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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.

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

**INTERVENOR THE NORTH FORK RANCHERIA OF MONO INDIANS' REPLY MEMORANDUM IN SUPPORT OF CROSS-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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## INTRODUCTION

Picayune's Combined Opposition and Reply largely fails to address the arguments raised in North Fork's summary judgment memorandum ("Mem.") and instead raises entirely new arguments that Picayune neither alleged in its complaint nor briefed in its opening memorandum. The Court should rule in favor of North Fork and the federal defendants on all claims.

*First*, Picayune's suit fails for a threshold, dispositive reason: Picayune is collaterally estopped from re-litigating whether the State of California is an indispensable party to its claims. In Picayune's District of Columbia action against the Secretary of the Interior, the district court held that California is an indispensable party to "claims in any way involving the Governor's concurrence." *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 254 (D.D.C. 2016); *see also id.* at 247 n.16. Picayune's claims are all predicated on its allegation that the Governor's concurrence is invalid. It cannot just ignore the preclusive effect of the District of Columbia court's judgment. All of its claims should be dismissed.

*Second*, Picayune has abandoned all of its claims except those challenging the Secretarial Procedures. It now argues that the Procedures are unlawful because the Secretary failed to consider the validity of the Governor's concurrence or to publish notice in the Federal Register. But Picayune never raised those arguments before, so they are waived. In any event, the Indian Gaming Regulatory Act ("IGRA") did not require the Secretary to examine the validity of the Governor's concurrence in issuing the Secretarial Procedures; Picayune's argument is an improper collateral attack on the Secretary's earlier decision to take the Madera Site into trust. Nor did IGRA's implementing regulations require publication of notice in the Federal Register.

*Third*, a stay is unnecessary, because all of Picayune's claims fail as a matter of federal law.

## ARGUMENT

### I. ALL OF PICAYUNE'S CLAIMS MUST BE DISMISSED FOR FAILURE TO JOIN AN INDISPENSABLE PARTY—THE STATE OF CALIFORNIA

Picayune (at 3-9) fails to address why it is not collaterally estopped from bringing federal claims predicated on its assertion that the Governor's concurrence was invalid under state law. It

instead argues (at 5-6) that California is not an indispensable party, but Picayune is collaterally estopped from re-litigating that issue and, even if it could do so, its arguments are wrong.

**A. Picayune Is Collaterally Estopped From Re-Litigating Whether The State Of California Is An Indispensable Party To Its Claims**

In Picayune's District of Columbia action, the district court held that the State of California is an indispensable party to claims against the Secretary "in any way involving the Governor's concurrence." *Stand Up*, 204 F. Supp. 3d at 254; *see also id.* at 247 n.16. In this case, all of Picayune's claims involve the Governor's concurrence, as they are predicated on Picayune's assertion that the concurrence was invalid under state law (*see* North Fork Mem. 14-15). Picayune disputes none of that—yet offers nothing to overcome the preclusive effect of the judgment against it in its District of Columbia action. The District of Columbia court's decision collaterally estops Picayune from re-litigating whether California is an indispensable party to federal claims involving the validity of the Governor's concurrence—like Picayune's claims here. That issue is dispositive; collateral estoppel is the only issue that this Court needs to reach.

As North Fork argued (Mem. 11-13), collateral estoppel applies here because whether California is an indispensable party to federal claims involving the Governor's concurrence (1) is the same issue presented in the District of Columbia case in which Picayune was a party, (2) was litigated there, and (3) was necessary to the District of Columbia court's judgment to dismiss the pertinent claims on indispensable-party grounds. Picayune does not argue that any requirement of collateral estoppel is not met here. Instead, it asserts (at 4) that collateral estoppel does not apply because the "ultimate issue … North Fork seek[s] to preclude" is "whether the Governor's concurrence was valid," which Picayune says "has been conclusively decided by California's Fifth Appellate District Court of Appeal." Neither component of Picayune's assertion is correct or responsive to North Fork's argument.

North Fork does not seek to preclude litigation over whether the Governor's concurrence was valid (that issue is pending before the California Supreme Court as a question of state law, in litigation to which the State of California *is* a party), but instead seeks to preclude a different, threshold issue that arises under federal law: whether California is an indispensable party to

federal claims against the Secretary that involve the validity of the Governor's concurrence. Whether California is indispensable is a separate issue from whether the Governor's concurrence is valid. The District of Columbia court's holding that California was indispensable did not turn on the validity of the Governor's concurrence; indeed, the court specifically stated that it could not "address the validity of the California Governor's concurrence under California law." *Stand Up*, 204 F. Supp. 3d at 252. Rule 19 dismissals do not determine the merits of the underlying issue, which are irrelevant to the analysis. *See Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) ("Appellants challenge the district court's ruling on the grounds that the very existence of the absent tribes' interest depends on the legality of the Act.… The language of Rule 19, however, forecloses such an analysis."); *Citizen Potawatomi Nation v. Norton*, 248 F.3d 993, 998 (10th Cir. 2001) ("The underlying merits of the litigation are irrelevant under Fed. R. Civ. P. 19(a).").

The District of Columbia court has thus decided whether California is an indispensable party to the claims Picayune has brought here—and decided the issue against Picayune. Picayune's only avenue to challenge that decision was on appeal to the D.C. Circuit; it cannot simply ignore that decision in this Court. Collateral estoppel bars Picayune from bringing any of its claims here.

**B. Even If Picayune Could Re-Litigate The Issue, California Is An Indispensable Party To Claims Involving The Governor's Concurrence**

Ignoring collateral estoppel, Picayune argues (at 5) that "California is not an indispensable party." Even if Picayune could re-litigate that issue here, Picayune is wrong.

