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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants;

NORTH FORK RANCHERIA OF MONO INDIANS,

Intervenor Defendant.

Case No. 1:16-cv-00950-AWI-EPG

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Date: May 30, 2017
Time: 1:30 p.m.
Court: 2, 8th Floor
Judge: Honorable Anthony W. Ishii

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This case is Picayune Rancheria of Chukchansi Indians' (Picayune) second attempt to challenge the United States Department of the Interior's (Interior) decision to approve a trust acquisition for gaming by the North Fork Rancheria of Mono Indians (North Fork) of a 305.49 acre parcel of land located in Madera County, California (Madera site), Complaint, Doc. 1 *Picayune Rancheria of the Chukchansi Indians v. United States* (*Picayune Rancheria*), No. 1:12-cv-02071 (D.D.C. filed Dec. 31, 2012). Picayune cannot reboot their failed claims—their prior challenge to the Governor of California's concurrence in the Secretary's determination (termed a "two-part" determination) approving off-reservation gambling at the Madera site—in order to challenge Secretarial Procedures issued in compliance with this Court's Order in *North Fork of Rancheria of Mono Indians of California v. State of California* (*North Fork*), No. CV 1:15-00419-AWI-SAB, 2015 WL 11438206 (E.D. Cal. Nov. 13, 2015) (North Fork's good-faith lawsuit under 25 U.S.C. § 2710 against California). In its prior lawsuit, Picayune alleged that Interior "violated the APA, IGRA, and the IRA by relying on a purported concurrence from the Governor of California that is ultra vires and invalid under California law." *Picayune Rancheria*, Compl. Doc. 1 ¶ 57. The District of Columbia Court granted Federal Defendants and intervenor-defendant North Fork summary judgment on that claim, holding that Picayune had abandoned the claim and that, in any event, "any challenge to the validity of Governor's concurrence may not proceed in the state's absence." *Stand Up for California! v. U.S. Dep't of the Interior*, No. CV 12-2039, 204 F. Supp. 3d 212, 2016 WL 4621065, at *20 n.16, *23 (D.D.C. Sept. 6, 2016), *appeal docketed*, No. 16-5327 (D.C. Cir. Nov. 15, 2016) (Picayune's case was consolidated with the case brought by Stand Up for California). Picayune once again asserts that the "Governor had no legal authority to issue the concurrence" but now it also claims that "[a]s a consequence, Secretarial Procedures purporting to authorize gaming" are somehow invalid. Pl.'s Mem. and P.

& A. in Supp. of Mot. for Summ. J., Doc. 19, at 1-2, (Pl.'s Mem.) This Court should reject Picayune's efforts to relitigate previous cases and enter summary judgment in favor of Federal Defendants on all of Picayune's claims.

Even if Picayune's claims are not precluded, they each fail for several reasons. Picayune's claims I, II, and III allege that the Governor's concurrence is invalid under state law. Picayune does not, however, challenge any final federal agency action or identify any private right of action against the Federal Defendants, with regard to these claims. Claim IV is Picayune's second challenge to the Secretary of the Interior's (Secretary) two-part Indian Gaming Regulatory Act (IGRA) determination. This claim is barred by res judicata and, even if it were not, it should fail for the same reason that it did the first time Picayune litigated the claim: "the plaintiffs' 'argument makes no sense' because 'the Secretary's [two-part] determination is not dependent upon the Governor's concurrence . . . ." *Stand Up*, 2016 WL 4621065, at *22. Claim V is also barred by res judicata because it seeks to relitigate the status of the Madera site as Indian lands, even though Picayune's Complaint admits the Madera site is in trust and therefore falls within IGRA's definition of Indian lands. Claim V, like claims I-IV, also fails to challenge an agency action. Claim VII seeks a declaratory judgment that the Madera site is not eligible for Class II gaming under IGRA, but it too fails to present a challenge to an agency action. Claims VI and VIII challenge the issuance of the Secretarial Procedures, but the issuance of those procedures was required by statute and is not subject to review. Moreover, even if the issuance of Procedures is an appropriate subject of judicial review, the Procedures comply with IGRA, and Picayune should not be allowed to use this proceeding to collaterally attack the final judgment in *North Fork*, which ordered North Fork and California to conclude a compact.

Finally, Picayune's brief does not appear to discuss claims I, II, III, and V, and these claims, therefore, are abandoned.

Federal Defendants are entitled to summary judgment on each of Picayune's claims, on multiple independent grounds, any of which are sufficient to enter summary judgment in favor of Federal Defendants. In the event, however, that this Court cannot enter summary judgment in favor of Federal Defendants and, instead, finds that it must examine whether the Governor's concurrence was valid under California law, then it should stay this case until the California Supreme Court resolves the question presented to it under California law.

BACKGROUND

This is Picayune's second challenge in the federal courts to the Secretary's two-part determination and the Governor's concurrence in that determination. Picayune seeks to relitigate the same claims and issues in order to challenge the Secretarial Procedures prescribed as a result a final judgment of this Court and the subsequent operation of IGRA. *See North Fork*, 2015 WL 11438206, at *12 (North Fork's good-faith lawsuit under 25 U.S.C. § 2710 against California). Picayune also unsuccessfully sought intervention in *North Fork*. *North Fork Rancheria of Mono Indians of California v. California*, CV No. 15-00419-AWI-SAB, 2016 WL 3519245 (E.D. Cal. June 27, 2016). This Court set forth much of the relevant background for this case in its order granting North Fork's motion to intervene in this lawsuit. *See* Doc. 15 (Order entered Oct. 24, 2016); *see also North Fork*, 2015 WL 11438206, at *1-4. Another court has also extensively examined and set forth facts relevant to Picayune's original challenge to the Secretary's two-part determination and the Governor's concurrence. *Stand Up for California! v. U.S. Dep't of the Interior* (*Stand Up I*), 919 F. Supp. 2d 51, 54-61 (D.D.C. 2013) (denying Picayune's request for preliminary injunction); *Stand Up for California! v. U.S. Dep't of the Interior* (*Stand Up II*), 71

F. Supp. 3d 109, 112-15 (D.D.C. 2014) (dealing with administrative record issues); and *Stand Up for California! v. U.S. Dep't of the Interior* (*Stand Up III*), No. CV 12-2039, 2016 WL 4621065, at *4-16 (D.D.C. Sept. 6, 2016) (granting summary judgment on most claims for Federal Defendants and North Fork, and dismissing the other claims). The following additional background supplements what this Court has already explained in its prior rulings.

I. THE SECRETARY'S TWO-PART DETERMINATION, THE GOVERNOR'S CONCURRENCE, AND FEDERAL ACQUSITION OF THE MADERA SITE AS TRUST LAND

California voters authorized, via constitutional amendment, Indian gaming under IGRA in March 2000. 2000 Cal. Legis. Serv. Prop. 1A- Gambling on Tribal Lands (Ca. 2000); *amending* Cal. Const. art. IV, § 19(f). Since the enactment of Proposition 1A, the Secretary has considered many land-into-trust applications for gaming purposes in California. North Fork is a federally recognized Indian tribe located in Madera County. *See* Restoration of Federal Status to 17 California Rancherias, 49 Fed. Reg. 24,084 (June 11, 1984); Indian Tribal Entities Recognized and Eligible to Receive Services, 50 Fed. Reg. 6,055, 6057 (Feb. 13, 1985). In 2005, North Fork submitted a fee-to-trust application for the Madera site to Interior for the purpose of developing a resort hotel and casino, as provided for in IGRA. AR00000160. North Fork did so in order to meet its need for economic development, self-sufficiency, and self-governance, and to provide its quickly growing Tribal citizen population with employment, educational opportunities, and critically needed social services. This application was supplemented by North Fork's 2006 request for a Secretarial determination of the Madera site's eligibility for gaming pursuant to IGRA.

Land taken into trust after IGRA's enactment is eligible for gaming if the Secretary issues a favorable two-part determination finding that gaming on the newly acquired lands is in the best

interest of the Indian tribe and its members and that such gaming would be non-detrimental to the surrounding community, and "if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719 (b)(1)(A). In this matter, on September 1, 2011, the Secretary issued a favorable two-part determination and, pursuant to IGRA, the Assistant Secretary—Indian Affairs wrote to Governor Jerry Brown on September 1, 2011, to inform him of that determination and to request the Governor's concurrence. On August 30, 2012, the Governor concurred with the Secretary's "determination to allow 305 acres in Madera County to be placed in trust for the North Fork Rancheria of Mono Indians for the purpose of establishing a class III gaming facility." AR00000317

The Secretary took the Madera site into federal trust for North Fork on February 5, 2013. *See* Am. Compl., Doc. 5, ¶ 17, 28 (correctly alleging that the Secretary did so). The Madera site is held in trust today.

