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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

STAND UP FOR CALIFORNIA!, 7911 Logan Lane, Penryn, California 95663

RANDALL BRANNON, 26171 Valerie Avenue, Madera, California 93638;

MADERA MINISTERIAL ASSOCIATION, 17755 Road 26, Madera, California 93638;

SUSAN STJERNE, 24349 Tropical Drive, Madera, California 93638;

FIRST ASSEMBLY OF GOD – MADERA, 22444 Avenue 18 ½, Madera, California 93637; and

DENNIS SYLVESTER, 18355 Road 25, Madera, California 93638,

Plaintiffs,

v.

Case No. 2:16-CV-02681-AWI-EPG
[Related Cases: 16-cv-950-AWI and 1:15-cv-00419-AWI]
Hon. Anthony W. Ishii, Ctrm. 2
Mag. Judge Erica P. Grosjean, Ctrm. 10

OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Complaint Filed: November 11, 2016

UNITED STATES DEPARTMENT OF THE INTERIOR, 1849 C Street, N.W., Washington, D.C. 20240;
SARAH MARGARET ROFFEY JEWELL, in her official capacity as Secretary, U.S. Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240;

BUREAU OF INDIAN AFFAIRS, U.S. Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240;

LAWRENCE ROBERTS, in his official capacity as Principal Deputy Assistant Secretary, Bureau of Indian Affairs, U.S. Department of the Interior, 1849 C Street, N.W., Washington, D.C. 20240,

Defendants.

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INTRODUCTION

The arguments in both the North Fork Tribe's and the federal defendants' cross-motions for summary judgment are variations on a single false premise: IGRA requires the Secretary to approve the gaming requested by the Tribe in the proposed compact selected by the mediator. According to defendants, because this compact authorized both the operation of slot machines and the development of two gaming facilities at the Madera Site, the Secretary lacked the power to do anything but rubberstamp it and authorize the Tribe to begin gaming activities. This is inconsistent with both IGRA's plain language and purpose.

None of the cases on which defendants rely address the issue before this court—the limits of the Secretary's authority under IGRA's remedial scheme. Defendants' argument is based on the false assertion that IGRA's remedial scheme exists solely to allow Indian tribes to conduct class III gaming over the objections of recalcitrant states. The only two federal circuits that have addressed the issue explicitly rejected this notion. The Fifth Circuit has held that "IGRA . . . does not guarantee an Indian tribe the right to conduct Class III gaming . . . ." *Texas v. U.S.*, 497 F.3d 491, 511 (5th Cir. 2007). More recently, the Tenth Circuit held that there is no evidence to "substantiate [the Department's] claim that Congress intended IGRA's negotiations process to *invariably* result in the issuance of Class III gaming procedures." *New Mexico v. Dep't of the Interior*, 854 F.3d 1207, 1227 (10th Cir. 2017). Indeed, as the Tenth Circuit further held, interpreting IGRA's purpose as ensuring a tribe's right to class III gaming is directly contrary to IGRA, because the purpose of the remedial scheme was to facilitate negotiation: "Equal bargaining cannot be had . . . where the parties know that, absent an agreement, one side will nevertheless obtain its fundamental goals." *Ibid*. Such a holding would undermine the remedial scheme entirely by eliminating the incentive for negotiation.

Defendants' ubiquitous argument that the Secretary lacked authority to alter the mediator-selected compact would directly undermine the negotiation process established by Congress. Even more egregiously, it would give the Tribe and the mediator authority beyond that of

Secretary. The plain language of IGRA and its remedial scheme provides the mechanism for negotiating and regulating class III gaming; it does not guarantee Indian tribes the right to conduct class III gaming. The remedial scheme must therefore be interpreted as Congress drafted it, and not as requiring the Secretary to rubberstamp a proposed compact submitted by the Tribe and chosen by a mediator to ensure the Tribe can conduct the gaming it desires.

Accordingly, and for the reasons discussed below and in Stand Up's motion for summary judgment, the Court should grant Stand Up's motion and deny defendants' cross-motions.

LEGAL ARGUMENT

I. THE SECRETARIAL PROCEDURES VIOLATE IGRA AND THE JOHNSON ACT

Congress provided for the regulation of class III gaming on Indian land under two separate and distinct mechanisms: a tribal-state compact, 25 U.S.C. § 2710(d)(1)(C), and Secretarial Procedures. *Id.* § 2710(d)(7)(B)(vii). Only under a tribal-state compact did Congress include language that triggers IGRA's waiver of the Johnson Act. The provision authorizing Secretarial Procedures, the culmination of IGRA's detailed and intricate remedial scheme, omits this language. Thus by arguing that IGRA's Johnson Act waiver applies to Secretarial Procedures, both the North Fork Tribe and the federal defendants effectively ask this Court to rewrite IGRA's remedial scheme to add the necessary language and apply the waiver to gaming under Secretarial Procedures. The Court lacks that power. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-74 (1996) ("Where Congress has created a remedial scheme for the enforcement of a federal right, we have, in suits against federal officers, refused to supplement that scheme with one created by the judiciary.").

A. Defendants ignore the plain language of IGRA's Johnson Act waiver and the remedial scheme

The Tribe and the federal defendants argue that their position is supported when IGRA is read as a whole [Dkt. 37 at 12; Dkt. 41 at 14], but that is not what they do. Rather, the defendants

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ignore the specific language of IGRA's Johnson Act waiver and its application to the remedial scheme. They then cherry-pick from two provisions to manufacture the notion that Stand Up's interpretation would lead to an absurd result. The Court should reject these arguments as contrary to the detailed regulatory scheme Congress provided.

The Tribe first asserts that if Stand Up's reading of IGRA is correct, "Class III gaming would remain unlawful under IGRA after the Secretary issued any Secretarial Procedures."[1] [Dkt. 37 at 13.] The argument is based on IGRA's authorization of class III gaming "*only if* such activities—are conducted in conformance with a Tribal-State compact . . ." 25 U.S.C. § 2710(d)(1)(C) (emphasis added). While this specific provision does not mention Secretarial Procedures, it doesn't need to because the broader remedial scheme expressly authorizes class III gaming pursuant to Secretarial Procedures. *Id.* § 2710(d)(7)(vii). In the Tribe's view, a narrow reading of the word "only" must mean that Secretarial Procedures are the equivalent of compacts; otherwise Secretarial Procedures would be incapable of authorizing class III gaming. [Dkt. 37 at 13.] This is incorrect.

Stand Up does not dispute that IGRA authorizes class III gaming under Secretarial Procedures. But the Tribe is wrong to assert that "IGRA must be read to treat class III gaming under Secretarial Procedures *as equivalent* to class III gaming under a compact." [Dkt. 37 at 13.] The Secretarial Procedures are not an equal substitute for a compact. Such an assertion ignores the distinction Congress drew between tribal-state compacts and mediator-selected compacts, on the one hand, and Secretarial Procedures, on the other. [*See* Dkt. 29 at 9-10.] The fact that Congress provided an exception to § 2710(d)(1)(C) (authorizing class III gaming "only" pursuant to a compact) by authorizing gaming pursuant to Secretarial Procedures in § 2710(d)(7)(B)(vii)(II) does not mean the Secretarial Procedures authorize class III gaming to same extent as a compact. Rather, because the authority to conduct gaming under Secretarial Procedures derives from an

[1] The Tribe and the federal defendants make essentially the same arguments in their briefs. In this reply, Stand Up's references to the Tribe's arguments also apply to the federal defendants. The federal defendants do, however, make a few additional arguments, which this reply identifies in the discussion.

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entirely separate statutory provision, the scope of that authority and any limitations thereon must be considered separate from that of compacts.

IGRA must also be read according to its plain language. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994). Mediator-selected compacts, if consented to by the state, "shall be treated as Tribal-State compact entered into under paragraph (3)," 25 U.S.C. § 2710(d)(7)(B)(vi); there is no similar provision for treating Secretarial Procedures as a compact. *Id.* § 2710(d)(7)(B)(vii). Given the detailed and mechanical application of the remedial scheme, it must be presumed that Congress's differing treatment in these two separate sections was intentional; certainly nothing in IGRA suggests otherwise. *See Bates v. United States*, 522 U.S. 23, 29–30 (1997) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

Another provision on which the Tribe relies throughout its cross-motion is the requirement that the Secretary prescribe procedures "'consistent with the proposed compact selected by the mediator,' except that the Secretary may modify them to be consistent with the relevant state laws and '*the provisions of this chapter*'—in other words, IGRA." [Dkt. 37 at 14 (citing 25 U.S.C. § 2710(d)(7)(B)(vii) (emphasis original).] From this, the Tribe asserts, "IGRA does not require or even authorize the Secretary to modify the procedures to be consistent with other federal laws or the Johnson Act." [*Id.*] Instead, the Tribe interprets this provision as rendering the Secretary's prescription of the procedures a merely ministerial action. According to the tribe, because the mediator-selected compact authorized slot machines, which are otherwise prohibited by the Johnson Act, the Secretarial Procedures therefore must also authorize slot machines. [*Id.*] Essentially, the Tribe interprets the phrase "consistent with" as *requiring* the Secretary to "adopt" the mediator-selected compact without modification whatsoever. IGRA does not say that.

The provision authorizing the mediator to select a compact marks IGRA's final attempt to

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encourage the state to consent to a compact with the Tribe. [Dkt. 29 at 12.] At this point in IGRA's remedial scheme, the authorization of class III gaming—and corresponding Secretarial obligations—will proceed along one of two separate and independent tracks. On the first track, if the State consents to the mediator-selected compact, the Secretary must act pursuant to 25 U.S.C. § 2710(d)(8). The Secretary may affirmatively approve the compact. *Id.* § 2710(d)(8)(A). The Secretary may disapprove the compact only if it violates IGRA, other federal law, or the United States' trust obligations to Indians. *Id.* § 2710(d)(8)(B). If the Secretary fails to affirmatively approve or disapprove the compact within 45 days, the compact is deemed approved by operation of law. *Id.* § 2710(d)(8)(C). The Secretary must publish the approval in the Federal Register. *Id.* § 2710(d)(8)(D). Compacts entered into under paragraph (3) are not "in effect" until the approval is published in the Federal Register. *Id.* § 2710(d)(3)(B). Accordingly, a compact authorizing the operation of slot machines that was entered into under paragraph (3) and approved under paragraph (8) satisfies each element of the Johnson Act waiver. *See id.* § 2710(d)(6) (waiving application of the Johnson Act where "gaming is conducted under a Tribal-State Compact that (A) is entered into under paragraph (3) by a State in which gambling devices are legal, and (B) is in effect").

