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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STAND UP FOR CALIFORNIA!, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, and North Fork Rancheria of Mono Indians, Intervenor Defendant.	Case No. 16-cv-02681-AWI-EPG

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In the end, this case presents the Court with a single issue: when the Indian Gaming Regulatory Act ("IGRA") requires the Secretary of the Interior ("Secretary") to prescribe Secretarial Procedures for a tribe because a state has failed to act in good faith, whether the tribe is penalized because the Secretary lacks the authority to prescribe Procedures that include gaming devices that are otherwise permissible in the state. IGRA contemplates casino-type or "Class III" gaming occurring pursuant to a Tribal-State compact and provides the details regarding what compacts must encompass, how they are approved, and what remedies a tribe has where a state fails to negotiate in good faith. By contrast, Secretarial Procedures are given brief treatment, as the last stop in a remedial process for a tribe confronted by a state that refuses to negotiate a compact in good faith or to negotiate at all. Based on this lack of detail, Plaintiffs ("Stand Up") in their first claim urge this Court to draw implicit distinctions, with far-reaching consequences, between the Secretary's authority pursuant to compacts and Procedures based on a lack of specificity in IGRA. Specifically, they claim that the Johnson Act prohibits certain forms of gaming under Procedures but not pursuant to compacts. This approach in effect penalizes a tribe when a state engages in bad faith and forces the Secretary to promulgate Procedures.

Stand Up's second and third claims attempt to further mine the purported distinction between Procedures and compacts by claiming that Secretarial Procedures are subject to review under the National Environmental Protection Act ("NEPA") as well as the Clean Air Act ("CAA"), even though the same is concededly not true in the case of a Tribal-State compact. And finally, Stand Up asks this Court to find that the Secretary is barred from issuing Procedures unless and until every other requirement for Class III gaming under IGRA has been met, which is not true for compacts. Stand Up's theory is not that the North Fork Rancheria of Mono Indians ("Tribe" or "North Fork") cannot game until all of IGRA's requirements are met, but that the Secretarial Procedures themselves must be vacated if Stand Up can prevail in challenging the Tribe's compliance with other requirements of IGRA.

These arguments are a brazen attempt to transform the mechanism that Congress designed to counteract state intransigence into a weapon to be used strategically to constrain tribal gaming. None of this is supported by the plain language of IGRA, and Plaintiffs' challenges to the Secretarial Procedures issued for the Tribe should be rejected and the Court should grant Defendants' motions for summary judgment.

ARGUMENT

I. THIS COURT SHOULD REJECT STAND UP'S WHOLLY UNSUPPORTED THEORY THAT SECRETERIAL PROCEDURES ARE INFERIOR AND CANNOT AUTHORIZE THE USE OF SLOT MACHINES.

Stand Up's newly minted theory, that IGRA authorizes two different types of Class III gaming—one for Tribal-State compacts and another, inferior and restrictive, type under the Secretarial Procedures—should be rejected. Stand Up seeks to narrowly construe a particular subsection in § 2710(d), 25 U.S.C. § 2710(d)(6), which waives the Johnson Act's (15 U.S.C. § 1175) restriction on the use of gambling devices in Indian county, such that it only applies to Class III gaming under Tribal-State compacts and not Secretarial Procedures.[1] Their argument, would, if adopted, mean that slot machines may never be authorized through Secretarial Procedures. It would read "Class III" gaming in two entirely different ways, a result that is contrary to bedrock statutory interpretation principles and IGRA's congressional purpose. It would, indeed, force this Court to add limitation language to the legislation. And it would lead to the perverse result that states would be incentivized to refuse to negotiate in good faith, knowing that their intransigence will be rewarded by a ban on certain types of Class III gaming – an outcome completely opposite from the remedial purpose intended by Congress. Defendants are entitled to summary judgement in their favor with respect to Stand Up's Johnson Act claim.

Stand Up's theory would result in "Class III" gaming having a different meaning for Secretarial Procedures. An elementary principle of statutory construction requires that terms

[1] Moreover, the Interior Department has consistently held the view that Class III gaming under the Secretarial Procedures does not differ from Class III gaming under a Tribal-State compact. That interpretation should be accorded deference.

