JEFFREY H. WOOD
Acting Assistant Attorney General

JUDITH RABINOWITZ (Alaska State Bar No. 8912094)
Indian Resources Section
Environment & Natural Resources Division
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, CA 94105
Telephone: (415) 744-6486
judith.rabinowitz2@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CAL-PAC RANCHO CORDOVA, LLC, dba PARKWEST CORDOVA CASINO; CAPITOL CASINO, INC.; LODI CARDROOM, INC. dba PARKWEST CASINO LODI; and ROGELIO'S INC., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN ZINKE, in his official capacity as Secretary of the Interior; and MICHAEL S. BLACK in his official capacity as Acting Assistant Secretary – Indian Affairs, Defendants.	Case No. 2:16-cv-02982-TLN-AC **FEDERAL DEFENDANTS' RESPONSE TO CAL-PAC'S MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD**

INTRODUCTION

Federal Defendants the United States Department of the Interior, Ryan Zinke, Secretary of the United States Department of the Interior, Mike Black, Acting Assistant Secretary-Indian

Affairs (collectively "Federal Defendants" or "Interior") oppose the Motion to Supplement the certified Administrative Record of the Secretarial Procedures challenged by Cal-Pac Rancho Cordova, LLC, dba Parkwest Cordova Casino, Capital Casino, Inc., Lodi Cardroom, Inc. dba Parkwest Casino Lodi, and Rogelio's Inc., (collectively "Plaintiffs" or "Cal-Pac"). The Court has directed that this case be adjudicated based on the Administrative Record pursuant to the Administrative Procedure Act's ("APA") standards and scope of review. In so doing the Court stated that its review will be limited to the Administrative Record "unless good cause is found for augmentation of that record." Amended Pretrial Scheduling Order at 2, May 16, 2017, ECF No. 17.

Cal-Pac has not shown cause, let alone good cause. Consistent with settled principles of APA law, the existing Administrative Record reflects the documents that were before the Secretary at the time the mandatory decision (issuance of Secretarial Procedures pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2710(d)(7)(B)) was made, not more. Plaintiffs' bid to alter that Record by adding Records of Decision ("RODs") of distinct and prior decisions (the 2011 IGRA ROD and 2012 Indian Reorganization Act ("IRA") Trust Acquisition ROD for the 40 acre parcel of land in Yuba County ("Yuba Parcel") upon which the Tribe intends to offer gaming) neither previously nor presently challenged by Plaintiffs should be rejected. So too should Plaintiffs' bid to burden the Court with an extra-record declaration attesting to one hundred and sixty three (163) years of irrelevant and voluminous title history not before the Secretary in connection with the challenged action. As this Court has already signaled, absent clear evidence to the contrary, Interior is entitled to a strong presumption of regularity that it properly compiled the Administrative Record. Plaintiffs have a heavy burden to overcome that presumption. They have not shouldered their burden.

FACTUAL AND PROCEDURAL BACKGROUND

This Court's decision in *Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California v. California*, 163 F.Supp.3d 769 (E.D. Cal. 2016) (finding State of California had failed to negotiate an IGRA Class III gaming compact with the Estom Yumeka Maidu Tribe of the Enterprise Rancheria) (the "good faith lawsuit"), sets forth the contextual backdrop to issuance of the Secretarial Procedures. That backdrop includes Interior's trust acquisition and gaming eligibility determinations for the Yuba Parcel, the Tribe's negotiations with the State of California over an IGRA Class III gaming compact, and the remedy under IGRA for a court's finding of state failure to negotiate such a compact in good faith. *Id*. at 772-76.

