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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; SALLY M. JEWELL, Secretary of the Interior; and LAWRENCE S. ROBERTS, Acting Assistant Secretary of the Interior for Indian Affairs,

Defendants.

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

PLAINTIFF'S COMBINED OPPOSITION TO DEFENDANTS CROSS-MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

In this case, the Picayune Rancheria of the Chukchansi Indians ("Picayune") challenges final agency action of the Secretary of the United States Department of Interior ("Secretary"). The Secretary's action consists of prescribing gaming procedures authorizing the North Fork Rancheria of Mono Indians ("North Fork") to conduct gaming on at an "off-reservation" site ("Madera Site") pursuant to section 2710(d)(7)(B)(vii) of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, et seq. The gaming procedures the Secretary prescribed and deemed "in effect" (hereinafter the "North Fork Procedures") authorize North Fork to immediately conduct class III, or Las Vegas style, gaming on the Madera Site.

As the Secretary and North Fork unwittingly acknowledge in their respective motions for summary judgment the Secretary's decision to prescribe and put the North Fork Procedures into effect was arbitrary, capricious, and contrary to the IGRA. The Secretary's motion for summary judgment and the administrative record confirm that Secretary did not consider "relevant laws" of California before prescribing the North Fork Procedures and putting them into effect. By acknowledging her failure to consider, and follow California law, the Secretary has also admitted that she did not satisfy her obligations under the IGRA as a general matter.

Moreover, in addition to the fact that prescribing the North Fork Procedures and putting them into effect was contrary to law, the actions the Secretary took with regard to the prescription of the North Fork Procedures were likewise arbitrary and capricious. Specifically, the Secretary prescribed the North Fork Procedures, despite the fact that she was fully aware that the issue of whether the Governor of California had authority under California law to concur in a Secretarial two-part determination concerning the Madera Site was being litigated in California's courts. Moreover, the Secretary has continued to maintain that the North Fork Procedures are "prescribed and in effect"

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despite California's Fifth District Court of Appeal determination that the Governor's concurrence concerning the Madera Site was invalid because the Governor lack authority to concur under California law.

A valid concurrence is necessary for the Madera Site to qualify as gaming eligible lands under California and federal law. Therefore, the Secretary's action of prescribing the North Fork Procedures and placing them into effect when she did, and her continuing decision to maintain the North Fork Procedures "in effect," are equally arbitrary, capricious and are also contrary to the law.

In their respective combined motions for summary judgment and opposition to the Picayune Rancheria of Chukchansi Indian's, the Secretary and North Fork make arguments that are essentially identical. First, they argue that the doctrines of collateral estoppel and the *res judicata* bar the vast majority of Picayune's claims. Next, they assert that Picayune's causes of action do not challenge final agency action. Then, they assert that the Secretary's act of prescribing Secretarial Procedures pursuant to the remedial provision of the IGRA based on the administrative record upon which she made her decision, and that issues of state law are immaterial when considering whether to issue Secretarial Procedures and put them into effect. Finally, both the Secretary and North Fork suggest that if this Court determines that state law issues were relevant when the Secretary prescribed the North Fork Procedures and put them into effect, this Court should stay this action pending the California Supreme Court's determination in *United Auburn Indian Community of the Auburn Rancheria v. Brown*, 4 Cal.App.5th 36, 208 Cal.Rptr.3d 487 (Cal.Ct.App. 2016), *petition for review granted* (Cal. January 25, 2017) (No. S238544) ("*United Auburn v. Brown*").

Largely, the Secretary's and North Fork's arguments are diversions. They are intended to distract the Court from the decision in *Stand Up v. State*, *supra*, and allow North Fork to sidestep California law and the IGRA and conduct gaming at the Madera Site despite the fact that the

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most critical act necessary for the Madera Site to be gaming eligible – the Governor's concurrence in the Secretary's two-determination – was never valid because as a matter of California law.

II. DISCUSSION

A. Issuance of a Stay

As an initial matter, Picayune notes that both the Secretary and North Fork suggest that if this Court determines that the Secretary was required to consider issues of California law in relation to prescribing Secretarial Procedures and putting them into effect then it would be appropriate for this Court to stay this action pending the California Supreme Court's determination of *United Auburn v. Brown*, *supra*. Picayune agrees that a stay of this action is appropriate.

Picayune believes that the Court can find that the decision to prescribe the North Fork Procedures and put them into effect was arbitrary and capricious without a ruling from the California Supreme Court because the Secretary failed to fulfill his obligations under the IGRA. However, the California Supreme Court granted a Petition for Review in *Stand Up for California! v. State*, 6 Cal.App.5th 686, 211 Cal.Rptr.3d 390 (Cal.Ct.App. 2017) *petition for review granted* 214 Cal.Rptr.3d. 2, 390 P.3d 781 (Cal. March 22, 2017) (No. S239630) ("*Stand Up v. State*"). The California Supreme Court's decision will be determinative of some if not all of the claims Picayune presents here. Even if the decision is not entirely determinative, it will likely refine the issues necessary for the Court to determine in this case. Consequently, Picayune agrees that a stay may be appropriate until the California Supreme Court rules in *Stand Up v. State*.

B. California Is Not an Indispensable Party

The United States and North Fork spend considerable time discussing the related doctrines of collateral estoppel and *res judicata* and their purported effect on Picayune's fourth and fifth causes of action. First, the United States and North Fork argue that Picayune is collaterally estopped from

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"relitigating the issue of whether California is an indispensable party" under the doctrine of collateral estoppel. See Doc. No. 26 at pages 9-15; Doc. No. 29, at pages 16-19. Next, they argue that the doctrine of *res judicata* bars Picayune's fourth and fifth causes of action relating to the effectiveness of the secretarial procedures and the designation of the Madera Site as "Indian lands" under the IGRA. Doc. No. 26 at pages 20-24; Doc. No. 29 at pages 19-21.

The United States and North Fork misuse *res judicata* and collateral estoppel. Neither applies in this case at this point. The ultimate issue that the United States and North Fork seek to preclude from this case – whether the Governor's concurrence was valid – has been conclusively decided by California's Fifth Appellate District Court of Appeal. *Stand Up v. State*, *supra*.[1]

The ruling in Stand Up was the reason why Picayune did not seek summary judgment on its first through third causes of action. It was not because Picayune abandoned those claims, it was because the Fifth Appellate Court's decision decided those issues.

Picayune discussed the details of the *Stand Up* decision in its motion for summary judgment. However, because the United States and North Fork each avoid the issue when making their preclusion arguments further discussion of the case and its impact are relevant.

In March 2013, shortly after the governor purported to issue his concurrence with the two-part determination for the Madera Site, the citizen's group Stand Up for California! sued the Governor in Madera County Superior Court. *Stand Up v. State*, *supra*, 6 Cal.App.5th 686, at 690. Stand Up challenged the validity of the Governor's concurrence arguing that the Governor had authority under California law to issue the concurrence. *Id.* Also, Stand Up argued that the California Constitution

[1] North Fork seems to suggest that this Court can disregard the Fifth District Court of Appeal ruling in *Stand Up v. State*, *supra*, because after California Supreme Court granted review that case is now only "persuasive" not binding authority in California. See Doc. No. 26, page 9, citing Cal.R.Ct. 8.1115(e)(1). This ignores the fact that, as a federal court, this Court is not subject to the California Rules of Court. It also ignores Ninth Circuit precedent, discussed *infra,* detailing how this Court should treat the decision in *Stand Up v. State.*

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prohibits the Governor from taking any action relating to the authorization of gaming at off-reservation sites in California. *Id.*

Stand Up lost in the trial court. *Stand Up v. State*, *supra,* 6 Cal.App.5th at 691. On demurrers by the State of California and North Fork, the trial court ruled that the Governor had authority to issue the concurrence under Article IV, Section 19(f) of the California Constitution. Section 19(f) expressly authorizes the Governor to *negotiate and conclude* tribal gaming compacts *subject to ratification by the Legislature. Id.* The trial court acknowledged that California Constitution did not expressly authorize the Governor to concur. However, the trial court found that such power was implicit in the power to negotiate and conclude gaming compacts.