The Rule 19 factors establish that California is an indispensable party to federal claims involving the Governor's concurrence, as the District of Columbia court concluded, *Stand Up*, 204 F. Supp. 3d at 251-254, and North Fork explained (Mem. 14-15). Picayune offers no Rule 19 analysis to the contrary. Instead of addressing Rule 19, Picayune asserts (at 4, 5) that California is not an indispensable party because the Fifth District's decision is "conclusive[]," "there is nothing left to litigate" about the Governor's concurrence, and California "would be precluded from arguing that the Governor's concurrence was valid" if it were a party here.

Picayune's assertions are irrelevant to the Rule 19 analysis and wrong as a matter of law.

The Fifth District's decision is not conclusive because the California Supreme Court has agreed to review it, so it "has no binding or precedential effect." Cal. R. Ct. 8.1115(e)(1). Moreover, a California Court of Appeal decision is never conclusive—either in state court or in federal court—"for the purposes of collateral estoppel until it is free from the potential of a direct attack, *i.e.*, until no further direct appeal can be taken." *Geographic Expeditions, Inc. v. Estate of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1105 n.3 (9th Cir. 2010) (citing *Abelson v. National Union Fire Ins. Co.*, 35 Cal. Rptr. 2d 13, 19 (1994)).[1] Thus, if California were a party to this case, California could continue to defend the validity of the Governor's concurrence—just as it is currently doing in the California Supreme Court. Nor would the Fifth District's decision bind this Court, for the reasons North Fork explained earlier (Mem. 34-37).[2] California thus retains an interest in the validity of its Governor's concurrence and is an indispensable party to Picayune's claims. All of Picayune's claims should be dismissed for failure to join California.

## II. PICAYUNE'S CLAIMS FAIL AS A MATTER OF FEDERAL LAW

Even if California were not an indispensable party, each of Picayune's eight claims fails for the reasons North Fork discussed earlier (Mem. 15-32). Picayune has abandoned six of those claims, and the only two that it continues to pursue fail for threshold reasons and on the merits.

### A. Picayune Has Abandoned Claims I, II, III, IV, V, And VII

North Fork moved for summary judgment on all of Picayune's claims. Doc. 25 at 2. For six of those claims, Picayune offers no response to North Fork's arguments (Mem. 15-25) that summary judgment should be entered in North Fork's favor and against Picayune. Picayune has therefore abandoned them. *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009).

[1] Picayune's assertion (at 4 n.1) that the Fifth District's decision is somehow conclusive in federal court despite its non-binding status in state court law is absurd. The Ninth Circuit has never said that a state court decision under review by the California Supreme Court has conclusively decided any issue in federal court. In fact, in *Geographic Expeditions*, it said the opposite. 599 F.3d at 1105 n.3.

[2] In asserting (at 6) that this Court "must follow" the Fifth District's decision, Picayune not only ignores the Ninth Circuit precedent that North Fork cited (Mem. 34) that contradicts Picayune but also fails to mention the split of authority between the Fifth and Third Districts. *See United Auburn Indian Cmty. v. Brown*, 208 Cal. Rptr. 3d 487 (Ct. App. 2016), *review granted* (Jan. 25, 2017). Instead, Picayune discusses (at 7-9) two cases that are irrelevant to whether California is an indispensable party.

**1. Picayune Has Abandoned Its Claims That The Governor's Concurrence Is Invalid (Claims I, II, and III)**

Picayune responds (at 4) to North Fork's argument that Picayune abandoned its first three claims—directly challenging the Governor's concurrence—by asserting that "Picayune did not seek summary judgment on [them] … not because Picayune abandoned those claims," but "because the Fifth Appellate Court's decision decided those issues." That is not a meaningful response. It is irrelevant whether *Picayune* sought summary judgment on Claims I, II, and III because *North Fork and the federal defendants* moved for summary judgment on them. Doc. 25 at 2 (North Fork); Doc. 28 at 2 (federal defendants). Picayune does not respond to North Fork's summary-judgment argument (Mem. 16-19) that Picayune lacks any cause of action to assert its claims challenging the validity of the Governor's concurrence. Because Picayune fails to defend those claims, the Court should grant North Fork summary judgment on them.

Picayune's assertion that the Fifth District's decision has "decided" the issues in its first three claims is no defense. As an initial matter, Picayune is wrong. The Fifth District's decision has not decided anything even as a matter of state law because the decision is not in effect while the California Supreme Court reviews the case. *See* Cal. R. Ct. 8.1115(e). Thus, this Court would still "proceed on the merits" of any issue on which the Fifth District had issued judgment. *Geographic Expeditions*, 599 F.3d at 1105 n.3. Further, the state-court decision did not—and could not—decide whether Picayune was entitled to relief on the *federal* claims it has brought against *the Secretary*. Nor does the Fifth District's decision excuse Picayune's obligation affirmatively to argue why North Fork's motion should be denied.

**2. Picayune Has Abandoned Its Claim That The Secretarial Determination Is No Longer Effective (Claim IV)**

Picayune does not respond to North Fork's arguments (Mem. 20-22) that Picayune's fourth claim—challenging the Secretarial determination—is barred by res judicata and fails on the merits. Instead, Picayune makes (at 4) only one passing reference to its fourth claim, characterizing it as "relating to the effectiveness of the secretarial procedures." This is not accurate; Claim IV is about the Secretarial determination, not the Secretarial Procedures. *See*

Am. Compl., Doc. 5 ¶ 78 ("As a consequence of the concurrence not being effective on August 31, 2012, *the Secretarial two-part determination* relating to the Madera Site is no longer valid or effective." (emphasis added)). Because Picayune fails to defend that claim—or even to describe it accurately—it is abandoned.

