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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

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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ISSUES PRESENTED

Did defendants violate the Indian Gaming Regulatory Act when they issued Secretarial Procedures authorizing the North Fork Rancheria of Mono Indians ("the North Fork Tribe") to operate a casino on off-reservation land that is still under state jurisdiction?

Does it violate the Tenth Amendment if the Federal government unilaterally diminishes a state's territorial jurisdiction and shifts it to an Indian tribe?

I. INTRODUCTION and BACKGROUND

As this court recently observed:

> Legally, the parties are in agreement that, at least in the ordinary case, acquisition of an ownership interest in land by the United States only impacts title to that land; it does not divest the state of jurisdiction over the land. *See Silas Mason Co. v. Tax Comm'n of State of Washington*, 302 U.S. 186, 197 (1937). The partiers are equally agreed that 'Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession….' *Kleppe v. New Mexico*, 426 U.S. 529, 542-543 (1976). The parties disagree regarding the jurisdictional impact of the Secretary taking the Madera Site into trust for North Fork through the authority delegated to the Secretary by the IRA.

ECF 33 at 5 (Nov. 29, 2017).

The issues presented involve territorial jurisdiction, which is one of the fundamental building blocks of governmental structure. More specifically, the questions presented require analysis of when and how territorial jurisdiction shifts from a sovereign state to the federal government, and in turn through the federal government to an Indian tribe.

These issues arises under the Indian Gaming Regulatory Act ("IGRA," 25 U.SC. §§ 2701, et seq.) as well as the Tenth Amendment (U.S. Const., Amend. X). IGRA requires that before a tribe can engage in casino gambling, it must first obtain territorial jurisdiction over the proposed casino site. *See* 25 U.SC. § 2710(d). The Tenth Amendment protects state sovereignty.

In this case, the proposed casino site is off-reservation land that has historically been under state jurisdiction. As the court has already noted, the state has never ceded its jurisdiction over the property. *See* ECF 33 at 4-5.[1] Although the United States obtained title to the proposed casino site in 2013 when a third party – a Nevada gaming company – transferred title to the federal government in trust for the North Fork Rancheria of Mono Indians, that transaction did not alter California's historic territorial jurisdiction over the property. It only affected ownership of the property.

Because neither the United States nor the North Fork Tribe has obtained territorial jurisdiction from the State of California, the land in question is not eligible for casino gaming under IGRA and the Secretarial Procedures that purport to authorize casino gambling there are invalid and subject to challenge under the Administrative Procedure Act.

The issues presented by this case arises in a new and troubling context: an out-of-state gambling company's acquisition of real estate long governed by the state, followed by a deed transferring the land to the federal government so the gambling company can then partner with an Indian Tribe to engage in casino gaming that would be illegal if conducted by California residents. The notion that California's historic territorial jurisdiction over the acquired property can be stripped away without the state's legislative consent raises a profound issue of national importance that merits the court's attention. A jurisdictional transfer on these facts is without legal precedent.

[1] The essential facts of this case are undisputed. The vast majority of the facts have been established in prior proceedings relating to the casino site; others are confirmed in the Administrative Record (AR) that has been lodged with the court. Where a fact has been included in a prior ruling, we cite to the court's opinion/order; when confirmed in the AR, we cite to a specific page or pages (i.e., "AR 1" refers to the first page of the record).

II. SUMMARY OF ARGUMENT

Plaintiffs challenge the validity of the Secretarial Procedures under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, on an issue of law that arises out of undisputed facts and which supports summary judgment in plaintiffs' favor. Plaintiffs' basic contention is simple: the Secretarial Procedures issued by defendants are arbitrary, capricious and in violation of law because defendants have never considered a key requirement under IGRA: whether the North Fork Tribe actually possesses territorial jurisdiction over the proposed casino site.

IGRA repeatedly requires that a tribe possess territorial jurisdiction over Indian lands before Class III gaming can occur there. In this case, the land is *off* reservation, and governed by state law. *See* Cal. Gov't Code § 110; ECF 33 at 4-5 ("the parties agree that the Madera Site was not reserved by the United States for North Fork when the State of California was admitted to the Union, that the Madera Site was not acquired pursuant to the Enclaves Clause of the Constitution, and that the State of California did not expressly cede jurisdiction over the land to the United States"). Under long standing precedent, as well as the Tenth Amendment, the federal government has no power to unilaterally strip the state of its territorial jurisdiction. *See Fort Leavenworth RR. v. Lowe*, 114 U.S. 525 (1885).

The law differentiates between *title* and *jurisdiction*. The federal government acquired title to the property from a private third party owner in 2013 (AR 244, 246), but that transfer by itself did not shift jurisdiction. It merely changed the identity of the property's owner.

To shift jurisdiction, much more than a deed is required. Specifically, the law requires a formal cession of jurisdiction from the State of California and formal acceptance by the federal government. *See* 40 U.S.C. § 3112. There has been no cession of jurisdiction by the state and no acceptance by the federal government. As a result, there has been no jurisdictional shift. Indeed, federal law provides that without cession and formal acceptance by the United States,

there is a conclusive presumption that the federal government does not have jurisdiction. 40 U.S.C. § 3112(c). And despite the court's prior comments about state consent only being required for a transfer of exclusive jurisdiction, that is not the law. State consent is required for the transfer of even partial jurisdiction. *Kleppe v. New Mexico*, 426 U.S. 529, 542-543 (1976). Moreover, federal consent is required to conclude such a transfer. *See Adams v. United States*, 319 U.S. 312 (1943) (a prior version of 40 U.S.C. §3112 "created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction'")(quoting from Congressional hearings). Because the Tribe does not have jurisdiction, the subject property does not qualify for casino gambling under IGRA.

Alternatively, if the statute under which the land was acquired—the Indian Reorganization Act (IRA, 25 U.S.C. §§ 5101, *et seq.*)—were construed to empower the federal government to unilaterally shift, and thereby diminish, the territorial jurisdiction of the State of California, the IRA would violate the Tenth Amendment to the United States Constitution. Simply put, the federal government does not possess the power to unilaterally appropriate, and by such action reduce, the territorial jurisdiction of a sovereign state.

For these reasons the Secretarial Procedures are arbitrary, capricious and not in accordance with law. They should be struck down by this court pursuant to 5 U.S.C. § 706.

III. STATEMENT OF PERTINENT UNDISPUTED FACTS

(a) Plaintiffs and The Alleged Injury

Plaintiffs in this case are two state-licensed card clubs located within the same market area as the proposed Madera Casino authorized by the challenged Secretarial Procedures. Card clubs are limited in the gaming they can offer. They cannot offer Nevada-style casino gaming. They cannot operate slot machines and cannot host banking and percentage card games, all of

which are more popular than non-banked card games. Thus, the cardrooms are at a competitive disadvantage if a tribe is able to open a Nevada style casino and operate casino-style games in the same area. Plaintiff Club One, Inc. has been in business for over 20 years at its present location. Plaintiff GLCR, Inc. has been in business at its present location for over 5 years. Both businesses (as well as the surrounding community) will suffer if the Tribe opens a Nevada-style casino, with the resulting loss of jobs, revenue, and tax contributions. *See* Declaration of Kyle Kirkland, filed herewith, at ¶¶ 2-9.

(b) The Madera Parcel and its Ownership History

The subject parcel of real property is located in Madera County (we also refer to it as "the Madera Parcel"). The Madera Parcel consists of 305 acres located approximately 15 miles north of the border of the City of Fresno on Avenue 17 just west of the intersection with State Route 99. AR 2299-2300. The site is about 38 miles from the Tribe's current Rancheria lands, which are located near the town of North Fork, and about 36 miles from a second parcel of land near North Fork purchased by the Tribe for housing. *See* AR 245, 478; *see also Stand Up for California! v. US Dept. of Interior*, 204 F. Supp. 3d 212, 231 (D.D.C. 2016), *aff'd* __ F.3d ___, 2018 WL 385220.

The Madera Parcel is off-reservation land. *See* AR 245, 478; *Stand Up for California!*, 204 F. Supp. 3d at 231. It was acquired by the United States in 2013. AR 479; *North Fork Rancheria of Mono Indians of California v. State of California*, 2015 WL 11438206 at *2 (E.D. Cal. Nov. 13, 2015). Prior to acquisition by the federal government, the land was owned by a private party. *See* ECF Doc. 30 at 3. There is no evidence in the record that the subject parcel was ever occupied or governed by the North Fork Tribe prior to the transfer to the federal government in 2013.

There is also no evidence in the record or otherwise that the federal government reserved jurisdiction over the Madera Parcel when California was admitted to the Union in 1850. *See* 9 Stat. 452 (1850)(California Admission Act); ECF Doc. 33 at 4-5. Rather, like almost all other land within California's borders, the Madera Parcel was under the territorial jurisdiction of the state. *See* Cal. Gov't Code § 110. The means by which a state surrenders its territorial jurisdiction are consent (pursuant to the Enclaves Clause) or by a statute ceding all or a portion of jurisdiction to the federal government. *See Coso Energy Developers, v. County of Inyo*, 122 Cal. App. 4th 1512, 1521 (2004); *United States v. Davis*, 726 F.3d 357, 363 (2d Cir. 2013). There has been no consent or cession of jurisdiction with respect to the Madera Parcel. ECF 33 at 4-5.