As discussed in detail in Picayune's summary judgment motion, Stand Up appealed the trial court's order. On December 12, 2016, Fifth District Court of Appeal overturned the trial court's ruling. Of particular importance, as Picayune discussed in detail in its motion for summary judgment, *Stand Up* Court unanimously agreed that the California Governor's concurrence was invalid under California law.

The issue of whether the Governor's concurrence with the two-part determination for the Madera Site has been litigated and decided. Moreover, that issue was decided in a case in which the State of California and North Fork were parties. Therefore, as discussed below, there is nothing left to litigate and California is not an indispensable party. The irony of the United States' and North Fork's argument is that if California were involved in this action, it would be precluded from arguing that the Governor's concurrence was valid under the same doctrines the United States and North Fork seek to use to dodge the decision in *Stand Up v. State*, *supra.*

Contrary to North Fork's suggestion that this Court may simply ignore the Fifth Appellate District's decision in *Stand Up v. State* the rule in the Ninth Circuit, and this District, is that federal

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courts must follow state court rulings concerning matters of state law. That includes decisions of a state's inferior appellate courts. As recently as two and half months ago the Ninth Circuit stated:

> While the state's Supreme Court is the final arbiter of what is state law, there are many rules of decision commonly accepted and acted upon by the far and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed on them. A state appellate court's announcement of a rule of law is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.
> ...
>
> This approach is consistent with the longstanding principle that state law should be applied consistently in federal and state courts, a goal that would be thwarted if the federal courts were free to choose their own rules of decision whenever the highest court of the state has not spoken.

Poublon v. C.H. Robinson Company, 846 F.3d 1251, 1266 (9th Cir. 2017) (internal citations and quotations omitted).

Here, again contrary to North Fork's suggestion, there is no persuasive datum indicating that the California Supreme Court will reach a conclusion different from the Fifth Appellate District. The only datum to which North Fork or the United States has pointed is that North Fork believes that the Fifth Appellate District incorrectly decided *Stand Up v. State*. However, a party's disagreement with a decision is not the type of datum that the Ninth Circuit contemplates as a basis for a state appellate decision to be non-binding. Clearly, if an interested party could tip the balance by simply voicing a disagreement no such ruling would ever have a binding effect.

Rather, than inquiring as to the opinions of interested parties, a more appropriate approach is to look to decisions of the state's Supreme Court on similar or related issues. The California Supreme Court's decisions concerning the application of California's gambling laws indicate that the Fifth Appellate Districts narrow read of the Governor's authority to concur is sound.

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First, although the California Supreme Court has not decided many cases involving Indian gaming specifically, or gaming more general, the few decisions it has issued view the authority to authorize gaming or the conduct of gaming very narrowly.

The most recent, and as far as Picayune could discern, the only example in the area of Indian gaming is *Hotel Employees and Restaurant Employees, Intern. Union v. Davis*, 21 Cal. 4th 585, 981 P.2d 990 (Cal. 1999) ("*Hotel Employees*"). There the California Supreme Court considered whether California voters could authorize Indian gaming in California through the state's initiative process.

As a rule, in California, "all presumptions favor the validity of initiative measures" and therefore, initiative measures "must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears." *Legislature v. Eu*, 54 Cal.3d 492, 501, 816 P.2d 1309 (Cal. 1991). Despite this rule, the California Supreme Court struck down the initiative measure seeking to legalize Indian gaming in California. *Hotel Employees*, 21 Cal.4th at 615.

In striking down the Indian gaming initiative, the California Supreme Court closely scrutinized California's long history of constitutional prohibitions of gaming. *Id.* at 591-594. In particular, the California Supreme Court noted that Section 19(e) of California's Constitution contains an express ban on "casinos of the type currently operating in Nevada and New Jersey." *Id.*, at 594. Even more, the California Supreme Court noted, the California Constitution expressly mandates that the California Legislature "shall prohibit" such casinos. *Id.* In other words, the California Supreme Court concluded the California Constitution prohibited class III Indian gaming as defined by the IGRA. *Id.*, at 601-607. The California Supreme Court arrived at this conclusion despite the strong presumption in favor of the people of California's power of initiative. *See Associated Home Builders, Inc. v. City of Livermore*, 18 Cal.3d 582, 591, 557 P.2d 473 (noting that

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it is the duty of California courts to jealously guard the right of the initiative and to construct the power liberally whenever it is challenged.).

In other cases, the California Supreme Court has similarly taken a narrow view of the types of gaming allowed within the state. For example, in *Western Telcon, Inc. v. California State Lottery*, 14 Cal.4th 475, 917 P.2d 651 (Cal. 1996) the California Supreme Court even took issue the California State Lottery, ruling a popular state lottery game was illegal under California law. *Western Telcon, Inc.*, 14 Call.4th at 479.

Without getting into the fine details, the issue in *Western Telcon* was whether a state lottery game known as Keno was a lottery or whether it was a "banked game" and thus prohibited in California. *Western Telcon, Inc.*, 14 Cal.4th at 479. After closely reviewing the constitutional and statutory authority concerning lotteries and gaming in California the Supreme Court determined that the Keno game offered by the California State Lottery was a "banked game" rather than a "lottery." *Western Telecon, Inc.*, 14 Cal.4th at 489-494. Consequently, the California Supreme Court found that the California State Lottery was prohibited from continuing to conduct "Keno" games. *Western Telcon, Inc.*, 14 Cal.4th at 495-496.

Hotel Employees and *Western Telcon* suggest that the California Supreme Court does not look favorably on attempts to expand authority to authorize gaming or the actual conduct of gaming in California beyond the limits *expressly* stated in the California Constitution. As the United States and North Fork must admit, there is nothing within the California Constitution's provisions addressing gaming that expressly grants the Governor any unilateral power to make any final decision for the state. The only power the Governor possess is the limited authority to negotiate and conclude gaming compacts. CA. CONST. OF 1879 art. IV, § 19(f). However, the California Constitution mandates that even compacts cannot be effective unless the California Legislature ratifies them. *Id.* Thus, based on

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the California Supreme Court's previous decisions concerning gaming, the datum suggests that the California Supreme Court is not likely to find that the Governor has unilateral authority to expand gaming in California in a way that is beyond even legislative authority.

C. Standard of Review for Picayune's APA Claims

Under the Administrative Procedures Act, 5 U.S.C. § 706(A) the Court must set aside the North Fork Procedures if the Secretary's decision to prescribe them and deem them to be "in effect" was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*"). As the United States Supreme Court further explained, an agency's decision is arbitrary and capricious if:

> [T]he agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

State Farm, 463 U.S. at 43. At the core of an agency's obligations is the requirement that it articulate some reasonable justification for its action that shows a rational connection between the facts found and the choices made." *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1091 (9th Cir. 2005).

Importantly, "conclusory statements" of an agency are insufficient to support a decision. Rather, the agency's justification for its action "must be one of reasoning[.]" *State Farm*, *supra*, 463 U.S. at 43. Moreover, an agency's reasoned explanation for its decision or action must stand alone: A court reviewing an agency action may not "supply a reasoned basis for the agency's action that the agency itself has not given." *Id.*

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Here, as discussed below, the Secretary's decision to prescribe the North Fork Procedures is arbitrary and capricious for multiple reasons. First, the Secretary, admits that he failed to follow the IGRA by failing to make an independent determination that the North Fork Procedures were consistent with California law. Second, in prescribing the North Fork Procedures, the Secretary failed to consider an important aspect of the problem by refusing to consider problems arising out of the invalidity of the Governor's concurrence under California law. Third, the Secretary failed to provide any reasoned explanation for the decision to prescribe the North Fork Procedures and put them into immediate effect. Fourth and finally, the Secretary's decision to make the North Fork Procedures immediately effective without publishing notice of their effectiveness in the Federal Register is inconsistent with the Secretary's established interpretation of the IGRA.

