SLOTE, LINKS & BOREMAN, LLP
Robert D. Links (SBN 61914) (bo@slotelaw.com)
Adam G. Slote, Esq. (SBN 137465) (adam@slotelaw.com)
Marglyn E. Paseka (SBN 276054) (margie@slotelaw.com)
1 Embarcadero Center, Suite 400
San Francisco, CA 94111
Phone: 415-393-8001
Fax: 415-294-4545

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

CAL-PAC RANCHO CORDOVA, LLC, dba PARKWEST CORDOVA CASINO; CAPITOL CASINO, INC.; LODI CARDROOM, INC. dba PARKWEST CASINO LODI; and ROGELIO'S INC.,

Plaintiffs,

vs.

UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN ZINKE, in his official capacity as Secretary of the Interior; and MIKE BLACK in his official capacity as Acting Assistant Secretary of the Interior – Indian Affairs,

Defendants.

No. 2:16-CV-02982-TLN-AC

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO SUPPLEMENT THE ADMINISTRATIVE RECORD

Hearing Date: October 19, 2017
Time: 2:00 p.m.
Location: US Courthouse
501 I Street, Suite 4-200
Courtroom 2
Sacramento, CA 95814

INTRODUCTION

Defendants' response to the motion to supplement misstates plaintiffs' argument. There is no dispute as to the standards that govern a request to supplement the record in an APA case. Nor is there a dispute about the federal government's ability to acquire land and place it in trust for an Indian tribe. What *is* in dispute is the effect of such a land acquisition.

Defendants assert in their opposition that when the United States acquired the Enterprise casino site and placed it into trust for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("the Enterprise Tribe"), jurisdiction automatically shifted from California to the tribe. Plaintiffs dispute that contention. There is a major issue here regarding when and how territorial jurisdiction transfers from a state to the federal government and/or an Indian tribe. There is also a major issue as to whether, in issuing the challenged Secretarial Procedures, defendants properly analyzed that issue, which is an IGRA prerequisite expressly stated several times in the statutory framework.

Per IGRA, defendants are authorized to issue Secretarial Procedures for the operation of Tribal casino gaming *only* if the gaming will be on Indian lands "over which the tribe has jurisdiction." 25 U.S.C. § 2710(d)(7)(B)(vii); see also 25 U.S.C. §§ 2710(d)(1) and 2710(d)(3)(A). As plaintiffs set forth both in their complaint (ECF 1 at ¶s 2, 47-52), as well as in the motion to supplement (see ECF 22 at pp. 8-9), there is a vast difference between *title* and *territorial jurisdiction.* Title involves ownership, while territorial jurisdiction involves the legal authority to enact laws of general application that govern the land in question. Under IGRA, a tribe must have jurisdiction *and* it must actually govern the property in question in order to invoke the statutory framework. See *Massachusetts v. The Wampanoag Tribe of Gay Head*, 858 F.3d 618, 624-625 (1st Cir. 2017); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 700-

703 (1st Cir. 1994)(exercise of governmental power and having jurisdiction are "dual limitations" under IGRA).

As we explain briefly below (and are prepared to brief more fully in connection with our summary judgment motion), territorial jurisdiction does not shift from the State of California to the federal government by implication or by federal fiat; nor can it be transferred by a third party who deeds property to the United States. An express surrender of territorial jurisdiction by governing state is required. Such a surrender occurs via the cession process, and federal law dictates that unless the cession process is followed, there is a *conclusive presumption* that the federal government has not acquired territorial jurisdiction. See 40 U.S.C. § 3112(c)("It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section"); see also *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 538-39 (1885)("…jurisdiction cannot be acquired tortiously, or by disseizin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state").

Case law confirms that the process outlined in section 3112 apples to *any* transfer of jurisdiction, whether exclusive, partial, concurrent or otherwise. *Paul v. United States*, 371 U.S. 245, 264 (1963) ("Since 1940 Congress has required the United States to assent to the transfer of jurisdiction over the property however it may be acquired."); see also *Adams v. United States*, 319 U.S. 312 (1943) (the statute "created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction'")(quoting from Congressional hearings).