II. THE 2012 COMPACT AND ISSUANCE OF SECRETRIAL PROCEDURES

Where state law allows Class III gaming pursuant to IGRA, as California does pursuant to its Constitution, Cal. Const. Art. IV, § 19(f), IGRA anticipates that a tribe seeking to engage in Class III gaming will first attempt to obtain a compact with the state. 25 U.S.C. § 2710(d)(1)(C). California has waived its sovereign immunity, Cal. Gov. Code § 98005, to lawsuits by tribes alleging that the State has failed to conduct "negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . in good faith." 25 U.S.C. § 2710(d)(7)(A). IGRA provides a remedial process for tribes that prevail on their claim that the state has failed to negotiate in good faith. *Id.* § 2710(d)(7)(B)(iv-vii). The remedial process is designed to produce a compact as a result of mediation between a tribe and state. *Id.* § 2710(7)(B)(iv). If the state and tribe do not reach agreement during mediation about a compact, they must each submit a

proposed compact to the mediator, who will select from the two proposed compacts the one which best comports with IGRA, applicable federal law, and the findings and order of the court. *Id.* Thereafter the state has 60 days to consent to the selected compact. *Id.* § 2710(d)(7)(B)(vi)-(vii). If the state does not consent, the mediator will forward the selected compact to the Secretary, who "shall prescribe, in consultation with the Indian tribe, procedures," *id.* § 2710(d)(7)(vii), under which Class III gaming may be conducted.

Although North Fork and the Governor executed a compact in 2012 (2012 Compact) governing Class III gaming, the 2012 Compact is no longer in effect. AR00002187. The 2012 Compact was ratified by the California legislature on May 2, 2013, via Assembly Bill 277 (AB 277). AB 277 (Hall), (2013-2014 Reg. Sess.) (Cal. July 3, 2013) *chaptered at* 2013 Stat. Ch. 51; Cal Gov. Code § 12012.5. On July 3, 2013, the Governor approved AB 277. In compliance with 25 C.F.R. § 293, the California Secretary of State submitted the 2012 Compact to the Secretary for review and approval. AR00002187. The Assistant Secretary—Indian Affairs, took no action within 45-days and subsequently published notice that the 2012 Compact was "considered to have been approved" by operation of IGRA. Notice of Tribal-State Class III Gaming Compact Taking Effect, 78 Fed. Reg. 62649-01 (Oct. 22, 2013). In a November 4, 2014 referendum, California voters opted to overturn AB277[1] and following the 2014 referendum, California refused to recognize the validity of the 2012 Compact or enter into further negotiations with North Fork for a new compact. AR00002187.

[1] Legal disputes regarding the 2012 Compact are "effectively moot" in light of the "Secretarial Procedures prescribed by the Secretary," because the 2012 Compact is no longer in effect. *Stand Up III*, 2016 WL 4621065, at *20.

Following the referendum North Fork filed suit against California pursuant to IGRA's remedial provision, 25 U.S.C. § 2710(d)(7). On November 13, 2015, this Court ruled that California had failed to "enter into negotiations with North Fork for the purpose of entering into a Tribal-State compact within the meaning of § 2710" and ordered the parties to conclude a compact within 60 days. *North Fork*, 2015 WL 11438206, at *12. The parties did not conclude a compact within 60 days and the Court appointed a Mediator. The Mediator selected a compact to which the State did not consent and, as required by IGRA, the Mediator notified the Secretary of the State's failure to consent and submitted the selected Compact to the Secretary for conversion to Secretarial Procedures. AR0000001-03, 02187.

On July 29, 2016, the Secretary fulfilled IGRA's mandate by prescribing procedures and sending a letter notifying the Tribe and the State that Secretarial Procedures were prescribed and in effect. AR00002188.

III. RELATED ACTIONS

A. PICAYUNE'S AND STAND UP'S RELATED ACTION IN THE DISTRICT OF COLUMBIA

Stand Up for California and several plaintiffs (Stand Up) challenged the Secretary's two-part determination and trust decision in the United States District Court for the District of Columbia. *See Stand Up I*, 919 F. Supp. 2d at 54. Picayune brought a similar challenge and the district court consolidated the two cases. *Stand Up I*, 919 F. Supp. 2d at 55 n.5.

Picayune alleged that the Secretary "violated the APA, IGRA, and the IRA by relying on a purported concurrence from the Governor of California that is ultra vires and invalid under California law." *Picayune Rancheria*, Doc. 1 at ¶ 57. Picayune claimed that "[t]he Governor, however, failed to follow state law in issuing this purported concurrence, rendering it ultra vires and void" and that as a result, "any attempt to conduct gaming on the Madera Site would be

illegal." *Id.* at ¶ 42. Picayune also filed challenges to the Governor's concurrence in California courts. *Id.* at ¶ 43. On March 14, 2017, Picayune devoted much of its opening appeal brief to its concerns regarding the Governor's concurrence. Br. for Pl.-Appellant Picayune Rancheria of Chukchansi Indians, *Picayune Rancheria of the Chukchansi Indians v. United States Dep't of the Interior*, Doc. 1 at 40-52, No. CV-16-5327 (D.C. Cir. Mar. 14, 2017) ("D.C. Cir. Br."), attached as Ex. A.

The *Stand Up III* Court denied Stand Up's and Picayune's motions for summary judgment, granted the defendants' motions for summary judgment on all of Picayune's claims, granted the defendants motions for summary judgment on most of Stand Up's claims, and dismissed Stand Up's remaining claims as moot and/or for failure to join an indispensable party. *Stand Up III*, 2016 WL 4621065, at *79. The Court rejected Picayune's challenge to the Governor's concurrence because "the Picayune Tribe nowhere in its ample briefing on summary judgment even mentions its allegation regarding the Governor's concurrence, the claim is deemed abandoned in this case." *Id.* at *20 n.16. The Court further found that "regardless, the claim would be dismissed . . . because California is an indispensable party." *Id.* The Court held that "summary judgment is granted to the defendants as to the Picayune Tribe's allegation regarding the Governor's concurrence." *Id.*

B. OTHER CASES IN THE EASTERN DISTRICT OF CALIFORNIA

Two other cases have been filed in the Eastern District of California purporting to challenge the Secretary's issuance of procedures. Those include *Stand Up for California! v. United States Dep't of the Interior*, No. CV 16-02681-AWI-EPG (E.D. Cal. filed Nov. 11, 2016) and *Club One Casino, Inc. v. United States Dep't of the Interior*, No. CV 16-01908-AWI-EPG (E.D. Cal. filed Dec. 12, 2016).

C. CASES IN CALIFORNIA STATE COURTS

1. *Picayune Rancheria of Chukchansi Indians v. Brown*, 178 Cal. Rptr. 3d 563, 229 Cal. App. 4th 1416 (Ct. App. 2014). Picayune's California Environmental Quality Act challenge to the Governor's concurrence in the Secretary's decision to take the Madera site into trust for North Fork was rejected by the Superior Court and Court of Appeal. The California Supreme Court denied review.

2. *Picayune Rancheria of Chukchansi Indians v. Brown*, No. MCV 072004, (Cal. Super. Ct. Madera Cty., filed Mar. 21, 2016). This is Picayune's second complaint in state court challenging the Governor's concurrence. The court initially granted North Fork and California's demurrers but on January 10, 2017, vacated its order pending the outcome of the two other California court actions described below.

3. *United Auburn Indian Cmty. v. Brown*, 208 Cal. Rptr. 3d 487, 4 Cal. App. 5th 36 (Ct. App. 2016). This is a challenge to the Governor's concurrence in a Secretarial determination regarding the Enterprise Rancheria of Maidu Indians. The Superior Court ruled for California and the Court of Appeal for the Third District affirmed, and determined that the Governor's concurrence was valid. On January 25, 2017, the California Supreme Court granted review and the case is undergoing merits briefing.