D. The Secretary's admitted failure to consider California law before prescribing the North Fork Procedures was arbitrary, capricious and contrary to law.

Under the IGRA's remedial procedures, the Secretary may prescribe procedures for the conduct of class III gaming when a state refuses to consent to a compact chosen through mediation and ordered a finding that the state refused to negotiate a tribal-state compact, or if the state did negotiate, it did so without exercising "good faith" during negotiations. 25 U.S.C. § 2710(d)(7)(B)(vii). However, the IGRA does not grant the Secretary unrestricted authority when it comes to prescribing gaming procedures. Of particular importance to this case, the IGRA mandates that all procedures the Secretary prescribes must be consistent with "the relevant laws of the State[.]" *Id.* Thus, it is an independent obligation of the Secretary to consider state law when prescribing gaming procedures and to also independently determine that the procedures are consistent with all state laws relevant and related to gaming. *Id.*

Of note, in the Secretary's June 29, 2016, letter to North Fork, he acknowledges this duty. AR000002187. Thus, the Secretary stated:

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> The IGRA requires the Secretary to prescribe procedures after receiving notice that a state has not consented to a mediator's selected compact. After government-to-government consultations with the Tribe, the procedures are to be consistent with a mediator's selected compact, IGRA, *and the relevant provisions of state law.*

AR00002187. Then Assistant Secretary Roberts continued, stating that "[w]e find that the procedures meet those requirements." AR00002187.

The problem for the Secretary, and the North Fork Procedures, is that the Assistant Secretary's statement provides no reasoning or rationale how he reached this conclusion. The Assistant Secretary does not even identify what California law concerning gaming he considered and reviewed to determine that the North Fork Procedures are "consistent with relevant laws" of California. Critically, there is nothing in the administrative record that indicate that the Secretary did anything to ensure that the North Fork Procedures were consistent with California law.[2] , considered a single California law.

The only items in the Administrative Record that relate to California's laws at all are those contained in a memorandum that Picayune provided to the Secretary concerning issues related to the inability of the Secretary to prescribe the North Fork Procedures due to the invalidity of the Governor's concurrence in the Secretarial two-part determination for the Madera Site. AR00000143-AR00000573. In addition to Picayune's memorandum, the only items dealing with California's gaming related laws is an April 21, 2016, letter from members of California's congressional delegation.[3] AR00000873-00000875. In that letter, California's congressional delegation states that

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[2] Roughly seventy-seven percent (77%) of the Administrative Record consists of seven (7) copies of the proposed compact that North Fork submitted to the mediator, five (5) copies of various drafts of the North Fork Procedures, and email correspondence transmitting copies of them. See AR00000001-00000142; AR00000579; AR00000580-AR00000720; AR00000721- AR00000722; AR00000727-AR00000870; AR0000903-AR0000904; AR00001044-AR00001325; AR00001348-AR00001364; AR00001396-AR00001397; AR00001399-AR00001541; AR00001609-AR00001900; AR00001903-AR00002181; AR00002186-AR00002325.

[3] The April 21, 2016, letter from members of California's congressional delegation appears in the Administrative Record at total of four (4) times. AR00000873-AR00000875; AR00000890-AR00000892; AR00001591-AR00001593; AR00001604-AR00001606.

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because of the California voter's rejection of legislation approving a compact for North Fork, "[w]e therefore believe that your obligation under the Indian Gaming Regulatory Act – to provide for gaming that is consistent with 'relevant provisions of the laws of the State' – prohibits gaming on this parcel." AR00000873.

Notably, the Administrative Record for the North Fork Procedures contains no response to Picayune memorandum concerning state law matters or the California congressional delegation's concerning matters of California law. Nor, as noted, does the administrative record contain any record of how the Secretary determined that gaming at the Madera Site was consistent with any provision of California law at all, whether those laws related to the legality of gaming at the Madera Site generally, or whether the gaming North Fork proposed to conduct would be consistent with California's regulatory laws.

The bottom line is that in this instance it is impossible to determine how the Assistant Secretary arrived at the necessary conclusion that the North Fork Procedures were consistent with the relevant laws of California. Neither, the Administrative Record, nor the Assistant Secretary's June 29, 2016, letter transmitting the North Fork Procedures to North Fork provide any reasoned rationale for his conclusion that the North Fork Procedures are consistent with California law. As a consequence of the Assistant Secretary's failure to provide any reasoned rationale determination that the North Fork Procedures are consistent with California law, the decision to prescribe the North Fork Procedures and put them into effect was arbitrary, capricious, an abuse of discretion and otherwise contrary to the law. *State Farm*, *supra*, 463 U.S. at 43.

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E. The Secretary's decision to prescribe the North Fork Procedures was arbitrary, capricious, an abuse of discretion and otherwise contrary to law because he refused to consider whether the Governor's concurrence was valid under California law, failed to provide any reasonable justification for that decision.

a. The IGRA required the Secretary to consider the validity of the Governor's concurrence under California law.

As discussed above, the IGRA requires that all procedures that the Secretary prescribes as part of the IGRA's remedial process must be consistent with the "relevant laws of the state." 25 U.S.C. § 2710(d)(7)(B)(vii). The IGRA does not specify areas of law, but rather requires consistency with all "relevant" laws. This requirement requires the Secretary to delve into a state's concerning gaming generally, and Indian gaming in particular. To be sure, there is no way for the Secretary to know whether the procedures he prescribes are consistent with state law unless he considers and evaluates state law.

Importantly, the Secretary was fully aware there was an ongoing legal dispute concerning whether California law authorized the Governor to concur in the Secretarial two-part determination concerning the Madera Site. Nevertheless, the Secretary refused to consider the issue as part of the part of the decision to prescribe the North Fork Procedures and put them into effect. Equally, important the Secretary failed to provide any explanation of, or justification for, this decision.

i. The Secretary was aware of the state law issues concerning the validity of the concurrence when he made his decision to prescribe the North Fork Procedures and put them into effect.

There is no question that before he prescribed the North Fork Procedures and placed them into effect, the Secretary was fully informed of the controversy surrounding the validity of the Governor's concurrence under California law. Notably, the Secretary admits her knowledge of the controversy throughout her motion for summary judgment. For example, at page 7 of the Secretary's memorandum in support of her motion for summary judgment the Secretary states that in Picayune's

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December 21, 2012, complaint in *Stand Up for California! v. Dep't of the Interior*, No. CV 12-2039, 204 F.Supp.3d 212, 2016 WL 4621065 (D.D.C. Sept. 6, 2016), *appeal docketed*, No. 16-5327 (D.C. Cir. Nov. 15, 2016), "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." Doc. No. 29 at page 7.

Similarly, in that same case, Stand Up for California raised issues concerning the validity of the California Governor's concurrence alleging that when the Governor of California issued the concurrence for the Madera Site he "engaged in policy-making decisions that bound the state, constituting a legislative act for which he lacked authority under California, thereby rendering the Governor's concurrence and the Secretary's action null and void." See First Amended Complaint, *Stand Up v. Dep't of Interior*, No. 12-cv-02039-BAH (D.D.C. June 27, 2013), ECF. No. 56, p.17-18, par. 60. Moreover, in *Stand Up v. Dep't of Interior* the District Court discussed in some detail the California state-court litigation concerning the Governor's authority to concur in the Secretarial Determination for the Madera Site and the fact that the issue was before California's Fifth Appellate District Court of Appeal. *Stand Up v. Dep't of Interior*, 204 F.Supp.3d 212, 240-242 (D.D.C. 2016). Obviously, if the District of Columbia Court was aware of the issue, the Secretary likewise had to know whether the Governor's concurrence was valid under California law was in doubt at the time the Secretary decided to prescribe the North Fork Procedures and deem them to be "in effect."