If the state does not consent to the mediator-selected compact, however, the authorization of class III gaming follows the second track, and the Secretary's obligations under this track are provided in a separate provision. Importantly, on this second track, section 2710(d)(8) is not triggered, and the Secretary does not "approve" or "disapprove" of the mediator-selected compact. Rather, after consultation with the tribe, he "prescribe[s]" the procedures that determine how gaming will be conducted. 25 U.S.C. § 2710(d)(7)(vii). Additionally, this second track does not provide any time limit within which the Secretary must act, nor does it provide for the procedures to be deemed approved by operation of law if he does not act. [AR00001563 (BIA email acknowledging that "[t]here is no deadline for approval of Secretarial Procedures").] Finally, the Secretary is not required to publish the prescribed procedures in the Federal Register—there is, in

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fact, no language governing when the procedures are deemed "in effect." This is a decision left to the Secretary.

In contrast to gaming authorized under a tribal-state compact, gaming authorized under Secretarial Procedures, even where slot machines are legal under state law, fails to satisfy both the "entered into" and "in effect" elements of the Johnson Act waiver. The Secretary must therefore remove any class III gaming device authorizations from the mediator-selected compact. Otherwise the procedures will violate IGRA, because gaming under them will not be conducted pursuant to a compact that was "entered into" and "in effect."

While the mediator-selected compact provides the basis for the procedures, the mediator has no authority to authorize class III gaming. That authority belongs solely to the Secretary, and the Secretary's actions are limited by whichever provision of IGRA is triggered. The plain language of IGRA's remedial scheme, as drafted by Congress fails to waive the application of the Johnson Act for gaming conducted under Secretarial Procedures. *See Seminole Tribe*, 517 U.S. at 73-74 (holding that the court should not alter IGRA's detailed remedial scheme). Moreover, even if Congress intended for Secretarial Procedures to be subject to the waiver, it is up to Congress to change that if it so desires. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 542 (2004) ("If Congress enacted into law something different from what it intended, then it should amend the statute to conform to that intent. It is beyond [the court's] province to rescue Congress from its drafting errors, and to provide for what we might think . . . is the preferable result." (quotation marks omitted) (citation omitted)).

B. Defendants misconstrue the purpose of IGRA's remedial scheme

The North Fork Tribe argues that Stand Up's interpretation of IGRA is inconsistent with IGRA's purpose, which requires IGRA's remedial scheme be interpreted as "intended to protect tribes by providing them with a full substitute for a compact when states do not comply with IGRA's requirements to negotiate in good faith for a compact." [Dkt. 37 at 14.] This is an overbroad interpretation of the remedial scheme's purpose and text, and it is inconsistent with

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IGRA's overall purpose.

While Congress authorized gaming under both compacts and Secretarial Procedures, it privileged compacts over procedures. [*See* Dkt. 29 at 12.] The problem Congress faced in designing IGRA, however, was that it could not compel states to enter into compacts with Indian tribes without treading on the Tenth Amendment. *See Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273, 281 (8th Cir. 1993) (holding that IGRA does not violate the Tenth Amendment because it "gives the states the right to get involved in negotiating a gaming compact . . . , but does not compel it"). The remedial scheme was therefore designed only as an "*incentive* for States to *negotiate* with tribes . . . ." S. Rep. 100-446, at 13 (1988) (emphasis added). It was not put in place to ensure states would enter into compacts or that tribes could conduct any particular form of gaming. *See Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1260 (9th Cir. 1994) (holding that California was not required to negotiate with Tribes for all forms of class III gaming).

The Tribe ignores that the remedial scheme was not designed solely for the benefit of tribes, but also for the protection of states' interests. IGRA does not require that a state enter into a compact, *Cheyenne River Sioux Tribe*, 3 F.3d at 281, and in the remedial scheme, Congress provided states with the right to a judicial determination of bad faith and further provided defenses against allegations of bad faith. 25 U.S.C. § 2710(d)(7)(B)(ii)(I) ("In determining whether . . . a State has negotiated in good faith, the court—may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities . . . .") Thus if a court finds that, despite failing to enter into a compact, the state negotiated in good faith, the tribe's case is over, and the Secretary is not empowered to prescribe procedures. *See New Mexico*, 854 F.3d at 1226 (holding the Part 291 regulations invalid because they altered the remedial scheme to provide for gaming under Secretarial Procedures irrespective of the State's good faith). Even if the court finds the state acted in bad faith, the Secretary is not authorized to prescribe procedures until the state is given two more opportunities to enter into or

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consent to a compact. *Id.* § 2710(d)(7)(B)(iii)-(iv). The remedial scheme, therefore, is focused on encouraging state involvement and protecting state interests. The Secretary is authorized to issue procedures as a second-best alternative, only after a finding of bad faith, and then, only in the event that all efforts to bring the state on board fail. The limitations on the Secretary's authority under the remedial scheme are consistent with IGRA's purpose "*to provide a statutory basis for the operation of gaming by Indian tribes* as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2702(1) (emphasis added). While IGRA unquestionably seeks to promote tribal development, it does not do so by "guarant[eeing] an Indian tribe the right to conduct Class III gaming . . . ." *Texas*, 497 F.3d at 511. The North Fork Tribe's argument that the purpose of the remedial scheme is to ensure tribes can conduct class III gaming is premised on ignoring the operative clause of the provision, which limits the means of tribal promotion to the "statutory basis" Congress devised.

IGRA authorizes class III gaming only "in a State the permits such gaming for any purpose by any person, organization or entity . . . ." 25 U.S.C. § 2710(d)(1)(B). Thus in a state that prohibits class III gaming, or even particular class III games, a tribe's ability to conduct class III gaming as a means of tribal development is limited. *See, e.g.*, *Rumsey* 64 F.3d 1260 (holding that California was not required to negotiate for banked and percentage card games and slot machines because such games were illegal under state law). In the extreme, gaming cannot be used for the promotion of tribal development at all in Utah where all forms of gaming are prohibited. Utah Const., art. VI, § 27; Utah Code Ann. 76-10-1101.

IGRA's deference to state law was by design because, as Congress realized at the time, "there is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place." S. Rep. No. 100-446, at 13 (1988). Thus Congress chose to regulate class III gaming through tribal-state compacts and limit class III gaming to states that allowed such gaming and had experience regulating it. In regard to class III gaming devices, IGRA provides that they may be operated, only in states (i)

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where they are legal, ***and*** (ii) where the state agrees to compact with the tribe to jointly regulate their operation. This interpretation is consistent with IGRA's plain language and purpose, and with the legislative history and Senators Reid's question about whether the "limited waiver" in § 2710(d)(6) "is the only respect in which S. 555 would modify the scope and effect of the Johnson Act?"[2] 134 Cong. Rec. S12643, at 12650 (daily ed. Sept. 15, 1988) (emphasis added). Congress did not want the operation of class III gaming devices on Indian land without state participation and oversight.

The defendants' interpretation of the remedial scheme based on IGRA's purpose of promoting tribal development ignores IGRA's express limitations governing the extent to which class III gaming may be conducted. The Court should therefore reject any argument that IGRA's purpose authorizes the Secretary to read into the remedial scheme language which is not there.

C. The Ninth Circuit has not addressed whether the Johnson Act waiver applies to Secretarial Procedures

According to the Tribe, "[T]he Ninth Circuit has rejected Stand Up's [Johnson Act] argument in the class II gaming context." [Dkt. 37 at 15.] On its face, this assertion is fatally flawed. Stand Up challenges only class III gaming devices requiring waiver under the Johnson Act. *See* 25 U.S.C. § 2710(d)(6). The extent to which certain gaming devices fall within that waiver is irrelevant to the issue here. Neither the Tribe nor the federal defendants claim that the slot machines purportedly authorized under the Secretarial Procedures are not class III devices, or that operation of these slot machines does not require application of the waiver. The only question before this Court is whether the waiver also covers class III devices authorized under Secretarial Procedures. The Ninth Circuit has not addressed this issue.

The Tribe's reliance on *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir.

[2] The Tribe contends that Senator Inouye's response to the question demonstrates that IGRA also authorizes class III gaming devices under Secretarial Procedures. [Dkt. 37 at 19.] But the contention can be true only if Senator Reid's question is ignored. Reid specifically asked if the Johnson Act waiver applied to any other provisions of IGRA. Reid's apparent satisfaction with the answer—he pressed the issue no further— suggests that he understood that the waiver applies only to compacts entered into under paragraph (3) and not to procedures.

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1994) for the proposition that the Ninth Circuit has held that the Johnson Act waiver applies to Secretarial Procedures [Dkt. 37 at 17] is unavailing. The issue in *Sycuan Band* was strictly whether the electronic pull-tab devices the tribe operated were class III or class II gaming devices. *Id.* at 541. The Court held that the devices were "'electronic facsimile['s] of a game of chance,' properly categorized as Class III under 25 U.S.C. § 2703(7)(B)(ii)." *Id.* at 543. While the court stated in dicta that if the devices were class III, they could be operated "only pursuant to a compact *or procedures prescribed by the Secretary*," *id*. at 542 (emphasis added), the court neither addressed whether the Johnson Act waiver applies to Secretarial Procedures or cited any previous authority that reached such a conclusion. The case is therefore inapposite. *See U.S. v. Rivera-Guerrero*, 377 F.3d 1064, 1071 (9th Cir. 2004) (holding that cases are not authority for issues not addressed by the court); *see also Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

The Tribe also attempts to suggest an ambiguity in IGRA through its discussion of court decisions addressing class II gaming devices, which do not fall under the Johnson Act. [Dkt. 37 at 16.] This too is unavailing. Contrary to the Tribe's assertion that IGRA does not "'explicitly address the relationship between IGRA and the Johnson Act as applied to class II gaming'" [*Id.* (quoting *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1101 (9th Cir. 2000)], IGRA does explicitly address this relationship as applied to class III gaming. 25 U.S.C. § 2710(d)(6). And in the remedial scheme, Congress unambiguously declined to apply the Johnson Act waiver to the procedures.