4. *Stand Up for California v. California*, 211 Cal. Rptr. 3d 490, 6 Cal. App. 5th 686 (Ct. App. 2016). Stand Up brought another lawsuit challenging the Governor's authority to concur in the Secretary's determination under state law. The Superior Court ruled for California but the Court of Appeal for the Fifth District reversed. The California Supreme Court granted review.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56, summary judgment may be granted when the court finds, based on the pleadings, depositions, and affidavits and other factual materials in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In cases brought pursuant to the Administrative Procedure Act (APA), there is no need for "fact finding" because "the court's review is limited to the administrative record . . . ." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agriculture*, 18 F.3d 1468, 1472 (9th Cir. 1994); *Lacson v. U.S. Dep't of Homeland Sec.*, 726 F.3d 170, 171 (D.C. Cir. 2013) ("determining the facts is the agency's responsibility, not ours").

To the extent a plaintiff states a claim under the APA, the reviewing Court should uphold an agency action unless the plaintiff demonstrates that the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance in law," 5 U.S.C. § 706(2)(A), "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C), or "without observance of procedure required by law." *Id.* § 706(2)(D). The scope of review under the arbitrary and capricious standard is "narrow" and "a court is not to substitute its judgment for that of the agency." *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011).

ARGUMENT

Picayune's amended complaint raises eight claims against Federal Defendants. Claims I, II, and III argue that the Governor's concurrence is invalid under state law. Claim IV contends that the Secretarial two-part determination is invalid. Claim V contends that the Madera site does not constitute Indian lands under IGRA. Picayune' claims VI and VIII contend that the

Secretarial Procedures are invalid. Claim VII alleges that the Madera site is ineligible for Class II gaming.

Claims I, II, III, IV, V, and VII are barred by collateral estoppel to the extent they rely on challenges to the Governor's concurrence. Claims IV and V are barred by res judicata. To the extent those claims are not barred, claims I, II, and III, fail to state a cause of action, fail to challenge an agency action, and are barred by sovereign immunity. Claim IV fails on the merits because it ignores a straightforward reading of caselaw, statutes, and regulations. Claim V also fails to challenge an agency action and fails on the merits because it is seeking a declaratory judgment about whether the Madera site qualifies as Indian lands. Claims VI and VIII are barred because Secretarial Procedures are mandatory and, in any event, were issued in accordance with IGRA's requirements. Claim VII fails to state a cause of action and does not challenge an agency action. Because claims I, II, III, V, and VII, fail to challenge any agency action and, thus, have failed to identify a waiver of sovereign immunity, the Court lacks subject matter jurisdiction over these claims.

I. COLLATERAL ESTOPPEL AND RES JUDICATA

A. PICAYUNE IS COLLATERALY ESTOPPED FROM RELITIGATING WHETHER CALIFORNIA IS AN INDISPENSABLE PARTY TO CLAIMS INVOLVING THE GOVERNOR'S CONCURRENCE

Picayune unambiguously challenged the Governor's concurrence in *Picayune Rancheria*, Doc. 1 ¶ 57, and is estopped from doing so again. In that complaint, Picayune claimed that the Secretary "violated the APA, IGRA, and the IRA by relying on a purported concurrence from the Governor of California that is ultra vires under California law." *Id.* Picayune's claims, based on challenges to the Governor's concurrence, are foreclosed by collateral estoppel because the District of Columbia Court has already rejected Picayune's challenge to the Governor's

concurrence. That Court ruled against Picayune on two grounds: (1) "the Picayune Tribe nowhere in its ample briefing on summary judgment even mentions its allegation regarding the Governor's concurrence, the claim is deemed abandoned in this case," but that (2) "regardless, the claim would be dismissed . . . because California is an indispensable party." *Stand Up III*, 2016 WL 4621065, at *20 n.16. "Collateral estoppel, or issue preclusion, bars relitigation of issues actually adjudicated in previous litigation between the same parties." *Beauchamp v. Anaheim Union High Sch. Dist.* 816 F.3d 1216, 1225 (9th Cir. 2016) (citation omitted). Each of Picayune's first three claims relies on their claim that the Governor's concurrence is invalid and, if they are collaterally estopped from challenging the Governor's concurrence again, Federal Defendants are entitled to summary judgment on these claims.

1. Picayune's Actions in the District of Columbia and the Circuit Court of Appeals for the District of Columbia Demonstrate that it is Making the Same Argument Here

Picayune seeks to relitigate in this lawsuit a question that has been actually litigated, decided, and was critical and necessary to a judgment that Picayune is actively appealing. Picayune first challenged the validity of the Governor's concurrence in 2012. It alleged that the Secretary "violated the APA, IGRA, and the IRA by relying on a purported concurrence from the Governor of California that is ultra vires under California law." *Picayune Rancheria*, Doc. 1 ¶ 57. That case was consolidated with an action filed by Stand Up for California and other plaintiffs, which raised similar challenges to the Secretary's two-part determination and other aspects the Secretary's actions related to North Fork and the Madera site. *Stand Up I*, 919 F. Supp. 2d at 55 n.5. After summary judgment briefing on the merits, the *Stand Up* Court ordered supplemental briefing on the question of "whether the State of California is a party required to be joined under Federal Rule of Civil Procedure 19 and, if so, the effect of California's absence on

the plaintiffs' claims." *Stand Up III*, 2016 WL 4621065, at *12. Picayune participated in briefing on the question of whether California was an indispensable party. *Id.* (citing Doc. Nos. 140, 144) (acknowledging Picayune's participation and position taken on whether California was an indispensable party).

In *Stand Up III* the district court rejected Picayune's claims related to the Governor's concurrence on two grounds. The Court found Picayune had abandoned its claim because "the Picayune Tribe nowhere in its ample briefing on summary judgment even mentions its allegation regarding the Governor's concurrence, the claim is deemed abandoned in this case." *Id.* at *20 n.16. Second, "regardless, [ ], the claim would be dismissed . . . because California is an indispensable party." *Id.* The *Stand Up III* Court held that "California's interests would be directly affected by the relief sought by the plaintiffs, who ask this Court to make determinations about the propriety and continuing viability of [the] Governor's action significantly affecting the State's statutory obligations, relationship with its citizens and federally–drecognized Indian tribes, and fiscal interests." *Id.* at *25. It further concluded that California had not waived its sovereign immunity and could therefore not be joined. *Id.* The Court ruled that because California was an indispensable party to any claims against the Secretary, "claims in any way involving the Governor's concurrence must be dismissed due to the absence of an indispensable party." *Id.* at *26.

The Court also confirmed the reasonableness of the Secretary's actions. "Indeed, neither the IGRA nor the IRA require the Secretary to determine the validity of the Governor's concurrence under California law." *Id.* Therefore, "in light of Governor Brown's August 2012 letter explicitly concurring in the Secretary's two-part determination . . . the Secretary's November 2012 land acquisition was reasonable." *Id.* (citation omitted).

Picayune continues to actively litigate its claims related to the Governor's concurrence because those claims are critical to resolution of its case in the District of Columbia. On March 14, 2017, Picayune filed its opening brief in its appeal of *Stand Up III*. D.C. Cir. Br., attached as Ex. A. In that brief, Picayune wrote that "the trust decision is necessarily dependent upon a gubernatorial concurrence found to be invalid under California law." D.C. Cir. Br. at 50. Picayune "raised issues concerning the legality and effectiveness of the California Governor's concurrence in the Secretarial determination concerning the Madera Site." *Id.* (citations omitted). That brief also discussed pending cases in the California court system and concluded that "[t]his Court should adhere to the California Fifth Appellate District Court of Appeal's ruling that the California Governor's concurrence concerning the Madera Site is invalid and never went into effect." *Id.* at 45.

Picayune is making the same argument in this lawsuit in support of nearly identical claims. Comparing the arguments in support of Picayune's claims before the D.C. Circuit and those Picayune has made to this Court demonstrates that their claims are nearly identical. For example, in two different briefs, compare Picayune's arguments regarding the state court decision in *Stand Up v. California v. California*, 211 Cal.Rptr.3d 490-559 (Cal. Ct. App. 2016):

> "[I]n a **lengthy and** thoroughly reasoned decision, California's Fifth Appellate District Court of Appeals specifically ruled that the Governor's concurrence in the Secretarial Determination concerning the Madera Site was invalid. There, all three Court of Appeals Judges agreed that the Governor's concurrence regarding the Madera Site was invalid. However, the Judges split on the issue of whether the Governor had any authority whatsoever in relation to granting a concurrence. Two Justices determined that the Governor had no authority at all to concur in the Secretarial Determination for the Madera Site, while the third Judge and author of the lead opinion made no clear determination of the concurrence power but determined if such authority existed under the California Constitution is must be directly tied to, and contingent upon, the existence of a state approved tribal state gaming compact.