This action was filed on December 20, 2016. ("Complaint or Compl."), ECF No. 1. The matter originally was assigned to Judge Mueller, who set a pre-trial status conference and ordered the parties to file a joint status and scheduling report. Plaintiffs' Notice of Related Cases, ECF No. 3, listed the Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("Tribe's")[1] good faith lawsuit against the State of California. At the status conference before Judge Mueller the parties raised this Court's handling of that lawsuit as well as the prior challenges to Interior's decisionmaking regarding acceptance of the Yuba Parcel into trust for gaming purposes. *See Citizens for a Better Way, et al. v. U.S. Dep't of the Interior*, No. 12-CV-3021 TLN (E.D. Cal., filed December 14, 2012). Subsequently, the matter was reassigned to this Court. *See* Notice of Related Case Order, May 12, 2017, ECF No. 15.

Pursuant to this Court's Amended Scheduling Order, on June 30, 2017, Federal Defendants lodged with the Court and served on Plaintiffs the complete certified Administrative

[1] The Tribe's federally recognized status is confirmed by its inclusion on the Secretary's list of Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs, 82 Fed. Reg. 4915, 4916 (Jan. 10, 2017) (listing "Enterprise Rancheria of Maidu Indians of California").

Record. *See* ECF Nos. 18, 18-2. On July 20, 2017, counsel for Plaintiffs contacted undersigned counsel for Federal Defendants seeking agreement to Plaintiffs' desire to supplement that certified Administrative Record. Within the same week counsel for Federal Defendants responded that Federal Defendants could not agree to such supplementation.

Plaintiffs have conceded that their challenge is "made under the Administrative Procedure Act (APA), 5 U.S.C. §§ 551, *et seq.*," and that the focal point for judicial review in an APA case should be the administrative record "already in existence, not some new record made initially in the reviewing court." Plaintiffs' Notice of Motion and Motion to Supplement the Administrative Record and Consider Extra-Record Evidence (hereinafter "Pls.' Mem."), ECF No. 22 at 3-4 (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). Notwithstanding, Plaintiffs seek both to shift the Court's review away from the certified Administrative Record and to implicate the Court in creating a new record not before the agency.

Their lawsuit centers on alleged unlawfulness of the Secretarial Procedures based on the anomalous theory that an absent party, the State of California, must first have ceded territorial jurisdiction over the Yuba Parcel to the Federal Government and/or the Tribal Government, Compl. ¶¶ 2, 31. Plaintiffs describe this legal theory as their "core allegation." Pls.' Mem. at 4. They further challenge the Procedures as inconsistent with state law, Compl. ¶ 3, and the IGRA itself. Compl. ¶ 4. Federal Defendants have denied these allegations. *See* Answer ¶¶ 2-4, 31, ECF No. 10.

STANDARD OF REVIEW

This action is governed by the record review principles embodied in the APA. *See* 5 U.S.C. § 706. Review is based on the administrative record and courts do not engage in de novo proceedings. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the

reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.") (citation omitted); *see also Camp*, 411 U.S. at 142. The record consists of all documents directly or indirectly considered by the relevant decision makers. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Courts "normally refuse to consider evidence that was not before the agency because 'it inevitably leads the reviewing court to substitute its judgment for that of the agency."' *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)).

When, as here, an agency designates an administrative record, that designation is afforded a presumption of regularity. *See Nat. Res. Def. Council v. Zinke*, No. 1:05cv-01207-LJO-EPG, 2017 WL 3705108, at *2-3 (E.D. Cal. Aug. 28, 2017); *San Luis & Delta-Mendota Water Auth. v. Jewell*, No. 1:15-cv-01290-LJO-GSA, 2016 WL 3543203, at *2 (E.D. Cal. June 23, 2016) (citing *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007)). This presumption derives logically from the fact that "the agency determines what constitutes the whole administrative record, because it is the agency that did the considering, and that therefore is in a position to indicate initially which of the materials were before it -- namely, were directly or indirectly considered." *Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (quotation marks and citation omitted); *California v. U.S. Dept. of Labor*, No. 2:13-cv-02069-KJM-DAD, 2014 WL 1665290, at *4 (E.D. Cal. April 24, 2014). Given this "strong presumption," the addition of documents to the record compiled by the agency, whether styled "completion" of the record or "supplementation," "decidedly is the exception not the rule." *Deukmejian v. U.S. Nuclear Regulatory Comm'n*, 751 F.2d 1287, 1324 (D.C. Cir. 1984) (quotation marks and citation omitted), *vacated in part sub nom. San Luis*

Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n, 760 F.2d 1320, 1321 (D.C. Cir. 1985) (per curiam),(*aff'd on reh. en banc*), 789 F. 2d 26 (1986); *accord Am. Petroleum Tankers Parent, LLC v. United States*, 952 F. Supp. 2d 252, 261 (D.D.C. 2013); *see also Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 667 F. Supp. 2d 111, 112 (D.D.C. 2009) (noting that "[a] court that orders an administrative agency to supplement the record of its decision is a rare bird"). A party seeking to supplement an administrative record bears the burden of overcoming this presumption by "clear evidence." *Cook Inletkeeper v. EPA*, 400 F. App'x. 239, 240 (9th Cir. 2010) (quoting *Bar MK Ranches v. Yuetter*, 994 F.2d 735, 740 (10th Cir. 1993)) (denying motion to supplement the administrative record, or, alternatively, to allow extra-record material); *Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1232 (E.D. Cal. 2013) (holding presumption may only be overcome by "clear evidence").

Thus, to ensure due deference and to avoid de novo fact finding, the reviewing court should not consider extra-record evidence, except under specific, narrowly construed exceptions to the record-review rule. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 604 (9th Cir. 2014) (finding that district court "overstepped its bounds" by relying on extra-record evidence to decide ESA Section 7 case); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*); *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). Extra-record evidence is only permitted if the movant can show by clear evidence that one of four narrow exceptions applies:

> (1) if necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, [] (3) when supplementing the record is necessary to explain technical terms or complex subject matter, [or] (4) when plaintiffs make a showing of agency bad faith.

Ctr. for Biological Diversity, 450 F.3d at 943 (quoting *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d. 1443, 1450 (9th Cir. 1996)). "The scope of these exceptions . . . is constrained, so that the exception does not undermine the general rule." *Lands Council*, 395 F.3d at 1030 (noting that "[w]ere the federal courts routinely or liberally to admit new evidence when reviewing agency decisions" they would be "proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making.").

ARGUMENT

The filed index of the Administrative Record, ECF 18-2, reflects the "true, accurate and complete copies of the original administrative record of the August 12, 2016, issuance of Class III Secretarial Procedures for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria which is challenged in this case." Certification of Administrative Record by Declaration of Maria K. Wiseman, Deputy Director, Office of Indian Gaming, U.S. Department of the Interior, June 29, 2017, ECF No. 18-1. Interior was not obligated to include every potentially relevant extant document, only those documents that were directly or indirectly considered. *Pac. Shores Subdiv.*, 448 F. Supp. 2d at 4-5 (quoting *Fund for Animals v. Williams*, 245 F. Supp. 2d 49, 57 n. 7 (D.D.C. 2003) for the proposition that broad application of the phrase "before the agency" to include any potentially relevant document within agency or in possession of a third party "would render judicial review meaningless").

It is not entirely clear whether Plaintiffs are arguing Interior relied on documents not contained in the Administrative Record or that Interior failed to consider alleged relevant documents. On the one hand, Plaintiffs seek to supplement the Administrative Record with "Two Records of Decision (RODs), both issued by defendants, with respect to the subject property," which, they assert, are "highly relevant to assessing whether defendants evaluated a key statutory

factor." Pls.' Mem. at 3-4. (As will be explained more fully below, these assertions point to Plaintiffs' desire to have this Court revisit prior Interior decisions not challenged by Plaintiffs when issued and not challenged directly in this lawsuit.) On the other hand, Plaintiffs assert the Administrative Record "contains no conclusion that the territorial jurisdiction prerequisite has been satisfied nor does the record identify facts which would support such a conclusion." Pls.' Mem. at 5-6. Whether Plaintiffs are claiming documents not included in the Administrative Record were relied upon, or that documents that should have been included are missing, they are wrong.

