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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

FRESNO DIVISION

CLUB ONE CASINO, INC., dba CLUB
ONE CASINO; GLCR, INC., dba THE
DEUCE LOUNGE AND CASINO,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF THE
INTERIOR; RYAN ZINKE, in his official
capacity as Secretary of the Interior; and
MIKE BLACK in his official capacity as
Acting Assistant Secretary of the Interior –
Indian Affairs,

Defendants.

No. 1:16-cv-01908-AWI-EPG

**NOTICE OF MOTION AND MOTION
TO SUPPLEMENT THE
ADMINISTRATIVE RECORD AND
CONSIDER EXTRA-RECORD
EVIDENCE**

Hearing Date: August 28, 2017

Time: 1:30 p.m.

Location: US Courthouse
2500 Tulare Street
Courtroom 2, 8th Floor
Fresno, CA 93721

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that plaintiffs CLUB ONE CASINO, INC., dba CLUB ONE CASINO, and GLCR, INC., dba THE DEUCE LOUNGE AND CASINO, hereby move the court to supplement the administrative record previously submitted by defendants and/or admit extra-record materials so the court will have a full and complete record upon which to decide the legal issue of territorial jurisdiction that lies at the heart of this case.

This motion is based on the accompanying memorandum of points and authorities, the declaration of Robert D. Links and exhibits thereto, as well as upon such further briefs, argument or other information as may be submitted to the court.

Dated: June 26, 2017

SLOTE LINKS & BOREMAN, LLP

By: /s/

Robert D. Links
Attorneys for Plaintiffs

MEMORANDUM OF POINTS AND AUTHORITIES

Introduction

Plaintiffs request that the court supplement and/or augment the administrative record in this case to include the following documents:

- 1) The Declaration of James N. Cordova attesting to the chain of title through the certified deeds that trace the title to the subject property from statehood in 1850 to the transfer to the federal government in 2013; these deeds are part of the official records of Fresno and Madera Counties;
- 2) Two Records of Decision (RODs), both issued by defendants, with respect to the subject property:
 - (a) The ROD issued in 2011 as to the so-called “2719 Determination” that the subject parcel can be taken into trust for possible future use as a casino gaming site under the Indian Gaming Regulatory Act (IGRA); and
 - (b) The ROD issued in 2012 as to the decision to take the land into trust.
- 3) Excerpts from public filings posted on the SEC website documenting ownership of the subject property by Station Casinos, a Nevada gambling corporation, immediately prior to the transfer to the United States.¹

Copies of these documents are attached to the declaration of Robert D. Links filed in conjunction with this motion as Exhibits A through D inclusive. This request need not result in a voluminous burden on the court. Although the full and complete copies of the Cordova Declaration and the RODs have been attached to the accompanying declaration in order to ensure authenticity, targeted excerpts containing the relevant information would be sufficient for proper judicial review.

Background

As the court is aware, plaintiffs challenge the validity of the Secretarial Procedures that have been issued to allow Tribal gaming on the subject parcel of real estate. The challenge is

¹ If the court would prefer having the entire SEC filing, plaintiffs will make it available for review, although the issue of the identity of the subsidiaries of Station Casinos, Inc., is the only pertinent data contained in the full document and that information is contained in just a few pages of a much larger document.

made under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, *et seq.*, and is based on the contention that defendants exceeded their statutory authority because the Tribe in question, the North Fork Rancheria Mono Indians of California, does not have territorial jurisdiction over the subject parcel and, therefore, the land does not qualify for casino gaming under IGRA.

IGRA authorizes defendants to issue Secretarial Procedures *only* if the proposed casino gambling will be on Indian lands “over which the tribe has jurisdiction.” See 25 U.S.C. § 2710(d)(7)(B)(vii). To the extent defendants contend they had statutory authority under this section to issue the challenged Secretarial Procedures, the administrative record must contain evidence that defendants at least considered the territorial jurisdiction factor, and properly concluded that the Tribe actually satisfied it with respect to the proposed casino site.

By this motion, plaintiffs seek to submit extra-record materials for the limited purpose of assisting the court in determining whether defendants considered the crucial territorial jurisdiction factor when they decided to issue the Secretarial Procedures at issue. As we explain, the extra-record materials set forth above are highly relevant to assessing whether defendants evaluated a key statutory factor and whether defendants’ challenged action is beyond statutory authority. These materials support plaintiffs’ core allegation that California’s historic territorial jurisdiction has never been ceded to either the federal government or to the North Fork Tribe—and without such a transfer of jurisdiction, there is no statutory authority to issue the Secretarial Procedures in question.