within the same statute should be given the same meaning. *See, e.g.*, *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) ("identical words used in different parts of the same act are intended to have the same meaning"). Congress used the same term, "class III gaming," with regard to both Tribal-State compacts and Procedures. 25 U.S.C. § 2710(d)(7)((B)(vii)(II) expressly says Secretarial Procedures apply to all "class III gaming [to be] conducted on Indian lands." The term "class III gaming" is not limited here, and nowhere else does the statute provide a separate definition for the purposes of Secretarial Procedures. Stand Up's "plain language" reading of IGRA means the statute requires Secretarial Procedures to allow "class III gaming [to be] conducted" on Indian lands, 25 U.S.C. § 2710(d)(7)((B)(vii)(II), while *simultaneously* making unlawful Secretarial Procedures that authorize Class III gaming utilizing devices banned by the Johnson Act. It would apply exclusively the language at 25 U.S.C. § 2710(d)(6) to effectively override 25 U.S.C. § 2710(d)(7)((B)(vii)(II)'s plain meaning and unconditioned authorization of Class III gaming pursuant to Secretarial Procedures, making "class III gaming" mean different things in the same statute. That interpretation flouts the statutory interpretation principle and must be rejected.

Stand Up's theory violates the principle that courts may not add limitation language to statutes. Courts lack authority to add restrictive terms to statutes. *Overseas Educ. Ass'n, Inc. v. FLRA*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley, J., concurring). Yet this would happen if this Court added "except slot machines" to 25 U.S.C. § 2710(d)(7)((B)(vii)(II).

Stand Up's theory is inconsistent with the statutory scheme. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food and Drug Administration v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). That means that "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson*, 529 U.S. at 132; *see also Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014). In addition, courts "must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a

provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Stand Up's theory, in contrast, requires reading 25 U.S.C. § 2710(d)(6) without context. It would, among other things, mean that IGRA simultaneously authorizes Class II gaming, which includes devices banned by the Johnson Act, 25 U.S.C. § 2703 (7)(A)(i), even as it prohibits use of the same devices for Class III gaming. In no sense can this convoluted reading of IGRA be sustained, let alone understood as tracking its plain language.

Not one word of legislative history supports Stand Up's theory, and the congressional purpose refutes it. "[U]nderstanding the historical context in which a statute was passed can help to elucidate the statute's purpose and the meaning of statutory terms and phrases." *County of Amador v. Dep't of Interior*, No. 15-17253, D.C. No. 2:12-cv-01710-TLN-CKD, slip op. at 20 (9th Cir. Oct. 6, 2017) attached as Exh. 1 to Kintz Declaration. Congress enacted IGRA with the stated 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). In an effort to read into IGRA a distinction between the scope of Class III gaming under Tribal-State compacts and under Secretarial Procedures, Stand Up alleges, without support in either statutory text or legislative history, that Congress envisioned Secretarial Procedures as allowing only a stunted form of Class III gaming as a result of a tribe failing to convince a state to agree to a compact. This would penalize tribes for the state's failure to negotiate in good faith. The legislative history behind IGRA's gaming compact provision and the remedial process that can result in Secretarial Procedures does not suggest that Secretarial Procedures are anything but a substitute for a gaming compact where a state refuses to agree to a compact. *See S. Rep. 100-446* at 14-15 (1988) (IGRA's remedial process designed to "encourage States to deal fairly with tribes as sovereign governments"); *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299-300 (9th Cir. 1998) (through gaming compacts "IGRA shifted power to the states" to regulate tribal gaming but remedial process subjected "recalcitrant states" to suit, "thereby forcing them to enter into a compact"). If Congress

intended otherwise, it could have said so directly. *County of Amador*, No. 15-17253 at 16 n.8 (citing *Zachary v. Cal. Bank & Tr.*, 811 F.3d 1191, 1198-99 (9th Cir. 2016)).

Rather than attempting to square its construction of IGRA and the Johnson Act waiver under § 2710(d)(6) with IGRA's legislative history, Stand Up instead attempts to distort the state's role in regulating tribal gaming through gaming compacts. Stand Up argues, [Dkt. 46 at 15-18], that states cannot be forced to enter compacts and that where a state demonstrates it negotiated in good faith but was unable to arrive at a compact, the tribe cannot engage in Class III gaming. That is true, but also irrelevant since Secretarial Procedures emerge only where a court has concluded a state did not negotiate in good faith. 25 U.S.C. 2710(d)(7)(B)(iii). Nothing indicates that IGRA is meant to reward states that negotiate compacts in bad faith by drastically limiting the Class III gaming available in Secretarial Procedures.

Stand Up also points to 25 U.S.C. § 2710(d)(1)(B), which requires that Class III gaming only be allowed "in a State that permits such gaming for any purpose by any person, organization or entity . . . ." But that is a limitation on all Class III gaming, and simply does not speak to whether Congress intended Secretarial Procedures to offer a curtailed form of Class III gaming that would otherwise be permitted under a Tribal-State compact. In any event, California law now permits the use of slot machines, so this provision is not pertinent here. In sum, Stand Up's attempts to shoehorn its construction of Class III gaming into IGRA's remedial scheme fail and further conflict with IGRA's overall purpose.

