under Rule 19, the State of California would have to satisfy several conditions. First, it would have to claim a protectable interest in the subject matter of this action. Fed.R.Civ.P 19(B). Moreover, that interest would have to be such that California's absence would "as a practical matter impair or impede [California's] ability to protect [it's] interest." Fed.R.Civ.P 19(B)(i). Alternatively, California's absence would have to leave one of the existing parties "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of [California's] interest." Fed.R.Civ.P 19(B)(ii).

After, the decision in *Stand Up v. State,* California no longer satisfies any of criteria of a "required party." That case unequivocally decided the issue of the validity of the concurrence—the only potential interest California might claim in this action. Moreover, because that decision is binding on California such that California would be collaterally estopped from arguing in this action that the concurrence was valid.[2] Thus, at this point, California no longer has any protectable interest in the subject matter of this case and cannot be considered a "required" party under Rule 19.

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[2] It is important to note that North Fork and Stand Up were both parties in *Stand Up v. State*. Consequently, North Fork, like California is collaterally estopped under California law and the law of this Circuit from asserting in this action that the Governor's concurrence concerning the Madera Site is valid. *See Zevnik v. Superior Court*, 70 Cal.Rptr.3d 817, 823 (Cal.Ct.App. 2008)(judgment entitled to collateral estoppel effect is judgment by the appellate court.); 28 U.S.C. § 1738 (requiring federal courts to give preclusive effect to state-court judgments if they are given preclusive effect in state court.); *Allen v. McCurry*, 449 U.S. 90, 96 (1980). The requirements for collateral estoppel in California courts are: (1) the issue sought to be precluded must be identical to the issue decided in the former proceeding; (2) the issue must have been actually litigated; (3) the issue must have been necessary to the final decision; (4) the decision must be final and on the merits; and (5) the party against whom preclusion is sought must be identical to, or privity with, the party to the former proceeding. *Lucido v. Superior Court*, 795 P.2d 1223, 1225 (Cal. 1990.) North Fork, and California, were both parties in *F, supra.* Moreover, the issue of whether Governor's concurrence was valid was fully litigated and necessarily decided. To be sure, that was the only issue present in that case. Consequently, North Fork is, and California would be, precluded for raising issues concerning the validity of the concurrence in this action.

C. California Rule of Court 8.1115(e) Does Not Render The Fifth Appellate District's Decision Ineffective.

North Fork (at 53-54), but not the Secretary, attempts to avoid the decision in *Stand Up v. State*, with an argument based on the California Rule of Court concerning case citations. Specifically, North Fork (at 53-54) asserts that because the California Supreme Court has granted review in *Stand Up v. State* decision is "not in effect" under California Rule of Court 8.1115(e). North Fork's interpretation of Rule 8.1115(e) is indefensible.

Contrary to North Fork's suggestion, California Rule of Court 8.1115(e) does not render California Appeals Court decisions void or ineffective upon the California Supreme Court's decision to grant review. Rule 8.1115(e) addresses only whether Appeals Court decision can be cited as binding precedent in other cases while California Supreme Court review is pending.

The rule provides:

> Pending review and filing of the Supreme Court's opinion, unless otherwise ordered by the Supreme Court under (3), a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and *may be cited for potentially persuasive value only.* Any *citation* to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court.

Cal.Rule of Court 8.1115(e) (emphasis added.) Rule 8.1115(e) only operates as an exception to, or limitation on, the general rule in California that Court of Appeal decisions are binding on all trial courts throughout the state in all subsequent matters. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal.2d 450, 455 (Cal. 1962). It does not operate to invalidate or suspend the binding effect of *Stand Up v. State* on the parties to that case—including North Fork and the State of California.

