No. 18-16696

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLUB ONE CASINO, INC., dba CLUB ONE CASINO; and
GLCR, INC., dba
THE DEUCE LOUNGE AND CASINO,
Plaintiffs/Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Defendants/Appellees.

Appeal from the United States District Court
for the Eastern District of California
No. 1:16-cv-01908 (Hon. Anthony W. Ishii)

CORRECTED ANSWERING BRIEF FOR THE APPELLEES

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GLOSSARY

DCt. Dkt. No.	Docket Number in District Court proceedings
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act

INTRODUCTION

Plaintiffs Club One Casino and The Deuce Lounge (the "Clubs") are two state-licensed card clubs located in Fresno and Goshen, California, respectively. They filed suit challenging the "Secretarial Procedures" issued by the Secretary of the Interior ("Secretary") under the federal Indian Gaming Regulatory Act ("IGRA"). The Secretarial Procedures prescribe the process under which the North Fork Rancheria of Mono Indians (the "Tribe") may conduct Class III gaming activities on a parcel of land in Madera County, California (the "Madera Parcel," or "Parcel,") that the United States acquired in trust for the Tribe. The Clubs contend that issuance of the Secretarial Procedures violated IGRA because the Tribe lacked jurisdiction over the Madera Parcel, a requirement of IGRA. In the alternative, the Clubs contend that tribal jurisdiction would violate the Tenth Amendment. On cross-motions for summary judgment, the district court granted judgment to the Secretary.

The district court correctly ruled that issuance of the Secretarial Procedures complied with IGRA because, when the United States acquired the Madera Parcel in trust for the Tribe, the Tribe acquired jurisdiction. The court correctly declined to resolve the alternative Tenth Amendment issue on the ground that the agency action that purportedly violated that Amendment was not challenged in the Clubs' complaint. The judgment of the district court should be affirmed.

STATEMENT OF JURISDICTION

(a) The district court had jurisdiction under 28 U.S.C. § 1331 because the Clubs' claims arose under a federal statute, namely, IGRA, 25 U.S.C. §§ 2701, et seq.

(b) The district court's judgment was final because it resolved all of the Clubs' claims against all defendants. 1 Excerpts of Record (ER) 3-25. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court entered judgment on July 13, 2018. 1 ER 3. The Club filed their notice of appeal on September 7, 2018, or 56 days later. 1 ER 1. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the Tribes' jurisdiction over the Madera Parcel arose by the United States' acquisition of the Parcel in trust under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5108, preempting State jurisdiction that interferes with the federal purposes for which the Parcel was placed in trust.

2. Whether the Clubs' alternative Tenth Amendment challenge to the Tribe's jurisdiction claim fails because

a. the Clubs did not challenge that final agency decision to take the Parcel into trust; or

b. the challenge lacks merit because the Tenth Amendment is not implicated by placing lands into trust under the IRA.

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. The Indian Reorganization Act

The IRA authorizes the Secretary to acquire "any interest in lands," whether they are "within or without existing reservations," for the "purpose of providing land for Indians." 25 U.S.C. § 5108. While the interest in the land is acquired for the benefit of the Indian tribe, the title associated with the land is held by the United States "in trust for the Indian tribe." *Id.*

2. The Indian Gaming Regulatory Act

Congress enacted IGRA 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). IGRA generally prohibits gaming on lands taken into trust for tribes after October 17, 1988. *See id.* § 2719(a). The Act, however, provides exceptions under which gaming may be conducted after that date on trust lands that are not contiguous to the tribe's reservation. *See id.* §§ 2719(a); (b)(1). The exception relevant here provides that gaming is permitted if (1) the Secretary determines that a gaming establishment on newly acquired trust lands would be in the tribe's best interest

and not detrimental to the surrounding community; and (2) the governor of the affected state concurs in the Secretary's determination. *Id.* § 2719(b)(1)(A). This is referred to as the Secretarial "two-part determination."

a. Class III gaming and tribal-state compacts

IGRA provides that "Class III gaming"—the type of gaming at issue here—is lawful only if it is conducted on "Indian lands" that are located in a state that permits such gaming. 25 U.S.C § 2710(d).[1] IGRA defines "Indian lands" as "any lands[,] title to which is either held in trust by the United States for the benefit of any Indian tribe . . . and over which an Indian tribe exercises governmental power." *Id.* § 2703(4)(B). Class III gaming is "lawful on Indian lands" only if such gaming is authorized by the "Indian tribe having jurisdiction over such lands." *Id.* § 2710(d)(1)(A)(i).