**3. Picayune Has Abandoned Its Claims That The Madera Site Does Not Constitute "Indian Lands" (Claim V)**

Picayune also does not respond to North Fork's arguments (Mem. 23-24) that Picayune's fifth claim—challenging the Madera Site's status—lacks a cause of action because it is not challenging agency action, is barred by res judicata, and fails on the merits. Picayune references (at 4) the claim only once and does not rebut any of North Fork's arguments. Picayune simply asserts its disagreement with North Fork's res judicata argument but fails to offer any argument to the contrary or to address North Fork's other arguments. Picayune has abandoned the claim.

**4. Picayune Has Abandoned Its Claim That The Madera Site Is Ineligible For Class II Gaming (Claim VII)**

Picayune does not even reference its seventh claim—challenging class II gaming—and seeks (at 36) relief only with respect to class III gaming ("Secretarial Procedures are contrary to law and cannot authorize class III gaming on ineligible lands."). The claim is abandoned.

**B. Picayune Is Not Entitled To Relief On Its Claims Challenging The Secretarial Procedures (Claims VI and VIII)**

Each of Picayune's three new arguments challenging the Secretarial Procedures fails because it is waived and, in any event, is wrong on the merits.

**1. Picayune's Argument That The Secretary Failed To Consider Or Determine The Validity Of The Governor's Concurrence Fails**

**a. The Argument Is Waived**

Picayune argues (at 10-28) that the Secretary's issuance of Secretarial Procedures was unlawful because the Secretary did not consider, explain his consideration of, or determine the validity of the Governor's concurrence under California law. That challenge is waived because Picayune did not raise it in its complaint or in its opening memorandum.

Picayune's sixth claim alleges that the Secretarial Procedures are invalid because (1) North Fork's 2012 Compact with California was in effect, Doc. 5 ¶ 89; (2) the Madera Site does not constitute "Indian lands," *id.* ¶ 90; and (3) the referendum on Assembly Bill No. 277, which had rejected the California Legislature's ratification of the 2012 Compact, "established that, under California law, the voters of California declared that the Madera Parcel does not qualify for gaming under the IGRA," *id.* ¶ 91. Picayune's eighth claim similarly alleges that the Secretarial Procedures are invalid because they were prescribed while the 2012 Compact "was in effect pursuant to IGRA, and with respect to a location that does not constitute 'Indian lands' under IGRA." *Id.* ¶ 102. Neither claim alleges that the Procedures are unlawful because the Secretary did not consider, explain his consideration of, or determine the validity of the Governor's concurrence. Likewise, Picayune's opening memorandum did not argue that the Procedures are unlawful because the Secretary did not consider, explain, or determine the validity of the Governor's concurrence. *See* Doc. 19 at 1-22. Accordingly, North Fork and the federal defendants did not address that issue in their own cross-motions and oppositions to Picayune's motion. *See* Doc. 26 at 1-47 (North Fork); Doc. 29 at 1-47 (federal defendants).

Picayune cannot raise a new basis for challenging the Secretary's actions in its summary judgment briefing when nothing in the complaint suggested that it was raising it. *See McNeely v. County of Sacramento*, 344 F. App'x 317, 319 (9th Cir. 2009) (plaintiff waived argument because "he failed to plead this claim or anything like it in either of his complaints," but instead presented the claim "for the first time as an argument in opposition to the county's motion for summary judgment"); *Brass v County of Los Angeles*, 328 F.3d 1192, 1197 (9th Cir. 2003) (district court "properly refused to permit [plaintiff] to assert the three additional arguments he sought to raise" at summary judgment because "[n]othing in Counts I-III of the amended complaint even suggests that [plaintiff] was raising those issues").

Moreover, Picayune cannot raise a new argument here in its opposition-and-reply memorandum that was not raised in its opening memorandum. *See, e.g.*, *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007); *Nevada v. Watkins*, 914 F.2d 1545, 1560 (9th Cir. 1990). "'It is improper for a moving party to introduce new facts or different legal arguments in the reply brief

than those presented in the moving papers.'" *Ceja-Corona v. CVS Pharmacy, Inc.*, 2015 WL 1276695, at *5 (E.D. Cal. Mar. 19, 2015) (Ishii, J.). Because Picayune's challenge is different than the allegations it presented in its complaint and the arguments it made in its moving papers, Picayune's argument is doubly waived and the Court should not consider it.

**b. The Secretary Was Not Required To Consider The Governor's Concurrence When Issuing The Secretarial Procedures**

Even if it were not waived, Picayune's new argument fails on the merits because IGRA did not require the Secretary to consider the concurrence at all in prescribing the Secretarial Procedures in 2016. The Secretary's consideration of the concurrence was instead relevant to his 2012 decision to take the Madera Site into trust. Picayune's argument is an impermissible collateral attack on the Secretary's land entrustment decision, which it is already challenging in the District of Columbia litigation.