And in the other:

> "In a thoroughly reasoned decision, California's Fifth Appellate District Court of Appeals found that the Governor's concurrence in the Secretarial Determination concerning the Madera Site was invalid. There, all three Court of Appeals Judges agreed that the Governor's concurrence regarding the Madera Site was invalid. However, the Judges split on the issue of whether the Governor had any authority whatsoever in relation to granting a concurrence. Two Justices determined that the Governor had no authority at all to concur in the Secretarial Determination for the Madera Site, while the third Judge and author of the lead opinion made no clear determination of the concurrence power but determined if such authority existed under the California Constitution is must be directly tied to, and contingent upon, the existence of a state approved tribal–state gaming compact.

Compare Pl.'s Mem. at 17 *with* D.C. Cir. Br. at 52 (difference bolded, errors not omitted). No comparison is necessary at other points, as the briefs often are nearly identical:

> It is important to note that Justice Smith, like Justice Detjen and Justice Franson, ultimately rejected North Fork's and California's arguments that the Governor had inherent power to grant a concurrence regarding the Madera Site because in so doing the Governor was merely implementing existing state policy concerning gaming.

Pl.'s Mem. at 18; D.C. Cir. Br. at 53. In two different federal courts, Picayune is advancing substantially similar arguments, based on the same facts, about the same claim: their challenge to the Governor's concurrence. Picayune cannot plausibly argue that they are advancing different claims when they use the same words and arguments to advance claims in this case that they are using to appeal their loss on the same issues and claims in another court.

A straightforward reading of Picayune's own filings demonstrates that they are litigating the same issue, with the same parties, in two courts, and in each case using the same legal arguments.

2. Picayune is Collaterally Estopped From Relitigating Its Claims Regarding the Governor's Concurrence Because Another Court Ruled That California was an Indispensable Party[2]

Picayune has already litigated the Governor's concurrence, against the same parties, on the same facts, resulting in a determination of the issue that was critical and necessary to the judgment: "the Picayune Tribe nowhere in its ample briefing on summary judgment even mentions its allegation regarding the Governor's concurrence, the claim is deemed abandoned in this case," *id.* at *20 n.16, and if that were not the case then "the plaintiffs' claims in any way involving the Governor's concurrence must be dismissed due to the absence of an indispensable party." *Stand Up III*, 2016 WL 4621065, at *26, *20 n.16 (applying that holding to Picayune). "Collateral estoppel, or issue preclusion, bars the relitigation of issues adjudicated in previous litigation between the same parties. *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)." For the claim preclusion to apply: "(1) the issue must be identical to one alleged in prior litigation; (2) the issue must have been "actually litigated" in the prior litigation; and (3) the determination of the issue in the prior litigation must have been "critical and necessary" to the judgment." *Beauchamp*, 816 F.3d at 1225 (quoting *Clark*, 966 F.2d at 1320); *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011).

[2] The United States presents no arguments here about whether California is a necessary and indispensable party, and is under no obligation to do so, because no party should be forced to litigate the same issue in different courts, particularly against a party that files briefs with substantially identical arguments in two cases. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action" even if that judgment "may have been wrong or rested on a legal principle subsequently overruled in another case." *Federated Dep't Stores Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (citations omitted); *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011).

Each element for issue preclusion is satisfied here. Picayune was a plaintiff in *Stand Up III* and had sued Federal Defendants; North Fork was a defendant-intervenor. That is identical to this case. In each case, Picayune has alleged that the Governor's concurrence was invalid. In Picayune's first challenge the Court examined whether California was a necessary and indispensable party to claims based on Picayune's assertion that the Secretary "violated the APA, IGRA, and the IRA by relying on a purported concurrence from the Governor of California that is ultra vires and invalid under California law." *Stand Up III*, 2016 WL 4621065, at *20 n.16 (quoting Picayune's Compl.). This claim, the court found, had been abandoned by Picayune. *Id.*

Picayune's abandonment constituted a "failure to prosecute." A "plaintiffs' failure to prosecute" is, "[u]nless otherwise specified, [] a dismissal on the merits for purposes of res judicata." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 714 (9th Cir. 2001) (quoting *United States v. Schimmels* (*In re Schimmels*)), 127 F.3d 875, 884 (9th Cir. 1997). Failure to prosecute a claim is "treated as an adjudication on the 'merits' for purposes of preclusion." *Johnson v. United States Dep't of Treasury*, 939 F.2d 820, 825 (9th Cir. 1991) (citing Fed. R. Civ. P. 41(b)); *Clark-Cowlitz Joint Operating Agency v. F.E.R.C.*, 826 F.2d 1074, 1079 (D.C. Cir. 1987) ("The principle underlying the rule . . . is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not to have another chance to do so" and, likewise, the principle that "the one who has actually litigated an issue should not be allowed to relitigate it—underlies the rule of issue preclusion.") (quoting *Restatement (Second) of Judgments* at 6 (1982)); *Brodie v. Burwell*, Civ. No. 15-322-JEB, 2016 WL 3248197, *14 (D.D.C. June 13, 2016) ("if he could have but did not bring those facts to the attention of the court in which the case was pending, he may not bring a later action stemming therefrom"). Courts do not "permit a plaintiff to avoid the preclusive effects of an adverse decision simply by

abandoning the action before final judgment is entered," *Covington and Burling v. Food and Nutrition Serv. of U.S. Dep't of Agriculture*, Civ. No. 88-3713, 1991 WL 241909 at *1 (D.C. Cir. Oct. 31, 1999), nor do they excuse abandonment which results in summary judgment. "Both Picayune and Stand Up raised issues concerning the legality and effectiveness of the California Governor's concurrence in the Secretarial determination concerning the Madera Site." D.C. Cir. Br. at 50. Indeed, with respect to the actual parties to a prior case, an involuntary dismissal must generally be treated as a judgment on the merits for purposes of res judicata. *See* 5 *Moore's Federal Practice* 41-173 (2d ed. 1996). S*ee also Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 327 (1955) ("[i]t is of course true that [a] judgment dismissing [a] previous suit 'with prejudice' bars a later suit on the same cause of action."); 9 *Wright & Miller*, Voluntary Dismissal - Effect of Dismissal, Federal Practice & Procedure § 2367 (3d ed. 2013) ("A dismissal with prejudice, unless the court has made some other provision, is subject to the usual rules of res judicata"). Picayune's abandonment of their claims in *Stand Up III* also bars its claims here.

Picayune also litigated the issue of whether California was an indispensable party to its claims regarding the Governor's concurrence. The *Stand Up III* Court found that California was a necessary and indispensable party to claims "in any way involving the Governor's concurrence." *Id.* at *26. The issue was fully litigated and briefed by all parties to this case. The determination of this issue was necessary to the Court's judgment to dismiss certain claims filed by Picayune and the other plaintiffs. *Id.* at *20 n.16, 26. *Stand Up III*'s holding that California is an indispensable party should not be relitigated here.[3]

[3] To the extent that Picayune asserts that the trial court's judgment is not final for purposes of res judicata or collateral estoppel, under federal law, a trial court's judgment is final for res judicata

Claims I-V, and VII of Picayune's amended complaint assert that the Governor's concurrence is invalid and uses this as a basis to request declaratory relief from the Court. Claims I, II, and III directly challenge the Governor's concurrence under California law. Am. Compl. ¶¶ 53-68. Claims IV, V, and VII also rely on allegations that the Governor's concurrence is invalid. Because Picayune is collaterally estopped from challenging the Governor's concurrence, summary judgment should be entered for the Federal Defendants on claims I, II, and III. Summary judgment should also be entered in favor of Federal Defendants to the extent claims IV, V, and VII rely on Picayune's second challenge to the Governor's concurrence.