Class III gaming must be conducted in conformance with a "tribal-state compact entered into by the Indian tribe and the State," *id.* § 2710(d)(1)(C), or, if attempts to reach such a compact are unsuccessful, procedures prescribed by the Secretary under IGRA's mediation process, *id.* § 2710(d)(7)(B)(vii)(II). *See infra* p. 5. The Indian tribe must request that the state "enter into negotiations for the purpose of entering into a tribal-state compact governing the conduct of gaming

[1] IGRA divides gaming into three classes of activities. *See* 25 U.S.C. § 2710. Class III gaming includes slot machines and house banking games, including card games and casino games (such as roulette and keno). *See id.* § 2703(8).

activities." *Id.* § 2710(d)(3)(A). This requirement provides states with an opportunity to participate in developing the regulatory scheme of Indian gaming—an opportunity that states "would not otherwise have" under the Constitution. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996). Upon receiving a compact negotiation request, the state "shall negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A).

If negotiations are unsuccessful, the tribe may sue the state in federal district court. *Id*. § 2710(d)(7)(A)(i). If the court finds that the state did not negotiate in good faith, the court must order the state and the tribe to conclude a compact within 60 days. *Id.* § 2710(d)(7)(B)(iii). If they fail to do so, IGRA provides a mediation process that must be followed. 25 U.S.C. § 2710(d)(7)(B). The state and the tribe each must submit to a court-appointed mediator a proposed compact that represents its "last best offer." *Id.* § 2710(d)(7)(B)(iv). The mediator must select the proposed compact that best comports with IGRA, other applicable federal law, and the court's findings. *Id.* After the mediator submits the selected compact to the state and tribe, the state has 60 days to consent to the mediator's choice of compact. *Id*. §§ 2710(d)(7)(B)(v), (vii). If the state does not consent within that time period, the mediator must notify the Secretary, who "shall prescribe . . . procedures . . . under which class III gaming may be conducted" without a tribal-state compact. *Id.* § 2710(d)(7)(B)(vii). Those "Secretarial

Procedures," which are at issue here, must be consistent with IGRA, the proposed compact selected by the mediator, and relevant state law. *Id.* § 2710(d)(7)(B)(vii).

B. Factual background

1. The United States acquires the Madera Parcel in trust for the Tribe

The North Fork Tribe is a federally recognized Indian tribe. 1 ER 6. In 1916, pursuant to Acts of Congress authorizing the purchase of California lands for Indians, the Secretary purchased 80 acres of lands for "approximately 200 landless Indians belonging to the North Fork band." 1 ER 6. At the time that this "North Fork Rancheria" was purchased, the land was "essentially uninhabitable" in that it was "poorly located," "worthless as a place to build homes on," and "lacked water for both domestic purposes and irrigation." *Id.* (brackets and ellipses omitted).

The United States also holds in trust for the Tribe a 61.5-acre tract of land that is used for housing. 1 ER 7. The tract was placed in trust for "low income Indian housing," among other uses. *Stand Up for California! v. U.S. Department of Interior*, 204 F. Supp. 3d 212, 231 (D.D.C. 2016)), *aff'd*, 879 F.3d 1177 (D.C. Cir. 2018). The tract is "located on a steep hillside in North Fork" and contains a community center, basic infrastructure (i.e., roads, water, sewer), pads for nine single-family homes, and the Tribe's "current government headquarters." 1 ER 7.

In 2005, when the Tribe was facing "high unemployment, inadequate public services, and an uncertain revenue stream," it pursued tribal gaming under IGRA.

Stand Up for California!, 879 F.3d at 1179-80. The Tribe's "existing land was ill-suited to [that] purpose," *id.* at 1180, so the Tribe applied to the Secretary to have the "largely undeveloped," private fee lands of the Madera Parcel taken into trust for the Tribe's benefit under the IRA (the "land-into-trust application"). 1 ER 7. The Parcel is located approximately 38 miles from the Tribe's Rancheria and approximately 36 miles from its 61.5 acre-tract of land. *Id*.