Of note, the Secretary was not only aware that there was a controversy concerning the concurrence, but the Secretary was also made fully aware that the resolution of that controversy was consequential. As the District of Columbia Court stated in its order granting the United States' and North Fork's respective motions for summary judgment:

> Contrary to the federal defendant's position, the Court agrees with the plaintiffs that a Governor's authority to concur in an IGRA two-part determination is an issue of

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> state law, but the Court disagrees with the plaintiffs that this Court may address the validity of the Governor's concurrence under California law. As another court explained,
>
> > When the Governor exercises authority under IGRA, the Governor is exercising state authority.... The concurrence (or lack thereof) is given effect under federal law, but the authority to act is provided by state law....[W]hen the Governor responds to the Secretary's request for a concurrence, the Governor acts under state law, as a state executive, pursuant to state interests.
>
> *Confederated Tribes of Siletz Indians*, 110 F.3d at 697-98. Thus, the plaintiffs are correct that, 'if the Governor lacks authority under state law to concur, the concurrence is invalid.

Stand Up v. Dep't of Interior, 204 F.Supp.3d at 251. The fact that the District of Columbia Court determined that it could not decide the issue does not negate the fact that the Secretary knew of the controversy and knew that it would be determined by a California Appellate Court in the near, if not immediate, future, when he prescribed the North Fork Procedures and deemed them to be "in effect."

ii. Under the circumstances, the IGRA required the Secretary to consider California law as it pertained to the validity of the concurrence.

Both the United States and North Fork argue that the issues surrounding the validity of the Governor's concurrence and the subsequent ruling by Fifth the Governor's concurrence was invalid and are immaterial to this action. Instead, they both state that the Secretary was reasonable in relying on "a facially valid" Governor's concurrence and had no duty to consider matters of state law before prescribing the North Fork Procedures. Doc. 29, p. 34-36, Doc. 26, pp. 30-32. These arguments are unavailing.

First, as a general matter of law, their claims that the Secretary had obligations to consider state law before issuing the North Fork Procedures is, as shown above, simply wrong. The IGRA's requirement that gaming procedures be "consistent with the relevant laws of the state" is unambiguous. 25 U.S.C. § 2710(d)(7)(B)(vii). The United States' and North Fork's claim that

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despite the plain language of the IGRA, the Secretary is not required to consider state law issues when prescribing procedures purporting to authorize gaming begs the question: How can the Secretary determine that procedures are consistent with the relevant laws of the state without considering, or looking into, the relevant laws of the state? The short and only answer is that he cannot.

Moreover, any claim that the "relevant laws of the state" do not include state laws concerning a Governor's authority to concur in a Secretarial two-part determination is unreasoned. First, from the standpoint of basic statutory construction, the IGRA does not limit the requirement of consistency with state law, to any particular area with a state's gaming related laws. For example, the IGRA does not provide that Secretarial Procedures must be consistent with the relevant "regulatory" or "licensing" laws of a state. Rather, the language of the IGRA is broad and open-ended. It requires that Secretarial Procedures must be consistent with "*the relevant laws* of the state." 25 U.S.C. § 2710(d)(7)(B)(vii) (emphasis added). The relevant laws of the state are necessarily all of the laws relevant to the conduct of gaming general and Indian gaming specifically, including state laws concerning the Governor's authority to grant a concurrence that is an absolute prerequisite to gaming in the first instance.

As this Court is aware from its experience in *North Fork v. California*, 15-cv-00419-AWI (E.D. Cal. Sept. 8, 2016), gaming could not occur at the Madera Site without a concurrence. This is so because the Madera Site consists of off-reservation lands acquired after October 17, 1988, and the IGRA, as the Court is aware, prohibits gaming on lands acquired after October 17, 1988, subject to very limited exceptions. 25 U.S.C. § 2719(a)-(b). There is only one exception applicable to the Madera Site. That is the exception providing that gaming can occur on after-acquired lands when a Governor concurs with the Secretary's two-part determination for a particular site. 25 U.S.C. §

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2719(b)(1)(A). Critically, and devastating to the United States' and North Fork's arguments, the Ninth Circuit long ago held that the question of whether a Governor has the authority to concur is a matter of state, not federal, law. *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688 (9th Cir. 1997) ("*Siletz*").

In *Siletz,* the Ninth Circuit considered whether the concurrence provisions of the IGRA violated the Appointments Clause of the United States Constitution by essentially granting a state official authority to make a federal decision. *Siletz*, 110 F.3d at 697-698. To decide the issues, the Ninth Circuit was required to look into the source of a Governor's authority to take action in relation to and necessitated by the IGRA. *Id.* Of particular importance here, the Ninth Circuit determined:

> When the Governor exercises authority under IGRA, the Governor is exercising state authority. If the Governor concurs, or refuses to concur, it is as a State executive, *under the authority of state law.* The concurrence (or lack thereof) is given effect under federal law, *but the authority to act is provided by state law.*

Siletz, 110 F.3d at 697. Thus, as the *Siletz* Court recognized it is the exercise of authority "under state law" that will "affect how the Secretary of Interior will proceed to execute the IGRA." *Siletz*, 110 F.3d at 698.

Taken together, the plain language of the IGRA and *Siletz's* instruction that a Governor's authority to issue a concurrence is a matter of state law, dictate that here the Secretary was required to consider whether the Governor's concurrence was valid before prescribing gaming procedures.

The only situation where the Secretary may be justified in failing to consider whether a Governor had the authority concur before prescribing Secretarial Procedures and thereby authorizing "off-reservation" gaming is where this is no hint of a controversy concerning the Governor's power to concur. However, as discussed in detail above that is not the case here. Here, the Secretary was aware of the controversy surrounding the validity of the Governor's concurrence concerning the Madera Site. Moreover, at the time the Secretary issued the North Fork Procedures, the Secretary

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was likewise aware that the issue was being litigated in California's Fifth District Court of Appeal and a decision was likely imminent.

iii. The IGRA's inherent deference to State interests mandates that the Secretary must consider whether a disputed concurrence in a Secretarial two-part determination is valid under state law before prescribing gaming procedures and placing them into effect.

Requiring the Secretary to be certain that state law authorizes a Governor grant a concurrence before purporting to authorize gaming on land subject to a two-part determination is not only required by the plain language of the IGRA and the law of the Ninth Circuit, it is equally in accord with the legislative intent behind the IGRA. As much as the IGRA was intended to promote the ability of Indian tribes to engage in tribal economic development to obtain self-sufficiency and strong tribal governments, it was equally a recognition of state interests in controlling gaming within its borders.

As Congress made plain, the IGRA only provided statutory authorization for gaming in states that permit the type of gaming to be conducted "for any purpose by any person, organization or entity[.]"25 U.S.C. § 2710(b)(1)(A); 25 U.S.C. § 2710(d)(1)(B). Thus, the IGRA, cannot be said to be an absolute authorization of class II or class III gaming. Rather, it is, in essence and in practice, a delegation of power to the states to decide in the first instance whether class II or class III gaming under the IGRA can occur within at all. 25 U.S.C. § 2710(b)(1)(A); 25 U.S.C. § 2710(d)(1)(B).