B. PICAYUNE'S FOURTH AND FIFTH CLAIMS ARE BARRED BY RES JUDICATA

Picayune's Fourth and Fifth claims are barred by res judicata. In each case, Picayune has alleged that the Secretary's two-part determination was invalid because of some supposed defect in the Governor's concurrence. Picayune alleged that the Secretary "violated the APA, IGRA, and the IRA by relying on a purported concurrence from the Governor of California that is ultra vires under California law." *Picayune Rancheria*, Doc. 1 ¶ 57. Once again, Picayune, in its Fourth and Fifth claims, alleges that "[a]s a consequence of the concurrence not being effective . . . the Secretarial two-part determination relating to the Madera Parcel is no longer valid or effective" and "[b]ecause there is no valid affirmative concurrence, the Madera Parcel does not

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purposes as soon as it is entered, regardless of whether it is appealed. *Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 882 (9th Cir. 2007) ("a final judgment retains its collateral estoppel effect . . . pending appeal."); s*ee, e.g., Heron Holding Corp. v. Lincoln M. Operating Co.*, 312 U.S. 183 (1940); *Deposit Bank of Frankfort v. Board of Councilmen*, 191 U.S. 499 (1903); *Performance Plus Fund, Ltd. v. Winfield & Co.*, 443 F. Supp. 1188, 1190 (N.D. Cal. 1977); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4433.

constitute 'Indian lands' under IGRA." Am. Compl. ¶¶ 78, 84. As noted, Picayune abandoned these claims in *Stand Up III*: "the Picayune Tribe nowhere in its ample briefing on summary judgment even mentions its allegation regarding the Governor's concurrence, the claim is deemed abandoned in this case." *Stand Up III*, 2016 WL 4621065, at *20 n.16.

"Res judicata, or claim preclusion, prohibits lawsuits on 'any claims that were or could have been raised' in a prior action." *Stewart v. U.S. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002) (quoting *Owens*, 244 F.3d at 713). Res judicata applies when there is "an identity of claims," "a final judgment on the merits," and "identity or privity between parties." *Id.* Picayune's abandonment of their claims in Stand Up III also bars their claims here.[4]

Likewise, res judicata is applicable to Picayune's fifth claim, which purports to be an APA challenge to the agency action that took the Madera site into trust for North Fork. Picayune has already challenged the "Federal Defendants' decision to acquire land under the IRA on behalf of the North Fork Tribe based on the allegedly 'invalid IGRA Decision,' in violation of the IRA and the APA." *Stand Up III*, 2016 WL 4621065, at *20. *Stand Up III* rejected this claim, and granted summary judgment against "all of the Picayune Tribe's claims." *Id.* at *79. Picayune's Fourth and Fifth claims are barred by res judicata.

[4] There are exceptions to res judicata, *see, e.g., United States v. Mendoza*, 464 U.S. 154 (1984) (recognizing exceptions to general principles of res judicata in light of overriding federal policy concerns), but none are applicable here. Exceptions are available only "on rare occasions," where "threatened or continuing acts which were the subject of the prior action involve substantial public policy concerns, such as environmental pollution or civil rights violations" or "a new statute conveys jurisdiction upon a court to entertain claims that were previously beyond its jurisdiction" 18 Moore's Federal Practice § 131.22[3] (3d ed. 2008).

C. PICAYUNE MAY NOT RELITIGATE WHETHER THE MADERA PARCEL IS INDIAN LANDS

Because Picayune is barred by res judicata from relitigating whether the Madera site constitute Indian lands (claim V), it is collaterally estopped from asserting that the Madera site is not Indian lands in claims VI, VII, and VIII. Picayune already challenged whether the Madera site could be acquired as trust land, alleging that "Interior failed to properly consider the North Fork Tribe's lack of historical connection to the Madera Site, in contravention of" IGRA and that the acquisition "violated the APA, IGRA, and the IRA." *Picayune Rancheria*, Doc. 1 at ¶¶ 51, 56, 57. Picayune's prayer for relief requested "[a] permanent injunction enjoining the Secretary and his agents and employees from taking the Madera Site into trust or holding the Madera Site in trust for the benefit of the Nation." *Id.* at p. 17. Now, Picayune, again, contends that the "Madera Parcel does not constitute 'Indian lands' under IGRA," Am. Compl. ¶ 90 (claim VI), "the Madera Parcel does not constitute 'Indian lands' under IGRA," Am. Compl. ¶ 98 (claim VII), and alleges violations of IGRA and the APA because the Secretarial Procedures involve "a location that does not constitute 'Indian lands' under IGRA." Am. Comp. ¶ 102 (claim VIII). In its prayer for relief, Picayune once again attempts to set aside the Secretary's two-part determination: "the Secretarial Determination concerning the Madera Parcel . . . is not and has not been valid." Am. Compl. at p. 18.

Picayune is collaterally estopped from relitigating, in claims VI, VII, and VIII, the status of the Madera site as Indian lands. In another action brought by Picayune challenging the Secretary's two-part determination, Picayune wrote that it "asserted that the Trust decision was arbitrary, capricious, and otherwise contrary to law . . .," and that "the District Court denied the Picayune Tribe's summary judgment motion finding the Department's decisions in every regard were proper and reasonable." D.C. Cir. Br. at 28; *Stand Up III*, 2016 WL 4621065, at *79.

Picayune has already litigated the Indian lands status of the Madera site and is estopped from relitigating the same issue before this Court.

II. PICAYUNE'S FIRST THREE CLAIMS FAIL AS A MATTER OF LAW AND FOR LACK OF SUBJECT MATTER JURISDICTION

To the extent their claims are not otherwise barred, or abandoned, claims I, II, and III seek declaratory relief against Federal Defendants on the basis that the Governor of California violated California law. Claim I alleges a violation of IGRA based on Picayune's assertion that the Governor violated the California Constitution, but does not indicate which provision of IGRA they believe the Secretary violated. Am. Compl. ¶ 53-57. Claim II, without any reference or citation to federal statutes or regulations, asks for declaratory relief on the basis that California's voter passed a referendum regarding the 2012 Compact. Am. Compl. ¶ 58-68. Claim III asks for declaratory relief based on the alleged ineffectiveness of what Picayune incorrectly calls the "Governor's conditional concurrence," but it too fails to cite any federal statue or authority. Am. Compl. ¶ 69-73. None of these claims state a valid cause of action, and Picayune does not address these claims in its motion for summary judgment.

A. PICAYUNE HAS NOT CHALLENGED A FEDERAL AGENCY ACTION NOR IDENTIFIED A CAUSE OF ACTION UNDER THE APA

Simply put, neither the amended complaint nor the motion for summary judgment provide any indication that Picayune's first three claims for relief challenge any action of Federal Defendants. These claims merely list Picayune's grievances with the Governor of California under California law. The Governor of California is neither named as a defendant nor a party to this case. Although the APA may provide some plaintiffs with a cause of action based on an alleged violation of IGRA, those plaintiffs must "challenge 'agency action' that is 'final.'" *Wildlife Fish Conservancy v. Jewell*, 730 F.3d 791, 800 (9th Cir. 2013) (citations omitted). None

of Picayune's first three claims challenges any federal agency action but instead appear to challenge Governor Brown's actions. The APA does not provide a cause of action against Governor Brown because "[a]ctions under the APA may be brought only against federal agencies." *Shell Gulf of Mexico Inc. v. Ctr. For Biological Diversity, Inc.*, 771 F.3d 632, 636 (9th Cir. 2014) (citing *City of Rohnert Park v. Harris*, 601 F.2d 1040, 1048 (9th Cir. 1979). This is consistent with the plain text of the APA which states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The APA defines and limits the definition of agency action to include "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). Picayune has not identified, for its first three claims, either in its amended complaint or motion for summary judgment, a federal agency action that falls within that definition. The Governor's concurrence with the Secretary's two-part determination is not an action subject to the APA. Accordingly, Picayune has failed to state a cause of action and Federal Defendants are entitled to summary judgment on Picayune's first three claims.

B. PICAYUNE HAS NOT IDENTIFED A PRIVATE RIGHT OF ACTION UNDER IGRA OR THE DECLARATORY JUDGMENT ACT

Although claims I, II, and III do not specifically identify a cause of action, Picayune's amended complaint indicates that it is brought pursuant to IGRA, 25 U.S.C. §§ 2701-14, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-559, and the Declaratory Judgments Act, 28 §§ 2201-02. Am. Compl. ¶ 7. None of these statutes establish a private right of action. *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) ("The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy.") (citations omitted); *In re Digimarc Corp. Derivative Litig.*, 549 F.3d

1223, 1230 (9th Cir. 2008). "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander*, 523 U.S. at 286. There is no such private right of action identified by Picayune.