IGRA *required* the Secretary to issue Secretarial procedures, which the Secretarial Procedures and the Secretarial letter accompanying the Procedures both recognize. AR2186 (Secretary had "duty under IGRA to prescribe Class III gaming procedures"), AR2188 ("IGRA requires the Secretary to prescribe procedures"); AR2196 (Secretary promulgated the Procedures "as mandated by IGRA"). IGRA's language is unambiguous on that point. After a federal court finds that a State has failed to negotiate a compact in good faith and the State has not consented to a mediator-selected compact, "the Secretary *shall prescribe* … procedures." 25 U.S.C. § 2710(d)(7)(B)(vii) (emphasis added). Thus, as North Fork explained (Mem. 27-28), the Secretary's decision to issue Secretarial procedures could not have been unlawful because the Secretary had no discretion *not to prescribe* Secretarial procedures. *See, e.g.*, *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004) (agency's failure to consider environmental effects of entry of Mexican trucks in environmental impact statement not unlawful because the agency "ha[d] no discretion to prevent the entry of Mexican trucks").

IGRA's mandate forecloses Picayune's new challenge. Picayune argues that the Secretary should have considered or determined whether the Governor's concurrence is valid under California law because, in Picayune's view, the Secretary should not have issued *any*

*Secretarial procedures* if he concluded that the Governor's concurrence was invalid. And Picayune argues (at 13-14, 17-18, 26-27) that issuance of any procedures would have been inconsistent with state law involving the concurrence. But IGRA's statutory mandate left no room for the Secretary to consider whether or not to issue any procedures at all.

Picayune is wrong that IGRA's requirement that the Secretary prescribe "procedures … which are consistent with … the relevant provisions of the laws of the State," 25 U.S.C. § 2710(d)(7)(B)(vii)(I), required the Secretary to consider whether the Governor's concurrence is valid under state law. That provision requires that *the "procedures" themselves*—meaning "the conditions [under] which class III gaming may be conducted in lieu of a compact accepted by a state," *American Indian Law Deskbook* § 12.30 (2017)—be consistent with relevant state laws. The Secretary must examine state laws relevant to *the conditions of gaming*, *i.e.*, relevant to the procedures' specific content, such as the permissible scope or form of gaming and the regulatory scheme for oversight of gaming. As one treatise has explained, the provision "presumably is intended to ensure that the procedures do not authorize gaming that otherwise could not be authorized under a compact. In short, the procedures should parallel as closely as possible the compact selected by the mediator, *compensating for the lack of any state involvement otherwise contemplated under that compact and ensuring that the additional procedures do not violate IGRA or state law recognized as applicable under IGRA as restricting the permissible content of a compact*." *Id.* (emphasis added).[3] The Secretary conducted that analysis, including noting that

[3] Although there is little guidance elsewhere on this provision—and Picayune has pointed to none—the Interior Department has described the kind of state laws it reviews when issuing Secretarial procedures under the 25 C.F.R. Part 291 regulations. Those regulations apply only when a State has asserted its sovereign immunity to an IGRA good-faith suit, *see* 25 C.F.R. § 291.1, but similarly require the Secretary to "prescribe appropriate procedures … under which Class III gaming may take place that comport with … the relevant provisions of the laws of the State," *id.* § 291.11(c). The Interior Department has explained that "the Secretary would disapprove proposals when 'contemplated gaming activities are not permitted in the State for any purpose by any person, organization, or entity.'" 63 Fed. Reg. 3289, 3293 (Jan. 22, 1998). The question would be whether "'the State has reasonably characterized the relevant State laws as completely prohibiting a distinct form of gaming.'" *Id.* In other words, the Secretary would evaluate whether the conditions of gaming, such as the scope or form of gaming, were consistent with state law. (The Fifth and Tenth Circuits have held the Part 291 regulations invalid on grounds unrelated to the Secretary's review of Secretarial procedures for conformity with relevant state law. *See New Mexico v. Department of Interior*, 854 F.3d 1207 (10th Cir. 2017); *Texas v. United States*, 497 F.3d 491, 494 (5th Cir. 2007); *but see United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301-1302 (9th Cir. 1998) (suggesting that Part 291 rulemaking could be valid).

any state involvement in the Secretarial Procedures would be voluntary and "largely consistent with the State's regulatory role in Class III gaming under numerous existing compacts with tribes in the State." AR2187. Picayune has not alleged, let alone established, that the Secretarial Procedures are inconsistent with any state law relevant to the conditions of gaming.

Picayune's argument that the Secretary was required to consider the Governor's concurrence and North Fork's eligibility to conduct gaming on the Madera Site is an impermissible collateral attack on the Secretary's earlier decision to acquire the Madera Site in trust for North Fork. Secretarial procedures are a substitute for a tribal-state compact. *See* AR2295 ("Under IGRA, these Secretarial Procedures are properly viewed as a full substitute for a Class III gaming compact[.]"). They are distinct from the Secretary's earlier decision, based on the Governor's concurrence, to acquire the Madera Site for North Fork's gaming development, as the Secretary explained. AR2188. The issuance of Secretarial procedures is not a vehicle for Picayune to challenge North Fork's eligibility to conduct gaming on the Madera Site.

The Ninth Circuit has made clear that collateral attacks like Picayune's are not allowed. In *Big Lagoon Rancheria v. California*, 789 F.3d 947 (9th Cir. 2015) (en banc), the State raised two arguments to support its position that it was not required to negotiate a gaming compact with the plaintiff tribe: (1) that the land on which the tribe sought to game was not eligible for gaming because the Secretary of the Interior's land entrustment decision was improper, and (2) that the tribe was not eligible to conduct gaming because it was not properly recognized. *Id.* at 952. The Ninth Circuit held that the State could not raise either argument in litigation pursuant to IGRA's remedial provision because they constituted impermissible collateral attacks on the Secretary's earlier decisions. *Id.* at 954. The Ninth Circuit added that, with the mediator having selected a compact, "[a]ll that remains is for the mediator to notify the Secretary of the Interior of his selection, and, once the Secretary of the Interior prescribes procedures to govern gaming that are consistent with [the mediator's] selection, [the tribe] will be authorized to build the casino and engage in the gaming that it seeks." *Id.* at 955-956.