Stand Up's theory makes no sense. But reading IGRA as treating Secretarial Procedures as a variant of a Tribal-State compact that emerges when a state in bad faith refuses to agree to any compact does. The Johnson Act waiver extends to Class III gaming under Tribal-State compacts as well as their substitute, Secretarial Procedures. Section 2710(d)(7)(B)(vii)(II), instead of contradicting the other provision, dictates a requirement that must be followed when the Secretary prescribes Procedures: that such Procedures provide that "class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." This common sense reading avoids the strained interpretation advanced by Stand Up, which requires concluding that the mention of Class III gaming means something different depending on whether it is used in

connection with compacts or Procedures (in effect, sometimes including devices banned by the Johnson Act, and sometimes not).

Stand Up's theory suffers from other defects. Under its reading of IGRA, the word *only* within § 2710(d)(1) would be rendered inoperative because § 2710(d)(7)(B)(vii)(II) also authorizes Class III gaming under different circumstances. Additionally, if Stand Up were correct—that the Secretary's authority to authorize Class III gaming through the issuance of Secretarial Procedures does not stem from § 2710(d)(1), but from another provision within IGRA viewed as an "exception" to § 2710(d)(1)—this would mean that when the Secretary issues Procedures, he is not bound by the other requirements within § 2710(d)(1). Stand Up essentially reads Secretarial Procedures "Class III gaming" under § 2710(d)(1)(c) to mean "gaming, except for gaming devices restricted under the Johnson Act, regardless of whether a state permits such gaming by operation of state law or whether the tribe has issued an ordinance approved by the National Indian Gaming Commission." And Stand Up reads Tribal-State compact "Class III gaming" under § 2710(d)(1) to mean "gaming, notwithstanding the restrictions under the Johnson act, as long as the state permits such gaming under state law and the tribe has an authorized ordinance." But IGRA does not say this, and nothing empowers Stand Up to add language to and infer meaning into IGRA that is not present in the statute as written by Congress.

Adoption of Stand Up's theory would give states incentives to negotiate in bad faith. This would be an obvious result of a ruling that Procedures may not authorize slot machines otherwise permissible under Class III gaming. Stand Up would impose a rule that even when a federal court has concluded that a state has failed to negotiate in good faith, the Secretary is powerless to remedy that failure, and Procedures that result are, at best, second-best. That result would make the remedial scheme a nullity, a mere charade.

Any ambiguities found within IGRA must be construed in favor of Tribes. In earlier briefing, Federal Defendants noted that if an ambiguity were to be found with respect to the scope of IGRA's authorization of Class III gaming under the Secretarial Procedures, the *Blackfeet* canon would apply, requiring that any ambiguity be interpreted in favor of Indian tribes. *See Montana*, 471 U.S. at 766; *see also Rincon Band of Luiseno Mission Indians of*

Rincon Reservation v. Schwarzenegger, 602 F.3d 1019, 1027 (9th Cir. 2010) ("In passing IGRA, Congress assured the tribes that the statute would always be construed in their best interests."). [Dkt. 41 at 26].[2] Rather than refuting the application of the *Blackfeet* canon, Stand Up's only response is that the Court should disregard application of the canon because IGRA is not ambiguous. [Dkt. 46 at 20]. Federal Defendants agree with Stand Up that IGRA is not ambiguous and that its meaning is clear – that the language of IGRA coupled with IGRA's overall purpose unequivocally authorize Class III gaming under the Secretarial Procedures to the full extent it is authorized pursuant to a Tribal-State compact. But to the extent this Court regards Stand Up's reading as a viable alternative on some level, the *Blackfeet* canon requires adoption of the statutory reading that does not read IGRA against the interests of tribes.

II. THE SECRETARIAL PROCEDURES ARE VALID

A. Stand Up's Fifth Claim is Barred Based on Issue Preclusion

In spite of Stand Up's efforts to argue its fifth claim is not barred by issue preclusion, this Court has already analyzed and rejected similar efforts made by Picayune, the other plaintiff in the District of Columbia case, to challenge the Secretarial Procedures on the basis of invalidity of the Governor's concurrence. *Picayune Rancheria of Chukchansi Indians v. United States Department of Interior*, No. 1:16-CV-0950-AWI-EPG, 2017 WL 3581735, at *9 (E.D. Cal. Aug. 18, 2017). Identical to Stand Up's claim here, the Picayune's sixth cause of action in *Picayune* sought challenge "because the Governor's concurrence was invalid . . ., issuance of secretarial procedures for conducting class III gaming on the Madera Site was inconsistent with IGRA." 2017 WL 3581735, at *5. Like Stand Up does here, Picayune attempted to argue that collateral estoppel principles do not apply because the validity of the concurrence has been conclusively decided by California Court of Appeals. *Id.* at *5. In rejecting this, the Court recognized that the District of Columbia action held that "'claims [that] in any way involve[ ] the Governor's concurrence must be dismissed due to the absence of an indispensable party,' namely the State of California." 2017 WL 3581735, at *7 (quoting *Stand Up*, 204 F.Supp.3d at 247 n.16). Thus, the