This recognition of the states' interests appears throughout the IGRA. For instance, it bears out in the prohibition against gaming on lands acquired after October 17, 1988, found at 25 U.S.C. 2719(a). This provision acts not only as a restriction on Indian tribes, but it is also a restriction on the Secretary of the Interior. Section 2719(a) dictates that except under two very limited exceptions the Secretary cannot unilaterally acquire lands in trust for a tribe for the purpose of conducting class II or class III. No similar restriction can be found anywhere in federal law concerning the Secretary's authority to take land into trust for a specific purpose, except in the area of gaming.

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Similarly, the deference to state interests is explicit in the requirement for a Governor's concurrence as to lands subject to a Secretarial two-part determination set forth at 25 U.S.C. § 2719(b)(1)(A). Again, this is an express restriction on the Secretary's ability to take lands into to trust for an Indian tribe for the purpose of class II or class III gaming. As the Court is aware, this restriction can only be overcome if an appropriate state official, with authority under state law, concurs in a Secretarial determination that the gaming on the proposed site would be beneficial to the Indian tribe intending to conduct gaming and would not be detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A).[4] Thus, a recognition of and deference to the states is built into the two-part process.

Finally, the recognition of states' interest is likewise both an inherent and an express part of the IGRA's remedial process. To be sure, the IGRA's remedial process, set forth at 25 U.S.C. § 2710(d)(7) provides an Indian tribe with an opportunity to conduct class III gaming on gaming eligible trust lands if the Indian tribe cannot reach an agreement on a compact with the state in which the proposed gaming will occur. However, it does not do so without giving the state multiple opportunities to influence the manner in which the Indian tribe will conduct III gaming.

As the Court will likely recall, the IGRA's remedial process is triggered when a state refuses to enter into negotiations for the purpose of entering into a Tribal-State Compact, or when the State conducts such negotiations in bad-faith. 25 U.S.C. § 2710(d)(7)(B)(i). In such an instance the Indian tribe may bring an action in federal district court for an order compelling the state to enter into a compact. 25 U.S.C. § 2170(d)(7)(A)(i); 25 U.S.C. § 2720(d)(7)(B)(iii).

[4] The United States and North Fork put too much focus on the IGRA's use of the term Governor in section 2179(b)(1)(A). Their suggestion that a Governor is the only state official who could ever convey a concurrence is entirely unrealistic and is inconsistent with the IGRA's inherent deference to state law. Their argument, taken to its logical end would mean that if a state reserved the power to concur to the state legislature, or delegated it to a state official other than the Governor, any such a concurrence granted would be invalid under the IGRA. The absurdity of such a result is obvious.

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If the Indian tribe prevails, the IGRA requires the Court to order the Indian tribe to conclude a compact within sixty (60) days. 25 U.S.C. § 2710(d)(7)(B)(iii). If the state and the Indian tribe fail to conclude a compact within sixty days, the IGRA requires the state and the Indian tribe to submit their "last best offer for a compact" to a court-appointed mediator. 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator is to select the compact "which best comports with [the IGRA] and other applicable Federal law …." *Id.* The IGRA then requires the mediator to send the selected compact to the Indian tribe and the state. 25 U.S.C. § 2710(d)(7)(B)(v). The state has sixty days during which to consent to the mediator's selected compact. 25 U.S.C. § 2710(d)(7)(B)(vi). If the state does not consent to the compact, the mediator then informs the Secretary. At that point, the Secretary is authorized to prescribe procedures for class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vii).

Notably, under the IGRA's remedial provisions, a state is given multiple opportunities to agree to the terms of Tribal-State Compact before the Secretary is authorized to prescribe procedures. More notably, even where a state maintains its refusal to negotiate a Tribal-State Compact, the IGRA still defers to a state's gaming related laws. 25 U.S.C. § 2710(d)(7)(B)(vii). Under the IGRA, the Secretary cannot prescribe any procedures the Secretary wishes. Rather, the IGRA mandates that procedures resulting from the IGRA's remedial process must be consistent with "the relevant provisions of the laws of the State[.]"

As shown above, even when a state is recalcitrant regarding negotiating a gaming compact, the IGRA protects the state's interests. The Secretary's decision to issue procedures purporting to authorize class III gaming at the Madera Site and maintain that they are valid and in effect, even after a California Appellate Court found that the Governor's concurrence concerning the Madera Site was invalid *ab initio*, cuts squarely against the language and intent of the IGRA. Consequently, the decision to prescribe the North Fork Procedures and put them into effect was arbitrary, capricious and

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contrary to the law. This is especially true when shortly before the Secretary issued the North Fork procedures, the Director of the Office of Indian Gaming-Indian Affairs, Paula Hart was confirming in email correspondence that there was "no deadline for approving Secretarial Procedures." AR00001563.

The bottom line here is that the United States and North Fork were aware of, and to varying degrees involved in, the controversy over whether the Governor's concurrence in the North Fork Determination was valid. Additionally, they were both aware of the Ninth Circuit's instruction that a Governor purporting to issue a concurrence must have authority to concur under state law. Moreover, as discussed above, the Secretary was fully aware that "there is no deadline for approval of Secretarial Procedures." AR00001563. Consequently, under the totality of the circumstance, the Secretary's decision to issue the North Fork Procedures before the California's appellate courts determined the scope of the Governor's authority concerning granting concurrences was arbitrary, capricious and contrary to law.

F. The "Retrocession" Cases Cited By The United States And North Fork Do Not Apply In Cases Involving the IGRA.

Rather than address the clear requirements of the IGRA head-on and in complete derogation of the Ninth Circuits ruling in *Siletz*, *supra*, both the United States and North Fork attempt to redirect the Court's attention to a series of carefully curated cases addressing the decision of certain states to retrocede civil and criminal jurisdiction delegated to them by a federal statute commonly known as Public Law 280. However, these "retrocession" cases are wholly inapplicable to situations involving the IGRA.

First, the federal statute allowing the United States to accept a state's retrocession of jurisdiction did not contain a specific requirement that retrocession must be consistent "with the

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relevant laws of the state." However, the IGRA does require that Secretarial Procedures must be consistent "with the relevant laws of the state." As a consequence, the retrocession cases provide no basis for comparison with the legal requirements applicable to this case. The United States' and North Fork's reliance on the "retrocession" case is a red-herring of significant proportion.

Second, the policy and purposes of allowing the states to "retrocede" criminal and civil jurisdiction over Indians and Indian territory back to the United States are wholly different from the IGRA's purpose of protecting state interests concerning gaming within their territories.

The "retrocession" cases involved a situation instance in which the United States transferred criminal and limited civil jurisdiction over Indian tribes and Indian country to certain "mandatory" states. 18 U.S.C. § 1162; 28 U.S.C. § 1360; *See also United States v. Lawrence*, 595 F.2d 1149, 1150 (9th Cir. 1979) (*cert. denied).* Other states were given the option to assume Public Law 280 jurisdiction. *Lawrence*, 595 F.2d at 1150.

The congressional purpose behind Public Law 280 was to address lawlessness on reservations and to encourage Indians to become "first class citizen[s]." *United States v. Brown*, 334 F.Supp. 536 (D.Neb. 1971.) It was Congress's belief that by eliminating legal impediments affecting Indian and "subjecting the Indian to equality of the responsibilities of state law" aid in assimilating Indians into non-Indian society. *Brown*, 334 F.Supp. at 537-538.

By the late 60's, both states and tribes had become dissatisfied with the jurisdictional arrangements of Public Law 280. Indian tribes were unhappy with being subjected to state jurisdiction, and states were unhappy with the financial burdens of law enforcement in Indian country. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 UCLA L.Rev. 535, 538 (1976).