IGRA does not provide a private right of action for Picayune's first three claims. Picayune titles claim I as "Ineffectiveness of Gubernatorial Concurrence under IGRA," Am. Comp. p. 12, but fails to identify what provision of IGRA is at issue, in any of its first three claims, because no provision of IGRA provides a cause of action related to their allegations. In claim I Picayune contends that the Governor's concurrence violated the California Constitution. There are no discernible allegations regarding any action taken by the Secretary, merely a mention of IGRA in the title of the claim. This pattern repeats itself. Claim II makes no mention of IGRA but describes the 2014 referendum and the 2012 Compact. Claim III alleges the Governor's concurrence was ineffective based on Picayune's subjective opinion regarding the Governor's intent when he concurred with the 2012 Compact. Given that these claims do not allege wrongdoing on the part of the Secretary, summary judgment is appropriate.

To the extent that Picayune alleges a violation of IGRA, "IGRA provides no general private right of action." *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000). Although IGRA does explicitly provide some private rights of action, for example, it allows for tribes to sue states under some circumstances for failure to negotiate a tribal-state gaming compact in good faith, 25 U.S.C. § 2710(d), it does not create general and unidentified private rights of action. There is simply no private right of action for Picayune's claims I, II, and III, and to the extent there could be one, Picayune has neither identified it nor made any effort to invent a new private right of action.

The Declaratory Judgment Act does not provide a cause of action or waive the Federal Defendants' sovereign immunity for claims I, II, and III. "The Declaratory Judgment Act does not by itself confer federal subject-matter jurisdiction." *Nationwide Mut. Ins. Co. v. Liberatore*, 408 F.3d 1158, 1161 (9th Cir. 2005). A plaintiff cannot pursue claims under the Declaratory Judgment Act without identifying an independent and substantive "statute or regulation that is enforceable pursuant to a federal private right of action." *N. Cty. Commc'ns Corp. v. California Catalog & Tech.*, 594 F.3d 1149, 1161 (9th Cir. 2010). Neither the APA nor IGRA supply Picayune a cause of action for their first three claims; and without that, there is no cause of action pursuant to the Declaratory Judgment Act either.

C. THERE IS NO WAIVER OF SOVEREIGN IMMUNITY FOR PICAYUNE'S FIRST THREE CLAIMS FOR DECLARATORY RELEIF

To the extent that Picayune has stated a cause of action pursuant to the Declaratory Judgment Act, there is no waiver of sovereign immunity. "[T]he Declaratory Judgment Act [] is not a consent of the United States to be sued, and merely grants an additional remedy in cases where jurisdiction already exists in the court." *Brownell v. Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128 (9th Cir. 1954); *Wells v. United States*, 280 F.2d 275, 277 (9th Cir. 1960). Thus, even if one of Picayune's first three claims states a cause of action under the Declaratory Judgment Act, Picayune has failed to identify a waiver of sovereign immunity and Federal Defendants are entitled to summary judgment.

III. IF RES JUDICATA DOES NOT BAR PICAYUNE'S FOURTH CLAIM IT STILL FAILS ON THE MERITS

Although res judicata bars Picayune's claim IV, the claim is nevertheless flawed and should be rejected because, "plaintiffs' argument makes no sense because the Secretary's [two-part] determination is not dependent on the Governor's concurrence, and necessarily comes

before the Governor even has a chance to concur." *Stand Up III*, 2016 WL 4621065, at *22. Picayune repeats its errant arguments from its prior challenge, asserting "the invalidity of Governor Brown's concurrence renders the 'two-part' inoperative and no long[er] valid by operation of law." Pl.'s Mem. at 14 n.2. Picayune's confusion is easily cleared up by examining the relevant statutes and regulations, which describe the appropriate process. IGRA permits gaming on lands acquired in trust by the Secretary, if the Secretary makes a two-part determination and the Governor concurs in that determination. 25 U.S.C. § 2719(b)(1)(A). If the "Secretary makes a favorable Secretarial Determination, the Secretary will send to the Governor" "[a] request for the Governor's concurrence in the Secretarial Determination." 25 C.F.R. § 292.22; *id.* § 292.13(c)-(d). The Secretarial Determination comes first. The Governor's concurrence comes second. Moreover, "'if the concurrence . . . is determined to have been invalid, the [two-part] determination' need not 'be rescinded.'" *Stand Up III*, 2016 WL 4621065, at *22 (citations omitted).

Picayune nevertheless contends that the Governor's concurrence, if somehow defective under state law, invalidates the Secretary's prior two-part determination. "The Secretary's two-part determination is not contingent upon the Governor's concurrence, but *gaming* on land acquired in trust by the Secretary after October 17, 1988, is contingent upon the Governor's concurrence." *Stand Up III*, 2016 WL 4621065, at *22 (citing 25 U.S.C. § 2719(a), (b)(1)(A); *Confederated Tribes of Siletz Indians v. United States*, 110 F.3d 688, 696 (9th Cir. 1997). Because "[t]he validity of a Governor's concurrence simply does not affect the validity of a Secretarial two-part determination: each is a separate requirement for gaming to take place on newly-acquired, non-reservation lands," *id.*, Federal Defendants are entitled to summary judgment on claim IV, to the extent it is not barred by res judicata.

IV. PICAYUNE'S FIFTH CLAIM FAILS TO CHALLENGE A FINAL AGENCY ACTION AND FAILS ON THE MERITS

Claim V alleges that the Madera site does not constitute "Indian lands" under IGRA because the Governor's concurrence is allegedly invalid. Am. Compl. ¶¶ 79-85. This claim lacks a cause of action, fails on any merits, is barred by res judicata, *supra* Section I.B, and is abandoned, *infra* Section VII.

A. CLAIM FIVE DOES NOT CHALLEGE ANY AGENCY ACTION

IGRA does not include a private right of action to obtain a declaration about the status of another Tribe's land. Nor is there any agency action which would allow Picayune to bring a challenge pursuant to the APA. Most APA challenges to a decision to accept land into trust are "a garden-variety APA claim[s]" wherein the plaintiff "asserts merely that the Secretary's decision to take land into trust violates a federal statute . . . ." *Mash-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 132 S. Ct. 2199, 2208 (2012). More recently, the Ninth Circuit has held that "parties cannot 'use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions.'" *Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015) (quoting *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012)). The practical application of that holding is that parties cannot "attack collaterally the [Secretary's] decision to take" land "into trust outside the APA" because doing so "would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government." *Id.* at 954. To challenge a land into trust decision a party must "file the appropriate APA action." *Id.* In this case Picayune has not challenged the agency action that took the Madera site into trust but has attacked the status of the Madera lands as Indian lands. Claim V is an attempt to collaterally attack an agency action without stating any cause of action at all. Accordingly, summary judgment is appropriate on this claim.

B. CLAIM FIVE FAILS ON THE MERITS

Picayune's claim that the Madera site is not "Indian lands" is barred by res judicata, but in any event the claim is demonstrably meritless based on Picayune's own amended complaint. IGRA's definition of "Indian lands" includes "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(B). Picayune's has (correctly) alleged that "the United States took [the Madera site] into trust for the North Fork Tribe on or about February 5, 2013." Am. Compl. at ¶ 17. IGRA states that Indian lands include "lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe," 25 U.S.C. § 2703(4)(B) and Picayune has asserted that the land is held in trust. Am. Compl. at ¶¶ 17, 28. To the extent Picayune is seeking to relitigate whether the Madera site was acquired as trust property pursuant to 25 U.S.C. § 2719(b)(1)(A), this Court should adopt the *Stand Up III* opinion's holding, which found that the Secretary's actions were reasonable and that "[t]he validity of a Governor's concurrence simply does not affect the validity of a Secretarial two-part determination . . . ." 2016 WL 4621065, at *22.

Picayune's claim lacks merit and Federal Defendants are entitled to summary judgment.