[2] Page references to documents in ECF refer to the ECF pagination, not the original pagination.

Court in *Picayune* determined that Picayune was "precluded from re-litigating whether California is an indispensable party to claims challenging the validity of the Governor of California's concurrence with the Secretary's two-part determination," *Picayune*, 2017 WL 3581735, at *14. For the same reasons, Stand Up is precluded from raising the issue here and Stand Up's fifth cause of action must be dismissed on the grounds that the State of California is a necessary and indispensable party to those claims.[3]

B. Stand Up's Challenge to the Secretarial Procedures is An Impermissible Attack on Prior Agency Action

Stand Up acknowledges that its challenge to the validity of the Secretarial Procedures cannot result in an invalidation of the two-part determination or a change in the trust status of the Madera Site, but argues that it is not seeking to collaterally attack those decisions. Yet, Stand Up's basis for challenging the Secretarial Procedures rests on the very premise that the Secretary was under some obligation to *re-evaluate prior determinations made by the Secretary* about the Tribe's gaming eligibility on the Madera Site (based on the validity of the Governor's concurrence) made in the context of those earlier decisions. This is exactly the type of scenario that the collateral attack doctrine is designed to prevent. "The collateral attack doctrine prevents litigants from 'relitigat[ing] the merits of . . . previous administrative proceedings' or 'evading . . . established administrative procedures' by raising a claim that is 'inescapably intertwined with a review of the procedures and merits surrounding' an underlying agency order." *Ctr. for Biological Diversity v. U.S. Envt'l. Prot. Agency*, 847 F.3d 1075, 1092 (9th Cir. 2017) (citing *Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006)). And "[a]t its core, the doctrine prohibits a plaintiff from using a later order that implements a prior agency action as a vehicle to undo the underlying action or order." *Ctr. for Biological Diversity*, 847 F.3d at 1092. Nothing in IGRA's remedial process, other provisions of IGRA, or other federal laws, require the Secretary to "delve into the validity of the Governor's concurrence" before it issues Secretarial Procedures.

[3] Despite the Court's decisions being issued on August 18, 2017, ten days before Stand Up's deadline to file its response, Stand Up fails to grapple with, attempt to distinguish, or even cite to the Court's decision.

Rather, the validity of the Governor's concurrence relates to the threshold determination of the Tribe's gaming eligibility on the Madera Site, a determination made in the context of and "inextricably intertwined" with the underlying two-part determination and trust decision. The Secretarial Procedures, on the other hand, are the result of Congress's mandate, established under a wholly separate section of IGRA that was supervised by this Court, that the Secretary "shall" issue Class III gaming procedures after receiving the mediator's compact selection. *Compare* 25 U.S.C. § 2719 (b)(1)(A) and 25 U.S.C. § 2710(d)(7)(A)(vii). The Procedures are not a vehicle to relitigate the issues of the unrelated prior agency decision that Stand Up disagrees with regarding the gaming eligibility of the Madera Site, and for this reason, Stand Up is prohibited from doing so under the collateral attack doctrine.

Moreover, Stand Up's theory – that the potential invalidation of the Governor's concurrence with the Secretary's determination that gaming on the Madera Site will be in the Tribe's best interest and not detrimental to the surrounding community, 25 U.S.C. 2719(b)(1)(A), also invalidates the Secretarial Procedures – is simply wrong. In order to engage in Class III gaming, several conditions must be met. The gaming (1) must be on "Indian lands," (2) must be conducted pursuant to an ordinance approved by the Chairman of the National Indian Gaming Commission, and (3) must be conducted pursuant to a Tribal-State compact (or Secretarial Procedures). 25 U.S.C. § 2710(d)(1)(A,C). Here the Governor's two-part concurrence makes the Madera Site Indian lands eligible for gaming while the Secretarial Procedures meet the requirement that gaming be conducted in "conformance with a Tribal-State compact." If the two-part concurrence is overturned and that in turn makes the Madera Site ineligible for gaming, that does not mean the Secretarial Procedures must be vacated. At most it means the Tribe must take steps to make the Madera Site gaming eligible before gaming pursuant to the Secretarial Procedures may commence. In short, the two-part concurrence provides no basis for overturning the Secretarial Procedures.