The determination of who has territorial jurisdiction over the proposed casino site necessarily entails, among other things, a review of the ownership history of the land. The fact

that the deeds and other requested documents were readily available, yet not included in the administrative record, demonstrates that the defendants did not evaluate the IGRA-relevant factor of territorial jurisdiction.

Case law allows supplementation of the administrative record "to determine whether the agency has considered all relevant factors and has explained its decision." *Lands Council v. Forester of Region One of the U.S. Forest Service*, 395 F.3d 1019, 1030 (9th Cir. 2004); see also *Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197-198 (D.D.C. 2005); *Pac. Shores Subd. Calif. Water Dist. v. United States Corps of Engineers*, 448 F. Supp. 2d 1, 5-6 (D.D.C. 2006)(same rule applies to submission of extra record materials; court commented that " [c]onsideration of extra-record information is appropriate when simply reviewing the administrative record is not enough to resolve the case").

Plaintiffs request that the proposed materials be considered for this limited purpose.

ARGUMENT

1. Plaintiffs Do Not Challenge Defendants' Decision To Take the Land Into Trust. The Issue Is The Effect Of That Decision.

As noted above, this is not a case in which plaintiffs' seek to "collaterally challenge" prior decisions made by the Department of the Interior. Plaintiffs do not contend that the federal government could not, or did not, acquire title to the subject property and place it in trust for the Enterprise Tribe. The issue is the *effect* of that action. Thus, while the parties have a fundamental disagreement over the effect of the instant trust acquisition, there is no factual dispute that the trust acquisition occurred.

The merits question for the court is straightforward: when and how does territorial jurisdiction shift from the State of California to the United States government? Defendants, as

noted, contend it occurs automatically when property is placed in trust for a tribe. Plaintiffs contend, and are prepared to brief in a motion for summary judgment, that the federal government can secure territorial jurisdiction over land within a state's border in three ways: (1) upon a state's admission to the Union;[1] (2) when the United States exercises its constitutional rights under the Enclaves Clause (U.S. Const., Art. I, sec. 8, cl. 17); or (3) when the state affirmatively cedes jurisdiction to the federal government. See *Ft. Leavenworth RR Co v. Lowe*, supra; 40 U.S.C. §3112. None of those things occurred here.

To be sure, this case involves a new phenomenon, which is an outgrowth of Indian gaming, *to wit*, the purchase of land in populated areas with significant impacts on the non-Indian population that is opposed to the gaming activity in question. The key issue in such situation is: who has the right to make the general laws that govern the subject property? That inquiry raises the issue of territorial jurisdiction.

The territorial jurisdiction issue is central to this case, just as it is central to IGRA. A tribe cannot engage in Class III gambling, unless and until it first acquires territorial jurisdiction over the casino site *and* actually governs the property. See *Massachusetts v. The Wampanoag Tribe of*

---

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

Gay Head, supra 858 F.3d at 624-625; *Rhode Island v. Narragansett Indian Tribe*, supra, 19 F.3d at 700-703.

Parenthetically, and to illustrate the point, a tribe cannot even request that a state negotiate a compact for Class III gambling unless it has territorial jurisdiction (see 25 U.S.C. § 2710(d)(3)(A)). A fortiori, the Secretary cannot issue Class III gaming procedures under section 2710(d)(7)(B)(vii) unless the territorial jurisdiction prerequisite is in place.[2]

Moreover, the notion advanced by defendants—that California somehow lost a portion of its historic territorial jurisdiction without any involvement or consent on the part of the state Legislature—is a radical proposition and calls into question major issues of state sovereignty. This case marks a radical departure from past cases where the tribal land in question fits into a consistent pattern, namely, where the land in question never became a part of the state in question, subject to state law. Where an Indian tribe does exercises territorial jurisdiction over land within a state, it does not do so merely because the federal government acquired the land and placed it into trust, but rather, because the land in question was held for and occupied by the tribe at or before the time the state was created. In short, the lands never became a part of the state in which they were situated.[3]

That historic backdrop forms the foundation for broad judicial pronouncements about tribal sovereignty over land within state borders. Thus, when one reviews the precedential cases

---

[2] Indeed, there are several decisions indicating that without territorial jurisdiction, a tribe lacks standing to invoke IGRA. See, e.g., *Match-E-Be-Nash-She-Wish Bank of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002); *Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, 2004 WL 1103021 at *4 (E.D. Cal.)("fulfillment of the statutory prerequisites for negotiation under the IGRA is an entirely reasonable standing requirement").