The 2013 transfer conveyed legal title from a private party to the United States and, in turn, beneficial title to the North Fork Tribe. ECF 33 at 3. Prior to that time the Madera Parcel was under private ownership, continuously subject to the territorial jurisdiction of the state. *See Wilcox v. Jackson*, 38 US. 498, 517 (1838)(whenever title passes from the United States to a private owner, "then that property, like all other property in the state, is subject to state legislation"). There is no evidence in the record that either the federal government or the North Fork Tribe has ever requested the state to cede territorial jurisdiction over the Madera Parcel. Nor is there any evidence in the record that the State of California, on its own, has taken such action. All parties agree that the federal government has never issued a written acceptance of cession of jurisdiction pursuant to 40 U.S.C. § 3112. *See* ECF 33 at 4-5.

Thus, while title to the land transferred to the federal government in 2013, there is no evidence in the record that the state ever relinquished its territorial jurisdiction to the federal government and/or the Tribe.

(c) Administrative Process

The administrative process regarding this site has been extensive, involving both the federal government (including the Department of the Interior (DOI), the Bureau of Indian Affairs (BIA) and the State of California (including the Governor, the Legislature and the electorate). *See Stand Up for California!*, 204 F. Supp. 3d at 228-234; *see also Picayune Rancheria of Chuckchansi Indians v. Dept. of Interior*, 2017 WL 3581735 (E.D. Cal. Aug. 18, 2017) at 3-5. However, there is no indication in the instant record—or in any of the prior decisions dealing with this property—that any of the various governmental agencies or elected officials has ever specifically considered whether the Madera Parcel satisfies IGRA's jurisdiction requirement, nor has anyone actually attempted to formally transfer territorial jurisdiction over the site.

In March 2005, the North Fork Tribe submitted an application to the BIA to have the Madera Parcel taken into trust for the Tribe for the purpose of developing a Class III gaming casino at the site. AR 160, 240-242; *see also Stand Up for California!*, 204 F. Supp. 3d at 232; ECF Doc. 30 at 3. The Tribe applied pursuant to a statute of general application to all Indian tribes (section 5 of the Indian Reorganization Act, formerly 25 U.S.C. § 465, currently 25 U.S.C. § 5108), not pursuant to a statute specific to the Tribe. AR 160.

In 2009, the Tribe submitted a request for a determination under section 20 of IGRA (25 U.S.C. § 2719) that it be allowed to conduct gaming on the land despite the fact that the land was acquired after enactment in 1988 and would violate the general ban on gaming on "after-acquired" land (i.e., land that was acquired after the date IGRA was enacted). *See* AR 3.

On September 1, 2011, the Secretary of Interior issued a Record of Decision on the 2719 application (the "2719 ROD"), finding that the Tribe could conduct gaming on its "after-acquired" land. AR 165, 1350; *Stand Up for California!*, 204 F. Supp. 3d at 233. The 2719

ROD was issued before the Secretary had determined whether the land could even be taken into trust. AR 240-291; see *North Fork Rancheria*, 2015 WL 11438206 at *2. The 2719 ROD contains no finding that the tribe has territorial jurisdiction over the subject site. *See* AR 244 (land owned by Fresno Land Acquisitions LLC, a subsidiary of a Nevada gaming entity, Station Casinos).[2]

Tellingly, the federal defendants did not find that the Tribe had ever previously occupied the property or governed it. Instead, the 2719 ROD states only that members of the Tribe may have been "in the vicinity" of the site at sporadic times in the past, usually for subsistence purposes including working for others in the area to earn a living. *See* AR 256; *Stand Up for California!*, 204 F. Supp. 3d at 232, 260-261. The record contains no finding or discussion of the Tribe actually occupying the site much less governing it.

On August 30, 2012, Governor Brown concurred in the Secretary's determination that the Tribe could conduct gaming on "after-acquired" land. AR 317-318.[3] The Governor's concurrence did not consider whether the Tribe has territorial jurisdiction over the site. It asserted without any specific finding that the Tribe "has a significant historical connection with the land," but simply failed to consider whether the Tribe had ever actually governed the property or acquired territorial jurisdiction over it. *Id.* (In California, the Governor does not

[2] Fresno Land Acquisitions LLC is a California limited liability company that is a subsidiary of Station Casinos, LLC a Nevada gaming company. *See* Station Casinos LLC SEC Form 10-K, Exhibit 21.1 – Subsidiaries of Station Casinos LLC, filed March 30, 2012 (https://www.sec.gov/Archives/edgar/data/1503579/000150357912000002/stn-ex211x10k.htm)(last accessed February 14, 2018).

[3] The Governor's authority to concur in a "2719 determination" is an issue currently being litigated before the California Supreme Court. See discussion at page 11, infra, as well as at footnote 13 on page 3.

possess the power to cede jurisdiction; that process is controlled by the legislature. *See* Cal. Gov't Code §§ 110, et seq.; s*ee also Coso Energy Developers*, 122 Cal. App. 4th at 1521.)

On August 31, 2012, Governor Brown entered into a compact with the Tribe. AR 320-438. That action was taken pursuant to state law, namely section 19(f) of Article IV of the California Constitution. Governor Brown then submitted the compact to the Legislature for ratification. AR 439-440.

On November 26, 2012, the Secretary issued a second ROD approving the Tribe's application to take the land into trust (the "Land into Trust ROD"). AR 159-227.

On June 27, 2013, the Legislature ratified the compact by means of Assembly Bill 277, and Governor Brown signed the bill into law on July 3, 2013. AB 277 did not address whether the Tribe had jurisdiction over the Madera Site and certainly did not by its terms cede jurisdiction to the Tribe. *See* AR 439-440; 445-446; *see also* Cal. Gov't Code § 12012.25.59(a).

Pursuant to state law, the electorate possesses the power to override Legislative action by way of a statewide referendum. *See* Cal. Const., art. II, §§ 9-10. AB 277 was subjected to a voter referendum (Proposition 48), and on November 4, 2014, state voters defeated the referendum 61% against to 39% for, thus voiding the compact. *See* http://elections.cdn.sos.ca.gov/sov/2014-general/ssov/ballot-measures-summary.pdf; AR 1351.

After the voters rejected the compact and nullified AB 277, the Governor refused to negotiate another compact with the Tribe to allow casino gaming on the Madera Parcel. As a result, and as will be discussed in the followed section, on March 17, 2015, the Tribe filed suit against the state claiming that it was not acting in good faith. On November 13, 2015, this court ruled that the state's refusal to negotiate constituted "bad faith" under IGRA, and sent the matter to mediation. *See North Fork Rancheria*, 2015 WL 11438206 *12.

The mediator notified the Secretary of the Interior that she had selected the Tribe's proposal (AR 1-3) and on July 29, 2016, the Secretary issued Secretarial Procedures purporting to allow the Tribe to conduct Class III gaming without a state compact. AR 2186-2325; *see also* ECF 33 at 4. The Secretary did not issue an ROD, but just a letter. Neither the letter (AR 2186-2188), nor the Secretarial Procedures themselves (AR 2189-2325), make any finding about whether the Tribe has jurisdiction over the site, or even whether the site qualifies as "Indian lands" under IGRA.

(d) Related Litigation Has Not Resolved the Issue of Territorial Jurisdiction

A number of prior cases have been brought by various parties in various courts concerning various actions taken in connection with this project. However, none of those prior cases has considered, much less determined, whether the Tribe has territorial jurisdiction over the Madera Parcel.

1. Picayune Rancheria of Chukchansi Indians v. Brown, 229 Cal. App. 4th 1416 (2014) (Challenge to Governor's 2719 concurrence under CEQA)

In this case, a rival tribe contended that the Governor's concurrence in the 2719 determination violated the California Environmental Quality Act. The claim was rejected by the court, and the California Supreme Court denied review. No part of the case concerned the issue of territorial jurisdiction over the casino site.

2. *Stand Up for California! v. Brown*, 6 Cal. App. 5th 686 (2016) (Pending in California Supreme Court as No. S239630)

A citizen group filed suit in state court (Madera County Superior Court) against the Governor claiming that he lacked authority to issue a concurrence to the 2719 determination. The trial court sustained demurrers, but that ruling was reversed on appeal. *See Stand Up for California! v. Brown*, 6 Cal. App. 5th 686 (2016). On March 22, 2017, the California Supreme

Court granted review and the case is pending as No. S 239630 and is being considered by the court along with a companion case dealing with the same issue pertaining to a separate casino project (the Enterprise Casino, proposed for Yuba County; *see United Auburn Indian Community of the Auburn Rancheria v. Brown*, 4 Cal. App. 5th 36 (2016), hearing granted on January 25, 2017 and pending as No. S238544). These cases concern the Governor's authority and not the issue of who has territorial jurisdiction over the Madera Parcel.

3. *Stand Up for California! v. DOI* consolidated with *Picayune Rancheria of Chukchansi Indians v. DOI*, 204 F. Supp. 3d 312 (D.D.C. 2016), *aff'd* ___ F.3d ___, 2018 WL 285220 (D.C. Cir.)