D. The Court should not apply the Indian canon of construction or give any deference to the Department's past practice

The Court should disregard the Tribe's appeal to the Indian canon of construction and its contention that that authorizing slot machines is consistent with long-standing Department practice [Dkt. 37 at 17-18.] These arguments are irrelevant where, as here, the plain language of a

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statute is clear and unambiguous.

The Indian canon of construction applies only where a statute affecting Indians is ambiguous. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). But the canon does not "permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress." *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 507 (1986). The Tribe has shown no specific ambiguity in IGRA. It, in fact, generally ignored the plain language of both the Johnson Act waiver and the remedial scheme. Instead the Tribe implies that IGRA is ambiguous because it would make no sense for IGRA to waive application of Johnson Act for compacts but not for Secretarial Procedures, which also authorize class III gaming. In invalidating the Part 291 regulations, the Fifth Circuit rejected this argument in the context of interpreting IGRA's remedial scheme. "When Congress has directly addressed the extent of authority delegated to an administrative agency, neither the agency nor the courts are free to assume that Congress intended the Secretary to act in situations left unspoken." *Texas*, 497 F.3d at 502.

Here, to apply the waiver to slot machines, the Secretary had to determine that Secretarial Procedures are the equivalent of and should be "treated as a Tribal-State compact entered into under paragraph (3)." IGRA does not give him that power.

Prior to the issuance of the North Fork Tribe's procedures, only three other tribes conducted gaming pursuant to Secretarial Procedures: the Mashantucket Pequot of Connecticut, the Arapaho Tribe of the Wind River Reservation, and the Rincon Band of Luiseno Mission Indians of the Rincon Reservation.[3] Only in Rincon did the procedures developed from the mediator-selected compact authorize slot machines, but in prescribing the procedures, the Secretary did not consider or address whether the Johnson Act was waived under the procedures. *See* Secretarial Procedures for the Rincon Band of Luiseno Indians, *available at*

[3] The Secretarial Procedures for these tribes can be found on the BIA website listing gaming compacts by state, available at https://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm.

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https://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm.

The Federal Register notice the Tribe cites for the proposition that "[t]he Secretary has consistently interpreted IGRA to permit slot machines when issuing Secretarial Procedures" [Dkt. 37 at 18] says no such thing. That notice placed the Secretarial Procedures for the Mashantucket Pequot Tribe into effect and expressly stated that the procedures "prohibit[] video slot machines" under section 15(a). 56 Fed. Reg. 24996, 24997 (May 31, 1991). Section 15(a) announces a moratorium on any class III gaming devices and prevents the Tribe from operating such devices unless and until the State of Connecticut changes its laws or enters an agreement with the Tribe to authorize their operation. *See* Secretarial Procedures for Mashantucket Pequot Tribe, *available at* https://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm. The Department's past issuance of Secretarial Procedures that prohibit slot machines is hardly evidence of a longstanding practice of interpreting procedures to include the Johnson Act waiver.

The only time the Department has discussed such an interpretation is in promulgating the Part 291 regulations, 63 Fed. Reg. 3289, 3292 (Jan. 22, 1998), which were invalidated by both the Tenth and Fifth Circuits. *See New Mexico*, 854 F.3d 1207; *Texas*, 497 F.3d 491. The Department's analysis, however, was premised on the argument that without the Johnson Act waiver, Secretarial Procedures would be rendered meaningless. 63 Fed. Reg. at 3292. This, however, is not true. IGRA limits the types of gaming tribes can conduct depending upon the state in which the gaming is conducted. 25 U.S.C. § 2710(d)(1)(B). In many states, class III gaming devices cannot be authorized under either a compact or procedures. And Secretarial Procedures in such states would not be meaningless. Indeed, the moratorium on such devices in the Mashantucket Pequot's procedures did not render those procedures meaningless.[4] Neither the

[4] Additionally, the procedures for the Arapaho Tribe were amended three different times. The original procedures expressly prohibited the operation of class III gaming devices. Class III Gaming Procedures for the Northern Arapaho Nation, II.B (2005), *available at* https://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm. The second amendment reversed course and authorized such devices. Second Amended Class III Gaming Procedures for the Northern Arapaho Nation, II.B (2007). There is no discussion in the amendment that it was needed because the procedures were otherwise meaningless. Moreover, neither the Tribe nor the federal defendants acknowledge that the ability of Secretarial Procedures to be amended calls into the question the notion that the Secretary is somehow bound by the terms of the compact selected by the mediator.

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North Fork Tribe nor the federal defendants offer any reason why the same limitation here would lead to a different conclusion.

Finally, even if there was evidence of a longstanding practice, which there is not, it would be irrelevant where, as here, there is no ambiguity, and Congress left no room for agency interpretation. *See Carcieri v. Salazar*, 555 U.S. 379, 391 (2009) (rejecting Department's longstanding interpretation of a provision of the Indian Reorganization Act because it contravened the plain language of the statute). Congress spoke clearly in providing that the Johnson Act is waived only under a compact that is "entered into under paragraph (3)" and is "in effect," and in further providing that gaming under Secretarial Procedures does not satisfy either of those elements.

II. THE SECRETARY VIOLATED NEPA IN ISSUING THE SECRETARIAL PROCEDURES

Defendants assert that the Secretary was not required to engage in NEPA review because the Secretary lacked the authority to alter the mediator-selected compact. [Dkt. 37 at 24; Dkt. 41 at 23.] They further assert that NEPA compliance was not required because of an irreconcilable conflict between NEPA and IGRA. [Dkt. 37 at 27; Dkt. 41 at 25.]

But in making such arguments, the defendants ignore the following fundamental facts and legal principles: (1) the mediator's authority under IGRA is limited to selecting between the two proposed compacts submitted, and *the mediator has no authority to authorize class III gaming*, 25 U.S.C. § 2710(d)(7)(B)(iv); (2) there is no time limit for the Secretary to issue procedures, *id*; [AR00001563]; (3) the issuance of the Secretarial Procedures was a separate decision, independent of the previous two-part determination and the trust decision, which were based on the development and operation of a single gaming facility at the Madera Site [AR00002188]; (4) as the procedures themselves make clear, a development alternative consisting of two gaming facilities at the Madera Site has not been subjected to environmental review [AR00002264]; and (5) the operation of two gaming facilities at the site could potentially impact the environment, and

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the Secretarial Procedures acknowledge that environmental review is required if the Tribe elects to develop that alternative. [*Id.*]

Instead of confronting these facts and legal principles, defendants misconstrue the relationship between IGRA's requirement that the Secretary prescribe the procedures and the significant discretion it allows—even requires—for him to do so. In essence they argue, as they do elsewhere in their briefs, that the Secretary's authority under IGRA is limited to rubber-stamping the mediator-selected compact. This is inconsistent with both NEPA and IGRA.

A. Issuing the Secretarial Procedures was a major federal action triggering NEPA

The 2009 EIS, issued in conjunction with the two-part determination and the trust decision, evaluated six alternatives. Alternative A—the preferred alternative—consisted of the development of a single 247,180 square-foot gaming and entertainment facility at the Madera Site. [AR00000175.] Alternative B consisted of a "smaller scale version of Alternative A" at the Madera Site [AR00000177.] Alternative C consisted of a non-gaming retail development at the Madera Site. [AR00000178.] Alternatives D and E consisted of smaller scale gaming developments on other lands [AR00000178-79.] And, alternative F was a no action alternative. [AR00000179.]

The 2009 EIS did not, however, consider a larger scale version of Alternative A at the Madera Site. Yet in prescribing the procedures, the Secretary authorized the Tribe to operate two gaming facilities and up to 2,500 slot machines. [AR00002204.] The authorization provided no discussion of the size of either facility. [*Id.*] Nor did the Secretary state that the authorization fell within any of the alternatives evaluated in the 2009 EIS. In other words, in authorizing two gaming facilities at the Madera Site, the Secretary proposed a seventh alternative of uncertain scope—but beyond the scope any considered in the 2009 EIS—without conducting any environmental review. This action was arbitrary and capricious and in violation of NEPA.

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1. The Secretary was not limited to merely adopting the mediator-selected compact

The North Fork Tribe contends that prescribing procedures was not a major federal action because "the Secretary must prescribe procedures that are *consistent with the mediator-selected compact* and may modify them only to be consistent with IGRA and relevant state provision. The Secretary has no other authority to modify them." [Dkt. 37 at 22 (emphasis original).] The Tribe therefore asserts, "The Secretary has statutory authority to consider requirements in IGRA and relevant state provisions, but lacks authority to otherwise modify the procedures, including for environmental reasons." [*Id.* at 22-23.] This interpretation is inconsistent with IGRA's remedial scheme.

The Secretary authorizes class III gaming; the mediator does not. The mediator's role is expressly limited to "select[ing] from the two proposed compacts the one which best comports with the terms of this Act and *any other applicable Federal law* and with the findings of the court." 25 U.S.C. § 2710(d)(7)(B)(iv) (emphasis added). If the state consents to the compact, the compact must be approved by the Secretary under § 2710(d)(8). If the state does not consent, the mediator must forward the proposed compact selected to the Secretary, who will prescribe the procedures. *Id.* § 2710(d)(7)(B)(vii). The mediator does not have any authority to authorize gaming under either scenario.

Once the mediator submits its chosen compact to the Secretary, IGRA's remedial scheme requires that the Secretary prescribe procedures "in consultation with the Indian tribe." 25 U.S.C. § 2710(d)(7)(B)(vii). Defendants' interpretation of IGRA's remedial scheme would make this language superfluous. Why would the Secretary be required to consult with the Tribe if the Secretary had no authority to deviate from the mediator-chosen compact? As the North Fork Tribe acknowledges, "one of the most basic interpretive canons" is that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." [Dkt. 37 at 24], *citing Corley v. United States*, 556 U.S. 303,

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314 (2009); *accord United States v. Doe*, 778 F.3d 814, 824 (9th Cir. 2015). This Court should thus reject defendants' claim that the Secretary lacks sufficient discretion in determining the content of the procedures. [Dkt. 37 at 33.]