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The problem for Indian tribes and states that Public Law 280 did provide any mechanism through which Indian tribes could prevent a state from acquiring jurisdiction over them and likewise did not provide dissatisfied states the ability to transfer jurisdiction back to the United States. Therefore, at the urging of states and Indian tribes alike Congress amended Public Law 280. First, to appease the Indian tribes, Congress amended Public Law 280 to provide that any new assumption of jurisdiction by a state would only be effective if the affected Indian tribe consented to the state's jurisdiction. 25 U.S.C. §§ 1321, 1322. To appease states that wanted to rid themselves of jurisdiction over and within Indian country, Congress amended Public to allow states to "retrocede" jurisdiction. 25 U.S.C. § 1323. The whole purpose of providing for "retrocession" was to all states to divest themselves of any burdens or responsibilities arising out of the exercise of criminal or civil jurisdiction Indians and Indian lands. 25 U.S.C. § 1323.

The purposes of the IGRA are wholly different from the purposes behind the "retrocession" of Public Law 280 jurisdiction. As discussed above, in the IGRA, Congress went to pains to recognized and defer to the interests of states regarding whether and where gaming could occur within state boundaries. Thus, Congress dictated that an Indian tribe's ability to conduct class II or class III gaming was entirely dependent on state law authorizing gaming. 25 U.S.C. §§ 2170(b)(1)(A), 2710(d)(1)(B). Additionally, in the IGRA, Congress dictated that a state approval, in the form of a concurrence, was an absolute necessity for all land subject to a Secretarial "two-part" determination. 25 U.S.C. § 2719(b)(1)(A).

If the Court applied the logic of the "retrocession" cases to situations such as this, it would effectively eviscerate the IGRA's purpose of protecting state interests. Under the logic of the United States and North Fork, even if a state passed legislation expressly prohibiting a Governor from granting a concurrence the state would have no protection against the actions of rogue Governor.

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Under, their logic, and the reasoning of the "retrocession" cases, even in that instance, the moment a Governor transmitted an indisputably *ultra vires* concurrence the matter is closed, and the land is deemed gaming eligible. Allowing the Secretary to turn a blind-eye to state law matters, including pending litigation concerning the validity of a gubernatorial concurrence, before issuing, and putting "in effect" Secretarial Procedures purporting to immediately authorize class III gaming does not square the language of the IGRA, or Congress's intention to respect and protect state interests.

Additionally, as the "retrocession" cases acknowledge, the reassumption of federal jurisdiction was done pursuant to the Congress's plenary authority over Indian affairs. *Brown*, *supra*, 334 F.Supp. at 540. As the *Brown* Court stated:

> The federal government, having plenary power over the Indians, had the power to prescribe any method or event it desired to trigger its own re-assumption of control over Indian affairs within a state. In fact, the triggering event could have been devoid of any mention of state action at all.

Brown, 334 F.Supp. at 540.

As it did with regard to the "retrocession" provision, Congress enacted the IGRA pursuant to its plenary authority over Indian affairs. Thus, in the exercise of that authority Congress could have expressly provided the Secretary did not need to consider matters of state law when issuing procedures. Similarly, Congress could have provided that gaming could occur on any lands held in trust irrespective of when the Secretary acquired those lands. Similarly, even if Congress maintained the prohibition on lands acquired after October 17, 1988, it also could have refused to require a concurrence for land taken into trust pursuant to a Secretarial "two-part determination" as it did with regard to lands taken into trust as part of a settlement claim, or for the creation of an original reservation.

Congress did not do any of these things. Instead, in the exercise of its plenary authority, Congress, in deference to the interests of the states, Congress prohibited gaming in states where such

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gaming is not allowed as a general matter of state law. 25 U.S.C. § 2710(b)(1)(A); 25 U.S.C. § 2710(d)(1)(B). Additionally, in states that do allow gaming, Congress required that "off-reservation" sites not part of settlement claim, or an initial reservation for a newly recognized tribe could only be designated as Indian lands for purposes of the IGRA if the Governor of the affected state concurred in that determination. 25 U.S.C. § 2719(b)(1). Also, Congress directed the any Secretarial Procedures issued as part of the IGRA's remedial process must be consistent "with the relevant laws of the state." 25 U.S.C. § 2710(d)(7)(B)(vii).

As a consequence of the unique aspects of the IGRA matters in involving a Secretarial "two-part determination" are wholly unlike situations in which the United States uses it plenary authority to reassume jurisdiction that the United States previously delegated to the states. Therefore, as the District of Columbia Court noted *Stand Up v. DOI*, *supra*, "if the Governor lacks authority under state law to concur, the concurrence is invalid." *Stand Up v. DOI*, *supra*, 204 F.Supp.3d at 251.

G. The Secretary's arguments that the Court's review is limited to the administrative record before the agency at the time the Secretary decided to prescribe the North Fork Procedures and put them into effect are unavailing.

In a last-ditch effort to avoid the consequences of acting arbitrarily and capriciously concerning the decision to prescribe the North Fork Procedure and put them into effect, the Secretary asserts that this Court's review is limited to the administrative record before the Secretary when the decision was made. Therefore, the Secretary asserts that this court cannot even consider the decision in *Stand Up v. State*, *supra*. Considering the circumstances of this case this argument is silly.

First, as discussed above, the Secretary was aware of the problem concerning the validity of the Governor's concurrence long before he prescribed the North Fork Procedures. For example, the administrative record includes a memorandum submitted by Picayune that contains a detailed discussion of the problem. AR00000143-AR00000573. Additionally, in his motion for summary

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judgment the Secretary admits that he was aware of the problem, and issues, concerning the validity of the Governor's concurrence due to the issue being raised in *Stand Up v. Dep't of Interior*, *supra*. Moreover, there is no question that the Secretary was aware that at the time he prescribed the North Fork Procedures and put them into effect the issue was pending before the California Fifth District Court of Appeal.

The problem here is not that the administrative record did not contain anything informing the Secretary of state law dispute over the validity of the concurrence: It unquestionably did. The problem here is that the Secretary, by his own admission, simply ignored the issue. By doing so, the Secretary intentionally ignored an aspect of the problem and thereby his decision to prescribe the North Fork Procedures was arbitrary and capricious and should be set aside. *State Farm*, *supra*, 463 U.S. 29 at 43.

Second, if the administrative record had been devoid of any indication of the problem concerning the validity of the Governor's concurrence under state law, that still would not have saved the Secretary's decision from being arbitrary and capricious. As discussed in detail above, the IGRA mandates that the North Fork Procedures must be consistent with the relevant laws of California. 25 U.S.C. § 2710(d)(7)(B)(vii). And, again as the Secretary has admitted, the Secretary was aware that the issue of the validity of the concurrence was pending before the California Fifth District Court of Appeal when he prescribed the North Fork Procedures. Consequently, if the administrative record contained nothing relating to the validity of the concurrence under California law, then the record would have been incomplete. In that instance, the Secretary's action would have still been arbitrary and capricious for all of the reasons it is now. Finally, if the situation were as the erroneously claims it was, and there was nothing in the record concerning the controversy surrounding the concurrence,

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that would reason to supplement the record, and allow "extra-record materials." *Center for Biological Diversity v. United States Fish and Wildlife Services*, 450 F.3d 930, 943 (9th Cir. 2006.)

As the *Center for Biological Diversity* Court explained, the Ninth Circuit recognizes four exceptions to the rule against allowing extra-record materials. *Center for Biological Diversity*, 450 F.3d at 943. Relevant here these exceptions allow "extra record" materials "if necessary to determine whether the agency has considered all of the relevant factors and has explained its decision." *Id.* Additionally, the Ninth Circuit also allows "extra record" materials in situations involving "agency bad faith." *Id.*

The Secretary's actions here would satisfy both. First, the California Fifth District Court of Appeal decision in *Stand Up v. State*, *supra*, does directly to the issue of whether the Secretary fully considered all relevant laws of California relating to his decision to prescribe the North Fork Procedures and put them into effect. It also relates to the question of whether the Secretary explained his decision and his conclusion that North Fork Procedures were consistent with the "relevant laws of the state."