On December 19, 2012, a citizen watchdog group and individual citizens filed suit in federal court in Washington DC, against the federal government, claiming that both the 2719 ROD and the Land into Trust ROD were defective. A few days later, on December 31, 2012, a tribe with a competing casino filed a similar suit in the same court. The lead theory was that the land did not qualify under section 465 to be taken into trust because the North Fork Tribe was not under federal jurisdiction in 1934. The cases were consolidated. With respect to the land into trust ROD, the plaintiff's theory concerned federal jurisdiction over the Tribe as persons (see *Carcieri v. Salazar*, 555 U.S. 379 (2009)), not the Tribe's jurisdiction over territory, which is a different jurisdictional issue. The theory against the 2719 ROD was that the Secretary failed to consider detriments to the surrounding community and to the competing tribe. The plaintiffs also challenged the environmental review and other procedural defects. On September 6, 2016, the court ruled against the challenge, but did not address the jurisdictional issue raised in this case. *See Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212 (D.D.C. 2016). Judgment in these consolidated cases was recently affirmed by the District of Columbia Circuit. __F.3d.__, 2018 WL 285220 (Jan. 18, 2018).

4. *North Fork Rancheria v. State of California*, No. 15-CV-00419 AWI (Case seeking IGRA mediation)

On March 17, 2015, the North Fork Tribe filed suit in this court against the State of California claiming that the Governor's refusal to negotiate a new compact following the passage of Proposition 48 constituted a failure to negotiate in good faith as required by IGRA. The state could have raised the Tribe's lack of territorial jurisdiction as a defense in that action, but for whatever reason did not do so. On November 13, 2015, this court issued its ruling that California had failed to negotiate in good faith, and ordered the parties to participate in IGRA's mediation process which is provided for in 25 U.S.C. § 2710(d)(7)(B). *North Fork Rancheria*, 2015 WL 11438206. The state did not appeal.

5. *Picayune Rancheria v. DOI,* No. 16-CV-0950 AWI (Challenge to Secretarial Procedures on ground that the Governor lacked constitutional authority to concur in the 2719 determination)

This case was filed prior to the issuance of the Secretarial Procedures and, by way of an amended complaint, challenges the legality of those procedures on the ground, inter alia, that the preceding 2719 determination was illegal because California's Governor lacked authority under state law to issue it. The court granted defendant's motion for summary judgment on August 18, 2017, but the case did not raise the issue of territorial jurisdiction.

6. Stand Up for California v. US DOI, 16-CV-2681 AWI

A citizen group and individual citizens filed suit in this court against the Department of the Interior challenging the Secretarial Procedures as violating the Johnson Act, and challenging the issuance of the Secretarial Procedures as violating NEPA and the Clean Air Act. This action is also pending before this court and is working its way through the summary judgment process as well. It does not address the Tribe's territorial jurisdiction over the Madera Parcel.

To date, the defendants, have not analyzed the issue of territorial jurisdiction with respect to the Madera Parcel and, specifically, whether the United States, and through it the North Fork Tribe, ever acquired territorial jurisdiction from the State of California over the Madera Parcel. Nor, as shown above, has any court resolved that issue.

As we explain below, territorial jurisdiction is a major IGRA prerequisite. Because defendants did not consider it, and because the record does not show that the North Fork Tribe ever acquired territorial jurisdiction over the Madera Parcel from the State of California, defendants have acted arbitrarily, capriciously and in violation of law. For that reason, the Secretarial Procedures at issue cannot stand.

IV. STANDARD OF REVIEW

This case arises under the litigation protocol of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* In such cases, agency decisions may be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A).

As the court in *Sierra Club v. Mainella,* 459 F. Supp. 2d 76, 89 (D.D.C. 2006) noted:

> Under Fed. R. Civ. P. 56(c), summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." … In a case involving review of a final agency action under the Administrative Procedure Act, 5 U.S.C. § 706, however, the standard set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record…. Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." …. Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review….

459 F. Supp. 2d at 89 (citations omitted).

While the court's role in an APA case has been described as "narrow" (*id.* at 90), the court "shall decide all relevant questions of law" and "interpret constitutional and statutory provisions" and shall hold unlawful and set aside agency action found to be "contrary to constitutional right" or in excess of statutory authority. 5 U.S.C. § 706; *see also County of Amador v. United States Department of the Interior*, 136 F. Supp. 3d 1193, 1198 (E.D. Cal. 2015).

The reviewing court must determine "whether the decision was based on a consideration of the relevant factors." *See Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 285 (1974). This inquiry must "be searching and careful." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

In this case, there was an obvious error: the failure to consider at any juncture the jurisdictional history of the subject property, specifically the fact that the State of California has never surrendered any of its territorial jurisdiction which means, in turn, that neither the United States nor the Tribe ever acquired any portion of the state's sovereign authority over the subject parcel. Defendants thus missed a critical step in the process because without tribal jurisdiction, land is not "IGRA eligible."

V. PLAINTIFFS HAVE STANDING

Both plaintiffs clearly have standing to present these issues. They claim economic injury stemming directly from the challenged actions. *See* Declaration of Kyle Kirkland, filed herewith, at ¶¶ 4-5, 8-9. To the extent plaintiffs contend that the issuance of Secretarial Procedures without territorial jurisdiction violates IGRA, the court should be guided by the prior ruling in *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1090, 1100-1109 (E.D. Cal. 2002), which held that a local card club had standing to challenge an allegedly illegal IGRA compact. *See also Artichoke Joe's v. Norton*, 353 F.3d 712, 719 n. 9 (9th Cir. 2003)("We agree

with the district court's cogent application of U.S. Supreme Court precedent regarding constitutional standing").

To the extent plaintiffs' claims are grounded in Tenth Amendment principles, plaintiffs possess Article III standing as well. *See Bond v. United States*, 564 U.S. 211 (2011). In *Bond*, the Supreme Court held that Tenth Amendment claims can be brought by individuals as well as the state itself. The Court observed that "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate." *Bond*, 564 U.S. at 222, *see also Upstate Citizens for Equality, Inc., v. United States*, 841 F.3d 556, 562 n. 15 (2d Cir. 2016), cert denied, 2017 WL 5660979.

VI. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE SECRETARIAL PROCEDURES ARE INVALID AS A MATTER OF LAW

(a) In Order To Qualify For Issuance Of Secretarial Procedures, A Tribe Must Satisfy Two Requirements: The Tribe Must Possess Territorial Jurisdiction Over the Casino Site And It Must Exercise That Jurisdiction

Before an Indian tribe can qualify to conduct Class III gaming, IGRA requires that several preliminary requirements be satisfied. Two of those requirements are intertwined and lie at the core of this case. They are (1) that the tribe acquire territorial jurisdiction over the casino site and (2) that the tribe actually exercise governmental power over the site.

These two requirements are central to IGRA and are repeated several times within the statutory framework. Prior case law makes it clear that without satisfying both of them, a tribe does not have Article III standing to invoke IGRA's provisions. *See Massachusetts v. The Wampanoag Tribe of Gay Head*, 853 F.3d 618, 624-625 (1st Cir. 2017); *Rhode Island v.*

Narragansett Indian Tribe, 19 F.3d 685, 700-703 (1st Cir. 1994)(exercise of governmental power and having jurisdiction are "dual limitations" under IGRA).

IGRA expressly requires that Class III gaming is lawful on Indian lands only when authorized by a tribal ordinance or resolution "adopted by the governing body of the Indian tribe having jurisdiction over such lands." 25 U.S.C. § 2710(d)(1). In addition, before there can be a tribal-state compact to provide for Class III gaming, a request for compact negotiations must emanate from an "Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity … is to be conducted." 25 U.S.C. § 2701(d)(3)(A).

The dual requirements apply to the Secretarial Procedures challenged by plaintiffs. IGRA provides that when the state and a tribe have not agreed on a compact, after an appropriate finding by the court and completion of a statutory mediation process, "the Secretary shall prescribe, in consultation with the Indian tribe, procedures…under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." 25 U.S.C. § 2710(d)(7)(B)(vii).

IGRA's dual prerequisites are interrelated, as evidenced by the statutory definition of "Indian land." That term is defined in IGRA to include land "within the limits of any Indian reservation," as well as land that has been taken into trust "and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(definition of "Indian land").

In the instant case, the proposed casino site is held in trust, but the question is whether it is land over which the North Fork Tribe exercises government power. In order to do that, a tribe must first have *jurisdiction.* "[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land." *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001). As another court has opined, "Absent

jurisdiction, the exercise of governmental power is, at best ineffective, and at worst, invasion." *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D.Kan. 1996).

We consider below whether the North Fork satisfies these two basic requirements. Given the fact that territorial jurisdiction undergirds the proper exercise of governmental power, we will analyze that issue first. After that, we will consider whether the Tribe has actually exercised jurisdiction (in the form of governmental power) over the Madera Parcel.