At bottom, Plaintiffs are simply unhappy with the state of the law regarding the Federal Government's authority to acquire land in trust for Indian tribes and the jurisdictional implications that flow therefrom. They assert that "approval of the Secretarial Procedures seems to be based on the common, but erroneous, belief that when land is taken into trust for an Indian tribe, jurisdiction somehow automatically shifts from the state to the tribe." Pls.' Mem. at 6. The Administrative Record includes the Secretarial Procedures which state that the Yuba Parcel is held in trust by the United States. AR00001074. Nothing more is necessary as this fact (trust status) carries with it jurisdictional consequences. Obviously, Interior was aware of this fact, and Plaintiffs fail to acknowledge that any documents sought to be added to the Administrative Record "must do more than raise nuanced points about a particular issue; [they] must point out an entirely new general subject matter that the defendant agency failed to consider." *Pinnacle Armor*, 923 F. Supp. 2d at 1234 (citation omitted).

Plaintiffs are free to brief and argue their anomalous legal theory in the scheduled summary judgment briefing. They are not, however, free to circumvent APA principles.[2] Plaintiffs' sweeping proposition that neither Interior, nor this Court in its prior decisionmaking, accurately perceived the jurisdictional implications of transfer of land from fee to trust status for the Tribe, cannot carry their burden to establish the "clear evidence" that would warrant supplementation.

A. The Hurst Declaration and Exhibits do not meet the relevancy requisite.

The Court should reject Plaintiffs' request to supplement the Administrative Record with the declaration of Susan F. Hurst ("Hurst Declaration"), offered to establish chain of title to the Yuba Parcel "from statehood in 1850 to the transfer to the federal government in 2013." Pls'. Mem. at 3. Again, such extra-record evidence is only permitted if the movant can show by clear evidence that one of the following narrow exceptions pertain: Such material is (1) necessary to determine whether the agency considered all relevant factors and has explained its decision, (2) when the agency has relied on documents not in the record, (3) when necessary to explain technical terms or complex subject matter, or (4) upon a showing of agency bad faith. *Ctr. for Biological Diversity*, 450 F.3d at 943. Only the first two of these exceptions could possibly be in

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[2] Nor can Plaintiffs gain admissibility of such documents by claiming that they are judicially noticeable. *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 986 n.2 (9th Cir. 2015). In *Bear Valley*, the Ninth Circuit rejected a request to take judicial notice of documents outside the record, explaining:

> [amicus's] request for this Court to take judicial notice is denied because 'judicial review of an agency decision is [generally] limited to the administrative record on which the agency based the challenged decision,' and [amicus] has not shown why the additional materials are 'necessary to adequately review' the decision here.

Id. at 986 n.2 (quoting *Fence Creek Cattle Co. v. U.S. Forest Serv*., 602 F.3d 1125, 1131 (9th Cir. 2010)); *see also Rybachek v. U.S. Envtl. Prot. Agency*, 904 F.2d 1276 (9th Cir. 1990) (construing request to take judicial notice of documents outside the record as request to supplement the record, and rejecting that request).

play, and Plaintiffs fail to carry their burden of qualifying the Hurst Declaration and Exhibits under either.

Plaintiffs apparently seek to admit the Hurst Declaration and Exhibits under the first exception (allowing extra-record evidence where "necessary to determine whether the agency has considered all relevant factors and has explained its decision"). They argue their proposed supplemental documents are "necessary to enable the court to fully evaluate the territorial jurisdiction factor and defendants' obligation to consider it." *See* Pls.' Mem. at 6. The "failure to consider" exception, however, only applies to a failure to consider factors that are *relevant* to the issues in the case and when the absence of additional explanation "effectively frustrates judicial review." *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir. 1988) *amended by*, 867 F.2d 1244 (9th Cir. 1989). The Hurst Declaration and Exhibits do not address any factor relevant to adjudicating the reasonableness of the IGRA-mandated Secretarial Procedures under the APA.[3]