Second, as discussed, the Secretary was fully aware of the issues concerning the validity of the concurrence under California law and the status of the California litigation concerning the concurrence. Nonetheless, even with this knowledge, the Secretary took action. The Secretary appears to have attempted to avoid the adverse decision that eventually came out of California's Fifth Appellate District by issuing the North Fork Procedures, and closing the administrative record before that court ruled on a critical aspect of California law. Remarkably, the Secretary took this action despite acknowledging that there was no deadline for prescribing the procedures (AR00001563).

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Finally, as discussed in detail immediately below, allowing the Secretary to avoid the consequences of an invalid gubernatorial concurrence and thereby unilaterally authorize gaming on an "off-reservation" parcel cuts against established federal case law and the purposes of the IGRA.

H. Even if the IGRA did not require the Secretary to consider the validity of the concurrence before prescribing gaming procedures, the North Fork Procedures cannot be put into effect after the decision in *Stand Up v. State*.

Even if this Court were to determine that the Secretary was not required to delve into matters of state law when she issued the North Fork Procedures that does not support the United States' and North Fork's argument that the North Fork Procedures remain valid and "in effect" after *Stand Up v. State, supra*. Rather, the natural consequence of the Secretary taking action under the IGRA that was ultimately dependent upon an *ultra vires* and invalid act of the California Governor is that the Secretarial action is also invalid. *See Pueblo of Santa Ana*, *supra*, 104 F.3d 1546, 1557.

As Picayune discussed in its motion for summary judgment, *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997) ("*Santa Ana*"), addressed the consequences that flow from the Secretary relying on a state governor's *ultra vires* actions.

Santa Ana involved the issue of whether certain Indian tribes in New Mexico could lawfully conduct class III gaming pursuant to the terms of gaming compacts they negotiated with then New Mexico Governor Gary Johnson. *Santa Ana*, 104 F.3d 1548. The Tenth Circuit framed the issue in *Santa Ana* as follows:

> 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 the authority under state law to sign on behalf of the state.

Santa Ana, 104 F.3d at 1548. As discussed in below the issues arose because after the Secretary approved the compacts and published notice of the approvals in the Federal Register, the New

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Mexico Supreme Court determined that Governor Johnson lacked authority under state law to enter into the compacts. *Id.*

The Tenth Circuit determined that the Secretary's approval of the compacts could not override their invalidity under state law. In the *Santa Ana* Court's words: "the Secretary cannot, under [IGRA] vivify that which was never alive …" *Santa Ana* 104 F.3d at 1548. Thus, the *Santa Ana* Court affirmed the district court's decision invalidating tribal gaming compacts that the Secretary previously approved and purported to put into effect. *Id.*

Many of the facts, the timing of events, and the arguments, in *Santa Ana* are strikingly similar to the facts, the timing of events, and arguments presented here.

In 1995 the New Mexico Governor signed thirteen separate gaming compacts with New Mexico Indian tribes. *Santa Ana*, 104 F.3d at 1550. The Secretary of the Interior approved twelve compacts on March 15, 1995. *Id.* The Secretary published notice of the approval in Federal Register on March 22, 1995. *Id.* The Secretary approved the thirteenth compact on April 24, 1995, and published notice of the approval in the Federal Register on May 15. *Id.*

Two months after the Secretary published notice of the approval of the New Mexico compacts in the federal register, the New Mexico Supreme Court ruled that under New Mexico law, Governor Johnson did not have authority to execute the compacts. *Santa Ana*, 104 F.3d at 1550-1551.

In *Santa Ana,* the Tribes and the United States argued that the compacts at issue were valid and in effect under the IGRA. *Santa Ana*, 104 F.3d at 1552. Their arguments centered on the same primary point that the United States and North Fork urge here. They argued the state law issues were irrelevant because compacts were valid under federal law as soon as the Secretary published notice of the compact approvals in the Federal Register. *Santa Ana*, 104 F.3d at 1553-56. Additionally, they argued that the need for finality dictated that Secretarial decisions could not be undermined by state

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law issues and that requiring the Secretary to make inquiries into state law matters was unreasonable. *Santa Ana*, 104 F.3d at 1556-1557.

The Tenth Circuit rejected each of these arguments. To decide the issue of whether the Secretary's notice of approval of the compacts overrode their invalidity under state law, the *Santa Ana* Court looked to both the language and purposes of the IGRA. *Santa Ana*, 104 F.3d at 1553.

Looking at the plain language of the IGRA, the *Santa Ana* Court noted that under the IGRA two separate requirements must be met before a compact is valid and effective. *Santa Ana*, 104 F.3d at 1553. First, the state and the Indian tribe must enter into a valid compact. *Id.* Second, the Secretary must put the compact "into effect" by approval and publication of notice in the Federal Register. *Id.*

The *Santa Ana* Court rejected the tribes' and United States' argument that "all that was required to make the compacts valid and in effect, regardless of whether the compacts were valid under state law" was Secretarial approval. *Santa Ana*, 104 F.3d at 1553. Instead, *Santa Ana* found that "state law determines the procedures by which a state may validly enter into a compact." *Id.* The *Santa Ana* Court opined that this result flowed naturally from the IGRA, through which, the Court noted, Congress expressed a great concern and respect for "state interests relating to class III gaming[.]" *Id.* at 1554.

Santa Ana then went on to address other issues that United States and North Fork raise here: the need for finality, and the reluctance to require the Secretary to inquire into state law matters.

Like North Fork asserts here regarding a concurrence, the tribes in *Santa Ana* argued that any decision requiring compacts to be valid under state law undermines the finality of Secretarial action and "forever subjects a compact to collateral attack on state law grounds." *Santa Ana*, 104. F.3d at

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1556. The *Santa Ana* Court easily rejected this argument stating plainly that the "possibility of indefinite collateral attack" was neither as real nor as dire as the Tribe's there claimed. *Id.*

As the *Santa Ana* Court discussed that a natural method for determining the validity of gubernatorial actions was through a court challenge. *Santa Ana*, 104 F.3d at 1556. Those challenges, it said, typically come promptly and are resolved relatively quickly. *Id.* Therefore, the argument that the need for finality should trump the need to respect state interests, including the state law concerning gubernatorial authority, was not one that gained any purchase with the Tenth Circuit. This was so despite the financial hardship and economic cost the *Santa Ana* Court recognized the Tribe was likely to suffer due to its ruling. *Id.*

Finally, the *Santa Ana* also addressed head-on arguments that the United States and North Fork raise here concerning the impropriety of requiring the Secretary to delve into state law matters to determine whether the Secretary's determination to take final action that effectively approves gaming.

Again, in the context of considering the validity of gaming compacts the *Santa Ana* Court had little difficulty dispensing with the Tribe's claims. Of note, the *Santa Ana* Court agreed with the Tribes argument that "the Congress did not intend to force the Secretary to make extensive inquiry into state law to determine whether the person or entity signing the compact for the state, in fact, had the authority to do so." *Santa Ana*, 104 F.3d at 1557. After agreeing with the Tribes on this initial point the *Santa Ana* Continued by stating: "*However, that 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 *Pueblo of Santa Ana* are striking. Indeed, in many instances, the two cases are essentially identical. This case, like *Pueblo of Santa Ana*, involves

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interpretation of the scope of the Secretary's authority under the IGRA. This case, like *Pueblo of Santa Ana,* involves Secretarial action that was based, and dependent upon, state action. This case, like *Pueblo of Santa Ana*, involves a situation where the Secretary did not consider the validity of the state action prior making a final decision concerning the Secretary's federal action. This case, like *Pueblo of Santa Ana*, involves a situation in which the underlying state action was subsequently deemed invalid under state law by a state appellate court. And, this case, like *Pueblo of Santa Ana*, involves a situation in which the Secretary is attempting to circumvent Congress's as expressed in the IGRA by ignoring the state court's determination of a state law matter.