(b) The Tribe Does Not Possess Jurisdiction Over The Madera Parcel, Which Remains Subject To The Territorial Jurisdiction Of The State Of California

The North Fork Tribe does not meet IGRA's jurisdiction prerequisite because the land-to-trust transfer whereby a private party deeded the proposed casino site to the United States shifted *title* only. It did not shift *territorial jurisdiction*. Only an affirmative release of the state's territorial sovereignty can do that. *See generally Ft. Leavenworth*, 114 U.S. at 538-539 ("jurisdiction cannot be acquired tortuously or by disseizin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state…."); *Davis*, 726 F.3d at 363-364; *United States v. Parker*, 36 F. Supp. 3d 550, 565-567 (W.D. N.C. 2014).

Indeed, states possess "primary jurisdiction" over all land within their borders. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998). As the Supreme Court observed long ago, "Upon the admission of a state into the Union, the state doubtless acquires general jurisdiction, civil and criminal…throughout its limits, except where it has ceded exclusive authority to the United States." *Van Brocklin v. Tennessee*, 117 U.S. 151, 167-168 (1886).

This doctrine is appropriate, for territorial sovereignty—the power to govern within specific borders through the exercise of general police power in the designated region—is a state's most prized possession. In a case involving a different aspect of state sovereignty, the United States Supreme Court observed "the well-established principle that States do not easily

cede their sovereign powers." *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013); *see also Silas Mason*, 302 U.S. at 199; *Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc.*, 64 F. Supp. 3d 872, 905 (E.D. La. 2014).

The use of the word "jurisdiction" in IGRA is entirely logical because in order for a tribe to have lawmaking authority over land, the tribe must possess legislative jurisdiction over it. But legislative jurisdiction (also known as territorial jurisdiction; see U.S. Const., art. I, § 8, cl. 17; *Surplus Trading Co. v. Cook*, 281 U.S. 647, 652 (1930)) does not transfer by osmosis and it does not shift with a mere change in title.

General lawmaking authority over territory within a state's borders only transfers when the state affirmatively relinquishes it to the federal government. The formal process for effectuating such a transfer is cession. *Id*. If there has been no cession of jurisdiction, the federal government owns the land in question as an "ordinary proprietor."[4]

The cession process itself has two distinct parts. Frist, the state in question must agree to cede its territorial jurisdiction (or a portion of it) to the federal government. Second, the federal government, for its part, must formally accept the cession. *See* 40 U.S.C. § 3112. Unless that process is completed, there is a conclusive presumption that jurisdiction has not shifted. 40 U.S.C. § 3112(c). Thus, the governing statute provides in pertinent part that the federal government "shall indicate acceptance of jurisdiction …by filing a notice of acceptance

[4] As the Supreme Court noted in the *Ft. Leavenworth* case, *supra*: "Where lands are acquired without [a state's] consent, the possession of the United States, unless political jurisdiction be ceded in some other way, is simply that of an ordinary proprietor." *Ft. Leavenworth*, 114 U.S. at 531. To this end, courts have noted that "the relinquishment of a state's sovereign jurisdiction over its own lands is not to be taken lightly." *Parish of Plaquemines*, 64 F. Supp. 3d at 905 (citing *Silas Mason Co.*, 302 U.S. at 199); see also *State ex rel. Laughlin v. Bowersox*, 318 S.W.2d 695, 699 (Mo. 2010). Moreover, "all of the Court's decisions are remarkably consistent in the level of solicitousness that they show for a state's sovereign jurisdiction." *Parish of Plaquemines*, 64 F. Supp. 3d at 905.

with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated" and that "[i]t is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section." 40 U.S.C. §§ 3112(b) and (c).

It is no answer to say that the consent requirement only applies to a transfer of exclusive jurisdiction (see, e.g., ECF 33 at 8, n.5)("Consent by a state is only required when the United States takes 'exclusive jurisdiction over land'"). The requirement of a formal state cession applies whether the federal government seeks exclusive or only partial or concurrent jurisdiction. *See Ft. Leavenworth*, 114 U.S. at 531; *Kleppe*, 426 U.S. at 542 ("The Legislative jurisdiction acquired [from the state] may range from exclusive federal jurisdiction … to concurrent, or partial, federal Legislative jurisdiction"); *Parker*, 36 F. Supp. 3d at 567 ("While the Framers designed the Enclave Clause to provide Congress 'exclusive' jurisdiction over enclaves, any jurisdiction was predicated upon the consent of a State that was authorizing acquisition by the federal government.").

Similarly, the mandate of section 3112 apples to *any* transfer of jurisdiction, whether exclusive, partial, concurrent or otherwise. *See Adams*, 319 U.S. at 314 (the statute "created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction'")(quoting from Congressional hearings); *see also Paul v. United States*, 371 U.S. 245, 264 (1963); *Kleppe*, 426 U.S. at 542; *United States v. Parker*, 36 F. Supp. 3d at 567.

(c) Jurisdiction Principles

Territorial sovereignty embodies the state's ability to apply its own law to land within its borders.[5] Judicial precedent and governing statutes have erected high barriers to protect that vital power. The United States Supreme Court has established that the federal government cannot take a state's legislative jurisdiction without the state's clear consent. *Ft. Leavenworth*, 114 U.S. at 538-39 ("the state shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously or by disseizing of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state….").

The Supreme Court has applied this principle consistently through the years. In *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 528 (1938), for example, the Court wrote "the Acts of cession and acceptance of 1919 and 1920 are to be taken as declarations of the agreements, reached by the respective sovereignties, State and Nation, as to the future jurisdiction and rights of each in the entire area of Yosemite National Park." And in *Pacific Coast Dairy, Inc. v. California Dept. of Agriculture*, 318 U.S. 285, 293 (1943), the Court examined pertinent state cession statutes before concluding that Moffett Field was under exclusive federal jurisdiction. Lower courts, both state and federal, have taken a similar approach to parsing jurisdictional status. *See, e.g.*, *Haining v. The Boeing Co.*, 2013 WL 4874975 at *2 (C.D. Cal.); *Taylor v. Lockheed Martin Corp.*, 78 Cal. App. 4th 472, 479-80

[5] The federal Constitution establishes a system of dual sovereignty. "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist, No. 45, p. 292 (Rossiter ed. 1961).); *see also Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577-2580 (2012); U.S. Const., Amend. X. In California, the basic rule is that state sovereignty and jurisdiction extends to all land within the state's borders. Cal. Gov't Code § 110.

(2000); *Davis*, 726 F.3d at 364; *United States v. Johnson*, 994 F.2d 980, 984 (2d Cir. 1993); *Parker*, 36 F. Supp. 3d 550.

i. How Does Jurisdiction Transfer From One Sovereign To Another?

Past decisions reveal only three basic situations in which the federal government, and through it an Indian tribe, can acquire jurisdiction over land within a state:

1) The parcel is reserved by the United States at the time the state is admitted into the Union;[6]

2) The land is acquired pursuant to the Enclaves Clause (U.S. Const., art. I, § 8, cl. 17); or

3) The state in question expressly cedes jurisdiction to the federal government.

See generally, *Ft. Leavenworth*, 114 U.S. at 528, 541-42; *Silas Mason Co.*, 302 U.S. at 197; *Surplus Trading Co.*, 281 U.S. at 651-52 (1930); *Paul*, 371 U.S. at 264; *Davis*, 726 F.3d at 363 n.2.

[6] This is precisely the case with many states. *E.g.*, Kansas and Nebraska, Kansas-Nebraska Act, 10 Stat. 277 (1854) (excluding from the new states "any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State"); Montana, North Dakota, South Dakota and Washington, Enabling Act, 25 Stat. 676 (1889)("Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States"); Idaho, Idaho Const., art. XXI, § 19 (1890)(all Indian lands within the state "remain under the absolute jurisdiction and control of the congress of the United States"); Utah, 28 Stat. 107 (1894)("Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States"); Oklahoma, 34 Stat. 267 (1906)("all lands … owned or held by any Indian, tribe, or nation … shall be and remain subject to the jurisdiction, disposal, and control of the United States"); Arizona and New Mexico, 36 Stat. 557 (1910) ("all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty … shall be and remain …under the absolute jurisdiction and control of the Congress of the United States"); Alaska, Alaska Statehood Act, 72 Stat. 339 (1958)("any lands … the right or title to which may be held by any Indians, Eskimos, or Aleuts … or is held by the United States in trust for said natives … shall be and remain under the absolute jurisdiction and control of the United States").

The opportunity for the first method ceases once statehood is achieved,[7] and the latter two methods share the requirement—missing here—of an explicit and unambiguous state consent to transfer jurisdiction to another sovereign. The transfer, after statehood, of a state's territorial jurisdiction poses questions of state and federal law. The question of whether a state had made the cession is determined by state law. *See Ft. Leavenworth*, 114 U.S. at 527; *see also Coso Energy Developers*, 122 Cal. App. 4th at 1520-1523; Cal. Gov't Code §§ 110-127.) Whether the United States has accepted the cession, is determined according to federal law, and in that respect, the United States Code confirms that when there is a cession of jurisdiction from a state, it does not alone create a transfer of sovereign authority unless and until the United States formally accepts the cession. *See* 40 U.S.C. § 3112(c)("It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section."); *see also Davis*, 726 F.3d at 364.

ii. Title and Jurisdiction are Two Different Things

Any argument that federal acquisition of the property in trust for the Tribe automatically changes territorial jurisdiction rests on a widely-held misconception that once the federal government accepts title to land in trust for an Indian tribe, the land is automatically removed from the control of state law. That notion improperly conflates the concepts of *title* and *jurisdiction.* It also flies in the face of the time-honored concept, embedded in appellate precedent and accepted by the federal government itself, that states have primary jurisdiction on all lands within their borders, even where fee title is held by the federal government. *See*

[7] The land in question was not "reserved out" when California was admitted as a state. See 9 Stat. 452 (1850).