C. The Secretary was Entitled to Rely on the Governor's Facially Valid Concurrence

Even if the Secretary were under some obligation to consider the validity of the Governor's concurrence before issuing the Procedures, the Secretary was entitled to rely on the facial validity of the Governor's 2012 concurrence. Stand Up argues that administrative record demonstrates that the Secretary was aware that the concurrence was being challenged and "could potentially be invalidated under state law."[4] [Dkt. 46 at 43]. But even if this were the case, it is not clear what Stand Up thinks the Secretary should have done with this information or how it would have altered IGRA's mandate that the Secretary "shall prescribe" Procedures "which are consistent with the proposed selected compact . . . the provisions of this chapter, and the relevant provisions of the law of the State." 25 U.S.C. § 2710(d)(7)(B)(vii)(I).

Stand Up contends that the provision requiring the Secretary to ensure the mediator-selected compact is consistent with state law required the Secretary to ensure that the Governor's concurrence was consistent with state law. [Dkt. 46 at 46]. Even assuming the Secretary's obligation to looking into "the relevant provisions of the law of the state" went beyond the scope of verifying the mediator-selected compact complies with state law regulation and oversight of gaming, which Federal Defendants contend it does not, at the time that the Secretary issued the Procedures, the Governor's concurrence had not been determined to be invalid under state law. [5] And even today, more than a year after the Secretary prescribed the Procedures, the issue is still

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[4] Stand Up cites *Butte County v. Hogan*, 613 F.3d 190 (D.C. Cir. 2010) in support of its argument that the Secretary's failure to consider the validity of the Governor's concurrence violated the Administrative Procedure Act, but *Butte County* does not support that argument. That case involved a situation in which the Department summarily declined to review evidence submitted to the agency by an interested party in violation of 5 U.S.C. § 555(e), which requires that upon an agency's receipt of an interested party's written request, an agency must at least provide a "brief statement of the grounds for the denial." Those facts are not present here. To the extent that Stand Up cites *Butte County* for the proposition that an agency cannot simply ignore contrary record evidence, it has provided no support, other than conjecture, that the Secretary ignored contrary record evidence.

[5] Stand Up in effect argues that the Secretary cannot issue Procedures until every other requirement for Class III gaming is met, because otherwise such the Procedures might approve Class III gaming in violation of IGRA and potentially state law. But as noted above, while gaming may not occur on the Madera Site until all relevant requirements of IGRA are met, that does not mean that Secretarial Procedures, which will only apply to gaming on Indian lands, may not issue until the Indian lands requirement of IGRA is satisfied. Each is a separate, independent prerequisite of Class III gaming.

pending before the state courts. Stand Up admits that the record reflects that at the time the Secretary issued the Procedures, both state superior court cases had concluded that the Governor had the authority under state law to concur. *Id.* at 46; [AR00000456-474, AR00000228]. Even if there were a pending appeal to the California Court of Appeals on this issue at the time the Secretary issued the Procedures, this would not have given the Secretary the ability to second guess the Governor's previously-submitted concurrence or otherwise delve into state law and attempt to make a determination of its validity. *See, e.g., Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997) ("Congress did not intend to force the Secretary to make extensive inquiry into state law to determine whether the person or entity signing the compact for the state in fact had the authority to do so.") At best, Stand Up's argument seems to be that the Secretary should have waited to see how the state court adjudication resolved before issuing the Procedures. Nothing obligates the Secretary to do so. And notwithstanding the pending California Court of Appeals challenge to the Governor's concurrence at the time of the issuance of the Procedures, federal law imposes no obligation on the Secretary to look beyond the Governor's concurrence to ensure its validity under state law. *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979); *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191 (1978). In fact, requiring the Secretary to look behind the Governor's concurrence would amount to stripping the Governor's actions of a presumption of regularity that would otherwise attach. *See Red Top Mercury Mines, Inc. v. United States*, 887 F.2d 198, 202-203 (9th Cir. 1989) ("There is a presumption of regularity in the performance of their duties by government officials.").

Finally, contrary to Stand Up's broad assertion that *Pueblo of Santa Ana v. Kelly*, 104 F.3d at 1557, stands for the proposition that the Tenth Circuit has rejected application of retrocession cases to IGRA, that case specifically dealt with the validity of a Tribal-State compact under IGRA, which constitutes a contractual agreement between a state and tribe imposing affirmative duties on the state. In contrast, the Governor's concurrence pursuant to 25 U.S.C. § 2719(b)(1)(A), like a Governor's retrocession, "is a one-time event between the state

and the United States." *Pueblo of Santa Ana*, 104 F.3d at 1555 (citing *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1294 (D.N.M. 1996)).