Just as the facts of this case are essentially the same as those in *Pueblo of Santa Ana*, the result in this case should be the same as well. Based on the circumstances, and the congressional intention that state interests regarding Indian gaming were to be recognized and protected, the Court should find that the North Fork Procedures cannot be put into effect and cannot authorize North Fork to conduct either class II or class III gaming at the Madera Site because the California Fifth Appellate District Court of Appeal has determined that the state action necessary to make that site gaming eligible was invalid and violated the California Constitution.

This result is especially appropriate here because, as shown above, the Secretary was fully aware of the litigation concerning the Governor's concurrence at the time she issued the North Fork Procedures. Thus, she was also fully aware that the California Court's might, as they did, invalid the Governor's concurrence. Nevertheless, despite having that knowledge, the Secretary stubbornly pushed forward in a manner that appears to have been specifically intended to circumvent the interests of California. Considering all of the circumstances of this case her action of issuing the North Fork Procedures and deeming them to be "in effect" was arbitrary and capricious and contrary to law.

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I. The Secretary's decision to put the North Fork Procedures into effect without publishing notice in the Federal Register was arbitrary and capricious.

The Secretary acted arbitrarily and capriciously when it purported to make the Procedures effective immediately upon their issuance, in direct contravention of applicable regulations. Regulations at 25 CFR § 291.13 provide that Procedures become effective only after acceptance by the Tribe and publication in the Federal Register:

> § 291.13: When do Class III gaming procedures for an Indian tribe become effective?
>
> Upon approval of Class III gaming procedures for the Indian tribe under either § 291.8(b), § 291.8(c), or § 291.11(a), the Indian tribe shall have 90 days in which to approve and execute the Secretarial procedures and forward its approval and execution to the Secretary, who shall publish notice of their approval in the Federal Register. ***The procedures take effect upon their publication in the Federal Register***.

Contrary to what the Secretary may argue, the process set forth in § 291.13 for effecting procedures should apply in this case because it is the Secretary's sole published interpretation of IGRA's process for requesting, issuing, and effecting procedures.[5] *See* 25 U.S.C. § 2710(d)(7)(B)(vii). To find otherwise would not only be without sufficient reason but would also lead to the impracticable result of creating a regulatory vacuum for the issuance of one class of procedures but not another despite their being substantially identical. Because the regulation should be construed in a manner to avoid such a result, *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 816

[5] In an opinion issued on April 21, 2017, the Tenth Circuit in *New Mexico v. U.S. Dep't of Interior*, D.C. No. 1:14-CV-00695, --- F.3d --- at *17 (10th Cir. 2017) held that the Part 291 regulations are "invalid and unenforceable." While the court used sweeping language in striking down Part 291, nothing in that opinion undermines Part 291's relevance to this case. First, the decision appears to be one of first impression, with the issue never having been considered in this Circuit. Second, the procedure in § 291.13 remains the only published process by which the Secretary has indicated that secretarial procedures are made effective. While the primary intent of Part 291 appears to be the establishment of a process to bypass IGRA's mandate that secretarial procedures not issue until after a federal court finds that the state has failed to negotiate in good faith – which the *New Mexico* court found was foreclosed by the plain text of IGRA – the *procedure* established in Part 291 (§ 291.13) for effecting secretarial procedures after their issuance (regardless of the outcome of the underlying federal court action against the state for failure to negotiate a tribal-state gaming compact in good faith) should not in common sense be impacted by such analysis.

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(9th Cir. 2004) (the plain meaning will not be applied "if doing so leads to absurd or impracticable consequences."), quoting *Oregon Nat. Res. Council, Inc. v. Kantor*, 99 F.3d 334,339 (9th Cir. 1996),[6] and because the Secretary circumvented its only published method for effecting secretarial procedures, the Secretary's attempt to make the procedures immediately effective should be found void and the Procedures declared not in effect.

Even if Part 291 did not apply to the instant case, it was arbitrary and capricious for the Secretary to purport to make the Procedures effective immediately upon their issuance without a supporting citation or rational justification. *Pacific Coast Fed'n of Fishermen's Ass'ns v. U.S. Bureau of Recl.*, 426 F.3d 1082, 1091 (9th Cir. 2005) (An "agency is obligated to articulate a rational connection between the facts found and the choices made."), quoting *NRDC v. Dep't of Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997) (internal quotation and punctuation marks omitted). The Roberts Letter offers no explanation for its decision to forego the only other regulatory process by which secretarial procedures are made effective. As such, interested parties and the public are left without sufficient reasoning to ascertain the basis for the Secretary's decision, which is the result the Administrative Procedures Act seeks to avoid. Therefore, this Court should, at a minimum, remand the matter to the Secretary with a directive that the Secretary provide its reasoned analysis for its decision to have purportedly made the Procedures effective immediately upon their issuance by the Secretary.

The Secretary's failure to reasonably provide its rationale for purporting to make the Procedures immediately effective is even more significant in the circumstances at hand, where the Secretary was aware of the instant litigation in which the main issue was whether the Secretary has

[6] The Ninth Circuit has held that canons of interpretation apply to a court's construction of statutes and agency regulations. *AT&T Comm'ns of Cal., Inc. v. Pac-West Telecomm, Inc.*, 651 F.3d 980, fn. 17 (9th Cir. 2011). Also,

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authority to issue Secretarial procedures. One pointed example is an email dated July 15, 2016, from a senior adviser to the Assistant Secretary – Indian Affairs:

> The Chair[woman] of North Fork wants Larry [Roberts, AS-IA] to call her asap re: the pending litigation. . . . They just heard the judge is considering issuing an injunction on our ability to issue Secretarial Procedures. I'm also reaching out to the Solicitor's Office to see what they've heard.

AR00001603. Shedding further light on the urgency with which the injunction issue was presented to the Assistant Secretary and his staff, another email dated July 15, 2016, to Larry Roberts from what appears to be his staff members reads:

> Hi Larry,
>
> Chairwoman McGovern called to speak with you. She said it was in reference to a lawsuit that was submitted and it involved her tribe (North Fork Rancheria of Mono Indians). I advised her you were on travel and she asked if I can get a message to you because it was urgent.
>
> Maryann can be reached at [redacted].
>
> I had her speak with [another staff member], also.
>
> [signature]

AR00002185.

These circumstances raise the specter that the Secretary's action may have been an intentional effort to prevent this Court from ordering interim relief against the issuance/effectiveness of the Procedures. In that scenario, it is incumbent upon the Secretary to provide its reasoning for departing from the only published method for effecting secretarial procedures, albeit in a slightly different context. *See Motor Veh. Mfctr'rs Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency did not act in the first instance."); *see also Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112 ("Reasoned decision making . . . necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent, and an agency that neglects to do

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so acts arbitrarily and capriciously.") (citations and internal quotations omitted). Because the Secretary failed to do so, it acted arbitrarily and capriciously and this Court, at a minimum, should remand the matter to allow the Secretary to provide its reasoning for departing from the only published process for effecting Secretarial procedures.

III. CONCLUSION

For the reasons set forth above, namely that the Madera Site does not constitute gaming eligible lands under the IGRA because the Governor did not have authority under California law to concur in the Secretarial Determination for the Madera Site and that Secretarial Procedures are contrary to law and cannot authorize class III gaming on ineligible lands, the Court should grant summary judgment in favor of the Picayune Rancheria of Chukchansi Indians.

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Respectfully submitted,

By: /s/ Michael A. Robinson

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