Following a nearly seven-year administrative process, the Secretary approved the Tribes' land-into-trust application for acquiring the Madera Parcel. 1 ER 7. On February 5, 2013, the United States acquired the 305.49-acre Madera Parcel in trust for the Tribe pursuant to the IRA. 1 ER 4; *North Fork Rancheria of Mono Indians v. California*, No. 1:15-cv-00419 2015 WL 11438206, at *2 (E.D. Cal. Nov. 13, 2015).

2. The Secretary makes the two-part determination required to permit gaming on trust land acquired after 1988

Because IGRA generally prohibits gaming on trust land acquired after 1988, *see supra* p. 3-4, the Tribe asked the Secretary to determine whether the Madera Parcel was eligible for Class III gaming under IGRA's exception provision. The Secretary conducted the statutorily required consultation and made a "two-part determination." *See* 25 U.S.C. § 2719(b)(1)(A). In September 2011, the Secretary issued a Record of Decision for that determination, concluding that the Tribe was

eligible for gaming under the statutory exception. 1 ER 7. The Governor of California concurred in the Secretary's two-part determination on August 31, 2012. 1 ER 7. On the same day, the Governor and Tribe completed and executed a compact to govern the Class III gaming that would be conducted at the Madera Parcel. 1 ER 8. In June 2013, the Governor forwarded the completed tribal-state compact to the California Legislature, which ratified the compact in a bill passed by both houses thereof. *Id.* The Governor signed the bill into law on July 3, 2013. 1 ER 8; 39. The Secretary published notice in the Federal Register that a compact between the Tribe and the State of California had been approved. 78 Fed. Reg. 62,649 (Oct. 22, 2013).

3. Secretarial Procedures are issued when California refuses to recognize the negotiated compact

In November 2013, the State of California informed the Secretary that a voter-initiated "referendum" on the compact law had qualified for the ballot and would go before the electorate in November 2014. 1 ER 8. The electoral result of that referendum, commonly known as "Proposition 48" on the ballot, was to nullify the compact law and thereby the 2013 tribal-state compact. 1 ER 39. Thereafter, the State no longer recognized the compact as valid. *North Fork*, 2015 WL 11438206, at *3.

In 2015, the Tribe requested that the State enter into negotiations for a new compact for the Madera Parcel. 1 ER 9, 39. The State refused, and the Tribe filed

suit under IGRA, seeking a determination that the State failed to negotiate in good faith toward an enforceable compact. *See* 25 U.S.C. § 2710(d)(7)(i); *North Fork*, 2015 WL 11438206 at *1. In November 2015, the district court held that the State had failed to negotiate in good faith, and the court ordered the State and Tribe to conclude a compact within 60 days, but the parties failed to do so. *Id.* at *8, *12; 1 ER 9.

As required by IGRA, the court appointed a mediator who directed the parties to submit their last best offers for consideration. 1 ER 9. The mediator selected the Tribe's proposal, but the State did not consent within the statutory time frame. *Id.* at 9-10. The mediator notified the Secretary, and in July 2016, the Secretary prescribed Secretarial Procedures under which the Tribe is to conduct gaming on the Madera Parcel. 1 ER 9-10; 2 ER 79-218; *see also* 25 U.S.C. § 2701(d)(7)(B)(vii).

C. Proceedings below

The Clubs filed their complaint in December 2016. SER 3-18. On cross-motions for summary judgment, the Clubs challenged the Secretary's issuance of the Secretarial Procedures, arguing that (1) the Tribe did not acquire jurisdiction over the Madera Parcel when the United States acquired it in trust under the IRA; (2) the Tribe could not have jurisdiction without the consent or cession of the State; and (3) assuming that the Tribe acquired jurisdiction by virtue of the IRA,

that Act violates the Tenth Amendment by providing for the unilateral transfer of the State's territorial jurisdiction. 1 ER 13.

The district court denied the Clubs' motion and granted summary judgment in favor of the Secretary. 1 ER 4-25. The court pointed out that the "Ninth Circuit has indicated that § 5 of the IRA is designed to allow the Secretary to hold such lands in the legal manner and condition in which trust lands were held under the court decisions existing before enactment of the IRA, i.e., free of state regulation." 1 ER 17 (internal quotation marks and modifications omitted). The court concluded that the Tribe had jurisdiction over the Madera Parcel for purposes of IGRA by virtue of the lands being acquired in trust for the Tribe. 1 ER 13. The court further concluded that neither State consent nor cession was required for tribal jurisdiction to ensue after the Parcel was taken in trust. 1 ER 33. The court ruled that, because IGRA's tribal-jurisdiction requirement was satisfied, issuance of the Secretarial Procedures was not arbitrary, capricious, or otherwise not in accordance with law. 1 ER 25.