Principles of Federal Appropriations Law (Ofc. the General Counsel, U.S. Gov't Acct'g Ofc., 3d ed. (2008), vol. III, ch. 13 (the "GAO Report")(available at http://www.gao.gov/special.pubs/d08978sp.pdf (last accessed February 6, 2018).); *see also Balderama v. Pride Industries, Inc.* 963 F. Supp. 2d 646, 657 (W.D. Tex. 2013). The GAO Report notes: "Almost all federally owned land is within the boundaries of one of the 50 states. This leads logically to the question: who controls what? When we talk about jurisdiction over federal land, we are talking about the federal-state relationship. The first point is that, whether the United States has acquired real property voluntarily (purchase, donation) or involuntarily (condemnation), *the mere fact of federal ownership does not withdraw the land from the jurisdiction of the state in which it is located.... Acquisition of land and acquisition of federal jurisdiction over that land are two different things.*" GAO Report at ch. 13, 13-101 (emphasis added and citations omitted); *see also Davis*, 726 F.3d at 364; *Parish of Plaquemines*, 64 F. Supp. 3d at 901; *Parker*, 36 F. Supp. 3d at 565.

It is not uncommon for the federal government to own land in a state, but the government holds 97% of such lands as a mere proprietor. *See* Haines, Federal Enclave Law, at 56 (Atlas Books 2011). Unless there has been a formal cession, the state retains legislative jurisdiction to pass laws of general application that govern those lands. *See Silas Mason Co.*, 302 U.S. at 197; *see also Davis*, 726 F.3d at 364; *Parish of Plaquemines*, 64 F. Supp. 3d at 901; *State ex rel. Laughlin v. Bowersox*, 318 S.W. 695 (Mo. 2010).[8]

[8] The 2008 GAO Report cited above also notes that: "For the land over which the United States has not obtained exclusive, partial, or concurrent jurisdiction by consent or cession, federal jurisdiction is said to be 'proprietorial.'" *Id.* at 13-116. The report is consistent with a prior federal analysis of territorial jurisdiction which was published in 1957. See J*urisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States* (June 1957) at Part II, 45-46 ("the 1957 Report"); the full report is available at http://constitution.org/juris/fjur/fedjurisreport.pdf (last

The rules governing territorial jurisdiction as between the states and the federal government are deeply rooted in the Constitution. The Tenth Amendment reserves to the states those powers not delegated to the United States. Under the Admission Clause (U.S. Const., art. IV, § 3), and the Equal Footing Doctrine, the territorial jurisdiction of a state cannot be diminished without the consent of the state's legislature. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009); *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984). Moreover, the Enclaves Clause (U.S. Const., art. I, § 8, cl. 17) provides for the creation of areas of federal jurisdiction for specified purposes—such as military installations—but only with the express consent of the affected state. *See Kleppe*, 426 U.S. at 542[9]*; Parker*, 36 F. Supp. 3d at 565.

These rules serve to preserve the integrity of state government. It is not for the federal government to weigh local interests and step in to regulate local matters; indeed, there is no such thing as a general federal police power. *See Nat'l Fed. of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577-2580 (2012). Rather, local issues (such as whether to authorize casino gambling) are properly regulated by individual states, which can determine which activities serve the health, safety and welfare of their residents, and which do not. *Id*.

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accessed May 3, 2017). An early opinion of the Attorney General of the United States is to the same effect. See also, 14 Ops. Atty. Gen. 557 (1875)(available at 1875 WL 4391).

[9] As the Court said in *Kleppe*, *supra*: "Congress may acquire derivative legislative power from a State pursuant to art. I, s 8, cl. 17, of the Constitution by consensual acquisition of land, or by nonconsensual acquisition followed by the State's subsequent cession of legislative authority over the land. … In either case, the legislative jurisdiction acquired may range from exclusive federal jurisdiction with no residual state police power… to concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority…." 426 U.S. at 542 (internal citations omitted).

iii. These Jurisdictional Principles Apply to Indian Lands the Same as all Other Federal Lands

The Supreme Court applied these principles of jurisdiction when ruling on two companion cases involving Indian lands in Alaska and Indian fishing rights on those lands. The state had laws prohibiting use of fish-traps, and in both cases the Indians claimed they were not subject to the state laws on their lands. The court ruled differently in each case, and the rulings were based on whether the tribe or the state had jurisdiction. In *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), the Court held that Alaska lacked jurisdiction to enforce state anti-fish-trap laws on an Indian reservation because the federal government reserved jurisdiction at the time of the state's admission. *See* 369 U.S. at 57-58. However, in the companion case, *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), the Court held that Alaska could enforce the same anti-fish-trap laws over Indians from a different village not designated a reservation because "off-reservation" fishing rights are subject to state regulation. *See* 369 U.S. at 62-63, 70, 75.

Neither tribal occupancy nor tribal ownership of land within state borders alters territorial jurisdiction. The decision in *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), makes the point. In that case, the State of Michigan confronted a situation where a tribe had purchased land and opened a casino there. The state sued the tribe for injunctive relief to shut down the casino because it was in violation of Michigan law.

Although the Supreme Court held that the tribe enjoyed sovereign immunity (the vote was 5-4 on that issue), the majority also held that *the land was still subject to state law*. As Justice Kagan observed: "Unless federal law provides differently, 'Indians going beyond reservation boundaries' are subject to any generally applicable state law." *Id.*, at 2034-2035. Further, the Court noted that the state had a bevy of remedies at its disposal to enforce state law

against the gambling activity, including application of criminal statues against tribal officials and persons who engaged in illegal gambling. A salient teaching of the *Bay Mills* case—in addition to the tribal immunity ruling—is that land in question was not subject to the tribe's territorial jurisdiction despite ownership, occupancy and use for the tribe's benefit. It was still under state jurisdiction and subject to state law.

iv. Historic Examples of Tribal Jurisdiction

Where tribes do have sovereignty over their lands it is not because the federal government acquired the land and placed it into trust, but rather because the lands were held for and occupied by the tribes at the time the state was created. In a nutshell, the lands never became a part of the state in which they were situated.[10] Thus the following unbroken pattern emerges in the case law:

- *Worcester v. Georgia*, 31 U.S. 515 (1832), involved land set aside for the Cherokee tribe by treaty before Georgia became one of the original states;
- *In re Kansas Indians*, 72 U.S. 737 (1867), held that Indians were exempt from state property taxes because Kansas accepted admission into the union with a stipulation that Indian rights to their lands would remain unimpaired;
- *Williams v. Lee*, 358 U.S. 217 (1959), involved the Navajo Indian Reservation established by an 1868 treaty in the territory that became Arizona 44 years later; and
- *Montana v. United States*, 450 U.S. 544 (1981) and *Big Horn County Electric Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000), both concerned a Crow reservation in Montana established by the 1868 Second Treaty of Fort Laramie, see 450 U.S. at

[10] See state admission statutes cited in note 6, *supra*.

548, and "reserved out" when Montana became a state twenty-one years later, Enabling Act, 25 Stat. 676 (1889);

- *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), dealt with Indian lands established in California in 1876 and continuously occupied and governed by the tribe since that time, as opposed to a privately held parcel transferred to the United States 163 years after statehood.[11]

The undisputed facts in this case command the obvious conclusion that the North Fork Tribe does not have territorial jurisdiction over the proposed casino site. The land in question was not "reserved out" when California joined the Union, nor did the North Fork Tribe ever occupy or govern the site. Absent a formal cession by the state and compliance with 40 U.S.C. § 3112, jurisdiction does not shift from the State of California to the Federal government or the North Fork Tribe. And without such a shift, the subject property is not eligible for Class III gaming under IGRA.

The "jurisdictional history" of the Madera Parcel should have been central to defendants' inquiry prior to issuance of Secretarial Procedures. It is also central to the court's inquiry here as to the propriety of those procedures.[12] As noted, without tribal jurisdiction, the

[11] The *Cabazon* case is a world apart from the instant facts. In *Cabazon*, the Court noted that the lands were formally set apart for these tribes in 1876 and 1891, 480 U.S. 202, 204 n.1, and it appears that the tribes may have occupied the lands prior to 1850. If so, the lands would be under "Indian title." *See Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945). Further, a general California cession statute in effect until the 1940s provides another basis for confirming a jurisdictional shift for long-held Indian trust lands in California. *See* 1891 Cal. Stats. Ch. 181, § 1, at 262. In any event, the lands would also be deemed Indian lands under tribal jurisdiction. *See City of Sherrill v. Oneida*, 544 U.S. 197, 219-21 (2005)(applying equitable doctrines of laches and acquiescence to issue of tribal territorial jurisdiction when historical facts support such an approach).