[3] See state admission statutes cited in note 1, *supra*.

in detail, one finds that the land in question bears a common and crucial characteristic: it never became a part of the surrounding state. An unbroken pattern dominates the case law, including:

- *Worcester v. Georgia*, 31 U.S. 515 (1832), involved land set aside for the Cherokee tribe by treaty before Georgia became one of the original states;
- *In re Kansas Indians*, 72 U.S. 737 (1867), held that Indians were exempt from state property taxes because Kansas accepted admission into union with stipulation that Indian rights to their lands would remain unimpaired;
- *Williams v. Lee*, 358 U.S. 217 (1959), involved the Navajo Indian Reservation established by an 1868 treaty in the territory that became Arizona 44 years later; and
- *Montana v. United States*, 450 U.S. 544 (1981) and *Big Horn County Electric Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000), both concerned a Crow reservation in Montana established by the 1868 Second Treaty of Fort Laramie, 450 U.S. at 548, and "reserved out" when Montana became a state twenty-one years later, Enabling Act, 25 Stat. 676 (1889);
- *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), dealt with Indian lands established in California in 1876 and continuously occupied and governed by the tribe since that time, as opposed to a privately held parcel transferred to the United States 163 years after statehood.[4]

[4] The *Cabazon* case is a world apart from the instant facts. In *Cabazon*, the Court noted that the lands were formally set apart for these tribes in 1876 and 1891, 480 U.S. 202, 204 n.1, and it appears that the tribes may have occupied the lands prior to 1850. If so, the lands would be under "Indian title." *See Northwestern Bands of Shoshone Indians v. United States*, 324 U.S. 335, 338-39 (1945). Further, a general California cession statute in effect until the 1940s provides another basis for confirming a jurisdictional shift for long-held Indian trust lands in California. *See* 1891 Cal. Stats. Ch. 181, § 1, at p. 262. The lands could also be deemed Indian lands under tribal jurisdiction via equitable principles. *See City*

These principles apply with full force to the instant case.

2. The Supplemental Materials Enable the Court to Assess Whether Defendants Properly Considered the Jurisdiction Issue

Plaintiffs' motion to supplement enables the court to have before it a full and complete record upon which to assess whether defendants properly assessed the jurisdiction issue. And for there to be a complete record, the work defendants have done to analyze the proposed casino site—including work that was included and summarized in the two Records of Decision ("RODs") that plaintiffs' seek to add to the record—must be included.

a. Records of Decision (RODs)

The RODs with respect to this land include one that was issued pursuant to 25 USC § 2719 and another pertaining to the decision to take the land into trust. Neither one is included in the administrative record. And upon examination, one finds that neither one includes a conclusion that the tribe had jurisdiction over the property, or would have it once the land was transferred by Yuba County Entertainment, LLC, the third party company that deeded the casino site to the United States. While the 2719 ROD discusses the purported "historical connection" between the Tribe and the site, there is no finding that the Tribe ever occupied, much less actually governed, the land in question. Given that reality, which should be reflected in the record, how could one possibly conclude that jurisdiction shifted from California to the United States?

//

//

---

of Sherrill v. Oneida Indian Nation, supra, 544 U.S. at 219-21 (applying equitable doctrines of laches and acquiescence to issue of tribal territorial jurisdiction).

b. Deed History of the Property

As we explained in our earlier memorandum (see plaintiffs' opening memorandum, ECF 22 at p. 8-9), and as noted above, judicial analysis of the territorial jurisdiction issue necessarily requires reviewing the history of the land in question, particularly "the long history of state sovereign control over the territory." *City of Sherrill v. Oneida*, 544 U.S. 197, 214 (2005); see also *Rosebud Sioux Tribe v. Kneip*, supra, 430 U.S. 584, 605 (1977). Without such a review, there is no way to show whether jurisdiction ever shifted from California to the federal government. If defendants had analyzed the territorial jurisdiction issue, these deeds would be included in the administrative record.