ARGUMENT

1. Prior Judicial Decisions Support Supplementation of the Administrative Record in Appropriate Cases

Plaintiffs are well aware that the focal point for judicial review in an APA case should be “the administrative record already in existence, not some new record made initially in the

reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). However, that general rule is subject to a number of widely acknowledged exceptions. See *Lands Council v. Forester of Region One of the U.S. Forest Service*, 395 F.3d 1019, 1029 (9th Cir. 2004). The Ninth Circuit has identified "limited exceptions [which] operate to identify and plug holes in the administrative record." *Id.* at 1030. One of those exceptions allows supplementation of the administrative record "to determine whether the agency has considered all relevant factors and has explained its decision." *Id.*; see also *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197-198 (D.D.C. 2005); *Pac. Shores Subd. Calif. Water Dist. v. United States Corps of Engineers*, 448 F. Supp. 2d 1, 5-6 (D.D.C. 2006)(same rule applies to submission of extra record materials; court commented that "[c]onsideration of extra-record information is appropriate when simply reviewing the administrative record is not enough to resolve the case").

The relevant factors exception "permits a district court to consider extra-record evidence to develop a background against which it can evaluate the integrity of the agency's analysis...." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). Evidence under this exception may be admitted only to help the court understand whether the agency complied with the APA's requirement that the agency's decision complies with the law and is not arbitrary or capricious. *Id.* Here, plaintiffs request that the administrative record be supplemented with extra-record materials in order to show that defendants failed to consider a critical IGRA prerequisite—territorial jurisdiction—that must be satisfied before defendants have the legal authority to issue Secretarial Procedures.

As noted at the outset, defendants are authorized to issue Secretarial Procedures for the operation of Tribal casino gaming *only* if the gaming will be on Indian lands "over which the tribe has jurisdiction." 25 U.S.C. § 2710(d)(7)(B)(vii); see also 25 U.S.C. §§ 2710(d)(1) and 2710(d)(3)(A).

1 The administrative record submitted by defendants contains no conclusion that the
 2 territorial jurisdiction prerequisite has been satisfied nor does the record identify facts which
 3 would support such a conclusion. Rather, the approval of the Secretarial Procedures seems to be
 4 based on the common, but erroneous, belief that when land is taken into trust for an Indian tribe,
 5 jurisdiction somehow automatically shifts from the state to the tribe. However, this has never
 6 been the law. Plaintiffs seek to supplement the record to demonstrate that defendants not only
 7 did not evaluate the territorial jurisdiction factor, but could not have concluded that it had been
 8 satisfied because territorial jurisdiction over the land in question has continuously rested with
 9 the State of California ever since 1850 and has never been relinquished by the state. The
 10 documents plaintiffs request be included in the instant record are necessary to enable the court
 11 to fully evaluate the territorial jurisdiction factor and defendants' obligation to consider it.

12 **2. The Administrative Record Submitted by Defendants Does not Address the**
 13 **Jurisdiction Factor**

14 Agency decisions must be founded on a reasoned evaluation of the relevant factors. *San*
 15 *Luis & Delta-Mendota Water Auth. v. Locke*, supra, 776 F.3d 971, 995. Yet any suggestion that
 16 the North Fork Tribe has territorial jurisdiction over the subject parcel is completely
 17 unsupported by the instant record. The casino site has been governed by state law since
 18 California joined the Union in 1850. The State of California has never ceded jurisdiction to the
 19 federal government and the federal government never formally accepted jurisdiction. Without
 20 those two interconnected steps, there is a *conclusive presumption* that jurisdiction never shifted.
 21 See 40 U.S.C. § 3112; see also *Fort Leavenworth R.R. v. Lowe*, 118 U.S. 525 (1885)(federal
 22 government cannot unilaterally strip a state of territorial jurisdiction).

23 Defendants assert in the challenged procedures—without any explanation or analysis—
 24 that they are acting “as mandated by IGRA, 25 U.S.C. § 2710(d)(7)(B)(vii).” See AR 2196

1 (Secretarial Procedures, pg. 1, third paragraph). That is an insufficient explanation under the
2 APA. In order to meet minimal requirements of accountability, an agency must give reasons
3 sufficiently detailed to allow a judge to perform meaningful judicial review. *Citizens to*
4 *Preserve Overton Park v. Volpe*, 401 U.S. 402, 421 (1971).