[12] The Supreme Court has made it clear that individualized review of a property's provenance is crucial in this area. "The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia*, [31 U.S.] 515, 556-561 (1832), has given way to more individualized treatment of

land it not IGRA-eligible and there is no basis for the Secretarial Procedures. In this regard, the Secretary should have reviewed the factual details of the history of the parcel, tracing title, occupancy, and state jurisdiction back to statehood. That is the only way defendants could have properly considered all of the "relevant factors" under IGRA.

There is ample judicial precedent for conducting this very type of review. To begin with, the Supreme Court has noted the importance of a parcel's "jurisdictional history" particularly when assessing the rights of an Indian tribe. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603 (1977). The court there noted that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian both in population and in land use, not only demonstrates the parties' understanding … but has created justifiable expectations which should not be upset…." *Id.*, at 605.

The Ninth Circuit has noted that "the inquiry into the interaction between tribal sovereignty on the one hand, and state or federal sovereignty on the other, has always been historical in nature." *United States v. Enas*, 255 F.3d 662, 668, n.3 (9th Cir. 2001).

In this same vein, the First Circuit also looked at a parcel's jurisdictional history in a recent IGRA case. The court made particular note of IGRA's jurisdiction requirement and observed that a tribe must exercise governmental power in order to trigger IGRA. The court then said: "Meeting this requirement does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority. Consequently, an inquiring court must assay the jurisdictional history of the settlement lands." *Commonwealth of Massachusetts v. Wampanoag*, 853 F.3d at 625. The First Circuit then noted a series of

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particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

governmental actions taken by the tribe on the land in dispute. *Id.* at 625-626. Here, in sharp contrast, the record contains no history at all of the North Fork Tribe exercising *any* governmental authority over the subject parcel.

In *Wampanoag*, the First Circuit was quoting from its earlier decision in *Narragansett*, 19 F.3d at 702-703. It should also be noted that when the *Wampanoag* court said that "inquiry into governmental power need not detain us," it was because the parties there *stipulated* that the state, a nearby town, as well as the tribe had exercised jurisdiction over the property. *See* 853 F.3d at 625.

There is no such stipulation here; moreover, there is no evidence in the administrative record that the North Fork Tribe ever occupied this site prior to the transfer to the federal government in 2013. The best spin the government can come up with is that certain individual Indians may have been "in the vicinity" of the site. *See* AR 256; *see also Stand Up for California!*, 204 F. Supp. 3d at 232 260-261. One would expect that if defendants had information that the North Fork Tribe had governed this site, it would have been reflected in the Administrative Record. But no such information is there, and without some historical provenance, it is impossible to demonstrate that the Tribe possesses territorial jurisdiction over this property. As noted throughout this memorandum, jurisdiction does not transfer with a change in title—even if the Tribe has purchased the subject property itself and even if the land in question was part of a prior reservation. *See City of Sherrill v. Oneida*, 544 U.S. 197 (2005).

Another example of judicial review of jurisdictional history occurred recently in a criminal case in South Dakota. The case is *United States v. Sadekni*, 2017 WL 807024 (D. S.D. 2017). The defendant, a non-Indian, allegedly assaulted another non-Indian in an Indian Health Services facility located on an Indian reservation but leased to the United States. He was indicted and charged with two counts of violating federal criminal statutes. The defendant

moved to dismiss on the ground that the United States lacked jurisdiction and that he could not be prosecuted in federal court because the State of South Dakota had exclusive jurisdiction over the matter. The dispositive issue, said the court, "was whether the facility falls within the federal government's territorial jurisdiction." *Sadekni*, 2017 WL 807024 at *1. To determine that issue, the Magistrate Judge undertook a painstaking inquiry that traced the history of the Rosebud reservation back to a time before statehood. Only after reviewing the entire history of the property did the court conclude that the United States had jurisdiction. And in passing, the court recited the jurisdiction rules set forth above.

The same type of analysis should have been undertaken by defendants before they issued the Secretarial Procedures.

v. There Has Never Been A Specific Finding That The North Fork Tribe Has Territorial Jurisdiction Over The Proposed Casino Site

At the heart of plaintiffs' case is the fundamental point that a change in legal title does not change territorial jurisdiction, even if the new property owner is the federal government. Something more is required; namely, a voluntary surrender of territorial authority by the state where the land is situated.

In the context of the North Fork casino proposal, there has never been a specific finding that any surrender of jurisdiction has occurred. The records of decision (RODs) on the two-part 2719 determination and the land-to-trust transfer do not contain a cession of jurisdiction. The decision of the district court in *Stand Up for California!*, 204 F. Supp. 3d 212, did not draw any specific conclusion about a shift in territorial jurisdiction; although the court discussed the Tribe's "historic connection" to the land and ruled that the Secretary of the Interior did not act illegally in taking the land into trust. But that act, as explained above, does not and cannot strip a state of jurisdiction over land within its borders. Nor do the prior rulings of this court contain

a specific ruling on the point. Perhaps the closest one is the court's prior ruling on the motion to intervene filed by the Picayune Tribe of Chukchansi Indians. *See North Fork Rancheria of Mono Indians v. California*, 2016 WL 3519245 (E.D. Cal.).

However, although the court considered the proposed intervenor's point that the proposed casino site did not qualify as "Indian lands," the prime issue was the alleged failing of the 2719 determination and, in particular, the alleged invalidity of the Governor's concurrence.[13] There was no claim that territorial jurisdiction could somehow shift merely because title had been deeded by gift to the federal government by a private party. Moreover, to the extent this court deferred to the district court's decision in the above-referenced *Stand Up for California!* case, that proceeding did not involve the precise question presented here.

In sum: the issue presented by plaintiffs has never been squarely addressed with respect to this casino site.

vi. The State Court Decision Regarding The Graton Casino Does Not Save The North Fork On The Question Of Territorial Jurisdiction

A recent state court decision, *Stop the Casino 101 Coalition v. Brown,* 230 Cal. App. 4th 280 (2014), cert. denied, 135 S. Ct. 2364 (2015), highlights the lack of jurisdiction in this case. In 2010, the BIA took into trust for the Federated Indians of the Graton Rancheria certain land in Sonoma County which had been held by private parties and governed by California since the

[13] As noted above at page 11, that issue is presently before the California Supreme Court in two cases: *United Auburn Indian Community of the Auburn Rancheria v. Brown*, 4 Cal. App. 5th 36 (2016), hearing granted on January 25, 2017 by the California Supreme Court and pending as No. S238544; and *Stand Up for California! v. State of California*, 6 Cal. App. 5th 686 (2016), hearing granted on March 22, 2017 by the California Supreme Court and pending as No. S239630. The *United Auburn* case involves the Enterprise Casino project near Sacramento, which the *Stand Up for California!* case involves the same North Fork casino project at issue in this litigation.

state's admission to the Union. The state did not cede jurisdiction. In 2012, the Governor entered into a compact with the tribe to allow gaming on the land, and the Legislature ratified it. A local citizen group filed suit in state court, arguing that state law still governed the site.

Although the appellate court ruled against the challengers, it relied on two facts, neither of which is present here. First, in 2000, Congress passed a statute specifically mandating that land be taken into trust for the Graton and designated the land as a "reservation." The court ruled that recognition of an Indian reservation "necessarily confer[red] a degree of jurisdiction" on the Graton Tribe. *Stop the Casino 101 Coalition*, 230 Cal. App. 4th at 287, 291. The court did not cite any authority for that conclusion. Such a statement has never been the law, and needless to say, we do not agree with the holding. However, even if one accepts the ruling as correct, it does not help the North Fork Tribe because the Madera Parcel has not been designated as a reservation.

But there was another key fact in the Graton casino case: in 2013, the California Legislature ratified a compact. That action prompted the court to observe that "even if — contrary to all of the foregoing — the coalition were correct that jurisdiction over the land transferred to the United States in trust for the Graton Tribe could not be conferred on the tribe without the express consent of the state, such consent is implicit in the compact signed by the Governor and ratified by the Legislature." *Id.* at 290. Again, the state court of appeal did not cite any law for such a proposition, nor did it cite any evidence that the Legislature intended to cede jurisdiction when it approved the compact. As with the court's conclusion that the federal government could unilaterally shift jurisdiction by adopting a statute, we do not agree with the ruling that there can be an "implied" cession of jurisdiction. Yet, once again, the ruling *Stop the Casino 101* case does not support the North Fork whose compact was subjected to a referendum and *nullified* by the voters.

The contrast between *Stop the Casino 101* and the instant case is, therefore, stark. There is no statute enacted to deem the subject property part of the North Fork's reservation, nor is there an approved compact. What we do have is an empathic vote of the People opposing this particular casino site.

What emerges loud and clear from the foregoing discussion is that the North Fork Tribe has not acquired the necessary territorial jurisdiction. As we next explain, the Tribe has not exercised governmental authority over the site, which is a related IGRA requirement.

VII. THE TRIBE HAS NOT EXERCISED GOVERNMENTAL POWER OVER THE MADERA PARCEL AS REQUIRED BY 25 U.S.C. § 2703(4)

IGRA defines Indian lands as "any lands title to which is … held in trust by the United States for benefit of any Indian tribe….and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). Courts have recognized that because the statute is phrased in the present tense, a tribe must *presently* exercise governmental power over the proposed casino site *before* requesting a compact for Class III gaming. *See Narragansett*, 19 F.3d at 701-703; *see also Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, 2014 WL 1103021 (E.D. Cal. 2004) ("The statute's use of present tense denotes current jurisdiction over the Indian lands").