Interestingly, Rule 8.1115(e) represents a change to the California Rules of Court through which the California Supreme Court *expanded* the ability of California practitioners to cite appellate decisions while practicing in California courts after the California Supreme Court granted review. Before the California Supreme Court adopted Rule 8.1115(e), the rule was that all published appellate court decisions were automatically "depublished" when the California Supreme Court granted review. (*See* Amendments to the California Rules of Court, adopted by the Supreme Court on June 1, 2016, available at http://cms.ipressroom.com.s3.amazonaws.com/262/files/20164/California_Rules_of_Court-Amended_Automatic_Depublishing_CoA-Decisions_Rule.pdf). Once the case was depublished, it could not be "cited or relied upon by a court or a party *in any other action*" subject to certain exceptions. Of note, the first exception to the prohibition against citing unpublished appellate court opinions is "[w]hen the

opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel[.]" Cal. Rule Ct., 8.1115(a).

North Fork's position (at 53) that Rule 8.1115(e), which is part of the same rule as Rule 8.1115(a), somehow operates to invalidate or stay an appellate decision once the California Supreme Court grants review of the appellate order is categorically incorrect and illogical. Nothing in the rule even hints at any suggestion that after review is granted, an appellate decision becomes null and void for all purposes.

D. The Invalidity of the Concurrence Necessarily Invalidates The Decision to Designate the Madera Site as Gaming Lands Under the IGRA.

As shown immediately above, North Fork's claim that the Fifth Appellate Court's decision in *Stand Up v. State, supra,* is not in effect, is wrong. That case is fully effective against not just the State of California but also North Fork which was a party to the action. *See Zevnik v. Superior Court*, 70 Cal.Rptr.3d 817, 823 (Cal.Ct.App. 2008); 28 U.S.C. § 1738 Consequently, the doctrine of collateral estoppel precludes North Fork from now claiming that the concurrence is valid, just as it would preclude California if it was a party to this action.

Nonetheless, North Fork (at 54-57) continues to press its point arguing: (1) that the Court cannot consider *Stand Up v. State* because review in this action is limited exclusively to the administrative record at the time of Secretary's decision—which came before the decision in *Stand Up v. State*; and (2) the decision in *Stand Up v. State* is immaterial because the Secretary was reasonable in relying on a facially valid gubernatorial concurrence. North Fork is mistaken.

E. This Court Should Consider and Apply *Stand Up v. State*.

It is true that in many instances a reviewing court's consideration of agency action is limited to the administrative record at the time the Secretary made his decision. (NF Br. at 54, citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971). However, it is well-established that when there is a change in the law between the time an agency or trial court renders a decision and the time of decision by a reviewing appellate court, the appellate court must apply the law as it exists at the time of its decision. a [trial court decision] and an appellate court decision, the appellate court must apply the changed law. an appellate court must apply the law as it is at the time it renders its decision. *Thorpe v. Housing Authority*, 393 U.S. 268, 281-282 (1969); *Ziffrin, Inc. v. United States*, 318 U.S. 73, 78 (1943).

Importantly, this Circuit recognizes the applicability of this rule to changes in the law after an agency decision but before a decision on appeal. Thus, in at

least two cases, this Circuit has remanded agency decisions for reconsideration to require the agency to reconsider its prior decisions in light of subsequent changes in the law. *See Williston Basin Interstate Pipeline v. FERC*, 165 F.3d 54, 62 (D.C. Cir. 1999); *Panhandle Eastern Pipeline, Co. v. FERC*, 890 F.2d 435, 438 (D.C. Cir. 1989).

Here, there is arguably no reason to remand the matter to the Secretary to determine what action to take in light of the invalidity of the concurrence. The IGRA, and the regulations answer that question—without a valid concurrence the Secretary's two-part determination cannot be given effect and the Madera Site could not be taken into trust for gaming purposes. 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.23. Thus, the most appropriate action is for this Court to invalidate those portions of the Secretary's trust decision indicating that Madera Site is eligible for gaming. However, if the Court is disinclined to take that action, it should remand the matter to the Secretary for reconsideration in light of the decision in *Stand Up v. State*, *supra*.