It is undisputed that Federal Defendants did not examine the title history of the Yuba Parcel from California's statehood forward, and Plaintiffs cannot demonstrate that Federal Defendants had any legal obligation to do so. Plaintiffs' assertion that the Administrative Record must be supplemented to demonstrate that defendants "not only did not evaluate the territorial jurisdiction factor, but could not have concluded that it had been satisfied because territorial

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[3] Further, although Plaintiffs assert that in applying the relevant factors exception a court may "supplement the record" (Pls.' Mem. at 6), in applying the relevant factors exception the district court is actually considering "extra-record evidence to develop a background against which it can evaluate the integrity of the agency's analysis." *San Luis & Delta Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). This distinction is important because, as noted above, exceptions for consideration of extra-record evidence are to be narrowly construed, and Plaintiffs bear a heavy burden of showing that a relevant exception applies. *Id.* at 992-93. Here, Plaintiffs fail to make the requisite showing.

jurisdiction over the land in question has continuously rested with the State of California ever since 1850 and has never been relinquished by the state," Pls'. Mem. at 6, is a conclusory legal assertion, not supported in law[4] nor, tellingly, advanced by the State itself. Indeed as Plaintiffs concede, in the prior good faith litigation before this Court "the State of California failed to raise as an affirmative defense or otherwise that the State retained territorial jurisdiction over the proposed casino site and that, as a result, the Tribe did not have territorial jurisdiction over it as required by IGRA." Compl. ¶ 35.[5]

That Plaintiffs seek supplementation of the Administrative Record with title documents they alone think "should have been considered" operates as a concession that these documents were not before the Secretary. Irrespective, whether Interior should have considered the title history of the Yuba Parcel is a merits argument wholly irrelevant to the completeness of the Administrative Record. *See Midcoast Fishermen's Ass'n v. Gutierrez,* 592 F. Supp. 2d 40, 44-45 (D.D.C. 2008). Plaintiffs' own characterization of the alleged need for supplementation demonstrates that what they set forth is a merits argument rather than a basis for this Court applying one of the rarely invoked exceptions to the record rule: "Territorial jurisdiction is a vital

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[4] The Federal Government's authority to set aside lands in trust for Indian tribes does not stem from deeds no matter the vintage; the "plenary", "broad", and "exclusive" federal authority is a foundational principle of Indian law. It is derived from many sources including, but not limited to, the Constitution: the Indian Commerce Clause, the Treaty Clause, the Property Clause, the Debt Clause, and other sources not catalogued here. *See, e.g., United States v. Lara*, 541 U.S. 193, 200-01 (2004); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *Cty. of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 234 (1985); *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 172 n.7 (1973): *United States v. Kagama*, 118 U.S. 375, 379-80 (1886).

[5] Notably, Plaintiffs fail to mention that their theory was previously advanced to the California First District Court of Appeal in *Stop the Casino 101 Coalition v. Brown* (2014) 230 Cal.App.4th 280 [178 Cal.Rptr.3d 481]. That court rejected the assertions that (1) exclusive jurisdiction over Indian land by an Indian tribe is required by IGRA, and (2) that Indian tribes do not "necessarily exercise some jurisdiction over" Indian lands. *Id*. at 287-88. Moreover, it held that "acceptance by the federal government of land in trust for an Indian tribe thereby confers jurisdiction on the tribe over the resulting [Indian land.]" *Id*. at 289 (citing *City of Roseville v. Norton*, 219 F. Supp. 2d 130 (D.D.C. 2002)).

factor that is at the heart of IGRA. It should have been central to defendants' analysis prior to issuance of Secretarial Procedures." Pls.' Mem. at 7.