While the provision requiring the Secretary to prescribe procedures does not mention a duty to ensure the procedures comply with any particular federal laws beyond IGRA, including NEPA and the Clean Air Act, 25 U.S.C. § 2710(d)(7)(B)(vii), the mediator is required to select the proposed compact that best "comports with other applicable Federal law . . . ." *Id.* § 2710(d)(7)(B)(iv). The Tribe and the federal defendants ignore this provision and essentially argue that if the mediator-selected compact does not comport with other applicable federal laws, the Secretary has no alternative but to perpetuate the violation by adopting the mediator-selected compact. Certainly, Congress did not comprehended such a notion in requiring the procedures be "consistent with" the mediator-selected compact. Nor did the Secretary read such constraints into IGRA in prescribing the procedures for the North Fork Tribe. As both the Tribe and the federal defendants acknowledge, the Secretary had to modify the mediator-selected compact to eliminate any state obligations, because such obligations would violate the U.S. Constitution—other applicable federal law. [Dkt. 37 at 24; Dkt. 41 at 23-24.] *See also* Letter from Kevin K. Washburn, Assistant Secretary - Indian Affairs to Honorable Bo Mazzetti, Chairman Rincon Band of Luiseno Indians (Feb. 8, 2013), available at https://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm (acknowledging that "there are other provisions that we might have changed, consistent with IGRA and the mediator's submission" but choosing not to make such changes).

The defendants' reliance on the Supreme Court's decision in *Public Citizen* does not alter the analysis. The Supreme Court held that NEPA does not apply unless there is a "reasonably close causal relationship between the environmental effect and the alleged cause." *Department of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004). The court also held that NEPA does not apply where the agency has "no authority to prevent the effect" at issue. *Id.* But where there is

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a reasonably close causal relationship between the Secretary's action and an effect to the environment and the Secretary has the authority to prevent the effect, NEPA applies. Here, it cannot reasonably be disputed that the Secretary, by issuing the procedures, authorized the Tribe to construct and operate two gaming facilities at the Madera Site, an alternative that had not been analyzed in any previous NEPA review. It also cannot be disputed that under the plain meaning of IGRA, the Secretary had sufficient discretion to either conduct NEPA review or alter the procedures to avoid triggering NEPA. Accordingly, there is more than a "reasonably close causal relationship" between the issuance of the procedures and any potential environmental impact, and the Secretary had sufficient authority to prevent this effect.

IGRA fundamentally differs from the regulatory scheme at issue in *Public Citizen*. In that case, the Federal Motor Carrier Safety Administration ("FMSCSA"), responsible for prescribing safety rules and establishing levels of financial responsibility for commercial vehicles, was required by statute to "grant registration to all domestic or foreign motor carriers that are 'willing and able to comply with' applicable safety, fitness, and financial-responsibility requirements." *Public Citizen*, 541 U.S. at 758-59 (quoting 49 U.S.C. § 13902(a)(1). This obligation included certifying Mexican trucks to operate within the United States. *Id.* at 759 & n. 1. In 1982, Congress enacted a two-year moratorium on new certifications for Mexican trucks, and the President subsequently extended the moratorium. *Id.* In 2002, the President lifted the moratorium. *Id.* at 762. Plaintiffs filed suit alleging that FMCSA was required to subject rules governing the registration and certification of Mexican trucks to NEPA because the agency was required to "take into account the environmental effects of cross-border operations." *Id.* at 765. The Court rejected this argument because (1) "FMCSA has no ability to countermand the President's lifting of the moratorium or otherwise categorically to exclude Mexican motor carriers from operating within the United States," *id.* at 766, and (2) FMCSA was subject to the mandate that it must register and certify any "motor carrier, if [it] finds that the person is willing and able to comply with requirements established by DOT.'" *Id.* (quoting 49 U.S.C. § 13902(a)(1)). Accordingly, if

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FMCSA failed to authorize a Mexican carrier for cross-border services that satisfied the requirements, "it would violate § 13902(a)(1)."

An analysis of the Secretary's actions under IGRA does not lead to the same conclusion. Central to the Supreme Court's holding in *Public Citizen* was that FMCSA had no authority to regulate cross-border trucking. The President authorized cross-border trucking by lifting the moratorium, and the FMCA's action was limited to certifying trucks that met criteria unrelated to activity of actually driving trucks across the border. Under IGRA, by contrast, the mediator has no authority to authorize gaming, and the Secretary does not merely have to issue procedures if he determines the Tribe is eligible for them. By the time of his involvement in the process, eligibility has been determined as a matter of law. *See generally*, 25 U.S.C. § 2710(d)(7)(B). Rather, the Secretary's task is to determine how gaming will be regulated at the site. This is akin to a situation in which the FMCSA had authority to regulate the operation of the trucks it certified. But FMCSA had no such authority. Thus, despite that the Secretary must prescribe procedures, IGRA gives him the essential discretion necessary to determine how gaming will be regulated. He must consult with the tribe, 25 U.S.C. § 2710(d)(7)(B)(vii); he must ensure compliance with not only IGRA but all other applicable laws, *id.*; *see also* Part II(A)(1), *supra*; and he may also remove provisions from the mediator-selected compact that are not directly related to the operation of gaming. [*See* Dkt. 37 at 7 (quoting *American Indian Law Deskbook* § 12.30 (2017)).] Beyond surface similarities, the circumstances leading to the decision in *Public Citizen* simply do not apply here.[5]

2. Subjecting the Secretarial Procedures to NEPA review does not conflict with IGRA

There is no irreconcilable conflict between NEPA and the Secretary's duty to issue gaming procedures, and thus no reason to forgo NEPA review. *See Public Citizen*, 541 U.S. at

[5] For all the reasons discussed above, the Court should also reject the Tribe's argument that the "rule of reason" alleviates the Secretary's violation of NEPA. [Dkt. 37 at 26-27.] The argument is premised on the same flawed interpretation of the Secretary's discretion under IGRA.

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766-67 (irreconcilable conflict between two statutes only if it were "truly impossible" for agency to comply with both). With no irreconcilable conflict, the agency must comply with all of its statutory mandates. *Ibid*.

In *Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958 (9th Cir. 2016), on which defendants rely, the Ninth Circuit held that the approval of a tribal gaming ordinance by the National Indian Gaming Commission ("NIGC") was not subject to NEPA because IGRA's requirement that the NIGC approve or disapprove of the ordinance within 90 days directly conflicted with NEPA requirements. It would be impossible for the Secretary to comply with both NEPA and IGRA. *Id.* at 965. In reaching this decision, however, the Court acknowledged that it is generally "reticent to find statutory conflict between NEPA and other provisions of the U.S. Code . . . lest [the exception] undermine Congress's intent the NEPA apply broadly." *Id.* at 964. Moreover, the Court held that there can be no statutory conflict where Congress did not expressly limit the timeframe within which the agency must act. *Id.* If the deadline is imposed by the agency itself, or if the agency "'could withhold publication long enough to comply with NEPA requirement . . . ,'" the action is not exempt from NEPA. *Id.* (quoting *Jones v. Gordon*, 792 F.2d 821, 826 (9th Cir. 1986)).

Under *Jamul Action Committee*, the prescription of Secretarial Procedures does not create any conflict between IGRA and NEPA because Congress did not place any time limit on the Secretary's action, but left the timeframe subject to the Secretary's control. The Tribe's only response is that IGRA requires the Secretary to prescribe procedures on "an expedited basis" [Dkt. 37 at 28], and the procedures could not serve the purpose of the remedial scheme "if tribes were required to wait one or more years for a NEPA analysis after the mediator selected a compact before the Secretary could issue procedures, but a tribal-state compact would have been approved on 45 days after the state agreed to it, without NEPA analysis."[6] [Dkt. 37 at 29.] Neither of these

[6] Contrary to the Tribe's assertion, NEPA compliance will not necessarily create a delay of "one or more years." First, the NEPA regulations do not impose delays beyond the 45-day minimum period for the agency to receive comments on a draft EIS, and the 90-day minimum holding period after publication of the notice of draft EIS before

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arguments points to any Congressionally mandated timeframe within which the Secretary must act to prescribe procedures that would directly conflict with the statutory mandated NEPA review. Indeed, the "expedited basis" so critical to the defendants' argument does not even appear in IGRA.

The Tribe's reference to the 45-day period under which the Secretary must act in approving or disapproving tribal-state compacts cuts against rather than for its argument. Congress's inclusion of a time-limit to constrain the Secretary's action on tribal-state compacts stands in stark contrast to its failure to include one in the remedial scheme at issue here. And unlike its tribal-state counterpart, the mediator-selected compact is not subject to approval by operation of law if the Secretary fails to act within a certain time. Under IGRA, Congress was very clear where it wished to impose time limits. *See, e.g.*, 25 U.S.C. § 2710(d)(7)(B)(i) (requiring a tribe to wait 180 days from request to negotiate before filing bad faith suit); *id.* § 2710(d)(7)(B)(iii) (providing 60 days for state and tribe to enter into a compact after a bad faith finding); *id.* § 2710(d)(7)(B)(vi) (requiring mediator to submit compact to Secretary if the state fails to consent within 60 days; *id* § 2710(d)(8)(C) (requiring Secretary to approve or disapprove of a compact within 45 days or compact is deemed approved); *id.* § 2710(e) (requiring NIGC approve gaming ordinance within 90 or ordinance is deemed approved). Congress therefore left the timeframe in which to prescribe procedures to the discretion of the Secretary. Accordingly, there is no conflict between IGRA and NEPA under the circumstances here, much less an irreconcilable one.

Delaying the procedures pending NEPA review is not contrary to IGRA's requirement that the Secretary "shall prescribe procedures," nor it is an inevitable result of the prescription of

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finalization of the record of decision. 40 C.F.R. § 1506.10(b). Second, the delay can be at least partially mitigated by conducting NEPA review concurrently with the other work needed to issue the procedures. In this case it took the Secretary three months to prepare and issue the Secretarial Procedures. [AR00000001; AR00002186.] Additionally, the time it takes to prepare the NEPA documents will vary from case to case depending on the level of NEPA review, and the priority and resources given to it by the agency. Accordingly, NEPA cannot be disregarded as a matter of law simply because NEPA compliance *might* create some delay in the issuance of procedures—particularly when Congress has not imposed any timeframe for the issuance of procedures.