III. THE ISSUANCE OF SECRETARIAL PROCEDURES DOES NOT VIOLATE THE NATIONAL ENVIRONMENTAL POLICY ACT

The Secretary's prescription of Procedures by which North Fork may conduct Class III gaming does not violate the NEPA. Since the Secretary's action does not constitute a major federal action, NEPA's requirements are not triggered. And to the extent that NEPA was triggered, the existing environmental impact statement prepared for the land-into-trust decision satisfies any such obligation. In an effort to support its position that the Secretarial Procedures are a major federal action to which a new NEPA analysis must be done, Stand Up makes several assertions regarding facts and legal principles that it claims Defendants ignore, namely that the mediator does not have the authority to authorize Class III gaming; that the land-into-trust decision for the Madera Site is a separate and independent decision; and Stand Up's interpretation of the provisions of the Procedures. [Dkt. 46 at 22]. Stand Up is incorrect that Defendants ignore these facts; more importantly, none of them, alone or cumulatively, justify adoption of Stand Up's theory.

A. The Secretarial Procedures are not a major federal action triggering NEPA

To be a major federal action under NEPA, an action must be the legally relevant cause of the alleged environmental effects. *See* 40 C.F.R. §§ 1508.18; 1508.8. NEPA requires more than a "but for" causal relationship; it requires a "reasonably close causal relationship." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). And such a relationship does not exist when an agency lacks discretion to prevent an effect due to its limited statutory authority. *Id.* at 770.

Here, once certain statutory provisions have been met, IGRA requires the Secretary to prescribe Procedures allowing a tribe to conduct Class III gaming, and only affords the Secretary a limited scope of review in doing so. This Court has recognized that IGRA compels the Secretary's issuance of such Procedures: "Once the Court ordered initiation of the IGRA remedial process, *the Secretary was without discretion*. Once the Secretary was presented with the tribal-state compact selected by the mediator and rejected by the state, *the Secretary was*

required to prescribe procedures under which class III gaming could be conducted on the Madera Site." *Picayune Rancheria of Chukchansi Indians*, 2017 WL 3581735, at *13 (emphasis added). In such circumstance, IGRA states that the Secretary "*shall* prescribe . . . procedures . . . which are consistent with the proposed selected compact . . . the provisions of this chapter, and the relevant provisions of the law of the State." *Id.* § 2710(d)(7)(B)(vii)(I) (emphasis added). By IGRA's express terms, the Secretary is required to issue Procedures consistent with the mediator-selected compact, and may only modify them to comply with IGRA's other provisions or state law. *Id.* As a result, the Secretary lacks discretion to alter the Procedures to address environmental effects that may arise from the contents of the Procedures, and so the Secretary cannot be the cause of any such effects. Therefore, NEPA's requirements are not triggered.

In an effort to impose on the Secretary discretion he does not possess in prescribing the Secretarial Procedures, Stand Up attempts to downplay the significant role that the mediator, appointed and supervised by this Court, plays in the actions that culminate in the issuance of Procedures. While it is true that it is the Secretary, and not the mediator, who authorizes Class III gaming, the discrete roles of the mediator, as selector of the compact, and the Secretary, as the official authorized to issue the Procedures, are defined by IGRA, to which the Secretary must adhere. Without providing supporting authority, Stand Up asserts that the Secretary was free to alter the Secretarial Procedures as he saw fit, but nothing in § 2710(d)(7)(B)(iv) gives the Secretary such broad discretion. It is not for Stand Up or the Secretary to question the mandates of IGRA. Congress made a calculated decision in providing the mediator, a neutral body, the task of selecting the compact that best conforms to IGRA and other federal laws. *Texas v. United States*, 497 F.3d 491, 508 (5th Cir. 2007) ("[I]f mediation is ordered, it is undertaken by a neutral, judicially-appointed mediator who objectively weighs the proposals submitted by the state and tribe. . . . under IGRA's remedial scheme the court-appointed mediator essentially defines the regulations that the Secretary may promulgate."); *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1225 (10th Cir. 2017) ("Congress has narrowly circumscribed the Secretary's authority in prescribing procedures by cross-referencing previous steps in the judicial remedial process.").