The district court declined to decide the Clubs' alternative claim under the Tenth Amendment. 1 ER 13-14. The court determined that the agency action that purportedly violated the Tenth Amendment—i.e., the Secretary's land-into-trust determination made under the IRA—was not challenged in the Clubs' complaint therefore was not properly before the court. 1 ER 13. The court also held that the

Clubs lacked standing to "vindicate the State of California's partial divestment of jurisdiction by operation of the IRA." *Id.*

SUMMARY OF ARGUMENT

1. Issuance of Secretarial Procedures for the Tribe's gaming activities in the California was proper under IGRA. The statute's tribal jurisdiction requirement was satisfied once the United States acquired the Madera Parcel in trust for the Tribe under the IRA.

Under IGRA, Secretarial procedures may be issued for Class III gaming that is conducted on the Indian lands over which an Indian tribe has jurisdiction. Indian tribes possess inherent sovereignty, except where it has been taken away by treaty or act of Congress, and an integral aspect of a tribe's retained sovereignty is jurisdiction over the land it occupies and uses. Inherent in the Tribe's sovereignty here is jurisdiction over its land, which included the Madera Parcel once the Secretary acquired the Parcel in trust for the Tribe under the IRA. That Act authorizes the Secretary to acquire any interest in lands, whether located within or without a tribe's existing reservation, for the purpose of providing land for the tribe. Land owned by the federal government in trust for a tribe under the IRA is Indian Country over which the federal government and the tribe have primary jurisdiction. Accordingly, once the Secretary acquired the Madera Parcel in trust by operation of the IRA, the Parcel became Indian country over which the federal

government and the Tribe now have primary jurisdiction. The scope of that jurisdictional shift is defined by specific preemption principles that apply in matters involving Indian tribes and their lands. For trust lands, such as those here, state jurisdiction is preempted to the extent that it interferes with the federal purposes for which the lands were placed in trust.

Contrary to the Clubs' contention, the Tribal and federal jurisdiction over the Madera Parcel arose without requiring State consent or cession. The Clubs argue that such consent or cession is required under the Enclave Clause of the Constitution, which provides that Congress may acquire jurisdiction either by consensual acquisition of land, or by nonconsensual acquisition followed by the state's subsequent cession of legislative authority over the land. But the Enclave Clause is not relevant here because the United States does not rely on it to take land into trust. Rather, the federal government's authority to take land into trust for purposes of furthering tribal sovereignty and self-government originates from the Constitution—namely, the Indian Commerce Clause.

2. The Clubs' alternative Tenth Amendment argument fails on multiple grounds. The district court ruled that (i) the Clubs' Tenth Amendment claim is based on the Secretary's 2013 decision to take the Madera Parcel into trust pursuant to the IRA, and (ii) the Clubs' complaint did not challenge that final agency action. The Clubs do not dispute either of those rulings. Thus, the very

basis of the Clubs' Tenth Amendment claim—i.e., the Secretary's land-into-trust decision—is not before this Court. In any event, the Clubs' claim fails because the federal government's authority to acquire land in trust for Indian tribes is not a derivative legislative power from states. Rather, it originates from the Constitution, under the Indian Commerce Clause. Therefore, the Tenth Amendment was not implicated when the Madera Parcel was placed in trust under tribal jurisdiction.

The judgment of the district court should be affirmed.

STANDARD OF REVIEW

This Court reviews de novo a district court's grant of summary judgment under the APA, including its conclusions regarding Article III standing. *California Sea Urchin Commission v. Bean*, 883 F.3d 1173, 1180 (9th Cir. 2018).

ARGUMENT

I. The issuance of the Secretarial Procedures was proper under IGRA because the statute's tribal jurisdiction requirement as to the Madera Parcel was satisfied once the United States acquired the Parcel in trust for the Tribe by operation of the IRA.