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procedures. Here the Secretary consciously chose to forego any reliance on the 2009 EIS, when authorizing a more expansive casino.

For the foregoing reasons and those set forth in Stand Up's moving papers, the Secretary's issuance of procedures authorizing an expanded casino was a major federal action subject to NEPA. The Secretary's failure to perform any NEPA analysis in connection with this action is a violation of NEPA and the APA, requiring the procedures to be set aside and invalidated. *See supra* Part II.C.

B. The previous EIS does not satisfy the Secretary's NEPA obligation arising from the prescription of Secretarial Procedures

Relying yet again on alleged limitations arising out of the mediator-selected compact, the Tribe argues that the references to the previous environmental review through incorporation by reference are sufficient. [Dkt. 37 at 29-30.] This is not so.

The Secretarial Procedures do not recite any reliance upon the 2009 final EIS, and in fact the Secretary expressly disassociates his decision on the Secretarial Procedures from his prior trust decision and two-part determination. [AR00002188.] The procedures also acknowledge that the alternative authorization of two gaming facilities at the Madera Site has not been subjected to any environmental review and that such review is necessary. In Section 11.1 of the Secretarial Procedures, the Secretary required that before the commencement of any Project at the Madera Site, "other than the Preferred Alternative" described in the 2009 final EIS, "the Tribe shall cause to be prepared a comprehensive and adequate tribal environmental impact report (TEIR) analyzing the potentially significant off-reservation environmental impacts of the Project . . . ." [AR00002264.] The Tribe points to this section and others as evidence of the EIS's incorporation by reference. [Dkt. 37 at 30.] But the Tribe rationalizes away the need for NEPA review of the unexamined alternative by improperly arguing that the approval of the second facility was required by the mediator-selected compact and the unsupported and self-serving assertion that North Fork does not currently have any plans to develop two-gaming facilities. [Dkt. 37 at 32.]

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These assertions ignore both the Secretary's obligations under IGRA and NEPA and the fact that the mediator-selected compact authorizing the two facilities was the Tribe's proposed compact. While the Tribe's intentions are irrelevant to the new and unexamined alternative authorized by the Secretary, the Tribe can hardly claim that it has no intention to develop its casino based on a provision the Tribe itself added to the procedures.

Finally, the Tribe is also incorrect to assert that Stand Up's challenge to procedures is "essentially a challenge to the Secretary's decision to acquire the Madera Site in trust for North Fork's class III gaming project." [Dkt. 37 at 31.] As the Secretary acknowledged in the letter transmitting the procedures to the Tribe, the prescription of the procedures constitutes an agency action "separate from the Departmental decision made years ago requesting the Governor's concurrence to allow gaming on the subject parcel as well as the subsequent decision made in 2012 to accept that parcel into trust." [AR00002188.] It is only the separate decision and its authorization of an expanded gaming alternative that was never subjected to environmental review that Stand Up challenges here.

C. Vacatur and Injunctive Relief Are Proper

The North Fork Tribe's suggestion that the Secretarial Procedures should not be vacated or enjoined even if additional NEPA analysis is required would render further analysis perfunctory. Rather, the Secretarial Procedures must be vacated and the development, construction, and operation of casino facilities must be enjoined to allow the Secretary to perform the analysis required by NEPA and prescribe new procedures. 40 C.F.R. § 1502.5 (EIS should be implemented in manner ensuring it "will not be used to rationalize or justify decisions already made").

Vacatur and an injunction are separate remedies, each available when an agency violates NEPA. "Although the Supreme Court has cautioned courts against granting injunctive relief as a matter of course in NEPA cases, it did not question the use of vacatur as a standard remedy." *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Pena*, No. 3:12-CV-02271-

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HZ, 2015 WL 1567444, at *2 (D. Or. Apr. 6, 2015) (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010)). Indeed, the U.S. Supreme Court has urged courts to use the remedy of vacatur before considering an injunction. *Monsanto Co.*, 561 U.S. at 165; *see also Sierra Club v. Van Antwerp*, 719 F.Supp.2d 77, 78 (D.D.C. 2010) ("While the U.S. Supreme Court made clear in *Monsanto* that there is no presumption to other injunctive relief, ... both the Supreme Court and the D.C. Circuit Court have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA." (citation omitted)).

While vacatur is the presumptively appropriate remedy, the court need not vacate an action in the rare instance when equity demands otherwise. *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n. 7 (9th Cir.2010). Indeed, such a rare circumstance may arise when serious irreparable environmental injury may occur if an action is vacated. *Ctr. For Food Safety v. Vilsack*, 734 F.Supp.2d 948, 951 (N.D.Cal.2010) ("[T]he Ninth Circuit has only found remand without vacatur warranted by equity concerns in limited circumstances, namely serious irreparable environmental injury."); *see also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (remand without vacatur was warranted when doing so could have caused extinction of entire species of snail). Here, it is the failure to vacate rather than vacatur that may cause "serious irreparable environmental injury."

In another formulation, whether agency action should be vacated depends on how serious the agency's errors are "and the disruptive consequences of an interim change that may itself be changed." *Allied–Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C.Cir.1993) (internal quotation marks omitted). Here, the Secretary's error is fatal. The Secretary failed altogether to conduct the required NEPA analysis, and now in litigation seeks to rely on a 2009 EIS that did not consider the alternative two-facility casino promulgated by the Secretarial Procedure. Unlike many cases, where a challenged rule is already in place or construction is already underway, vacatur of the Secretarial Procedures would preserve the status quo. Vacatur resulting in the temporary halt of a project is less disruptive than allowing the

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project to continue with the risk that the EIS will find another alternative to be preferable. *Friends of the Capital Crescent Trail v. Fed. Transit Admin.*, 200 F. Supp. 3d 248, 254 (D.D.C.), amended, 218 F. Supp. 3d 53 (D.D.C. 2016). Thus, even if vacatur was not the presumptively appropriate remedy, it is the appropriate one here.

Injunctive relief pending NEPA review is also appropriate where, as here, a party demonstrates "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010); *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1054 (9th Cir. 2013). Injunctive relief is typically appropriate in environmental cases because "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). "[A] NEPA violation supports a finding of irreparable harm, given the risk to the environment from uninformed decision-making." *Sierra Nevada Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984, 993 (E.D. Cal. 2005).

The balance of harms here favors Stand Up. If an injunction is put in place, NEPA analysis would occur followed by the prescription of Secretarial Procedures, as provided by IGRA. In contrast, the failure to grant injunctive relief would allow the North Fork Tribe to begin construction of a project whose environmental impact has never been analyzed. Public interest would not be harmed by an injunction. Rather, compliance with NEPA would promote the "strong public interest in meticulous compliance with the law by public officials." *Fund for Animals v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (issuing preliminary injunction in case of NEPA noncompliance). "Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public

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interest." *S. Fork Band Council Of W. Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009). Maintaining the status quo with an injunction while additional environmental studies are performed, or additional alternatives are considered, ensures the possibility that the agency will "change its plans in ways of benefit to the environment." *State of Alaska v. Andrus*, 580 F.2d 465, 485 (D.C. Cir. 1978), *vacated in part on other grounds*, 439 U.S. 922 (1978), *quoting Jones v. District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 513 (1974), *cert. denied*, 423 U.S. 937 (1975). Without an injunction, "the new environmental review process ordered by the court will be a pointless exercise." *Sierra Nevada Forest Prot. Campaign*, 376 F. Supp. 2d at 994.

The North Fork's reliance on *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836 (2007) is unavailing, as that case actually supports an injunction here. There, the Bureau of Land Management prepared an EIS to evaluate development of coal bed methane resources in the Powder River Basin. *Id*. at 840. The BLM's EIS evaluated five alternatives. *Ibid*. Petitioners sued under NEPA contending that it should have evaluated a sixth alternative – "phased development." *Ibid*. The district court concluded that the EIS was generally sufficient under NEPA, but improperly failed to consider the "phased development" alternative. *Id*. at 841. The district court issued a partial injunction, prohibiting coal bed methane development on 93% of the Powder River Basin resource area, while permitting it to continue on 7% of the area subject to site-specific review. *Ibid*. Notably, the partial injunction allowed development to proceed on the 7% under a "phased development" approach urged by the petitioners while the BLM supplemented the EIS to evaluate the "phased development" alternative. *Ibid*. The Ninth Circuit affirmed, holding that NEPA violations are subject to traditional standards in equity for injunctive relief. *Id*. at 842. The Ninth Circuit then found that the district court did not abuse its discretion in granting a partial injunction because any further development would nevertheless be subject to further environmental review on terms urged by the petitioners. *Id*. at 844. Critically, the district court's partial injunction gave plaintiffs exactly the alternative they wanted pending further compliance

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with NEPA. *Id*. at 844. The partial injunction, which allowed for mining in a much smaller area than that previously considered, thus placed no hardship on the plaintiffs. This is not the case here, where the prescribed Secretarial Procedures provide for the construction of casino facilities *larger* than the scope of any alternatives previously considered.

III. THE SECRETARY VIOLATED THE CLEAN AIR ACT BY ISSUING THE SECRETARIAL PROCEDURES

The defendants' argument against the Secretary's obligations under the Clean Air Act ("CAA") mirrors their NEPA argument—that the Secretary lacked discretion to alter the mediator-selected compact. The Court should reject defendants' argument for the same reasons it fails under NEPA: (1) the Secretary may, and indeed must, alter the mediator-selected compact to comply with other applicable federal laws when necessary; (2) the decision to authorize two gaming facilities at the Madera Site was made by the Secretary, not the mediator, and the Secretary therefore had "practical control" over any increase in the project's scope that could affect emissions; (3) IGRA provides no timeline within which the Secretary must prescribe the procedures, so there is no conflict between IGRA and the CAA, and (4) Stand Up's challenge is not a collateral attack on the previous conformity determination since that determination did not include the expanded gaming alternative authorized under the Secretarial Procedures. Stand Up's points and authorities on these issues are addressed in Part II, *supra*, and incorporated here by this reference.