By separating the limited considerations relevant to IGRA's remedial provision from the underlying decisions that enable a tribe (like Big Lagoon or North Fork) to seek relief under it—

*i.e.*, the possession of gaming-eligible land and recognition as a tribe—the Ninth Circuit's *Big Lagoon* decision leaves no room for the reexamination that Picayune contends was lacking here. It would be inconsistent with the Ninth Circuit's decision to require the Secretary to re-evaluate whether the land at issue was eligible for gaming and whether the tribe was eligible to conduct gaming before issuing the Secretarial procedures; those decisions were collateral to IGRA's remedial provision.

Just as the State could not mount those collateral attacks in *Big Lagoon* to block the operation of IGRA's remedial regime, neither can Picayune mount them here to nullify the relief the Secretary has granted pursuant to that regime. Thus, in prescribing the Secretarial Procedures for North Fork, the Secretary was not required to re-evaluate the Madera Site's eligibility for gaming, and Picayune cannot collaterally attack the land entrustment decision by arguing that the Secretarial Procedures authorized gaming on land that is not gaming-eligible. The vehicle for Picayune to challenge the land entrustment decision is the District of Columbia litigation—where Picayune currently is arguing that the land entrustment decision is invalid based on the Governor's concurrence. Picayune cannot pursue that claim here in the guise of an action challenging the Secretarial Procedures.

**c. Even If The Secretary Were Required To Consider The Concurrence, The Secretarial Procedures Were Proper**

Picayune fails to establish any error even if the Secretary were required to consider the concurrence in issuing Secretarial Procedures. As North Fork explained (Mem. 29-32), the current legal status of the Governor's concurrence under state law cannot undermine the Secretary's issuance of the Secretarial Procedures for two independent reasons: (1) the Procedures were proper when prescribed, and (2) the Secretary was entitled to rely on the Governor's facially valid concurrence. Picayune does not show otherwise.

*First*, as North Fork explained (Mem. 29-30), Picayune cannot use the *December 2016* state-court decision holding the Governor's concurrence invalid under state law to show that issuance of the Secretarial Procedures in *July 2016* was unlawful under federal law because a "reviewing court must review the administrative record before the agency at the time the agency

made its decision." *National Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004). Subsequent state-court decisions are not grounds to invalidate prior agency action. *See San Luis & Delta-Mendota Water Auth. v. Department of Interior*, 624 F. Supp. 2d 1197, 1212 (E.D. Cal. 2009), *aff'd*, 672 F.3d 676 (9th Cir. 2012).

Picayune's argument (at 13-15, 25-26) that the Secretary was aware in July 2016 of the private litigant Stand Up for California!'s state-court lawsuit challenging the Governor's concurrence is irrelevant. IGRA did not require the Secretary to await or to anticipate the outcome of pending litigation in California state courts before issuing the Procedures. Rather, IGRA establishes an expedited timetable for the remedial process with short deadlines. *E.g.*, 25 U.S.C. § 2710(d)(7)(B)(i), (iii), (vii). The Ninth Circuit has thus instructed that "the structure and content of § 2710(d) make clear that the function of the good faith requirement and judicial remedy is to permit the tribe to process gaming arrangements *on an expedited basis*." *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1041 (9th Cir. 2010) (emphasis added); *accord Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1033 (2d Cir. 1990). The Secretary reviewed the mediator-selected compact for more than 90 days after the mediator had submitted the compact before issuing the Procedures. AR2186. Picayune cannot show that IGRA required the Secretary to wait longer simply because a private litigant had brought state-court litigation challenging the validity of the Governor's concurrence—which was given in August 2012, almost four years before the Procedures issued.

Ninth Circuit precedent forecloses Picayune's suggestion (at 26-27) that the administrative record could be supplemented with the December 2016 state-court decision. Picayune argues (at 27) that the December 2016 decision could be admitted to the record because it could be relevant to whether the Secretary considered all relevant factors or could somehow show agency bad faith. The Ninth Circuit, however, has squarely held that the exceptions "regarding consideration of extra-record materials 'only appl[y] to information available at the time [of the agency's decision], not post-decisional information.'" *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012). Indeed, the very case that Picayune relies on (at 27) explains that "post-decisional information 'may not be advanced as a new

rationalization … for attacking an agency's decision.'" *Center for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 944 (9th Cir. 2006). The exceptions Picayune invokes do not apply, and Picayune cannot invoke the December 2016 state-court decision or any other post-July 2016 information to invalidate the July 2016 issuance of the Secretarial Procedures.

*Second*, as North Fork explained (Mem. 30-32), the Secretary was entitled to rely on the Governor's facially valid concurrence when issuing the Secretarial Procedures in July 2016, regardless of whether a state court would subsequently conclude that the Governor had acted unlawfully under state law. Picayune does not even address the U.S. Supreme Court precedent that North Fork cited (Mem. 31) holding that the federal government could accept a state's facially valid ratification of the Nineteenth Amendment, even if the states' ratifying resolutions violated state law. *See Leser v. Garnett*, 258 U.S. 130, 137 (1922). Nor does Picayune distinguish the retrocession cases that North Fork discussed (Mem. 30-32) in which the Ninth Circuit held that the Secretary could accept a gubernatorial proclamation retroceding jurisdiction back to the federal government "'whether or not the Governor's proclamation was valid under [state] law.'" *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979) (quoting *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191 (1978)).