Under IGRA, Secretarial procedures may be issued for Class III gaming to be conducted on "Indian lands over which the Indian tribe *has jurisdiction*." 25 U.S.C. § 2710(d)(7)(B)(vii)(II) (emphasis added); *see also id.* § 2710(d)(1)(A)(i) ("the Indian tribe having jurisdiction over such lands"); *id.* § 2710(d)(3)(A) (the "Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted"). The Clubs contend (Br. 22-24, 28-52) both (1) that the Tribe did not have jurisdiction over the Madera Parcel at the time the Secretary issued the Secretarial Procedures for the Tribe's Class III gaming on the Parcel; and (2) that the Secretary did not consider whether the Tribe possessed such jurisdiction. As elaborated below, the district court correctly rejected both of these contentions.

A. By taking the Madera Parcel into trust for the Tribe under the IRA, the United States established the Tribe's jurisdiction over that parcel for purposes of IGRA.

Indian tribes are "dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) (internal quotation marks omitted). Although "tribes are subject to plenary control by Congress," the Supreme Court has repeatedly recognized that "unless and until

Congress acts, the tribes retain their historic sovereign authority." *Id*. (same). This sovereignty subsists "except where it has been specifically taken away from them by treaty or act of Congress." *Nance v. EPA*, 645 F.2d 701, 713 (9th Cir. 1981) (brackets omitted).

Relevant to the issue at hand, this well-recognized sovereignty extends to *land*. This Court has recently affirmed the long-standing principle that, as "separate sovereigns," Indian tribes "possess[] attributes of sovereignty over both their members *and their territory*." *United States v. Cooley*, No. 17-30022, 2019 WL 1285055, at *9 (9th Cir. Mar. 21, 2019) (emphasis added) (quoting *United States v. Antelope*, 430 U.S. 641, 645 (1977)). Moreover, "managing tribal land" is one element of a "tribe's sovereign interests." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 327 (2008) (brackets omitted); *accord United States v. Lara*, 541 U.S. 193, 204 (2004) (recognizing "a tribe's authority to control events that occur upon the tribe's own land").

On the basis of these principles, the First Circuit long ago concluded that unless taken away by treaty or statute, an Indian tribe "has jurisdiction" over its own lands for purposes of IGRA. *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 700-02 (1st Cir. 1994). Simply put, "*jurisdiction* is an integral aspect of [a tribe's] retained sovereignty." *Id*. at 701 (emphasis added). While not precisely on all fours, the Second Circuit has similarly held that "Congress intended lands

purchased with [Seneca Nation Settlement Act] funds and held in restricted fee to be subject to the Seneca Nation's tribal jurisdiction," such these lands are "subject to tribal jurisdiction, as required by IGRA." *Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267, 286 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 2387 (2016). This Court should join the First and Second Circuits. Those decisions were correct on they own terms, and they are bolstered by several other legal principles.

First, the Supreme Court has held that where the United States "sets aside" land for an Indian tribe, and exercises some element of "federal superintendence," the "Indian land in question constitutes Indian country" even if it is not formally a "reservation." *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527-31, 533 (1998); *see also* Br. 59.[2] Among other circumstances, these two requirements are satisfied when "the Federal Government [holds] the [tribe's] land in trust for the benefit of the Indians residing there," i.e., by "retaining title to the land and permitting the Indians to live there." *Id*. at 529; *accord*, *e.g.*, *Langley v.*

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[2] "Indian country" is defined as "all land within the limits of any Indian reservation under the jurisdiction of the United States" and "all dependent Indian communities within the borders of the United States." 18 U.S.C. § 1151. The Supreme Court has held that although this definition specifically relates to delineating the scope of *federal criminal* jurisdiction, it also generally applies to questions of *tribal civil* jurisdiction. *See Venetie*, 522 U.S. at 527 n.1. Moreover, although the definition refers expressly to any Indian "reservation" and not to "trust" lands, the Supreme Court has applied Section 1151 to such lands. *See id*. at 529-30, 533; *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991) ("[T]he test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.' ").

Ryder, 778 F.2d 1092, 1095 (5th Cir. 1985) (holding that whether lands acquired pursuant to the IRA "are merely held in trust for the Indians or . . . have officially been proclaimed a reservation, the lands are clearly Indian country"); *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1011 (8th Cir. 2010) (holding that "taking land into trust for the benefit of an Indian tribe" under the IRA operates "to convert such land into Indian country"); *United States v. Roberts*, 185 F.3d 1125, 1131-32 (10th Cir. 1999) (holding that "lands owned by the federal government in trust for Indian tribes are Indian Country"). Those are precisely the circumstances of the Madera Parcel. *See, e.g.*, 1 ER 7 (observing that the Parcel "was acquired in trust by the United States for the benefit of North Fork in 2013").

