JEFFREY H. WOOD
Acting Assistant Attorney General

STEVEN MISKINIS
JOANN KINTZ
Trial Attorneys
United States Department of Justice
Environment & Natural Resources Division
Indian Resources Section
Ben Franklin Station, P.O. Box 7611
Washington, D.C. 20044-7611
TEL: (202) 305-0262
FAX: (202) 305-0275
e-mail: steven.miskinis@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CLUB ONE CASINO, INC., et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants,	Case No. 16-cv-1908-AWI-EPG

DEFENDANTS' REPLY IN SUPPORT OF SUMMARY JUDGMENT

INTRODUCTION

The Indian Gaming Regulatory Act ("IGRA") requires a tribe to have jurisdiction over Indian lands for those lands to be eligible for Class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vii)(II). Plaintiffs (collectively, "Club One") fail to address the authorities cited by the Federal Defendants in their principal brief, which interpret IGRA's jurisdictional requirement as satisfied by any tribal jurisdiction over its land. *See, e.g., Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994). Plaintiffs instead rest their argument on the novel theory that when land is placed in trust for a tribe, that provides the tribe with only land, not jurisdiction. Moreover, Plaintiffs argue that jurisdiction over trust land is an all or nothing matter, leaving this Court only two choices: either hold that placing land in trust transfers bare title but otherwise leaves trust land fully subject to state jurisdiction or hold that placing land in trust strips a state of all jurisdiction. There is no support for either option.

The first choice contradicts settled principles of federal Indian law. It would mean that tribal trust land is not Indian country without a formal cession of state jurisdiction, contrary to settled law. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (explaining that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' Rather, we ask whether the area has been validly set apart for the use of the Indians as such, under the superintendence of the Government") (internal quotation marks omitted). It also means that trust land is fully subject to state law and local ordinances, again in spite of settled law to the contrary. *See, e.g., Santa Rosa Band of Indians v. Kings Cty.*, 532 F.2d 655, 666 (9th Cir. 1975) (noting "the immunity of Indian use of trust property from state regulation, based on the notion that trust

lands are a Federal instrumentality held to effect the Federal policy of Indian advancement and may not therefore be burdened or interfered with by the state"); *Cheyenne-Arapahoe Tribes of Okla. v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980) (state hunting and fishing laws do not apply to tribal members on trust lands). And finally it would mean that Class III gaming under IGRA cannot occur on newly acquired off-reservation trust lands, even though IGRA expressly contemplates gaming on such lands under certain scenarios. *See* 25 U.S.C. § 2719 (providing for gaming on newly acquired trust land where certain conditions are met). To conduct such gaming, a tribe must meet certain conditions, but IGRA nowhere requires a formal cession of state jurisdiction over such newly acquired trust lands.

Plaintiffs' alternative, a straw man, raises the specter of constitutional problems, falsely contending that tribal jurisdiction over trust land can only be found where state jurisdiction has been stripped. But again, the jurisdictional status of Indian country, including trust land, is a settled matter. State jurisdiction coexists over such land, alongside federal and tribal jurisdiction, although state jurisdiction is preempted to the extent necessary to protect tribal governance of tribal land and members. *Nevada v. Hicks*, 533 U.S. 353, 361 (2001). Plaintiffs avoid this simple proposition, as well as case law supporting it, because recognizing that states, tribes, and the federal government can share concurrent jurisdiction over trust land eliminates the constitutional issues they seek to raise in this challenge to agency action. Federal Defendants, the Department of the Interior et al. (hereafter "Department") should be granted summary judgment.

ARGUMENT

I. Tribal Jurisdiction Over Trust Land Does not Arise Through a Cession of State Jurisdiction over Land

Because of much of Club One's briefing involves imputing to and then refuting positions the Department has not taken, the Department here attempts to clarify the real dispute between the parties.

The Department does not dispute that the federal government may acquire some or all of a state's jurisdiction over land. Nor does the Department dispute that there are cases in which courts look to see if such a cession of jurisdiction has occurred. There are, however, no cases where a court has looked for evidence of a formal cession of state jurisdiction before deciding that land held in trust for a tribe is subject to tribal jurisdiction, that trust land is Indian country, or that state laws and regulations interfering with tribal use and governance of such land are preempted.