5 Here, the blanket assertion that the defendants had a duty under IGRA to prescribe Class
6 III gaming procedures is insufficient to determine whether the issuance of Secretarial
7 Procedures with respect to this parcel of land is actually justified under the governing statute.
8 The court should not be satisfied with defendants' rote recitation of legal conclusion as the basis
9 for their actions. Instead, the court should review the record—a complete record—to determine
10 whether territorial jurisdiction, a core IGRA prerequisite, ever actually shifted from the State of
11 California to the United States (and through the federal government to the North Fork Tribe).

12 Although agencies are afforded great deference under the APA, judicial review must be
13 sufficiently probing to ensure that the agency has not neglected to consider an important aspect
14 of the problem. *San Luis & Delta-Mendota Water Auth. V. Locke*, 776 F.3d 971, 994. This
15 inquiry must “be searching and careful.” *Marsh v. Oregon Natural Resources Council*, 490 U.S.
16 360, 378 (1989).

17 An agency's action is arbitrary and capricious if the decision makers relied on factors
18 which Congress did not intend them to consider, or entirely failed to consider an important
19 aspect that Congress mandated be part of the equation. *Motor Vehicle Mfrs. Ass'n v. State Farm*
20 *Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Territorial jurisdiction is a vital factor that is at the
21 heart of IGRA. It should have been central to defendants' analysis prior to issuance of
22 Secretarial Procedures, and we request supplementation/augmentation of the record to enable
23 the court to properly determine whether defendants properly analyzed the IGRA prerequisites
24 before issuing the Secretarial Procedures.

1 We now turn to the particular items in question to explain why they should be made a
2 part of the instant record.

3 **3. The Proposed Materials Are Highly Relevant to the Jurisdiction Factor.**

4 **a. The Deed History of the Proposed Casino Site**

5 Plaintiffs request that the record be supplemented with the title transfer deeds tracing
6 ownership of the subject parcel. Although *title* and *jurisdiction* are two different aspects of
7 dominion over land, determining title is pertinent when determining jurisdiction. The pertinent
8 title deeds show that the proposed casino site was owned by private parties from 1868 to 2013,
9 at which time the property was transferred by a third party (a Nevada casino company) to the
10 federal government. Copies of the deeds, attached as **Exhibit D** to the declaration of Robert D.
11 Links filed in conjunction with this motion, have each been certified by the Recorder's Office in
12 Madera County, where the property is located and where the transfer deeds were placed on the
13 public record.

14 Plaintiffs seek to submit the title deeds to show that territorial jurisdiction over the land
15 has never shifted. When California was admitted into the Union, the Madera Parcel was owned
16 by the federal government as public lands. There is no evidence in the record or otherwise that
17 the federal government reserved jurisdiction over the Madera Parcel or that it was occupied,
18 must less governed, by any Indian Tribe. Rather, like almost all public lands, the Madera Parcel
19 was under the territorial jurisdiction of the State. In 1868, the land passed into private hands by
20 patents issued by President Grant and the land was held by various private parties from 1868
21 until 2013. During that 145 year period, the land continued to be under the territorial
22 jurisdiction of the state. See Cal. Gov't Code § 110.

23 On February 13, 2013, NP Fresno Land Acquisitions, LLC transferred the property to
24 "the United States of America in Trust for the Northfork Rancheria of Mono Indians of

1 California.” The United States accepted the conveyance pursuant to the Indian Land
2 Consolidation Act of January 12, 1983. 25 U.S.C. § 2202. This conveyance transferred legal
3 title to the United States and beneficial title to the North Fork Tribe. It did not transfer
4 territorial jurisdiction from the State of California.

5 The United States never requested a cession of jurisdiction from the State of California
6 in connection with the forgoing conveyance, and the state never ceded its territorial jurisdiction.
7 There was no attempt to comply with 40 U.S.C. § 3112, the federal statute that governs the
8 acquisition of territorial jurisdiction by the United States government. Absent compliance with
9 section 3112, there is a conclusive presumption that jurisdiction has not shifted. See 40 U.S.C. §
10 3112(c).

11 Thus, while title shifted to the federal government in 2013, there is no evidence in the
12 record that the state ever relinquished its historic territorial jurisdiction to the federal
13 government or the Tribe.

14 These records are public documents. They were available to defendants as they are
15 available to plaintiffs. They should be added to the record so the court can determine if
16 defendants should have considered them as part of the jurisdictional analysis. Indeed, as the
17 Supreme Court has recognized, jurisdictional issues such as those raised by plaintiffs “must be
18 evaluated in light of the long history of state sovereign control over the territory.” See *City of*
19 *Sherrill v. Oneida*, 544 U.S. 197, 214 (2005); see also *Rosebud Sioux Tribe v. Kneip*, supra, 430
20 U.S. 584, 605 (1977).