While the Tribe and federal defendants present nearly identical arguments, the federal defendants add two additional arguments under the CAA that also must fail. First, they argue that the Secretarial Procedures are exempt from conformity requirements because they are either *rulemaking or administrative adjudications*. [Dkt. 41 at 29 (citing 43 C.F.R. § 93.153(c)(2)(iii)).] The federal defendants do not, however, provide any explanation or authority regarding which category the procedures fall into—rulemaking or administrative adjudications. The provision upon which they rely does not refer to administrative adjudications at all. 43 C.F.R.

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§ 93.153(c)(2)(iii) (exempting "rulemaking and policy development and issuance.") The Secretarial Procedures here do not fit within that provision, as they do not constitute agency rulemaking or the issuance of an agency policy. They are a federal approval authorizing the Tribe to develop and conduct class III gaming at two facilities at the Madera Site.

Second, federal defendants contend that a conformity determination is not required because it is not required for compact approval under 25 U.S.C. § 2710(d)(8) and a "compact negotiated by the State cannot violate the requirements of CAA Section 7506(c)(1)." [Dkt. 41 at 30.] Stand Up agrees that a conformity determination would not be required for a compact, but as the federal defendants acknowledge, "the obligations under [Section 7506(c)(1)] apply only to federal agencies." [Dkt. 41 at 30.] Unlike a compact, the Secretarial Procedures are prescribed by the Secretary as a means of regulating gaming at the site. In other words, while a compact is an agreement between the state and the tribe as to how gaming will be regulated at the site, Secretarial Procedures are not such an agreement, but rather the Secretary's prescription for how gaming will be regulated. While the Secretary is required to consult with the Tribe, the procedures are not the result of negotiation. The Tribe does not need to agree to or consent to any changes the Secretary makes. Thus the obligations under Section 7506(c)(1) apply to procedures where they would not apply to compacts. Moreover, in this case, the Secretary, as part of the procedures, has gone beyond prescribing how gaming at the site will be regulated and has authorized an entirely new development alternative, which was not part of the original conformity determination. Requiring the Secretary to comply with the CAA before prescribing procedures does not conflict with IGRA, but allowing the Secretary to avoid this obligation would directly conflict with and violate the CAA.

For the same reasons that vacatur and injunctive relief are the appropriate remedies for a NEPA violation, vacatur and injunctive relief are appropriate here if the court determines that the Secretarial Procedures violate the CAA. The purpose of the federal Clean Air Act is "to protect and enhance the quality of the Nation's air resources so as to promote the public health and

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welfare." 42 U.S.C. § 7401(b)(1). There is no dispute that the Madera Site is located within an extreme nonattainment area to which section 176 and conformity determination requirements apply. [Request for Judicial Notice, Attachment 3 at NF_AR_0039194-195.] The Secretary recognized that the development, construction, and operation of a casino would result in the emissions of air pollutants, for which a conformity determination is required. [*Id*. at NF_AR_0039195.] But the federal defendants failed to prepare a conformity determination or otherwise comply with the CAA and related EPA regulations when issuing the Secretarial Procedures that enable a two-casino facility. Without a conformity determination, development of the two-casino facility would result an unknown amount of air pollutants in an already vulnerable nonattainment area with no requirements that the North Fork Tribe offset these emissions. Defendants cannot rely on the conformity determination previously prepared determination both because: (1) the Secretary explicitly stated that the prescription of procedures was "separate from the Departmental decision made years ago requesting the Governor's concurrence"; and (2) the size and scope of the casino facilities allowed by the Secretarial Procedures are larger than those previously considered. Allowing the Secretarial Procedures to stand and the development of the casino facilities to proceed without a conformity determination would undermine the very purpose of the CAA.

IV. THE SECRETARIAL PROCEDURES VIOLATE IGRA BECAUSE THE GOVERNOR'S CONCURRENCE IN THE TWO-PART DETERMINATION IS INVALID

When Stand Up filed its first amended complaint in this action, in which it added its fifth claim for relief, the Governor's concurrence had been adjudicated as invalid by the California Court of Appeal. [Dkt. 13.] *Stand Up for California! v. State*, 6 Cal. App. 5th 686, 211 Cal. Rptr. 3d 490 (Ct. App. 2016). Stand Up acknowledges that as a result of the California Supreme Court's grant of review, the Court of Appeal's decision is no longer effective—at least until the California Supreme Court renders its decision. Stand Up does not seek this Court's determination

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that the concurrence is invalid. Stand Up's fifth claim for relief in this action—challenging the validity of the Secretarial Procedures due to an invalid Governor's concurrence—was asserted in light of the California Court of Appeal's decision. Stand Up recognizes that determination must be made by the California Supreme Court—not this Court.

Accordingly, given the current posture of the cases, Stand Up has sought a stay of this action pending a decision by the California Supreme Court on the validity of the Governor's concurrence, which is ultimately necessary to determine whether gaming can be authorized at the Madera Site. [Dkt. 28.] This brief is both a reply brief and an opposition to the defendants' motion for summary judgment. Defendants assert that Stand Up's fifth claim must be dismissed irrespective of the California Supreme Court's decision. In this section, Stand Up addresses those arguments.

A. Stand Up is not collaterally estopped from challenging the validity of the Secretarial Procedures

The North Fork Tribe's assertion that Stand Up is collaterally estopped from bringing a claim based on the Governor's concurrence by the District of Columbia court's ruling is incorrect. [Dkt. 37 at 36-40.] Collateral estoppel prevents a party from re-litigating an issue decided in a previous action if: (1) the issue is identical to one alleged in prior litigation; (2) the issue was "actually litigated" in the prior litigation; and (3) the determination of the issue in the prior litigation was "critical and necessary" to the judgment. *Beauchamp v. Anaheim Union High Sch. Dist.*, 816 F.3d 1216, 1225 (9th Cir. 2016) (citation omitted). The defendants arguments fail to satisfy any the three elements.

While the ultimate question of whether gaming can occur at the Madera Site is contingent on state law, Stand Up does not challenge the Governor's concurrence under California law in the instant action. Rather, Stand Up raises an entirely new claim regarding the impact of the concurrence—deemed invalid under state law by a state court—on the validity of the Secretarial Procedures. [Dkt. 13 ¶¶ 68-73.] Stand Up did not raise this issue in the District of Columbia

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action. Indeed, it has not been addressed by any court. Rather, Stand Up brought the claim in this Court following the Secretary's issuance of the procedures—a decision "separate from the Departmental decision made years ago requesting the Governor's concurrence to allow gaming on the subject parcel as well as the subsequent decision made in 2012 to accept that parcel into trust." [AR00002188]

Neither the validity of the concurrence under state law, nor the effect of that invalidity on gaming at the Madera site, was actually litigated in the District of Columbia court. In fact, the District of Columbia court passed on the issue, holding that it could not "address the validity of the California Governor's concurrence under California law." *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 251 (D.D.C. 2016). Because the issue before this Court was never addressed in the District of Columbia action, it follows that the issue played no part in the judgment.

Contrary to the North Fork Tribe's assertion [Dkt. 37 at 37], the District of Columbia court did not hold that the State of California is an indispensable party to any federal claim based on the Governor's concurrence. Rather, the court held that the State of California would be an indispensable party to "any challenge to the validity of the Governor's concurrence." *Stand Up for California!*, 204 F. Supp. 3d at 251. Stand Up does not challenge the validity of the Governor's concurrence in the instant action. The relevant ruling at the time Stand Up made its fifth claim held that the Governor's concurrence was invalid. *Stand Up for California! v. State*, 6 Cal.App.5th 686, 691 (Ct. App. 2016). Accordingly Stand Up's Fifth Claim cannot raise collateral estoppel issues.

B. Stand Up's challenge to the Secretarial Procedures is not a collateral attack on either the two-part determination or the trust decision

Stand Up's challenge to the Secretarial Procedures is independent of the Secretary's two-part determination under IGRA and the Secretary's decision to acquire the land into trust under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5101 et seq. [AR00002188.] Those previous

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decisions therefore present no bar to the Court's ability to address Stand Up's fifth claim and provide complete relief, by invalidating the Secretarial Procedures. [Dkt. 13. Prayer for Relief, ¶ E.]

In the District of Columbia action, Stand Up argued that the invalidity of the Governor's concurrence under state law rendered the Secretary's two-part determination invalid. The district court rejected that argument and held, "The Secretary's two-part determination is not contingent upon the Governor's concurrence, but *gaming* on the land acquired in trust by the Secretary after October 17, 1988 is contingent upon the Governor's concurrence. *Stand Up for California!*, 204 F. Supp. 3d at 250-251. Accordingly, the court concluded that "to the extent plaintiffs argue that the Secretary's two-part determination is invalid because the Governor's concurrence was void *ab initio*, and challenge the Secretary's approval of off reservation gaming at the Madera Site . . . , the defendants are entitled to summary judgment on that claim." *Id.* at 251. Under this view, Stand Up's challenge to the two-part determination can occur only in its appeal to the D.C. Circuit. Moreover, the invalidation of the concurrence and its consequence to gaming at the Madera Site do not require that the two-part determination under IGRA be invalidated or rescinded. *Id.* at 250.

Stand Up's challenge to the validity of the Secretarial Procedures in this action will have no effect on the validity of the two-part determination. Thus Stand Up is not collaterally attacking the two-part determination.

Stand Up also does not challenge the trust decision in this action; nor can Stand Up's fifth claim be interpreted as a collateral attack on the trust decision. The trust decision is entirely a creature of the Indian Reorganization Act (25 U.S.C. § 5101 *et seq*.), which is not dependent upon the Governor's concurrence. While the Secretary generally makes the two-part determination prior to deciding whether to take the land into trust, Stand Up's challenge here can have no impact on the trust decision. Under the applicable regulations, "if a notice of intent to take the land into trust has been issued" and the Governor fails to concur, "the Secretary will withdraw

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that notice pending a revised application for a non-gaming purpose." 25 C.F.R. § 292.23(a)(2). If, however, the land is already in trust and the Governor fails to concur, "the applicant tribe may use the newly acquired lands only for non-gaming purposes." *Id.* § 292.23(a). The invalidation of the Secretarial Procedures under Stand Up's fifth claim can affect only whether the North Fork Tribe can conduct class III gaming at the Madera Site and will leave the trust decision unaffected.