The Department also does not dispute that *Fort Leavenworth R.R. Co. v. Lowe* involved a state cession of jurisdiction, but there the Court noted that even without a formal cession of all state jurisdiction, state laws cannot operate to frustrate the federal purpose for acquiring state land—which is to say, such state laws are pre-empted. 114 U.S. 525, 539 (1885). Club One ignores this, emphasizing the language in *Lowe* explaining that when federal lands in a state are "not used as such instrumentalities the legislative power of the state over the places acquired will be as full and complete as over any other places within her limits," and further argues trust lands are not federal "instrumentalities." ECF No. 38 at 9[1] (quoting *Lowe*, 114 U.S. at 539). But courts have uniformly treated lands held for tribes as federal instrumentalities or their functional equivalent. *See Santa Rosa Band of Indians*, 532 F.2d at 666 (characterizing trust land as a "Federal instrumentality). Moreover the quoted language from *Lowe* is entirely consistent with

[1] Where ECF pagination does not correspond with internal pagination, this brief follows the ECF pagination.

the doctrine of preemption because preemption of state law only occurs so long as there is a conflict with federal law or purposes (while a cession of jurisdiction would preclude application of state law regardless of the federal use of the land).

There is also no dispute that *City of Sherrill v. Oneida Indian Nation of New York* did not "hold as a matter of law that acquisition of . . . land under the Indian Reorganization Act . . . would shift territorial jurisdiction out of the state's hands," ECF No. 38 at 10, and no one argues that placing land in trust does that. The Court expressly stated, however, that "Section 465 [now 25 U.S.C. § 5108, the Indian Reorganization Act provision for taking land in trust] provides the proper avenue for [the Oneidas] to reestablish *sovereign authority over territory* last held by the Oneidas 200 years ago." 544 U.S. 197, 221 (2005) (emphasis added).

There is a dispute with regard to Plaintiffs' assertion that trust land is not Indian country, ECF No. 38 at 11-12—an assertion made in a continuing effort to distinguish a host of precedent contradicting Plaintiffs' argument. *See* ECF No. 37-1 at 18 (Federal Defendants' principal brief citing cases for proposition that trust land is Indian country). Plaintiffs' argument that 18 U.S.C. § 1151 cannot apply to tribal trust land because it defines Indian country in terms of land within a reservation has been expressly rejected by the Supreme Court. *See Okla. Tax Comm'n*, 498 U.S. at 511 (Indian country exists where "area has been 'validly set apart for the use of the Indians as such, under the superintendence of the Government" regardless of what it is called) (citing *United States v. John*, 437 U.S. 634, 648-49 (1978)). In effect, trust land is treated as reservation land for purposes of 18 U.S.C. § 1151(a) even if not so formally designated. *See HRI, Inc. v. EPA*, 198 F.3d 1224, 1250 (10th Cir. 2000) ("We have interpreted Supreme Court

precedent as establishing that formal designation as a reservation is not a necessary precondition for land to qualify as Indian country under § 1151(a).").[2]

Finally, there is no dispute that the "Property Clause is a red herring." ECF No. 38 at 16. Plaintiffs correctly point out that the United States can enforce rules pursuant to its powers under the Property Clause. *Id.* It can also enact statutes and implement them pursuant to its other constitutional powers, including the Indian Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. It is settled law that the Constitution gives the federal government plenary authority over Indian affairs. *See United States v. Lara*, 541 U.S. 193, 200-04 (2004). So a cession of state jurisdiction is not a necessary prerequisite to enacting and enforcing federal statutes and policies related to tribal self-governance and sovereignty. Plaintiffs' argument about the Property Clause ignores this fact, allowing Plaintiffs to argue first that the Property Clause is not relevant and then to contend that a grant of "derivative legislative authority" from a state must be the basis for tribal and federal jurisdiction over trust land. ECF No. 38 at 16-17. However, tribal jurisdiction over trust land is not "derivative" of state legislative authority—which states lack absent delegation by Congress, *Washington v. Confed. Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-71 (1979)—tribal jurisdiction flows from the United States' constitutionally granted plenary authority over Indian affairs. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 62 (1996) ("[T]he States . . . have been divested of virtually all authority over Indian commerce and Indian tribes."). State legislative authority over trust land remains, except to the extent that it conflicts with federal law and the "firm federal policy of promoting tribal self-sufficiency and

[2] In *Alaska v. Native Village of Venetie Tribal Government*, the Court explained that the test to meet 18 U.S.C. § 1151(b) is "a federal set aside *and* federal superintendence." 522 U.S. 520, 530 (1998) (emphasis in original). Trust land also meets this definition of Indian country as well.

economic development." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). All this was laid out in the Federal Defendants' principal brief. *See* ECF No. 37-1 at 26-28.