V. PICAYUNE'S SEVENTH CLAIM FAILS TO CHALLENGE A FINAL AGENCY ACTION AND FAILS ON THE MERITS

Claim VII seeks declaratory relief based on the same failed argument presented in claims IV and V. Picayune conflates the Governor's concurrence with the secretarial determination, an issue it lost in *Stand Up III*. Picayune's claim that its concerns about the Governor's concurrence renders the two-part determination invalid is also meritless because "[t]he Secretary's two-part determination is not contingent upon the Governor's concurrence, but

gaming on land acquired in trust by the Secretary after October 17, 1988, is contingent upon the Governor's concurrence." *Stand Up III*, 2016 WL 4621065, at *22 (citing 25 U.S.C. § 2719(a), (b)(1)(A). Picayune points to no provision of IGRA which would allow it to seek a declaratory judgment about class II gaming on the Madera site. Picayune also fails to state a cause of action. IGRA does not allow a private right of action for suits questioning whether a tribe's land is eligible for Class II gaming. *Big Lagoon Rancheria*, 789 F.3d at 954 (to challenge a land-into-trust acquisition a party should file an appropriate APA challenge to the correct agency action). Finally, Picayune fails to identify any specific agency action that it is challenging—it merely asks for declaratory relief. Claim VII fails as a matter of law.

VI. THE SECRETARIAL PROCEDURES ARE VALID AND PICAYUNE'S SIXTH AND EIGHTH CLAIMS FAIL AS A MATTER OF LAW

Claims VI and VIII challenge the Secretary's issuance of Secretarial Procedures. Am. Compl. ¶¶ 86-91, 101-3. Picayune's primary arguments are a collateral attack on this Court's decision in *North Fork*, 2015 WL 11438206, at *12, and are nothing more than an attempt to relitigate its confusion over how a Governor's concurrence interacts with a two-part determination to Secretarial Procedures. Pl.'s Mem. at 18-22. There are five independent reasons to reject Picayune's claims. First, the issuance of Secretarial Procedures was a mandatory product of IGRA's remedial measures. Second, Picayune's argument is a collateral attack on a final judgment of this Court. Third, Picayune has failed to cite any portion of the administrative record and instead relies solely on material that is both not included in the record and produced after the time of the decision. Fourth, the Secretary was entitled to rely on the Governor's concurrence. Fifth, the validity of the Governor's concurrence has no bearing on whether Secretarial Procedures were appropriately issued.

A. THE SECRETARIAL PROCEDURES COMPLY WITH IGRA

IGRA mandated the issuance of Secretarial Procedures after the good-faith remedial process was completed. IGRA's plain text rebuts Picayune's argument that the Secretarial Procedures are unlawful. IGRA explicitly provides a cause of action "initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i). If "the court finds that the State has failed to negotiate in good faith with the Indian tribe" then "the court shall order the State and the Indian Tribe to conclude such a compact" within 60 days. *Id.* § 2710(d)(7)B)(iii). "If a State and an Indian tribe fail to conclude a Tribal-State compact" then "the Indian tribe and the State shall each submit to a mediator . . . a proposed compact that represents their last best offer for a compact." *Id.* § 2710(d)(7)(B)(iv). The mediator then selects the compact that "best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court." *Id.* The selected compact is then submitted to the tribe and State, *id.* § 2710(d)(7)(B)(v), and if "a State consents to a proposed compact" then "the proposed compact shall be treated as a Tribal-State compact." *Id.* § 2710(d)(7)(B)(vi). But, if the "State does not consent . . . to a proposed compact submitted by the mediator . . . the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures." *Id.* § 2710(d)(7)(B)(vii). It is undisputed that this is the process that occurred here; the result is the prescription of the Secretarial Procedures now challenged by Picayune. AR00002186-02325. Accordingly, the Secretary was obligated by "shall" to do what IGRA mandated:

> prescribe, in consultation with the Indian tribe, procedures--(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

25 U.S.C. § 2710(d)(7)(B)(vii). This is what the Secretary did.

IGRA's command that "the Secretary *shall prescribe* . . . procedures," *id.* (emphasis added), is mandatory, if IGRA's remedial process has failed to result in a tribal-state compact. *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress used 'shall' to impose discretionless obligations"); *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . creates an obligation impervious to . . . discretion.") (citation omitted); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (using "shall" in a statute expressed Congress' "intent that forfeiture be mandatory in cases where the statute applied."); *Black's Law Dictionary*, at 1375 (6th ed. 1990) ("As used in statutes . . . [shall] is generally imperative or mandatory.") "The word 'shall' is ordinarily 'The language of command.'" *Serv. Emps. Int'l Union. v. United States*, 598 F.3d 1110, 1113 (9th Cir. 2010) (quoting *Anderson v. Yungkau*, 329 U.S. 482, 485) (1947). While courts do not read "shall" as mandatory when such a reading impinges upon administrative enforcement discretion, *see Wood v. Herman*, 104 F. Supp. 2d 43, 47 (D.D.C. 2000) ("While it is a recognized tenet of statutory construction that the word 'shall' is usually a command, this principle has not been applied in cases involving administrative enforcement decisions." (citation omitted)), no such reading is permissible here.

The Secretary's issuance of Secretarial Procedures was not "arbitrary, capricious, [or] an abuse of discretion," 5 U.S.C. § 706(2)(A), because the Secretary had no discretion on the question of whether to issue Secretarial Procedures. IGRA stated that the Secretary "shall prescribe" procedures if the State failed to consent to the compact selected by the mediator. That is what the Secretary did. When a statute mandates an agency action, it cannot be found to be arbitrary, capricious, or an abuse of discretion. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752,

770 (2004) (decision was not arbitrary, capricious, or abuse of discretion when the agency "has no discretion").

IGRA requires only that the Secretary issue procedures"(I) which are consistent with the proposed compact selected by the mediator;" "(II) the provisions of this chapter and the relevant provisions of the laws of the State;" and "(III) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." 25 U.S.C. § 2710(d)(7)(B)(vii). Picayune does indeed contest the Madera site's status as "Indian lands," but they have not contested the Secretary's two-part determination in this case (nor is the record for that determination before the Court). Picayune cannot challenge the Secretarial Procedures in order to indirectly challenge the action that resulted in the land being taken into trust. In *Big Lagoon Rancheria*, the Ninth Circuit rejected collateral attacks on land-into trust decisions and emphasized that the proper cause of action was a "garden-variety APA claim" directly challenging the agency action. 789 F.3d at 953-54. Picayune clearly understands this because it has already challenged the decision to accept the land into trust, briefed the issue, and lost, in its District of Columbia action. This Court should reject Picayune's efforts to undermine IGRA and to litigate the same issue twice.

The Secretary properly fulfilled his mandate under IGRA by prescribing Secretarial Procedures that are consistent with the compact submitted to him by the Court appointed mediator in *North Fork*. 2015 WL 11438206, at *12; AR00002186. Picayune has not demonstrated that the Secretary's action was arbitrary, capricious, or an abuse of discretion.

B. PICAYUNE CANNOT COLLATERALLY ATTACK THIS COURT'S GOOD FAITH RULING IN *NORTH FORK V. CALIFORNIA*

Picayune does not dispute that the good faith remedial process under IGRA failed to result in a tribal-state compact. Instead, Picayune asserts that the ruling in *North Fork* is void,

alleging that the Secretary could not issue procedures because "having Indian lands is a prerequisite to an Indian tribe's ability to compel compact negotiations and therefore potentially obtain Secretarial Procedures as part of the IGRA's remedial process." Pl.'s Mem. at 20. Picayune is impliedly asserting that this Court's actions in *North Fork* should be set aside when it contends "there is no legitimate path to the issuance of Secretarial Procedures," *id.* at 21, or at the very least it is ignoring the mandate issued in *North Fork*. Picayune's arguments are not timely and should be rejected as a collateral attack on a final decision of this Court. Even so, the arguments still fail on the merits precisely because Picayune's own amended complaint admits that the Madera site is in trust and IGRA states that Indian lands include "lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe," 25 U.S.C. § 2703(4)(B). Moreover, the *Stand Up III* Court rejected Picayune's claims regarding the Secretary's trust decision. 2016 WL 4621065, at *79.

C. THIS CASE MUST BE DECIDED ON THE RECORD BEFORE THE COURT

Picayune's complaint contains no references to the California Court of Appeals December 2016 decision, nor does the administrative record for the Secretary's July 2016 issuance of the Secretarial Procedures. In its briefing, however, Picayune asserts that the December 2016 decision undermines the Secretary's two-part determination because the California Court of Appeals held that the Governor's concurrence was invalid. Pl.'s Mem. at 11.[5]

[5] As noted before "plaintiffs' argument makes no sense because the Secretary's [two-part] determination is not dependent on the Governor's concurrence, and necessarily comes *before* the Governor even has a chance to concur." *Stand Up III*, 2016 WL 4621065, at *22.