F. *Stand Up v. State* Invalidated any Basis for Relying on the California Governor's Concurrence.

North Fork (at 54-57), but notably not the Secretary, seeks to avoid the effect of the judgment in *Stand Up. v. State* through a last-ditch argument that whether

the California Governor's concurrence was valid under California law is immaterial, because the Secretary believed the concurrence was valid was at the time of his decision. Thus, North Fork (at 54-57) cites unrelated cases to argue that the Secretary was reasonable in relying on what believed was "facially valid" concurrence. However, the "retrocession" cases North Fork cites deal only with the retrocession of criminal and civil jurisdiction over Indian country transferred to the states pursuant to 28 U.S.C. § 1360 and 18 U.S.C. § 1162. They do not deal with the IGRA, and critically they do not deal with the Secretary unilaterally authorizing off-reservation gaming in a state without a valid agreement from that state.

Importantly, at least on other Federal Court of Appeals has specifically and directly addressed the application of the "retrocession" case to situations in involving the IGRA. In *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997)("*Santa Ana*"), the Tenth Circuit addressed whether the Secretary could approve, and make effective, facially valid tribal-state gaming compacts when it was later determined that the state governor who executed the compacts had no authority to do so under state law. *Santa Ana*, 104 F.3d at 1547. As the Tenth Circuit framed the issue:

> This case presents a central, and dispositive question: whether, under the Indian Gaming Regulatory Act, the Secretary of Interior can, by approval, give life to a compact which was void from its inception because the state governor who signed the compact lacked authority under state law to sign on behalf of the state.

Santa Ana, 104 F.3d at 1548.

The tribes and the United States in *Santa Ana* argued as North Fork does here, that the subsequent determination that that state governor lacked authority to execute the compacts was immaterial. *Id.* at 1555-1557. They argued that once the Secretary approved the compacts and published notice of them in the Federal Register they were valid under federal law, and there were no remaining issues of state law. *Santa Ana*, 104 F.3d at 1553-1556. Notably, primary sources the United States and the tribes cited for this proposition were the "retrocession" cases. *Id.* at 1555, n. 12.

After considering the purposes of the IGRA, the *Santa Ana* Court easily rejected the tribe's, and the United States claims. The *Santa Ana* Court stated, "the Secretary cannot, under [IGRA] vivify that which was never alive …." *Id.* at 1548. Notably, the *Santa Ana* Court agreed with the tribe's argument that "Congress did not intend for the Secretary to make extensive inquiry into state law." *Id.* at 1557. The *Santa Ana* Court recognized, the fact that the Secretary was not required to

make determinations of state law issue, "does not mean that consequences should not flow, such as a determination that the compact is invalid, if it turns out that the state has not validly bound itself to the compact." *Id.*

The similarities between this case and *Santa Ana* could not be more striking. Both cases revolve around the Secretary taking action to authorize gaming because he relied on a facially valid state action. In both cases, the state action was later determined by state courts to be invalid and beyond the state governor's authority. Using sound logic and a reasonable approach, the *Santa Ana* Court recognized that with the IGRA, Congress did not intend to give the Secretary authority to override a legally invalid act of a state governor and authorize gaming in the state. In so doing the *Santa Ana* Court expressly recognized the inapplicability of North Fork's "retrocession" cases to instances involving the implementation of the IGRA.

Santa Ana is a thoughtful and fair reading of the IGRA. As such, Picayune urges the Court to adopt the logic of *Santa Ana* and apply it to this case.

CONCLUSION

For the reasons stated herein and in Picayune's Opening Brief, the Secretary's decision to issue a favorable two-part determination for the Madera Site

and his decision to take the Madera Site into trust for gaming purposes were arbitrary, capricious, and otherwise contrary to the law.

/s/ Michael A. Robinson
Michael A. Robinson

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it has been prepared in a proportionally spaced typeface using Electra LT Std typeface with 14-point font and contains 6,482 words (excluding cover, tables, and certificate of service and compliance), according to the count of the computer program Microsoft Word used to prepare the brief.

/s/ Michael A. Robinson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of July 2017, a true and correct copy of this document was electronically filed through the CM/ECF system, which caused all parties to be served by electronic means, as more fully reflected in the Notice of Electronic Filing.

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