Picayune first tries (at 21-22) to distinguish the retrocession cases by repeating IGRA's requirement that Secretarial procedures be consistent with "the relevant provisions of the laws of the State," 25 U.S.C. § 2710(d)(7)(B)(vii)(I). The Governor's concurrence is not a "relevant" provision of state law for the reasons above. *See supra*, Section II.B.1.b. But even if it were, Picayune has not shown that the provision required the Secretary to look behind or second guess the Governor's representation as to what California law is to determine whether the concurrence was consistent with state law. Just as the Secretary could accept the governors' facially valid proclamations of retrocession, so too could the Secretary accept at face value the Governor's representation that his concurrence was valid under state law.

Picayune also argues (at 22) that "IGRA's purpose of protecting state interests" distinguishes the retrocession cases. As a threshold matter, Picayune mischaracterizes IGRA's purpose. As the Ninth Circuit has summarized, "Congress enacted IGRA to provide a legal

framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with the economic prosperity that has so long eluded their grasp—while setting boundaries to restrain aggression by powerful states." *Rincon Band*, 602 F.3d at 1027. IGRA's express purposes are "to promote tribal development, prevent criminal activity related to gaming, and ensure that gaming activities are conducted fairly." *Id.* at 1034 (citing 25 U.S.C. § 2702). "The only *state* interests mentioned in § 2702 are protecting against organized crime and ensuring that gaming is conducted fairly and honestly." *Id.* (citing 25 U.S.C. § 2702(2)).

In any event, the Secretarial Procedures complied with IGRA's provisions concerning states' interests. Picayune notes (at 24-25) that Congress prohibited class III gaming in states where such gaming is not permitted "by any person, organization, or entity," 25 U.S.C. § 2710(d)(1)(B), but California does permit class III gaming—indeed, Picayune has its own class III casino. The Secretarial Procedures indisputably comply with that provision. Picayune cites (at 25) IGRA's two-part determination requirement, *id.* § 2719(b)(1)(A), but Picayune is litigating its claims concerning that requirement in the District of Columbia case and cannot collaterally raise that issue in this case. Moreover, in issuing the Secretarial Procedures, the Secretary considered California's interests, noting that "the State may not be willing to fulfill" the regulatory role it ordinarily plays for tribal-state compacts and providing that the State would not have any regulatory responsibilities unless it voluntarily agreed to them. AR2187-2188.

Picayune thus fails to establish that anything in IGRA distinguishes the retrocession cases. Those decisions were based on "'[t]he plenary power of the federal government over Indian affairs, 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*, 544 F.2d at 1012 (quoting *United States v. Brown*, 334 F. Supp. 536, 540-541 (D. Neb. 1971)). That reasoning fully applies here. To the extent that the Secretary was required to consider the Governor's concurrence in issuing the Secretarial Procedures, he was therefore entitled to rely on the Governor's facially valid concurrence.

**2. Picayune's Argument That The Fifth District's Decision Renders The Secretary's Issuance Of The Secretarial Procedures Unlawful Fails**

**a. The Argument Is Waived**

Picayune also argues (at 28-32) that even if the Secretarial Procedures were lawfully issued in July 2016, the Fifth District's later decision subsequently invalidates them. That argument, too, is waived. Picayune's operative complaint was filed in August 2016, *before* the Fifth District's decision, and does not raise any claim based on the Fifth District's decision. *See* Doc. 5 ¶¶ 86-91, 101-103. Nor does Picayune's opening memorandum argue that even if the Secretarial Procedures were lawfully issued, the Fifth District's decision invalidates them. *See* Doc. 19 at 1-22. Picayune's new argument relies entirely on *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997), but its opening memorandum made no substantive argument based on that decision, which it cited only in passing. *See* Doc. 19 at 22. Picayune's argument is waived and should not be considered for the reasons above. *See supra*, Section II.B.1.a.

**b. Picayune Has No Cause Of Action Because Its Argument Does Not Challenge Federal Agency Action**

Picayune's argument fails for another threshold reason: Picayune cannot sue for a declaration that the Secretarial Procedures have become invalid, even if they were valid when issued, because it lacks any cause of action allowing it to state such a claim.

*First*, the APA does not provide Picayune with a cause of action. "To maintain a cause of action under the APA, a plaintiff must challenge 'agency action' that is 'final,'" identifying "a discrete 'agency action' that fits within the APA's definition of that term." *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 800-801 (9th Cir. 2013). Even if the Secretary's July 2016 issuance of the Secretarial Procedures was itself a discrete agency action,[4] the Procedures' continuing validity is not final agency action. Picayune cannot state an APA claim by arguing that even if the Secretary's issuance the Secretarial Procedures was lawful, the Procedures themselves are now unlawful because of the Fifth District's decision. To the extent that

[4] North Fork does not concede that Secretarial procedures are subject to review under the APA, given their non-discretionary nature.

Picayune is alleging that the July 2016 issuance of the Procedures was invalid, that argument duplicates Picayune's prior argument and fails for the reasons above. *See supra*, Section II.B.1.

*Second*, IGRA does not provide Picayune with a cause of action to challenge the Secretarial Procedures' validity. "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). Rather, "where IGRA creates a private cause of action, it does so explicitly." *Id.* IGRA does not provide any private right to challenge the validity of Secretarial procedures or to enjoin gaming conducted under Secretarial procedures. Indeed, except for actions to enforce a tribal-state compact, 25 U.S.C. § 2710(d)(7)(A)(ii), only the federal government may sue to enjoin gaming. *Cf. id.* § 2710(d)(7)(A)(iii) (only Secretary has a cause of action "to enforce the [Secretarial] procedures"); *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034 n.6 (2014) ("[I]f a tribe opens a casino on Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal Government can enforce the law."); *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1299-1300 (11th Cir. 2015) (no implied right of action to sue to prevent tribes from gaming under IGRA). Thus, to the extent that a tribe is unlawfully gaming under Secretarial procedures, only the federal government can enforce the law. Neither Picayune nor any other private plaintiff can bring an action under IGRA to invalidate Secretarial procedures.