The documents should now be considered under the "relevant factor" exception.

3. Defendants' Opposition Memorandum Incorrectly Asserts That Jurisdiction Transfers Upon the Recording of A Deed

Defendants are wrong when they assert in their opposition memorandum that territorial jurisdiction shifts automatically upon the transfer to title.[5] The federal government has acknowledged elsewhere that this is not the law. "Acquisition of land and acquisition of federal jurisdiction over that land are two different things." *See* Principles of Federal Appropriations Law (Ofc. the General Counsel, U.S. Gov't Acct'g Ofc., 3d ed. (2008), vol. III, ch. 13, p. 13-101 (the "GAO Report") (available at http://www.gao.gov/special.pubs/d08978sp.pdf (last accessed May 3, 2017).) The GAO Report also notes: "When we talk about jurisdiction over federal land, we are talking about the federal-state relationship. The first point is that, whether the United States has acquired real property voluntarily (purchase, donation) or involuntarily

---

[5] See defendants' opposition memorandum, ECF 23, at p. 8, lines 16-19.

(condemnation), *the mere fact of federal ownership does not withdraw the land from the jurisdiction of the state in which it is located.…" Id.* (emphasis added).

Although defendants do not question the Federal Government's authority to set aside lands in trust for Indian tribes the cases they cite on the jurisdiction point readily illustrate the problem with their approach. See Opposition Memo, ECF 23 at p. 11 & n. 4. Upon close examination, one sees that in each instance, the cited cases each involved land that was never subject to a state's territorial jurisdiction. *United States v. Lara*, 541 U.S. 193 (2004) involved land in the state of North Dakota – a state in which tribal lands were "reserved out" upon admission to the Union; the same is true in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998)(Indian land was reserved out when South Dakota became a state). *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 167 (1973), involved the Navajo Reservation over which the United States retained "absolute jurisdiction" upon statehood. A similar historic situation existed in *United States v. Kagama*, 118 U.S. 375 (1886), which involved the Hoopa Valley Indian reservation in California. The land in question was bought by the United States from Mexico via the treaty of Guadaloupe Hidalgo and had been occupied and governed historically by the tribe. See 118 U.S. at 381.

In short, the cases cited by defendants are a universe apart from the instant situation, and the case are consistent with the rule cited above that the federal government can reserve jurisdiction over lands when admitting a state, or obtain it via cession thereafter. None of these cases supports the unfounded notion that a state's historic territorial jurisdiction changes upon the recording of a deed transferring property within state borders to the federal government. Indeed, the cases cites by defendants are a world apart from the situation at issue, which involves

land that was governed by the State of California for well over a century prior to the transfer to the United States.

The jurisdiction analysis in this case involves a careful review of the history of the subject property, with a focused eye looking for evidence whether the State of California ever formally surrendered all or part of its territorial jurisdiction. That is why we submit that the history of the subject property be included in the record.

4. The Graton Litigation Does Not Support Defendants.

In their opposition, defendants refer to *Stop the Casino 101 Coalition v. Brown*, 230 Cal. App. 4th 280 (2014), cert. denied, 135 S. Ct. 2364 (2015)("*Stop the Casino*"), a case in which plaintiffs' counsel participated. See Opposition Memo, ECF 23, at p. 11 & n. 5.

The case involved the Graton Casino, situated in Sonoma County. In 2010, the BIA took into trust for the Federated Indians of the Graton Rancheria. Prior to that time, the land had been held by private parties and in fact was governed by the state since California's admission to the Union. There was no attempt to comply with 40 U.S.C. §3112 or any formal cession process.

The court in *Stop the Casino* issued two alterative holdings, and each was based on a key factor that is not present here.

Frist, the court noted that Congress had passed the Graton Act, 25 U.S.C. § 1300n-3, a statute specifically mandating that land in Sonoma or Marin County be taken into trust as a reservation for the Graton Tribe. The state court of appeal ruled that the Graton Act "necessarily confer[red] a degree of jurisdiction on the" Graton Tribe. *Stop the Casino*, supra, 230 Cal. App. 4th at 287, 291. The court did not cite any authority for its conclusion and, needless to say, we strongly disagree that Congress has the constitutional power to unilaterally alter a state's territorial jurisdiction. However, even if one accepts that portion of the ruling as correct, it does

not help the government here because Congress has not taken similar action with respect to this property. The Enterprise casino site is off-reservation land and was taken into trust by the Secretary of the Interior via general authority of the Indian Reorganization Act (25 U.S.C. § 465)[6], as opposed to a specific Congressional authorization creating a particular Indian reservation.