II. The Tenth Amendment is not Implicated by the Placement of Land in Trust

Club One ignores the governing principle that by virtue of the Supremacy Clause, where a state law obstructs the federal purpose for which land is acquired in trust, that state law is preempted. So, they assert that preemption does not apply here. Their back-up argument is that to the extent that preemption applies, it is absolute, creating constitutional problems. Preemption, according to Club One, cannot "supersede a state's territorial sovereignty," ECF No. 38 at 19; cannot "displace or transfer a state's territorial lawmaking authority," *Id.* at 20; and so on. This argument rests on the premise that for any tribal jurisdiction to exist, trust land must be akin to a federal enclave, stripped of all state jurisdiction. But state jurisdiction over land is not wholesale preempted on trust land. *See Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 571 (2d Cir. 2016) (rejecting argument that state cession of jurisdiction is a prerequisite for trust land because "the federal government does not obtain such categorically exclusive jurisdiction over the entrusted lands").

The Constitution states that Congress shall have power "[t]o regulate Commerce with . . . with the Indian tribes." U.S. Const., art. I, § 8, cl. 3. The "central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs." *Lara*, 541 U.S. at 2001 (citations omitted). The Indian Commerce Clause grants Congress the necessary power because it includes more than just the power to regulate Indians. The Clause places in the federal government the power to legislate the nation's relationship with Indians. This power "rest[s], in part, not upon 'affirmative grants of the Constitution,' but upon the Constitution's adoption of preconstitutional powers necessarily inherent in any Federal

Government, namely, powers that [the Supreme] Court has described as 'necessary concomitants of nationality."' *Id.* at 201 (citations omitted). A state cession of jurisdiction is not a prerequisite of the exercise of Indian Commerce Clause powers. Any such requirement would remove from the United States the power to legislate in Indian affairs and place it, ultimately, in the hands of each state. *See Kleppe v. New Mexico*, 426 U.S. 529, 542-43 (1976) (conditioning the operation of federal law on federal lands upon state consent "would place the public domain of the United States completely at the mercy of state legislation.") (internal quotation marks omitted).

Congress possesses authority to enact IGRA and the Indian Reorganization Act (IRA)—and, as a result, has the authority to limit a state's exercise of jurisdiction with respect to Indians on trust lands—by virtue of the Indian Commerce Clause. Club One argues that because the Indian Commerce Clause does not contain the word "jurisdiction," Congress must not have authority to acquire land in trust for a tribe without a cession of jurisdiction from the state. ECF No. 38 at 20. The sole authority Club One points to in making such an assertion is the Tenth Amendment. However, Club One wholly ignores the fact that "the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985); *see id.* ("In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.")[3]

[3] In *Garcia*, the Supreme Court rejected as "unworkable" a reading of the Tenth Amendment under which the courts were charged with identifying certain distinctive state functions with which Congress was not permitted to interfere. The Court concluded that the states did not require judicial protection for such distinctive functions, because the Constitution's structure already provides political safeguards which are ordinarily adequate to protect the interests of the states. 469 U.S. at 552-54. At most, the Tenth Amendment might provide safeguards to "compensate for possible failings in the national political process." *Id*. at 554. Subsequently, the

Instead, the Tenth Amendment only reserves to the states those powers that are not expressly delegated to the federal government in the Constitution. *New York v. United States*, 505 US 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."). Thus, the only question with respect to the Tenth Amendment is whether the Constitution delegates to Congress the ability to take land into trust for Indian tribes and whether Congress acted within that power. The answer to both inquiries is "yes." Thus, the Tenth Amendment is not implicated. *Gila River Indian Cmty., v. United States*, 729 F.3d 1139, 1153-54 (9th Cir. 2013); *see, e.g., Raich v. Gonzales*, 500 F.3d 850, 867 (9th Cir. 2007); *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000).