*Third*, the Declaratory Judgment Act does not permit Picayune's argument because it neither provides Picayune with a cause of action nor waives the federal government's sovereign immunity, for the reasons North Fork previously explained (Mem. 18-19).

Picayune cites (at 28-32) only *Pueblo of Santa Ana*, but that case was not an APA case like Picayune's suit. In that case, Indian tribes operating gaming facilities under compacts that the state supreme court had declared invalid were warned by the federal government that "their gaming activities must cease or casino employees and patrons will be subject to federal criminal sanctions and the alleged illegal gaming devices will be subject to forfeiture." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1291 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1997). Faced with an impending enforcement action, the tribes sought a declaratory judgment of their right to continue gaming. *Id.*; *see Pueblo of Santa Ana*, 104 F.3d at 1548. The tribes could bring

their declaratory-judgment action because they sought adjudication of claims that the federal defendants had threatened to assert against them. *See, e.g.*, *Levin Metals Corp. v. Parr-Richmond Terminal Co.*, 799 F.2d 1312, 1315 (9th Cir. 1986) (jurisdiction exists where declaratory-judgment plaintiff asserts a claim that is in the nature of a defense to threatened action). Likewise, sovereign immunity does not apply in suits against federal officials to enjoin threatened enforcement action. Picayune, in contrast, is not bringing this litigation as a defense to threatened action. Neither the APA nor IGRA nor the Declaratory Judgment Act permits a third party to bring litigation to invalidate Secretarial procedures that were valid when issued.

**c. The Fifth District's Decision Cannot Retroactively Invalidate The Secretarial Procedures**

Even if Picayune could seek to invalidate the Secretarial Procedures, its argument fails on the merits. As explained above, the concurrence had no role to play in the Secretary's issuance of the Procedures, but was instead relevant to his earlier decision to take the Madera Site into trust for North Fork. Thus, the concurrence's current validity under state law does not affect the Procedures' validity, and the Fifth District's decision is not relevant. *See supra*, Section II.B.1.

The sole case on which Picayune relies, *Pueblo of Santa Ana*, is inapposite. It did not involve Secretarial procedures or even a gubernatorial concurrence, but instead the status of a tribal-state compact. Compacts are different from Secretarial procedures. They are "ongoing agreements imposing affirmative duties on the states," *Pueblo of Santa Ana*, 104 F.3d at 1555 n.12, while the Secretary ensured that the Secretarial Procedures did not impose any affirmative duties on California that California did not voluntarily agree to assume within 60 days of the Procedures' issuance, AR2187-2188, AR2245 § 8.2.

Further, the Tenth Circuit did not hold that a state-court decision could invalidate what had been a lawfully entered-into compact. Rather, it held that the Secretary could not "vivify that which was never alive" and "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." *Pueblo of Santa Ana*, 104 F.3d at 1548. The Tenth Circuit did not suggest that a subsequent state-court decision could invalidate a compact that had been lawfully

entered into and valid at its inception. Picayune's argument is different. Picayune's argument assumes that the Secretarial Procedures were lawfully issued in August 2016 and thus *were valid at their inception* but contends that the Fifth District's decision subsequently invalidated them. The Tenth Circuit's decision does not support that argument. Moreover, to the extent that Picayune is alleging that the Procedures were void from their inception because the July 2016 issuance of the Procedures was invalid, that argument duplicates Picayune's prior argument and fails for the reasons above. *See supra*, Section II.B.1.

Finally, *Pueblo of Santa Ana* is distinguishable because it followed a state supreme court's interpretation of state law. It does not support Picayune's argument that this Court should follow the Fifth District's decision, which the California Supreme Court is reviewing and currently has no binding effect. This Court should not follow that decision for the reasons explained earlier (Mem. 33-37).

**3. The Secretary Was Not Required To Publish Notice Of The Secretarial Procedures To Make Them Effective**

Picayune's argument (at 33-36) that the Secretary unlawfully made the Secretarial Procedures effective upon their issuance, without publishing notice in the Federal Register, is waived because Picayune did not raise that claim in its complaint or in its opening memorandum. *See* Doc. 5 ¶¶ 86-91, 101-103; Doc. 19 at 1-22. Indeed, neither filing even cites 25 C.F.R. Part 291, upon which Picayune's argument is entirely based.

In any event, the 25 C.F.R. Part 291 regulations do not apply here. By their terms, they apply *only* when a "State and an Indian tribe are unable to voluntarily agree to a compact" and the "State has asserted its immunity from suit brought by an Indian tribe under 25 U.S.C. 2710(d)(7)(B)." 25 C.F.R. § 291.1. As the Interior Department explained in issuing the rule: "In cases in which a State chooses not to assert a sovereign immunity defense, the rule will not apply." 64 Fed. Reg. 17,535, 17,536 (Apr. 12, 1999). Instead, the statutory process in IGRA, 25 U.S.C. § 2710(d)(7), will exclusively govern. *Id.* Indeed, 25 C.F.R. § 291.13 itself expressly applies only to "approval of Class III gaming procedures for the Indian tribe under either § 291.8(b), § 291.8(c), or § 291.11(a)"—not to approval of Secretarial Procedures under IGRA's

statutory process. The State of California did not assert a sovereign immunity defense, *see North Fork*, 2015 WL 11438206, at *6, so the Part 291 regulations do not apply.