Contrary to the Tribe's contention, *Big Lagoon Rancheria v. State of California*, 789 F.3d 947 (9th Cir. 2015) (en banc), does not compel a contrary conclusion. In that case, the Big Lagoon Tribe brought suit against the State of California for failure to negotiate a compact in good faith. The State argued that the Tribe lacked standing to compel compact negotiation because the BIA's decision to acquire the land into trust for the tribe was improper and because the Tribe was not properly recognized as an Indian Tribe. *Id.* at 952. The Ninth Circuit rejected these arguments as improper collateral attacks on past agency decisions that had gone unchallenged during the limitations period. According to the court, the proper vehicle for challenging the trust acquisition was a suit brought under the APA. The State of California had brought no such suit, and even if the State had done so in response to the Tribe's suit, such a challenged would have been time barred. *Id.* 953-54. The Court rejected the State's argument regarding the Tribe's federal recognition on the same grounds. *Id.* at 954.

Here, Stand Up challenges under the APA only the most recent federal decision to authorize gaming under Secretarial Procedures. The North Fork Tribe concedes that this decision was separate and independent from the two-part determination or the trust decision. [Dkt. 37 at 43.]

C. The Secretary's decision to prescribe Secretarial Procedures without resolution of the state-law issue or determining that such resolution was unnecessary was arbitrary and capricious

The North Fork Tribe's assertion that "Stand Up makes no effort to tie its APA claim to the APA's standard of review" [Dkt. 37 at 52] is plainly wrong. Under the APA, this Court must

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hold unlawful and set aside agency action that is "not in accordance with law." 5 U.S.C. § 706(2). The Secretarial Procedures purport to authorize class III gaming on a property that is ineligible for gaming if the Governor's concurrence is invalid. 25 U.S.C. § 2719(a), (b)(1)(A). Ultimately, whether the procedures can authorize gaming at the Madera Site turns on the California Supreme Court's decision. If the Supreme Court holds that as a matter of California law the Governor lacked the authority to concur, then irrespective of the timing of that decision, the issuance of the procedures cannot overcome the concurrence's invalidity *ab initio* and "vivify that which was never alive." *Pueblo of Santa Ana v. Kelly*, 104 F.3d, 1546, 1548 (10th Cir. 1997). Gaming under the procedures would therefore violate IGRA. *See* 25 U.S.C. § 2719(b)(1)(A) (providing that gaming may be authorized on newly acquired land "only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination.").

The defendants argue, however, that Stand Up's argument is irrelevant because the Court's power of judicial review under the APA is limited to the administrative record and neither the state court of appeal decision or the California Supreme Court's decision is part of that record. [Dkt 39 at 46-48.] Notably, the Secretarial Procedures fail under defendants' standard because the administrative record demonstrates that the Secretary either ignored the concurrence issue or reached a conclusion and failed to provide any reasoned explanation for it. Either is inadequate under APA review and requires the Court to hold the Secretary's decision to issue the Secretarial Procedures was arbitrary and capricious.

1. The administrative record demonstrates that questions regarding the validity of the concurrence were before the Secretary at the time of the decision and inadequately addressed

It is a fundamental principle of administrative law that "[a]n agency 'must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection to the facts found and the choice made." *Humane Soc. Of U.S. v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463

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U.S. 29, 43 (1983)). The agency cannot blind itself to inconsistencies or "potential tension between current and earlier factual determinations in . . . related administrative actions." *Id.* Relatedly, the Secretary cannot manipulate the administrative record by ignoring relevant data that is contrary to the decision. *See Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) ("The whole administrative record . . . consists of all documents and materials directly or *indirectly* considered by the agency decision-makers and includes evidence contrary to the agency's position." (citation omitted) (quotation marks omitted)).

Here, the validity of the concurrence under state law was relevant to the Secretary's decision to issue the procedures. Without a concurrence gaming cannot occur at the Madera Site. 25 U.S.C. § 2719(b)(1)(A). While the concurrence is "given effect under federal law, . . . [t]he [Governor's] authority to act is provided by State law." *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 696 (9th Cir. 1997) ("If the Governor concurs, or refuses to concur, it is as a State executive, under the authority of state law."). The administrative record demonstrates that at the time the Secretary issued the procedures, he was well aware that the concurrence was being challenged and could potentially be invalidated under state law. Moreover, he was also aware of the dispute regarding the effect of the concurrence's invalidity on whether gaming could occur at the Madera Site under IGRA.

The administrative record contains both the Secretary's request for the Governor's concurrence, [AR00000240, AR00000241 (making request)] and the Governor's concurrence itself. [AR00000317-318.] Indeed, Secretarial Procedures cannot purport to authorize gaming if the Governor never concurred. 25 U.S.C. § 2719(b)(1)(A). The administrative record, however, also reflects the state-law concurrence dispute by including the superior court decisions from both *Stand Up v. State* [AR00000456-474] and *United Auburn* [AR00000228], both of which found the Governor had the authority under state law to concur. Additionally, the record includes the briefs submitted by the State of California in the superior court in *Stand Up v. State* [AR00000499-518 (raising the argument based on the "retrocession cases" asserted by the

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defendants)] and in the Fifth District Court of Appeal—further acknowledging that the dispute had not been resolved at the time the procedures were issued. [AR00000519 - 561.] Importantly, despite acknowledging the dispute, the administrative record contains only documents supporting the concurrence's validity. The State's briefs on the issue are included, but Stand Up's are not.[7]

The D.C. Circuit's decision in *Butte County v. Hogan*, 613 F.3d 190 (D.C. Cir. 2010) supports the conclusion that the secretary's failure to consider the validity of the governor's concurrence was arbitrary and capricious. In *Butte County*, the County challenged the Department's decision finding that land acquired into trust for the Mechoopda Tribe qualified under IGRA's restored lands exception. In 2003, the National Indian Gaming Commission ("NIGC") determined that the land qualified as restored land. *Id.* at 193. In 2006, and before the Department made a final decision, the County submitted a report that challenged the NIGC's conclusion. *Id.* The Department responded to the County that "[w]e are not inclined to revisit this decision now because the Office of the Solicitor reviewed this matter in 2003, and concurred in the NIGC's determination . . . ." *Id.* at 193-94. The Department did not issue its final decision until 2008. *Id.* at 194. The Court held that the decision to ignore the County's evidence was "totally irrational" because the Department not only ignored part of the administrative record, but failed to offer any reasoned explanation for its actions. *Id.* at 195.

Here, while the Secretary's decision to issue the Secretarial Procedures was not part of the previous two-part determination, some of the issues carried over. Even if the Secretary was not required to delve into validity of the concurrence under state law in 2012, by 2016, significant evidence was before the Secretary that the validity of the concurrence was in question and may affect the legality of gaming at the Madera Site.

Though the Secretary was aware that the state-law issue could present a barrier to gaming

[7] The administrative record contains a lengthy memorandum from Picayune asserting that gaming cannot be authorized by the Secretarial Procedures because the concurrence is invalid [AR00000143-158] and a complaint Picayune filed in Madera County Superior Court challenging the validity of the concurrence. [AR00000562.] While these documents further demonstrate the Secretary's awareness of the concurrence dispute and its potential consequences for gaming at the Madera Site, they raise different issues and theories from Stand Up's.

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at the Madera Site, nothing regarding this dispute or its possible implications is reflected in either the letter informing the Tribe that the Secretarial Procedures had been prescribed and were in effect [AR00002186-88] or the Secretarial Procedures themselves. [AR00002189-2325.] Accordingly, the Secretary either (1) violated the APA by feigning blindness and failing to address the issue at all; or (2) violated the APA by concluding that the validity of the procedures was not dependent on the validity of the concurrence under State law but failed to offer any reasoned explanation for this conclusion. *Locke*, 626 F.3d at 1051.

2. The Secretary's obligation to prescribe procedures does not allow him to do so in violation of IGRA

The defendants argue that the Secretarial Procedures will remain valid irrespective of any decision by the California Supreme Court because under IGRA, the Secretary was compelled to issue the procedures. [Dkt. 37 at 41.] According to the Tribe, the Secretary would have violated IGRA had he not prescribed the procedures. [*Id.* at 42.] This is incorrect. While IGRA provides that if the state refuses to consent to the mediator-selected compact, the Secretary "shall prescribe procedures," IGRA further requires the Secretary to ensure that the procedures are consistent with IGRA and state law. 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Thus the Secretary cannot prescribe procedures where doing so would violate either IGRA or state law. Here, he failed to reasonably consider both of these constraints.

That proper consideration of the concurrence or waiting for a decision by the California Supreme Court would delay issuance of the procedures does not contradict IGRA's statutory scheme, but is in accord with it. Beyond the Tribe's reliance on the vague assertion that the Secretarial Procedures should be prescribed "expeditiously" to facilitate gaming under them, IGRA does not provide any time limit within which the Secretary must act. Moreover, nothing in IGRA indicates the Secretary could not comply with his obligation to prescribe procedures by waiting for resolution of the state law issue.

In contrast to the Secretary's approval of a compact under 25 U.S.C. § 2710(d)(8), IGRA

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requires the Secretary consider the relevant state law before issuing procedures. For example, in the procedures issued to the Mashantucket Pequot Tribe of Connecticut, the Secretary prohibited the Tribe from operating class III gaming devices because of a dispute between the State and the Tribe as to whether such devices were legal under Connecticut law. The procedures further provided that the prohibition would remain in place unless and until the state revised its laws or the state and the tribe reached an agreement allowing the tribe to operate such devices. Secretarial Procedures for Mashantucket Pequot Tribe, sec. 15(a), *available at* https://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm. Nothing prevented the Secretary from following a similar course here.