In *Gila River Indian Community*, the Ninth Circuit addressed a similar Tenth Amendment challenge to the Gila Bend Indian Reservation Lands Replacement Act, Pub. L. No. 99–503, 100 Stat. 1798 (1986), which authorized Interior to acquire nearly 10,000 acres of land in trust for the benefit of the Tohono O'odham Nation, to replace reservation lands that had been flooded by a dam constructed the by the federal government. 729 F.3d at 1153–54. Like here, the plaintiffs there argued that the act exceeded Congress's authority under the Indian Commerce Clause and violated the Tenth Amendment "by diminishing the state's sovereign control over its land without the state's consent." *Gila River Indian Cmty. v. United States*, 2010 WL 11229528, at *14 (D. Ariz. Dec. 3, 2010). In rejecting this, the district court and Ninth Circuit recognized that

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Court has explained that such safeguards are limited to "extraordinary defects in the national political process," such as might occur if a state "was deprived of any right to participate in the national political process or . . . was singled out in a way that left it politically isolated and powerless." *South Carolina v. Baker*, 485 U.S. 505, 512-13 (1988). Club One does not identify any failings in the national political process that might warrant a Tenth Amendment claim of this kind.

the plaintiffs there were asking the courts "'to break new ground on this issue—to depart from every decision that has previously addressed it.'" *Gila River Indian Cmty.*, 729 F.3d at 1153–54. This is because every court to address a Tenth Amendment challenge to the Department's authority to take land into trust for a tribe has rejected it. *See id.*; *Carcieri v. Kempthorne*, 497 F.3d 15, 39-40 (1st Cir. 2007), *rev'd on other grounds* ("Because Congress has plenary authority to regulate Indian affairs, Section [5] of the IRA does not offend the Tenth Amendment."); *Cent. New York Fair Bus. Ass'n v. Salazar*, No. 608–CV–660, 2010 WL 786526, at *4 (N.D.N.Y. Mar. 1, 2010) ("The Tenth Amendment is simply not implicated by the [Department of the Interior's] action under [Section 5108] of the IRA because the Secretary's authority to take the land into trust for Indians is derived from powers delegated to Congress in Article I.") (citation omitted); *South Dakota v. U.S. Dep't of Interior*, 787 F. Supp. 2d 981, 992 (D.S.D. 2011) ("Under the Supreme Court's expansive interpretation of the Indian Commerce Clause, Congress had authority to enact Section 5 of the IRA. Because the Secretary's authority to accept land into trust for Indians flows from power delegated to Congress by the Constitution, Section 5 is consistent with the Tenth Amendment.").

Despite Club One's broad assertions, the Department's acquisition of the Madera Parcel in trust does not cloud or remove the state's title to any land, *see Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 174-75 (2009); *Idaho v. United States*, 533 U.S. 262, 272-73 (2001), and does not commandeer state officials to enforce federal regulatory schemes, *see New York*, 505 U.S. at 175-76; *Printz v. United States*, 521 U.S. 898, 923-24 (1997). Instead, Club One is concerned that some state laws do not apply on trust land. That point of law, however, is simply the manifestation of Congress's constitutional authority to regulate matters directly and the supremacy of Congress's action over contrary state regulation.

III. Federal Preemption Governs the Extent of a State's Exercise of Jurisdiction on Lands Held in Trust for Indians

Because Congress acted pursuant to an enumerated power in enacting IGRA and the IRA, the doctrine of federal preemption stemming from the Supremacy Clause controls whether state law applies once land is acquired in trust.[4] This is so because when land is acquired in trust for a tribe, state jurisdiction is not completely displaced, but is subject to two barriers: the first is "federal preemption, by which the federal government's exclusive authority over relations with Indian tribes may preempt state authority either by 'an explicit congressional statement [or because] the balance of federal, state, and tribal interests tips in favor of preemption.'" *Blunk v. Ariz. Dep't of Transp*., 177 F.3d 879, 882 (9th Cir. 1999) (citation omitted; brackets in original). The second barrier is "Indian sovereignty, by which traditional notions of Indian sovereignty may prevent state authority from infringing on the right of Indian tribal members to make their own laws and be ruled by them." *Id. See* Federal Defendants' Principal Brief, ECF No. 37-1 at 26-28.