Previous decisions have also clarified that in assessing the requirement of exercising governmental power, the focus is on what things the tribe has actually done, as opposed to things it may have the authority to do in the future. Thus the First Circuit said in *Narragansett* that "a tribe must exercise governmental power in order to trigger the Gaming Act. Meeting this requirement does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority." *Narragansett*, 19 F.3d at 702-703. The *Narragansett* court then recounted the ways in which the tribe satisfied this requirement with respect to the

property at issue in that case: (1) establishment of a housing authority; (2) obtained status equivalent to the state for purposes of the Clean Water Act, after having been recognized by the Environmental Protection Agency; (3) availed itself of benefits under the Indian Self – Determination and Education Assistance Act by administering programs for job training, education, community services, social services, real estate protection, conservation, public safety, and the like. *Id.*

The First Circuit undertook a similar analysis recently in another case that involved IGRA. In *Massachusetts v. Wampanoag Tribe of Gay Head*, 853 F.3d 618, the court noted the following with respect to the actual exercise of governmental power over the proposed casino site: (1) a housing program that receives HUD assistance construction of approximately 30 units of housing under that program; (2) an intergovernmental agreement with the EPA; (3) operation of a health care clinic with the aid of the Indian Health Service; (4) administration of programs for education with scholarships financed with Bureau of Indian Affairs funding; (5) social services with a human services director responsible for child welfare work; a conservation policy (the tribe had two conservation rangers to enforce its policy); and (6) a public safety program. In addition, the court noted that the tribe had passed numerous ordinances and employed a judge. The adopted ordinances dealt with such diverse topics as building codes, health, fire, safety, historic preservation, fish, wildlife, natural resources, housing, lead paint, elections, judiciary, criminal background checks, and the reporting of child abuse and neglect. *See Wampanoag*, 853 F.3d at 625-626.

The instant case stands in sharp contrast. The present administrative record does not disclose *any* exercise of governmental power over the casino site, and for that reason, the land in question does not meet the definition of "Indian lands" set forth in 25 U.S.C. § 2703(4).

VIII. THE AUTHORITY CITED BY THE COURT IN CONNECTION WITH RULING ON PLAINTIFFS' MOTION TO SUPPLEMENT DOES NOT SQUARELY ADDRESS THE TRANSFER OF JURISDICTION ISSUE

The court's discussion of the territorial jurisdiction issue in the Order Denying Plaintiffs' Motion to Supplement the Administrative Record (see ECF 33 at 6-10), relied on a number of cases, but none of them (other than *Stop the 101 Casino*, discussed above) dealt with the situation presented here—a case in which plaintiffs challenge the effect on territorial jurisdiction of the federal government obtaining title to land long governed by state law, and placing that land in trust for an Indian tribe.

The court wrote that when the federal government takes land into trust for an Indian tribe, "the state that previously exercised jurisdiction over the land cedes *some* of its authority to the federal and tribal governments." *See* ECF 33 at 8 (citing *Upstate Citizens for Equality*, 841 F.3d at 569). However, in *Upstate Citizens*, the plaintiffs challenged the government's authority to take land into trust for an Indian tribe based on a proposition that is the exact opposite of the argument plaintiffs make here: they argued that taking the land into trust would by itself effect a change in jurisdiction. The defendants in *Upstate Citizens* agreed, and the court simply recited the proposition in its ruling without any citation of authority. Here, plaintiffs challenge the premise that the federal government can unilaterally alter a state's territorial integrity without state consent. It should also be noted that the word "cession" connotes voluntary action by the sovereign giving up power, as opposed to describing the unilateral acquisition of jurisdiction by a transferee.

A similar analysis applies to *City of Roseville v. Norton*, 219 F. Supp. 2d 130 (D.D.C. 2002). In that case, the plaintiffs took an approach akin to what occurred in *Upstate Citizens*. They asserted that taking the land into trust was unconstitutional because it would remove land from state sovereignty without the state's consent. 219 F. Supp. 2d at 139. No one contested

that proposition and the court did not rule on the issue. In sharp contrast, the plaintiffs now before the court directly contest whether taking land into trust—by itself—can unilaterally diminish a state's historic territorial jurisdiction over land within its borders.

The court's order also refers to the Madera Parcel as "Indian country." ECF 33 at 7:22-23.[14] But most of the cases cited by the court concern lands that were Indian reservations under Federal and tribal jurisdiction before becoming trust lands—not state-governed lands being converted unilaterally into Indian lands. *See Oklahoma Tax Com'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991); *United States v. John*, 437 U.S. 634 (1978); *United States v. McGowan*, 302 U.S. 535 (1938); and *Cheyenne-Arapaho Tribes of Oklahoma v. State of Oklahoma*, 618 F.2d 665 (10th Cir. 1980). None of those cases resulted in a loss or diminution of state territorial jurisdiction without state consent.[15]

We also observe, with all respect, that the court's quotation from the *Venetie* case (ECF 33, 7:16-19) omits a key qualifier and, in that respect, is incomplete. The *Venetie* footnote cited

[14] The court's order states (ECF 33 at 7) that 18 U.SC. § 1151 defines Indian country only for purposes of criminal law and that for civil purposes, Indian country includes "land taken in trust by the United States for the benefit of an Indian tribe." ECF 33 at 7:20-21. However, the Supreme Court has made clear that the definition of Indian country in section 1151 applies to civil cases too. *Alaska v. Native Village of Venetie*, 522 U.S. 520, 527 n.1 (1998)("Although this definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally apples to questions of civil jurisdiction such as the one at issue here").

[15] As for the other cases cited in the court's order, there was no issue whether the lands were Indian country; that was the situation in *South Dakota v. DOI*, 665 F.3d 986 (8th Cir. 2012). In *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), the land was used to house the tribal headquarters serving the tribe, not a business serving the non-Indian community. In *Langley v. Ryder*, 778 F.3d 1092 (5th Cir. 1985), the land had previously been declared an Indian reservation. Here, the land is off-reservation and had been governed by state law for well over a century prior to being gifted to the federal government by a private party.

by the court begins, "Generally speaking…."[16] *See Alaska v. Native Village of Venetie*, 522 U.S. 520, 527, n1. In other words, primary jurisdiction over Indian country does not always rest with the United States government and/or an Indian tribe, but rather, sometimes rests with the state in question. The *Venetie* footnote does not say when the law dictates state or federal jurisdiction. In this case, however, where the land in question has not been occupied or governed by the tribe, and has been under state law as long as California has been in the Union, the legal principles do provide the answer: the state does not lose its sovereignty without a cession.

Moreover, the oft-quoted passage in *Nevada v. Hicks*, 533 U.S. 353, 365 (2001)("the state's inherent jurisdiction on reservations can of course be stripped by Congress")—to which the court made reference, see ECF 33 at 8—does not really apply to these circumstances because the land discussed in *Nevada v. Hicks* was never a part of the state of Nevada. It had been reserved out of the Nevada Territory in 1861 prior to statehood. *See* Nevada Admission Statute, 12 Stat. 209-214 (1863)(land reserved); 35 Stat. 85 (1908)(reservation created). It was thus land over which the United States had exclusive jurisdiction to begin with, and of necessity, the federal government could expand or contract state authority over the land as it saw fit. That is a universe apart from the instant case, which includes land that has been part of the state for generations, never occupied or governed by an Indian tribe or subject to federal jurisdiction.

None of the cited cases by the court stands for the proposition that the federal government can unilaterally—and against a vote of the People—diminish a state's historic territorial jurisdiction.

[16] The full quote reads, "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Venetie*, 522 U.S. at 527 n.1.

IX. THE SECRETARIAL PROCEDURES ARE NOT CONSISTENT WITH STATE LAW AND THUS VIOLATE IGRA

The People of the State of California never authorized a tribal casino under these circumstances, and if the Secretarial Procedures are allowed to stand, it will mark a radical wrong turn in the jurisprudence of IGRA.

The whole point of the statutory framework is to prevent unilateral imposition of a gambling casino on a state that does not want it. There is no room for the federal government to unilaterally impose casino gaming on land that has always been subject to the state's territorial jurisdiction. It is in this vein that IGRA permits the use of Secretarial Procedures only when they are "consistent with … the relevant provision of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii)(I).

In California, those laws are crystal clear. Tribal gambling can only occur pursuant to a *compact* duly ratified by the legislative process. The state constitution expressly provides that the Legislature has no power to authorize Nevada-style gambling in California. Cal. Const., art., IV, § 19(e). The only exception is a narrow one. Notwithstanding the Article IV, section 19(e), "the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally-recognized Indian tribe on Indian lands in California in accordance with Federal law." Cal. Const., art. IV, § 19(f). The provision concludes: "Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts." *Id.*

In short, the rule in California is simple: no compact, no casino gaming.

This construct hews to the will of the People of California, who authorized casino gaming only in a narrow set of circumstances: *via a compact duly negotiated and legislatively ratified.* What the People did not approve was a federal "cram down" of casino gaming against their will.