The defendants will no doubt argue that the Mashantucket Pequot procedures support their argument that IGRA's requirement for the Secretary to consider state law in prescribing procedures is limited to considering "the permissible scope or form of gaming and the regulatory scheme for oversight of gaming." [Dkt. 37 at 42.] For example, because California does not allow roulette or dice games, the Secretarial Procedures cannot authorize these games. Such a decision unquestionably falls within the requirement to consider state law, but IGRA contains no language limiting the Secretary to such narrow considerations. Rather, it requires consistency with the "relevant provisions" of state law. If state law does not authorize concurrences, the provisions of state law are relevant to whether gaming can occur at the site at all. As the treatise the Tribe cites notes, this provision "presumably is intended to ensure that the procedures do not authorize gaming that otherwise could not be conducted under a compact." [Dkt. 37 at 42 (citing *American Indian Law Deskbook* § 12.30 (2017)).] Without a valid concurrence, gaming could not be conducted under a compact either. *See Keweenaw Bay Indian Cmty. v. United States,* 136 F.3d 469, 475 (6th Cir. 1998) (holding that despite successfully entering into a compact in 1993 for gaming on land acquired in trust in 1990, the Tribe could not conduct gaming before satisfying 25 U.S.C. § 2719(b)(1)(A)).

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D. The facial validity of the concurrence at the time it was issued is irrelevant to the validity of the Secretarial Procedures

The Court should also reject the defendants' argument under the retrocession cases that "federal officials are entitled to rely on the facially valid actions of state officials when federal regimes depend upon state involvement." [Dkt. 37 at 48.] Contrary the circumstances in the retrocession cases, under IGRA, federal action cannot cure invalid state action and "vivify that which was never alive." *Pueblo of Santa Ana*,104 F.3d at 1548. This is true even where the Secretary was not obligated at the time to inquire into the validity of state action under state law. *Id.* (holding that a compact approved by the Secretary must subsequently be deemed invalid "if it turns out that the state has not validly bound itself to the compact").

The 10th Circuit has rejected application of the retrocession cases to IGRA, and its reasoning applies here as well. In *Pueblo of Santa Ana*, the10th Circuit addressed whether the Secretary's approval of a compact that had not been validly entered into under state law was in effect under federal law because the Secretary was entitled to rely on the facial validity of state action. The Court held that the "'entered into' language imposes an independent requirement that the compact must be validly entered into by a state *before* it can go into effect, via Secretarial approval under IGRA." *Pueblo of Santa Ana*, 104 F.3d at 1555 (emphasis added). Therefore, if the compact is not validly entered into under state law, it cannot be made effective by Secretarial approval. *Id.* 1548. The plaintiff tribes relied on the retrocession cases to argue that the "Secretary's approval of the compacts conclusively establishes their validity." *Id.* at 1555 & n. 12. The Court rejected the argument, holding that "the retrocession cases involve different considerations from this case and do not control this case." *Id.* at 1555 n. 12. Specifically, the Court noted the findings of the district court that distinguished IGRA from retrocession because retrocession "is a one-time event between the state and the United States; that the policy behind the retrocession statute strongly favored federal jurisdiction; that gaming compacts are ongoing agreements imposing affirmative duties on the states; and that the policy of finality, important to

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the retrocession statute, is less important to IGRA." *Id.* (citation omitted).

Despite that section 2719(b)(1)(A) also employs a statutory scheme contingent upon state involvement [*see* Dkt. 29 at 25-26], the North Fork Tribe attempts to distinguish the issue here from the holding in *Pueblo of Santa Ana* by arguing that the "concurrence is a one-time event between the governor and the United States; the policy behind the concurrence favors federal interests because the concurrence simply removes the federally imposed restriction on tribal land use; the concurrence does not impose any affirmative obligations on the states, but simply satisfies a condition for the Secretary to authorize gaming." [Dkt. 37 at 51-52.] These arguments inaccurately describe not only the statutory scheme but also the concurrence's purpose and effect. Governor Brown's concurrence cannot be interpreted accurately as "one time act" in the same way as retrocession, because retrocession was entirely a federal action that removed state responsibilities, and the concurrence, by contrast, created and facilitated state responsibilities, obligations, and options it otherwise would not have.

In section 2719(b)(1)(A), Congress placed even more emphasis on state action than it did in the provision requiring states to first "enter into" a compact before it goes into effect under federal law through Secretarial approval. While the Secretary must obtain the governor's concurrence, he does not "approve" it or "disapprove" it as he does with a compact. The concurrence stands alone as an independent requirement. The Secretary's two-part determination and the Governor's concurrence are "separate requirement[s] for gaming to take place on newly-acquired, non-reservation lands." *Stand Up for California!*, 204 F. Supp. 3d at 250. "The Secretary's two-part determination is not contingent upon the Governor's concurrence, but *gaming* on the land acquired in trust by the Secretary after October 17, 1988 is contingent upon the Governor's concurrence." *Id.* at 250-251. Indeed, in holding that the concurrence provision was not an invalid delegation undermining executive authority, the 9th Circuit held that "the formality of which official acts first should not be determinative. The important consideration is that both officials must act." *Confederated Tribes of Siletz Indians*, 110 F.3d at 696. Thus the idea

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that Secretary's authorization of gaming through Secretarial Procedures can cure an invalid concurrence makes even less sense than the notion rejected in *Pueblo of Santa Ana*. Under section 2719(b)(1)(A), the issue is that one of two separate and independent requirements was not met, and Secretarial action can have no effect on that. Accordingly, Secretarial Procedures cannot cure a concurrence that was not validly issued under state law.

Despite that the Governor issued the concurrence as a "one-time" event, the concurrence did not, as retrocession did, transfer all responsibilities from the state to the federal government; nor was it merely a transaction between the State and the federal government. Rather it was the predicate action for the State to assert its own interests and develop relationships with Indian tribes. Governor Brown issued the concurrence on the same day as, and in conjunction with, a compact, which, if ratified, committed California to long term regulatory obligations. [AR00000572.] Additionally, the concurrence involved broad statewide policy decisions affecting the State's relationship with other Indian tribes and an attempt to control the development of off-reservation Indian gaming within the State. Governor Brown issued the concurrence in exchange for the North Fork Tribe's agreement to contribute revenue to the Wiyot Tribe in support of a separate agreement with that tribe to forgo gaming on its own environmentally sensitive land. [AR00000330.] The Governor also concurred in exchange for the North Fork Tribe's agreement to make additional revenue sharing payments with the Chukchansi Tribe to mitigate competitive impact to that tribe's on-reservation casino. [AR00000331.] Thus while the concurrence was issued once, its purpose was to enter into an ongoing relationship with both the North Fork Tribe and the Wiyot Tribe and to exert some measure of control over the spread of Indian gaming in California.

The concurrence also represented far more than the mere removal of a land use restriction under federal law. The North Fork Tribe ignores that the concurrence removed a land-use restriction under state law. As Governor Brown acknowledged, the concurrence would "allow the expansion of gaming on land currently ineligible for it." [AR00000317.] This is true as a matter

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of federal law because the land was not Indian land. And it is also true as a matter of state law because the California Constitution prohibits casino gaming on non-Indian land. Cal. Const., art. IV., § 19(e). The purpose of the concurrence was therefore not only to authorize gaming at the Madera Site under federal law but also to authorize it under State law. *See id.* art. IV., § 19(f) (authorizing gaming on Indian land in California pursuant to a tribal state compact). Thus, in contrast to retrocession which eliminated state jurisdiction, the concurrence brought gaming at the Madera Site within the jurisdiction of the State's gaming laws, so that the State could participate in the regulation of gaming.

Finally, contrary to the Tribe's assertion, the policy behind the concurrence provision favors state interests over federal. The concurrence provides states with an absolute veto over off-reservation gaming. If the governor does not concur, the tribe cannot conduct gaming on the land even if the Secretary has made a favorable two-part determination. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 656 (7th Cir. 2004). In fact, if the Secretary has not yet acquired the land into trust, the Secretary may not do so without the concurrence. *Id.* As one federal district court has held, "The meaning of § 2719(b)(1)(A) is unmistakably clear: *Congress made the state's interests paramount* by granting the Governor veto power of the DOI's determination." *Confederated Tribes of Siletz Indians*, 841 F. Supp. 1479, 1490-91 (D. Or. 1994). Because the concurrence favors state interests, the "finality" of federal action to authorize gaming must yield to those interests, and the legality of the concurrence under state law must be resolved before gaming can occur at the Madera Site.

V. THE FEDERAL AGENCY DEFENDANTS VIOLATED THE FREEDOM OF INFORMATION ACT

The North Fork Tribe does not contest Stand Up's FOIA claim. And the federal defendants make a muddled argument, unsupported by any citation, that the Secretary did not violate FOIA because Stand Up's other claims "do not relate to the administrative record or its completeness." [Dkt. 41 at 38.] The federal defendants then make a strange offer—that they will

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alert the court if Stand Up's request is fulfilled by the "relevant agency" before the court issues a decision. *Ibid*. Except that the "relevant agency" is, in fact, one of the federal defendants, and that "relevant agency" does not get to choose if and when to comply with FOIA.

Critically, defendants concede that: (1) Stand Up made a proper FOIA request to the Department of the Interior's Bureau of Indian Affairs; (2) the Department of the Interior received this request and agreed that the Bureau of Indian Affairs would respond; and (3) neither the Bureau of Indian Affairs nor the Department of the Interior has responded to Stand Up's FOIA request beyond acknowledging receipt and agreeing to respond. [*See* Dkt. 42 at 2-5 (conceding that Stand Up's Statement of Undisputed Facts and Supporting Evidence are undisputed).] This is insufficient under FOIA. *Citizens for Responsibility and Ethics in Washington v. FEC*, 711 F.3d 180, 185 (D.C. Cir. 2013). Stand Up is entitled to a declaratory judgment and injunctive relief to compel federal defendants to respond to its requests. *South Yuba River Citizens League v. National Marine Fisheries Serv.*, 2008 WL 2523819 at *6, *17 (E.D. Cal. June 20, 2008).

CONCLUSION

For the foregoing reasons, the Court should grant Stand Up's motion for summary judgment, deny defendants' cross-motions for summary judgment, and enter judgment in favor of plaintiffs, holding unlawful and setting aside the Secretarial Procedures.

Dated: August 28, 2017

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By:/s/ *Sean M. Sherlock*
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[Related Cases: 16-cv-950-AWI and 1:15-cv-00419-AWI

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2017, the attached document **OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** was electronically transmitted to the Clerk of the Court using the CM/ECF System which will send a Notice of Electronic Filing to the following CM/ECF registrants:

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