Stand Up next asserts that if the Secretary lacks discretion to issue Procedures that deviate from the mediator-selected compact, this would render the "in consultation with the Indian tribe" requirement superfluous. [Dkt. 46 at 24]. Here, the consultation requirement, however, is not tied to agency discretion or intended to dictate a particular result. Rather, it ensures that the tribe whose gaming will be subject to the Procedures has an opportunity discuss any potential changes with the Secretary before he issues the Procedures. Ultimately, however, the Secretary cannot—and did not—make alterations that change material terms of mediator-selected compact. For these reasons, Stand Up's argument that Defendants' interpretation of IGRA's remedial scheme would render the consultation requirement superfluous fails.

While acknowledging that "the provision requiring the Secretary to prescribe procedures does not mention a duty to ensure the procedures comply with any particular federal law beyond IGRA," [Dkt. 46 at 25], Stand Up then attempts to escape this concession by posing a hypothetical scenario—not present here—in which the mediator-selected compact violates other applicable federal laws. To be sure, the Secretary did modify the compact to avoid unilaterally obligating the State to take on regulatory responsibilities, [AR0000-2245], which could raise Tenth Amendment concerns. The comparison that Stand Up seeks to make between the Secretary complying with the U.S. Constitution and "other applicable federal laws" like NEPA and the Clean Air Act is not apt, because the Secretary is *always* bound by constitutional constraints, whereas there are circumstances in which, like here, NEPA simply does not apply. *See* 42 U.S.C. § 4332(C) (an environmental analysis is only required for "major Federal actions significantly affecting the quality of the human environment.").

Finally, Stand Up's attempt to distinguish *Public Citizen* from this case appears to rest on the premise that because IGRA affords the Secretary the "essential discretion" to generally regulate gaming by Indian tribes, then he must have the discretion to modify Secretarial Procedures issued pursuant to IGRA. But this is false. Under IGRA, the Secretary is *required* by § 2710(d)(7)(B)(iv) to issue Procedures consistent with the mediator-selected compact if the compact complies with other provisions of IGRA and state law, in the same fashion that the Federal Motor Carrier Safety Administration (FMCSA) was mandated by 49 U.S.C. §

13902(a)(1) to "certify any motor carrier that can show that it is willing and able to comply with the various substantive requirements for safety and financial responsibility contained in DOT regulations," *Public Citizen*, 541 U.S. at 766. *Public Citizen* did not rest on the FMCSA's general authority to regulate the operations of trucks, but on the limited authority Congress vested in the agency to certify motor carriers.

Additionally, *Public Citizen* recognized that the "rule of reason" would relieve an agency from the requirement to prepare an EIS "due to the environmental impact of an action it could not refuse to perform." *Id.* at 769. Contrary to Stand Up's contention that the analysis in *Public Citizen* rests on a general ability of an agency to regulate a particular field, *see* [Dkt. 46 at 27], the holding of *Public Citizen* is much more specific: "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Public Citizen*, 541 U.S. at 770. Put differently, had the Secretary departed from the mediator-selected compact by stripping the provision allowing the Tribe to build a second gaming facility on the same parcel, such a departure would have to be justified on the basis of an inconsistency with either IGRA or State law or it would have been in violation of IGRA. Plaintiffs do not suggest what provision of IGRA or State law prohibits two facilities (but not one) on the same parcel. Absent such a showing of inconsistency, the Secretary is not the cause of any environmental effects that may someday result if the tribe chooses to build a second gaming facility, and NEPA work concerning such a hypothetical facility would serve no purpose.

Accordingly, the Secretary is not the legally relevant cause of any environmental impacts stemming from the contents of the Secretarial Procedures, and thus issuing such Procedures are not a major federal action triggering NEPA's requirements.

B. If the Court Determines that a NEPA Analysis is Necessary, the Existing EIS Satisfies Any Such Requirement

Stand Up argues that the Secretarial Procedures cannot rely upon the 2009 final EIS. [Dkt. 46 at 34]. But NEPA's implementing regulations expressly allow an earlier environmental document to relieve the agency from preparing a new EIS, provided that earlier document

sufficiently covers the new action. *See* 43 C.F.R. §§ 46.120(c); § 46.300. The regulations do not require that the Secretary utilize any particular language in relying on the previous EIS, and in any event, the Secretary does reference the 2009 EIS in Section 2.23 of the Procedures. [AR00002201]. Neither do the NEPA regulations restrict an agency's ability to rely on an earlier environmental document prepared for a separate agency action. Stand Up does not dispute that an EIS was prepared for the actual casino contemplated by the Tribe during the two-part determination and fee-to-trust process.[6] That EIS was prepared for the same parcel of land, the Madera Site, for which the Secretary authorized Class III gaming under the Secretarial Procedures, and to the extent that a NEPA analysis is necessary, the 2009 EIS is sufficient to satisfy that requirement.