In this case, such a cram down has occurred. Not only is there no ratified compact, but to the contrary, the People have spoken loud and clear: by a 61% vote, they do not want a Nevada style casino on this property. State law—in the form of California's organic constitution—does not authorize such a casino and, to the extent these Secretarial Procedures attempt an end run on the California Constitution, they must fall in light of section 2710 which requires Secretarial Procedures only when they are consistent with state law.[17]

X. IF THE INDIAN REORGANIZATION ACT WERE CONSTRUED TO ALLOW THE FEDERAL GOVERNMENT TO UNILATERALLY STRIP A STATE OF TERRITORIAL JURISDICTION, THE STATUTE WOULD BE UNCONSTITUTIONAL

Nothing in the language of Indian Reorganization Act (25 U.S.C. § 5108) expressly provides that when the Secretary takes title to land in trust for Indians, the state loses a quantum of the historic territorial jurisdiction it previously exercised over the land. Rather, section 5108 refers only to acquisition of "title."[18] To the extent, section 5108 is construed to force a

[17] It would be ironic indeed if the federal government can impose Secretarial Procedures against the will of the People as part of a program (IGRA) described as "cooperative federalism." See *Artichoke Joe's v. Norton*, 216 F.Supp. 2d at 1092 and 353 F. 2d at 715.

[18] 25 U.S.C. § 5108 provides in pertinent part that: "The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians…..Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. § 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and

divestiture of any portion of the state's territorial jurisdiction over the Madera Parcel, it would violate the Tenth Amendment.

"The Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). As Justice Story put it: "Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." *J. Story Commentaries on the Constitution of the United States* 752 (1833). The Supreme Court has consistently followed that understanding.

To this end, the Tenth Amendment provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., Amend. X.

Previously, we have argued at length that the Federal government cannot seize legislative powers from a state. We have explained that there are only three methods by which the federal government can gain powers not enumerated to it in the Constitution over lands within a state's borders: (1) reservation of power on admission of the state, (2) consent from the state on purchase of the property pursuant to the Enclaves Clause, or (3) cession from the state and acceptance by the federal government. *See* discussion at p. 21, *supra*.

No case has ever held that, as an exception to these fundamental rules governing federal-state powers, the federal government has the power to unilaterally acquire title to land within the borders of a state and thereby automatically divest the state of any of its legislative jurisdiction over that land without the state's consent. (The only exception is *Stop the Casino 101 v. Brown*, which is discussed and distinguished, *supra*, at pp. 31-33.) Nor has any case held

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local taxation." This exempts Indian trust lands from state taxation, and nothing more, consistent with *McCulloch v. Maryland*, 17 U.S. 316 (1819).

that, under the Indian Commerce Clause,[19] Indian lands are treated differently than other lands insofar as the acquisition of territorial jurisdiction from a state is concerned, or that the federal government can acquire land in trust for Indians and thus automatically displace state jurisdiction and replace it with federal and tribal jurisdiction so a tribe can engage in business activities prohibited under state law.

Cases hold that the Indian Commerce Clause provides "Congress with plenary power to legislate in the field of Indian affairs." *See* ECF 33 at 6-7. However, cases also hold that Congress' power has limitations. "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 84 (1977).

The cases cited by the court in its prior order (ECF 33) do not hold to the contrary, nor do they hold that the federal government can unilaterally strip a state of some or all of its territorial jurisdiction. One of the cited cases is *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989)(see ECF 33 at 7:1-3). However, the issue in that case was the state's jurisdiction to impose a tax on an Indian reservation which pre-existed the state, as opposed to a shift in territorial jurisdiction with respect to land put in trust 163 years after the state was admitted to the Union. In *Kansas v. United States*, 249 F.3d 1213(see ECF 33 at 7:5-6), the court did not rule for the Indians, but held that the tribe lacked jurisdiction over the subject parcel and upheld a preliminary injunction prohibiting the tribe from operating a casino in violation of state law. And in *Cherokee Nation v. S. Kansas Ry. Co.*, 135 U.S. 641 (1890)(see ECF 33 at 7:8-9), the court held that the federal government had the power of eminent domain over Indian reservations, but said nothing about jurisdiction.

[19] U.S. Const., art. I, § 8, cl. 3.

In *Upstate Citizens*, *supra*, also cited by the court (ECF 33 at 8), the Second Circuit observed: "Tribal jurisdiction — that is, the rights of the tribe and the federal government to assert jurisdiction over territory, largely displacing state government — *generally* follows from the land's reservation status." *Upstate Citizens for Equality*, 841 F.3d at 561 n. 4 (emphasis added). The qualification "generally" is not explained by the court, but the case at bar is an obvious exception. Indians have sovereignty over "reserved" lands which they were allowed to retain when the state was created, but not over lands historically subject to state territorial jurisdiction which have been purchased by business partners in an attempt to operate businesses prohibited under state law.[20]

In numerous recent cases, the Indian Commerce Clause has been cited as authority for the government to take *title* to land in trust for Indians. These recent cases have often wrongly assumed that when the federal government obtains title, the federal government gains, and the state in question loses, territorial jurisdiction. For example, in *City of Roseville*, plaintiffs argued that taking land into trust was unconstitutional because it would "remov[e] land from a state's sovereignty without the state's consent." *City of Roseville*, 219 F. Supp. 2d at 139. That is the exact opposite of what plaintiffs argue here. Plaintiffs are not aware of any prior case where the assumption about taking land into trust displacing state jurisdiction with federal and tribal jurisdiction was challenged, as it is here. Nor are plaintiffs aware of any case in which the court has scrutinized the law regarding jurisdiction of the respective levels of federal and state government and ruled, with respect to newly acquired land, that the federal government can unilaterally divest a state of some of its historic territorial jurisdiction simply by taking title and

[20] As noted previously, *supra* at p. 35, in *Upstate Citizens*, plaintiffs challenged the act of taking land into trust, as opposed to challenging the effect of that action. They did not make, and the Second Circuit did not address, the argument made here.

placing the land into trust. All of the pertinent authority states that a state's territorial jurisdiction cannot be diminished without the state's consent.

The case before the court is unprecedented. The federal government insists that the state must allow a casino project to proceed, despite the fact that there is no territorial jurisdiction, no compact, and further, despite the fact that the People have rejected this particular casino project by an overwhelming vote. We respectfully submit that forcing such a casino on the State of California and its People is an act that vastly exceeds Congressional power under IGRA as well as the Tenth Amendment. The Framers would not believe that the will of the People could be overridden by Secretarial Procedures issued by an unelected Federal official in a case where there has been no cession of any portion of the state's historic sovereignty over the land in question.

No federal power stretches that far under the Constitution.

CONCLUSION

We have spent a great deal of time walking though the rules and history of territorial jurisdiction. Against that backdrop, consider what the record shows:

- In 2011, the Secretary of the Interior made a "2719 determination," but that act did not shift territorial jurisdiction because the Secretary is not vested with the authority to strip a state of its territorial jurisdiction.
- In 2013, title to the subject property shifted to the United States, but that action did not shift territorial jurisdiction because a change in title does not change jurisdiction.
- The prior decisions of this court in the various "North Fork cases" have never specifically ruled on the jurisdiction question. There is no prior law of the case that territorial jurisdiction shifted from the State of California to the United States or to the North Fork Tribe.

- And of course, there has never been a cession of jurisdiction from the State itself. As the record indicates, the subject parcel has long been under continuous private ownership—and continuously governed by state law—prior to the time it was deeded by a third party to the United States.

The record upon which defendants acted thus fails to include a crucial factor—territorial jurisdiction—that must be in place before IGRA's protocol can be triggered. Without that key factor in place, the Secretarial Procedures were not authorized by IGRA. For that reason, defendants' actions in issuing the Secretarial Procedures are arbitrary and capricious, as well as "otherwise not in accordance with law."

The disruption of a state's historic territorial sovereignty is an issue of grave dimension, as the Supreme Court readily observed in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009). There the Court confronted a claim that a federal statute divested the State of Hawaii of title to certain lands. The Court flatly rejected that assertion, noting that the subject statute "would raise grave constitutional concern if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission the Union." *Id.* at 176. The Court went further and declared in a unanimous opinion that:

> We have emphasized that "Congress cannot, after statehood, reserve or convey … lands that have already been bestowed upon a State." *Idaho v. United States*, 533 U.S. 262, 280, n. 9 … (2001) …; *see also id.*, at 284 … (Rehnquist, C.J., dissenting) ("[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event ... to suggest that subsequent events somehow can diminish what has already been bestowed").

Id. The same concerns pertain here.

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The court should GRANT summary judgment in favor of plaintiffs and declare that the Secretarial Procedures challenged herein are arbitrary and capricious and were issued in violation of law. At a minimum, the Court should remand this case to the administrative agency for a proper assessment of the territorial jurisdiction issue.

Dated: February 15, 2018

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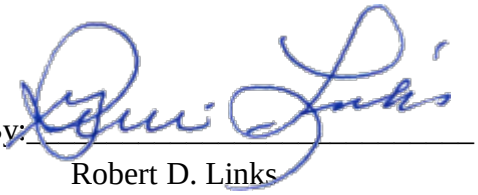
By: 

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