Such a legal merits argument does not establish a basis for supplementation of the Administrative Record with the Hurst Declaration and Exhibits. As aptly put by another district court:

> Supplementing the record with what all agree are documents the agency did not consider does not perfect the administrative record by supplying what is missing. It creates a new ersatz conglomeration consisting of what the decision maker considered and material that plaintiffs insisted it should have. The Court's doing so violates the principle that judicial review of administrative action must be based on the records before the agency, not a new "record" created in the court.

Midcoast Fishermen's Ass'n, 592 F. Supp. 2d at 45 (citing *Camp*, 411 U.S. at 142-43).

Plaintiffs concede that the land in question is held in trust by the Federal Government for the benefit of the Tribe as a matter of federal law. Pls.' Mem. at 8-9. The Secretarial Procedures acknowledge the trust character of the parcel and its IGRA eligibility as "Indian lands":

> **Sec. 2.34**. "Yuba Parcel" means the approximately forty (40) acres of Indian lands held in trust by the United States government for the Tribe in Yuba County, California, as legally described in the Federal Register notice (78 Fed. Reg. 114 (Jan. 2, 2013)) and represented on the map at Appendix A hereto.

AR00001074. Hence, Plaintiffs' motion asks this Court to add documents to the Administrative Record in order to consider a legal question.[6] No such supplementation is necessary. It is well understood by Congress, courts, the Secretary, tribes and states that jurisdictional consequences flow directly from the fact that land is transferred into federal trust for a federally recognized tribe. Prior title history of land so acquired is not relevant to this legal reality, and here it was not considered by the Secretary. Plaintiffs' point that the proffered title records are public documents

[6] Relatedly, it is not clear how Plaintiffs can establish subject matter jurisdiction or standing on behalf of the absent State of California. *See Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp. 2d 1174, 1181 (E.D. Cal. 2003).

equally "available to defendants as they are available to plaintiffs" misses the mark. Pls.' Mem. at 9. Availability of documents is not determinative, rather it is Plaintiffs' burden to establish that such documents were a relevant factor to the Secretary's issuance of Secretarial Procedures and necessary to the Court's review, or that they were relied upon but not included in the administrative record of that agency action. There has been no showing that would warrant application of either narrow exception to the record rule here.

B. The IGRA and IRA RODs relate to distinct and previously litigated decisions.

Plaintiffs' request that this Court allow supplementation of the Administrative Record with the 2011 IGRA and 2012 IRA RODs should also be rejected. They are not relevant to the agency action here--issuance of Secretarial Procedures--but to prior Interior decisionmaking to accept the Yuba Parcel into trust for gaming purposes. Those decisions have been litigated and lost by other plaintiffs.

Further, as Judge Ishii noted in rejecting a related challenge to the IGRA qualification of the North Fork Tribe's trust land, the first of three prerequisites to an Indian tribe filing an IGRA action alleging state failure to negotiate in good faith toward a compact is that "the tribe must exercise jurisdiction over Indian land." *Picayune Rancheria of Chuckhansi Indians v. U.S. Dep't of Interior et al.*, No. 1:16-cv-0950 AWI-EPG, 2017 WL 3581735, at *13 (E.D. Cal. Aug. 18, 2017) (citing *North Fork Rancheria of Mono Indians v. California*, (*Good Faith Litig. I*), No. 1:15-cv-00419-AWI-SAB, 2015 WL 11438206, at *7 (E.D. Cal. Nov. 13, 2015); *see also Big Lagoon Rancheria v. California*, 789 F.3d 947, 950 (9th Cir. 2015) (noting that gaming compact negotiations start at request of an "Indian tribe having jurisdiction over Indian lands upon which a class III gaming activity is being conducted, or is to be conducted") (quoting IGRA § 2710(d)(3)(A)). As such, Plaintiffs' assertion that their territorial jurisdiction theory was not

analyzed or addressed in the Secretarial Procedures effectively takes issue with this Court's decision in the good faith lawsuit, concluding that the State of California had failed to negotiate a Class III gaming compact in good faith with the Tribe. This Court found no infirmity with the Tribe's exercise of jurisdiction over the Yuba Parcel, the first prerequisite to the Tribe bringing its lawsuit. Nor for that matter did Governor Brown in negotiating and concluding the August 2012 compact that the California Legislature failed to ratify. *See Estom Yumeka* 163 F. Supp. 3d at 773-74.