The California Court of Appeal's December 2016 decision provides no basis to determine that the Secretarial Procedures are arbitrary, capricious, or an abuse of discretion. "A reviewing court must review the administrative record before the agency at the time the agency made its decision." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1170 (9th Cir. 2004) (citation omitted). "Review of an agency action is limited to the record considered and relied upon by the agency at a time the decision is made." *Wilderness Soc'y v. Dombeck*, 168 F.3d 367, 377 (9th Cir. 1999) (citing *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir. 1989). In *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of Interior*, the Court held that decisions issued by the California Court of Appeal after the challenged agency action had taken place could not be considered because the decisions were not part of the record that was considered and relied upon by the agency. 624 F. Supp. 2d 1197, 1212 (E.D. Cal. 2009). Picayune has failed to address the administrative record for the action that it challenges and has, therefore, failed to demonstrate that the Secretary's actions were arbitrary, capricious, or an abuse of discretion.

D. THE SECRETARY WAS ENTITLED TO RELY ON THE GOVERNOR'S CONCURRENCE

If the Court finds for Federal Defendants on claims VI and VIII for any of the independent reasons explained above, it is not necessary to reach this issue. However, if the Court does reach this issue, Federal Defendants are entitled to summary judgment because the Secretary was not required by IGRA, or any other federal statute, to make a determination of whether the Governor's facially valid concurrence was valid as a matter of California law. Federal law does not require federal officials to look behind the actions of state officials to determine whether those officials complied with state law. In *United States v. Lawrence*, the Ninth Circuit held that the Secretary was entitled to rely upon actions by the Governor of

Washington "whether or not the Governor's proclamation was valid under Washington law." 595 F.2d 1149, 1151 (9th Cir. 1979) (citation omitted). *Lawrence* involved state retrocession of jurisdiction over Indian lands under 25 U.S.C. § 1323, which allowed states to retrocede jurisdiction over Indian lands in certain matters to the United States. An executive order allowed the Secretary to accept any retrocession by publishing it in the federal register. Exec. Order No. 11,435, 33 Fed. Reg. 17,339 (Nov. 21, 1968). In 1971, the Governor of Washington proclaimed retrocession of jurisdiction over the Suquamish Port Madison Indian Reservation. The Ninth Circuit concluded that the Governor's authority to retrocede jurisdiction was irrelevant, citing "the plenary power of the federal government over Indian affairs" and "the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action. *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191 (1978).

Other retrocession cases support the Secretary's reliance on the validity of the Governor's concurrence. In *Omaha Tribe of Nebraska v. Vill. of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), the court determined that the relevant question was "not whether the state resolution was valid under state law, but whether it was valid under federal law." *Id.* at 831. "If the elected representatives . . . acted beyond their power in sending the Secretary of the Interior a notice offering a retrocession of jurisdiction over certain Indian country, then they must answer to the people of the state for their negligence." *Id.* at 832.

It is critical to distinguish between whether the (1) Governor's concurrence is valid as a matter of state law and (2) whether a federal cause of action lies against the Secretary for relying on a facially valid Governor's concurrence that plaintiffs allege violates state law. IGRA does

not mandate that the states follow a particular procedure to issue a Governor's concurrence. *See* 25 U.S.C. § 2719(b)(1)(A) ("but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination"). There is no other standard in IGRA by which the Secretary may determine whether he has received a Governor's concurrence. In other portions of IGRA Congress specifically mentions the State, and not merely the Governor. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,367 (May 20, 2008) ("section 2719 of IGRA requires only the Governor's concurrence" and does not require "the consent of the State . . . . ."). To the extent that any party attacks the Secretary's reliance on a Governor's concurrence in a two-part determination, it must do so based on IGRA, not some arbitrary standard that suits their case. The standard to be applied is simple —"the Governor of the State in which the gaming activity is to be conducted concurs . . ." 25 U.S.C. § 2719(b)(1)(A). This does not mean that a state court cannot find that the Governor violated her own authority. That, however, is not a standard that applies to the Secretary when he must evaluate whether the "Governor of the State" concurred in his two-part determination. In this case, the Governor of California concurred.

The Secretary was entitled to rely on the facially valid actions of the Governor of California and is entitled to summary judgment on claims VI and VIII.

E. THE GOVERNOR'S CONCURRENCE IS IRRELEVANT TO THE MADERA SITE'S STATUS AS INDIAN LANDS AND THE VALIDITY OF THE SECRETARIAL PROCEDURES

Picayune contends that the Governor's concurrence was invalid and therefore the Madera site does not constitute Indian lands, and on this basis, it contends that the Secretarial Procedures are invalid. Pl.'s Mem. at 19. Picayune argues that "[b]cause the Governor lacked authority under California law to concur in the Secretarial Determination for the Madera Site that

determination was never given effect," and that "the Madera Site cannot at this time be considered eligible for gaming;" as a result Picayune alleges that "Secretarial Procedures purporting to authorize gaming at the Madera Site are contrary to federal and California law." Pl.'s Mem. at 22. Picayune's argument section addressing this issue does not cite adverse authority from a case it brought and in which the Court ruled against Picayune on the same issue. "The validity of a Governor's concurrence simply does not affect the validity of a Secretarial two-part determination: each is a separate requirement for gaming to take place on newly-acquired, non-reservation lands." *Stand Up III*, 2016 WL 4621065, at * 22. Picayune's contention about the Madera site's status has already been rejected. Further, the *Stand Up III* Court also held that to the extent Picayune challenged "the Secretary's decision to acquire the Madera Site in trust for the North Fork Tribe . . . on the basis of an invalid or no-longer viable gubernatorial concurrence" then "neither IGRA nor the IRA require the Secretary to determine the validity of the Governor's concurrence under California law." *Id.* at *26. The Secretary's land acquisition decision was "reasonable" "in light of Governor Brown's August 2012 letter explicitly concurring in the Secretary's two-part determination." *Id.* Picayune's conclusion rests on arguments that it has tried and lost. If the Court reaches this issue, it should adopt the approach taken in *Stand Up III*, and reject Picayune's claims.

VII. PICAYUNE HAS ABANDONED ITS FIRST, SECOND, THIRD, AND FIFTH CLAIMS

Even if claims I, II, III, and V survive the other defenses, summary judgment should be entered against Picayune on these claims because they were not raised or addressed in the opening brief. A claim is abandoned at the summary judgment stage when a party "has a full and fair opportunity to ventilate its views with respect to an issue and instead chooses a position that removes the issue from the case." *BankAmerica Pension Plan v. McMath*, 206 F.3d 821,

826 (9th Cir. 2000); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009); *Davis v. City of Las Vegas*, 478 F.3d 1048, 1058 (9th Cir. 2007); *USA Petro. Co. v. Atlantic Richfield Co.*, 13 F.3d 1276, 1284 (9th Cir. 1992).

Picayune's first three claims allege that the Governor's concurrence was invalid. Picayune's brief does not discuss claim I's allegations that the California Legislature did not ratify the concurrence. Am. Compl, ¶ 53-57. Nor does Picayune's brief address claim II's allegations regarding the impact of the 2014 referendum on the Governor's concurrence. *Id.* at ¶ 58-68. Picayune also does not discuss claim III's allegations regarding a conditional concurrence. *Id.* at ¶ 69-73. Likewise, the opening brief does not address claim V's contention that the Madera site is not "Indian lands" under IGRA's definition. Picayune's opening brief does not discuss these claims and Federal Defendants are entitled to summary judgment on these abandoned claims.

VIII. STAY

Picayune's claims are all based on their assertion that the Governor's concurrence is invalid under California state law. As expressed above, Federal Defendants do not believe that the status of the Governor's concurrence under state law has any effect on these claims. However, if Picayune's claims cannot be resolved under principles of res judicata, collateral estoppel, and federal law, and the Court determines that state law affects the outcome of Picayune's claims, then the Court should stay the case until the California Supreme Court adjudicates North Fork's and California's pending petitions for review of the California Court of Appeal for the Fifth District's decision. A stay would promote economy of time and effort for [the Court], for counsel, and for litigants," *Landis v. N. American Co.*, 299 U.S. 248, 254 (1936), because it would allow the California courts to enter their judgment.

CONCLUSION

Federal Defendants respectfully request that this Court grant their motion for summary judgment and deny Picayune's motion for summary judgment.

DATED this 24th day of March, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 24, 2017, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.