Notwithstanding this, Club One asserts that a state's exercise of jurisdiction cannot be preempted by federal law. Constitutional limitations on state sovereignty, including through federal preemption of state law, is not a novel concept, as the Supreme Court recently reiterated:

> The Constitution limits state sovereignty in several ways. It directly prohibits the States from exercising some attributes of sovereignty. *See, e.g.*, Art. I, § 10. Some grants of power to the Federal Government have been held to impose implicit restrictions on the States . . . And the Constitution indirectly restricts the States by granting certain legislative powers to Congress, *see* Art. I, § 8, while providing in the Supremacy Clause that federal law is the "supreme Law of the Land ... any Thing in the Constitution or

[4] Club One indicates that because Defendants did not raise preemption as an affirmative defense in their answer, that such a defense is forfeitable. ECF No. 38 at 18. But that principle is premised on a defendant asserting that "state claims have been substantively displaced by federal law." *Geddes v. Am. Airlines, Inc.*, 321 F.3d 1349, 1352 (11th Cir. 2003). Here, plaintiffs are not bringing state claims against federal defendants, and thus, Club One's attempts to raise a procedural barrier to the applicability of principles of federal preemption here are not apt.

> Laws of any State to the Contrary notwithstanding," Art. VI, cl. 2. This means that when federal and state law conflict, federal law prevails and state law is preempted.

Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1475–76 (2018).

Club One relies on the Supreme Court's statement in *Murphy* that "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States," *id.* at 1481, but the Court in *Murphy* was not addressing federal preemption in the context of Indian tribes and lands.[5] The Supreme Court discussed the unique preemption inquiry applicable to cases involving Indian tribes in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983):

> We . . . emphasize[] the special sense in which the doctrine of preemption is applied in this context. Although a State will certainly be without jurisdiction if its authority is preempted under familiar principles of preemption, we caution[] that our prior cases [do] not limit preemption of State laws affecting Indian tribes to only those circumstances. "The unique historical origins of tribal sovereignty" and the federal commitment to tribal self-sufficiency and self-determination make it "treacherous to import . . . notions of preemption that are properly applied to other contexts." By resting preemption analysis principally on a consideration of the nature of the competing interests at stake, our cases . . . reject[] a narrow focus on congressional intent to preempt State law as the sole touchstone.

In standard preemption analysis "state jurisdiction will prevail unless sufficient contrary congressional intent can be found. But the opposite presumption prevails in Indian law because the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." Cohen's Handbook of Federal Indian Law, §6.03[2][a] at 519 (Nell Jessup Newton ed., 2012) (citing *Rice v. Olson*, 324 U.S. 786, 789 (1945)). On balance, a finding of federal preemption only requires that the state activity "conflict with the purpose or operation of a federal statute, regulation, or policy." *Crow Tribe of Indians v. Montana*, 819 F.2d 895, 898

[5] In any event, nothing about placing land in trust involves direct regulation of states.

(9th Cir. 1987). So the *Murphy* statement is not relevant to the acquisition of land in trust in the same manner it is in "standard" preemption cases.

Neither IGRA or the IRA operate to "strip" California of its territorial jurisdiction over the Madera Parcel, and the scope of state, federal, and tribal jurisdiction on the land is governed by principles of federal preemption and tribal sovereignty.

CONCLUSION

For the reasons stated above and in their principal brief, ECF No. 37-1, the Defendants respectfully request that this Court grant their motion for summary judgement, deny Club One's motion for summary judgment, and enter a judgment upholding the issuance of the Secretarial Procedures.

DATED this July 2, 2018.

Respectfully submitted,
JEFFREY H. WOOD
Acting Assistant Attorney General

/s/ *Steven Miskinis*
Steven Miskinis
JoAnn Kintz
Trial Attorneys
United States Department of Justice
Environment & Natural Resources Division
Indian Resources Section

OF COUNSEL
Andrew S. Caulum
U.S. Department of the Interior
Office of the Solicitor – Division of Indian Affairs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 2, 2018, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.

Dated: July 2, 2018

/s/*Steven Miskinis*
Steven Miskinis