The Secretary instead issued the Procedures for North Fork under IGRA's statutory process; the Procedures themselves note that they were issued "as mandated by IGRA, 25 U.S.C. § 2710(d)(7)(B)(vii)." AR2196. Although IGRA provides that a "Tribal-State compact" shall take effect only after notice is published in the Federal Register, 25 U.S.C. § 2710(d)(3)(B), and requires the Secretary to publish notice of "any Tribal-State compact" that has been approved, *id.* § 2710(d)(8)(D), IGRA does not include any such requirement for Secretarial Procedures, *see id.* § 2710(d)(7)(B)(vii). The Secretary's obligation is simply to "prescribe … procedures." *Id.* The Secretary therefore was not required to publish notice of the Procedures in the Federal Register.

Finally, Picayune's wholly unsubstantiated insinuations that (at 34) the Secretary might not have published notice in the Federal Register so that the public would lack "sufficient reasoning to ascertain the basis for the Secretary's decision" or that (at 35) the Secretary followed an irregular process in issuing North Fork's Procedures are baseless. The Secretary issued the Procedures contemporaneously with a Secretarial letter explaining in detail why the Secretary had issued the Procedures, *see* AR2186-2188—just as the Secretary has done on other occasions when issuing Secretarial Procedures under IGRA's statutory process.[5] The Secretarial letter noted that the Interior Department had reviewed the mediator-selected compact for more than 90 days. AR2186. The Interior Department published both the letter and the Procedures for North Fork on the Department's publicly accessible website. *See* Lawrence Roberts, Acting Assistant Secretary for Indian Affairs, U.S. Dep't of Interior, to Maryann McGovran, Chairwoman, North Fork Rancheria of Mono Indians of California (July 29, 2016), *available at* https://www.indianaffairs.gov/cs/groups/xasia/documents/text/idc2-056230.pdf. The letter and

[5] *See, e.g.*, Lawrence Roberts, Principal Deputy Assistant Secretary for Indian Affairs, U.S. Dep't of Interior, to Glenda Nelson, Tribal Chairperson, Enterprise Rancheria of Maidu Indians of California (Aug. 12, 2016), *available at* https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc2-056229.pdf; Kevin Washburn, Assistant Secretary for Indian Affairs, U.S. Dep't of Interior, to Bo Bazzetti, Chairman, Rincon Band of Luiseno Indians (Feb. 8, 2013), *available at* https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026439.pdf; James Cason, Associate Deputy Secretary, U.S. Dep't of Interior, to Rick Brannan, Chairman, Northern Arapaho Tribe (Sept. 21, 2005), *available at* https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038585.pdf.

Procedures are publicly accessible on the same webpage where the Interior Department has made publicly available the tribal-state compacts it has approved. *See* U.S. Dep't of Interior, Indian Affairs, *Gaming Compacts*, *available at* https://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm. The Secretary complied fully with IGRA's text and spirit.

## III. THIS CASE SHOULD NOT BE STAYED UNLESS THE COURT DETERMINES THAT ANY CLAIM REQUIRES RESOLUTION OF THE GOVERNOR'S CONCURRENCE AUTHORITY UNDER STATE LAW

Picayune's statement (at 3) that it "agrees" with North Fork and the federal defendants "that a stay of this action is appropriate" mischaracterizes North Fork's position. North Fork's position is that (1) all of Picayune's claims should be dismissed under Rule 19 because Picayune is collaterally estopped from re-litigating whether the State of California is an indispensable party to its claims, or (2) in the alternative, summary judgment should be granted against Picayune because all of its claims fail as a matter of federal law. *See* Doc. 25 at 2. North Fork's position is that a stay would be appropriate *only if* the Court decides that resolving Picayune's claims would require it to adjudicate whether the Governor's concurrence is valid under California law. *See* Doc. 26 at 43.[6] But Picayune's claims do not require this Court to adjudicate any issues of California law and they do not turn on the California Supreme Court's decision in the pending *Stand Up* case. Rather, they all fail on federal grounds. Accordingly, North Fork reaffirms that a stay is not necessary, unless the Court determines that it is necessary to adjudicate whether the Governor's concurrence was valid under California law.

## CONCLUSION

North Fork's motion for summary judgment should be granted, and Picayune's motion for summary judgment should be denied.

[6] North Fork recognizes that this Court has questioned whether a federal stay for a parallel state-court proceeding is ever available under *Landis v. North American Co.*, 299 U.S. 248 (1936), suggesting that such a stay might have to satisfy the stricter standard of *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). *See Abrahamson v. Berkley*, 2016 WL 8673060, at *19 n.14 (E.D. Cal. Sept. 2, 2016) (Ishii, J.). This Court need not decide that issue here because Picayune's claims fail as a matter of federal law and therefore do not require the Court to adjudicate any state-law issues, so a stay is unnecessary under either standard.

DATED: May 25, 2017

Respectfully submitted,

By: /s/ Christopher E. Babbitt

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**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF CALIFORNIA**

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| PICAYUNE RANCHERIA OF CHUKCHANSI INDIANS,<br><br>Plaintiff,<br><br>v.<br><br>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,<br><br>Defendants. | Case No. 1:16-cv-00950-AWI-EPG<br><br>**CERTIFICATE OF SERVICE** |

I hereby certify that, on May 25, 2017, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court for the Eastern District of California using the CM/ECF system, which sent notification of such filing to counsel of record in this case.

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