21 **b. Stations Casinos Documents**

22 There is no question that the private owner of this land prior to the transfer to the federal
23 government was a subsidiary of Station Casinos, Inc., a Nevada gambling corporation. One
24 document in the administrative record, dated September 1, 2011 (see AR 244) states that the

1 casino site is owned by Fresno Land Acquisitions, LLC, an affiliate of SC Madera
2 Development, LLC. However, prior to that time, and specifically on June 23, 2011, the land had
3 already been transferred to another entity, NP Fresno Land Acquisitions, LLC. There is no
4 reference in the record alluding to that transfer or to the affiliation of the transferee with Station
5 Casinos, Inc. It was NP Fresno Land Acquisitions, LLC that eventually deeded the property to
6 the United States.

7 The aforementioned title deeds document these transfers, and the additional items
8 plaintiffs seek to add to the record simply show that the transfers were made by subsidiaries of
9 Station Casinos. The documents in question (**Exhibit C** to the Links Declaration, filed
10 herewith) were obtained from the public website controlled by the Securities and Exchange
11 Commission (SEC) and they include excerpts from the SEC filings submitted by Station
12 Casinos, Inc. which list the company's subsidiary entities, including the companies that have
13 held title to the casino site. Although the court could take judicial notice of these items (see
14 *United States ex rel. Modglin v. DJO Global, Inc.*, 48 F. Supp. 3d 1362, 1381-1382 (C.D. Cal.
15 2014), plaintiffs believe it is a better practice to simply include these few pages in the instant
16 record.

17 We respectfully submit that plaintiffs are entitled to argue on an appropriate factual
18 record that a Nevada casino company cannot shift jurisdiction from the State of California to an
19 Indian Tribe simply by deeding property it owns to the federal government. That is why these
20 items should be added to the record.

21 **c. Records of Decision Pertaining to the Madera Site**

22 Plaintiffs also seek to supplement the record with two Records of Decision (RODs)
23 issued by defendants with respect to the subject property:
24

- 1 1) the ROD issued in 2011 that includes defendants’ two-part determination under
- 2 IGRA (25 U.S.C. § 2719); and
- 3 2) the ROD issued in 2012 with respect to the decision to take the land into trust.

4 Copies are attached as **Exhibits A and B** to the accompanying Links Declaration.

5 These documents show that while defendants may at one point have considered the
6 North Fork Tribe’s “historical connection” to the land—which was discussed in the ROD with
7 respect to the 2719 determination—there was never a conclusion or finding that the Tribe had
8 ever actually acquired territorial jurisdiction over the property (the closest the 2719 ROD comes
9 is the statement that certain Indians may have been present “in the vicinity” of the casino site
10 (see Links Declaration, Ex. B, pages 60-61; that is a far cry from a finding that there was
11 territorial jurisdiction over a specific piece of land). We submit that the RODs are relevant to
12 the court’s assessment of defendants’ consideration of the territorial jurisdiction factor.

13 It is important to remember in this context that the federal government has engaged in
14 three separate analyses of the proposed casino site: first, with respect to the aforesaid 2719
15 determination, which occurred in 2011; second, with respect to the decision to take the land into
16 trust, which occurred in 2012; and third, with respect to the issuance of the Secretarial
17 Procedures in 2016. A complete administrative record would include each of these analyses in
18 order for the Court to properly assess whether defendants have *ever* considered the issue of
19 territorial jurisdiction, not to mention whether the record could even support a finding that
20 jurisdiction has shifted from the State of California to the federal government and the Tribe.

21 Parenthetically, we note that the “historical connection” analysis contained in the 2719
22 ROD is contained in the administrative record, at least tangentially—it is part of an attachment
23 submitted to defendants by the Picayune Rancheria of the Chukchansi Indians. See AR 240-
24 291. The same is true for the ROD on the land-to-trust acquisition. AR 159-227. However, it is

1 more appropriate to have the RODs included in the administrative record as separate, stand-
2 alone components. There is no dispute as to their authenticity (after all, they were issued by
3 defendants), or their relation to the subject property, or their relation to the IGRA process that
4 eventually led to the issuance of Secretarial Procedures at issue.

5 **Conclusion**

6 For these reasons, plaintiffs respectfully request that the court GRANT this motion and
7 allow these materials to be part of the record. That is the only way for there to be a complete
8 factual basis upon which to properly assess the critical issue of territorial jurisdiction, and who
9 possesses it with respect to the subject property.

10 Dated: June 23, 2017

SLOTE LINKS & BOREMAN, LLP

11 By: /s/

12 Robert D. Links

13 Attorneys for Plaintiffs
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