In the guise of seeking supplementation of the Administrative Record Plaintiffs really seek to challenge prior decisionmaking: "These documents [the 2011 and 2012 RODs] show that . . . there was never a conclusion or finding that the Tribe had ever actually acquired territorial jurisdiction over the property." Pls.' Mem. at 10. The Ninth Circuit has rejected just such collateral attacks on trust acquisition of land for federally recognized tribes brought by way of litigation related to IGRA's remedial provision, 25 U.S.C. 2710(d)(7)(B). *See Big Lagoon*, 789 F.3d at 953 (holding that "parties cannot 'use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions'") (quoting *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012)). As in *Big Lagoon*, Plaintiffs cannot "attack collaterally the [Secretary's] decision to take" land "into trust outside the APA" because doing so "would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government." *Id.* at 954. To challenge a trust decision (including the purposes and jurisdictional ramifications of the trust transfer) a party must "file the appropriate APA action." *Id.*

Plaintiffs' action, while styled an APA action, is not "appropriate." Indeed Plaintiffs appear to want this Court to revisit its prior decisions respecting discretionary decsionmaking on

the part of the Secretary via a challenge to Secretarial action (Secretarial Procedures) virtually devoid of discretion. *See Picayune Rancheria of Chukchansi Indians*, 2017 WL 3581735, at *13 ("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. *See* 25 U.S.C. § 2710(d)(7)(B)(vii)."). Thus, as Judge Ishii has made clear, Plaintiffs' assertion that Federal Defendants fail to explain how their action of prescribing Procedures is "mandated by IGRA", Pls.' Mem. at 6 (citing AR 1067 (Secretarial Procedures p. 1, ¶ 3)), is answered by the IGRA itself.

Even under the most charitable view of the supplementation request, i.e., as intended solely as background history to the Secretarial Procedures, Plaintiffs still would not meet their burden. *See Midcoast Fishermen's Ass'n*, 592 F. Supp. 2d at 46 (noting that no matter what "background" information is included in the agency's administrative record "the issue remains the same: did the agency err by only considering the data that it did").[7]

Plaintiffs improperly seek to supplement the agency's Administration Record in order to mount an equally improper collateral attack on Interior's prior decision to acquire the Yuba Parcel in trust for the Tribe for gaming purposes. Dissatisfaction with the state of the law is not a proper basis to flout bedrock principles of APA record review.

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[7] And even if the RODs could be considered relevant, the Ninth Circuit has rejected efforts to admit relevant documents that "might have supplied a fuller record" when the issue "can either be extracted from the record or is not necessary to this court's review of the [agency's] action." *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1451 (quoting *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986); *Rybachek*, 904 F.2d at 1296 n.25 (excluding extra-record evidence because "[t]he [agency] did not rely on the information contained in the [plaintiffs'] proffered documents, nor does the information address issues not already present in the record") (citing *Friends of the Earth*, 800 F.2d at 829)).

CONCLUSION

Plaintiffs' Motion to Supplement the Administrative Record lacks merit. They have not produced clear evidence that the Record is incomplete, nor demonstrated that judicial review will be frustrated without the admission of extra-record evidence. For all of the reasons set forth above, the Court should deny Plaintiffs' Motion.

DATED this 28th Day of September, 2017

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

/s/ Judith Rabinowitz

JUDITH RABINOWITZ
United States Department of Justice
Environment & Natural Resources Division
Indian Resources Section
Attorneys for Federal Defendants

Of Counsel:
John Hay
Andrew S. Caulum
Office of the Solicitor - Division of Indian Affairs
U.S. Department of the Interior
Washington, D.C.