The second key factor for the court in *Stop the Casino* was that the Graton Tribe had secured a compact that was ratified by the Legislature. See Cal. Gov't Code §12012.56. That legislative action prompted the state court of appeal to observe alternatively that "even if — contrary to all of the foregoing — the coalition were correct that jurisdiction over the land transferred to the United States in trust for the Graton Tribe could not be conferred on the tribe without the express consent of the state, such consent is implicit in the compact signed by the Governor and ratified by the Legislature." 230 Cal. App. 4th at 290.

The state court of appeal did not cite any law for such a proposition, nor did it cite any evidence that the Legislature intended to cede jurisdiction when it approved the compact. State law does not authorize such a thing as an "implied" cession of jurisdiction. Instead, California law requires clear and unequivocal action to surrender jurisdiction. As the court observed in *Coso Energy Developers v. County of Inyo*, supra, 122 Cal.App.3d 1512, 1533, it "will not be presumed, in the absence of clearly expressed intent, that the state has relinquished its sovereignty."[7]

---

[6] Subsequent to the instant deed transferring title to the proposed casino site, this section was renumbered. The current citation is 25 U.S.C. § 5108.

[7] The *Coso* court was quoting from *Standard Oil v. Johnson*, 10 Cal.2d 758, 767 (1938), which in turn quoted from a Washington state case, *Ryan v. State*, 188 Wash. 115, 61 P.2d 1276, 1283 (1936).

In any event, the court's ruling on the implied cession point in *Stop the Casino* does not support defendants here because the California Legislature never adopted a compact for the Enterprise tribe. The state's failure to act cannot possibly constitute a cession of jurisdiction, implied or otherwise.

5. The Plaintiffs Have Standing to Raise These Issues.

Defendants also stretch to the merits phase of the case by suggesting, albeit in a footnote, that plaintiffs lack standing to present these issues. See Opposition Memo, ECF 23 at p. 12 & n. 6. There are several responses to the point, and while they must await the summary judgment phase, we address them briefly now.

To the extent plaintiffs contend that the issuance of Secretarial Procedures without territorial jurisdiction violates IGRA, the court should be guided by the prior ruling in *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1090, 1100-1109 (E.D. Cal. 2002), which held that a local card club had standing to challenge an allegedly illegal IGRA compact. See also *Artichoke Joe's v. Norton*, 353 F.3d 712, 719 n. 9 (9th Cir. 2003)("We agree with the district court's cogent application of U.S. Supreme Court precedent regarding constitutional standing").

To the extent plaintiffs' claims are grounded in Tenth Amendment principles, plaintiffs possess Article III standing as well. See *Bond v. United States*, 131 S. Ct. 2355 (2011). In *Bond*, the Supreme Court held that Tenth Amendment claims can be brought by individuals as well as the state itself. The Court observed that "[a]n individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate." Bond, *supra*, 131 S. Ct. at 2364.

//

CONCLUSION

While we appreciate the fact that defendants have helped frame the issue on the merits, we respectfully submit that the proposed documents should be made part of the instant administrative record.

The record should show the full history of the subject property so this court (and any appellate court should there be an appeal) has a proper record on which to adjudicate when and how territorial jurisdiction leaves a sovereign state and shifts to the federal government, and through the federal government, to an Indian tribe. See *Massachusetts v. The Wampanoag Tribe of Gay Head*, supra, 858 F.3d at 625 ("… an inquiring court must assay the jurisdictional history of the settlement lands').

Needless to say, this is an issue of major dimension and it deserves a proper record. We respectfully request that the plaintiffs' motion to supplement be GRANTED.

Dated: October 12, 2017

SLOTE LINKS & BOREMAN, LLP

By: _____
Robert D. Links
Attorney for Plaintiffs