In fact, doing anything other than relying on the 2009 EIS would lead to an entirely speculative NEPA process that further illustrates that the Secretarial Procedures are simply not the "proximate cause" of anything. *Public Citizen*, 541 U.S. at 767. When Stand Up discusses what should be evaluated, their briefing immediately becomes utterly vague. *See* [Dkt. 46 at 14] (noting Procedures "provided no discussion of the size of either facility"; that a second facility is an "alternative of uncertain scope"). In other words, NEPA work would have to guess at what might be the contours of a second gaming facility that the Tribe may or may not find to be feasible at some later date. No one can predict when or why the Tribe might decide it is worthwhile to build a second facility on the same parcel as the first, and so there is no basis for analyzing the potential environmental impacts of such a hypothetical facility. And that in turn shows that the Secretarial Procedures at most gave the Tribe the discretion to pursue a course of

[6] To the extent that the Secretarial Procedures differ from the 2009 EIS, these changes are not sufficient to trigger a new NEPA analysis. While the Secretarial Procedures may impose limitations by which the Tribe may engage in Class III gaming, they are not put in place for a particular project, but instead to define a process by which the Tribe may engage in Class III Gaming. The Tribe has expressly stated that it has not planned or developed a second facility. [Dkt. 37 at 43]. Because of these circumstances, Stand Up cannot demonstrate anything beyond a speculative injury, at best. If the Tribe plans at some later date to develop a second facility, the Procedures require that the Tribe prepare a tribal environmental impact report. [AR00002264].

action at some point in the future, but cannot be said to be the cause of any decision to actively pursue that action.

IV. THE SECRETARIAL PROCEDURES DO NOT VIOLATE THE CLEAN AIR ACT BECAUSE THE CONFORMITY REQUIREMENT DOES NOT APPLY

In taking the Madera Site in trust, a CAA conformity determination was done in connection with the Tribe's proposed gaming facility. Stand Up has challenged that determination and lost. *Stand Up for California v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212, 320-23 (D.D.C. 2016). Here Stand Up argues that because the Procedures afford the Tribe the discretion to build a second facility on the same parcel as the first, a new conformity determination must be done. As with any NEPA work evaluating environmental impacts of a hypothetical future facility, any CAA analysis could only be based on sheer speculation about what might be constructed, how it might be constructed, and what kinds of air pollutants might be emitted. But the CAA does not require any such analysis, which would be of little use or value. As noted above, the Secretary does not have broad discretion to alter the mediator-selected compact. Any alteration must be based on fixing an inconsistency with "the provisions of this chapter, and the relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Stand Up has failed to show how the possibility of a second facility being constructed at some future time provides a basis for the Secretary to alter the terms of mediator-selected compact.

IGRA does not afford the Secretary the authority to second-guess the mediator's selection, and the Secretary's only task in prescribing the Procedures is to ensure the mediator's selection does not violate any other provisions of IGRA or state law. The Secretary was not delegated "practical control" over the emissions that may result from the Tribe's project. Moreover, the Secretary lacks authority to dictate if, when, and where on the parcel the Tribe should build any second facility. Thus, the Secretary "cannot practicably control, nor will [he]

maintain control, over [any] emissions" that may result from a future decision by the Tribe to go forward with a second gaming facility on the same site. *Public Citizen*, 541 U.S. at 772.[7]

V. THE SECRETARY DID NOT VIOLATE THE FREEDOM OF INFORMATION ACT

Federal defendants are aware of the Freedom of Information Act ("FOIA") request submitted by Stand Up on August 12, 2016 and are diligently working to fulfill the request. As reflected in the Declaration of Carol Leader Charge, FOIA Coordinator for the Office of the Assistant Secretary – Indian Affairs[8], Interior has committed to responding to the request by no later than December 5, 2017, if the Court is amenable to that date. At that point, Plaintiffs' FOIA claim will become moot. *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002).

CONCLUSION

Federal defendants respectfully request that this Court grant their and North Fork Tribe's motion for summary judgement, deny Stand Up's motion for summary judgment, and enter a judgment upholding the issuance of the Secretarial Procedures.

[7] At the same time, of course, the Secretarial Procedures do not immunize the Tribe, or anyone else, from enforcement of all applicable laws, including the CAA, in the context of any facilities it chooses to construct and operate on the Madera Site.

[8] The Leader Charge Declaration is Exhibit 2 to the Kintz Declaration.

DATED this October 6, 2017.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 6, 2017, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.

: October 6, 2017

/s/*JoAnn Kintz*
JoAnn Kintz