For present purposes, the crucial consequence of lands being deemed Indian country is that "the Federal Government and the Indians involved, rather than the States, are to *exercise primary jurisdiction* over the land in question." *Venetie*, 522 U.S. at 531 (emphasis added); *accord id*. at 527 n.1 ("primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States"). In other words, "as a general rule Indian country falls under the primary civil, criminal, and regulatory *jurisdiction* of the federal government and the resident Tribe rather than the states." *Yankton Sioux*, 606 F.3d at 1006 (emphasis added).

Conversely, acquisition of trust lands for a tribe results in the exclusion of such lands from state jurisdiction. As this Court recognized long ago, Congress intended Indian trust lands acquired under the IRA "to be held . . . f*ree of state regulation*." *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 666 (9th Cir. 1975) (emphasis added).[3] The shift from state jurisdiction to primary jurisdiction of the federal government and the tribe is effected even though the IRA omits a provision *expressly* exempting trust lands from state regulation. This Court did not "read that omission as evidencing a congressional intent to allow state regulation"; rather, the Court "read the omission as indicating that Congress simply took it for granted that the states were without such power, and that an express provision was unnecessary: i.e., that the exemption was implicit in the grant of trust lands under existing legal principles." *Id*. at 666 n.17.

[3] This Court has since clarified, applying preemption principles, that for matters involving Indian tribes and their lands, state jurisdiction is preempted to the extent that it interferes with the federal purposes for which the lands were placed in trust. *See, e.g., Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1189 (9th Cir. 2008) ("State jurisdiction is preempted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983)); *Fisher v. District Court of Sixteenth Judicial District*, 424 U.S. 382, 386 (1976) (finding state law preempted where it "infringed on the right of reservation Indians to make their own laws and be ruled by them.") (internal quotations omitted).

Other courts of appeals have similarly held that the creation of tribal jurisdiction is implicit in the grant of trust lands. The Second Circuit, for example, held that "[w]hen the federal government takes land into trust for an Indian tribe, the state that previously exercised jurisdiction over the land cedes some of its authority to the federal and tribal governments." *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 569 (2d Cir. 2016), *cert. denied*, Nos. 16-1320 and 17-8, 2017 WL 5660979 (U.S. Nov. 27, 2017); *see also Citizens Against Casino Gambling*, 802 F.3d at 285 (agreeing with this Court's holding in *Santa Rosa* that "an express provision" in the IRA was "unnecessary"; rather, exemption from state regulation is "implicit in the grant of trust lands under existing legal principles"). The Eighth Circuit has concluded that "land held in trust under [the IRA] is effectively removed from state jurisdiction," for "when Congress enacted [the IRA] it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference." *Yankton Sioux*, 606 F.3d at 1011 (internal quotation marks omitted).

B. The Clubs' arguments disputing the tribal and federal government jurisdiction over the Madera Parcel cannot withstand scrutiny.

The Clubs advance several arguments as to why the foregoing fails to show that the Tribe "has jurisdiction" over the Madera Parcel. None has merit.

1. The Clubs' "title-only" theory is wrong.

The Clubs contend (Br. 32, 37) that when the Secretary acquired the Madera Parcel under the IRA the federal government acquired only *title* to the land, and the federal government and that Tribe are otherwise powerless to exercise jurisdiction over the land. The Clubs' "title-only" theory is mistaken, as this Court made clear in *Santa Rosa*:

> Congress, by the Indian Reorganization Act, authorized the government to purchase the lands involved here, and to hold the title in trust . . . . Against the historical backdrop of tribal sovereignty . . . we have little doubt that Congress assumed and intended that states had no power to regulate the Indian use or governance of the [trust lands], except as Congress chose to grant that power.

532 F.2d at 658. Consequently, taking land into trust acquires much more than mere title to the land; it acquires "power to regulate the use or governance" of the land. In a word, it acquires "jurisdiction" over the land.

The Clubs' title-only theory likewise cannot be squared with the Supreme Court's recognition of the IRA as a "sweeping" statute, the "overriding purpose" of which is to "establish *machinery* whereby Indian tribes would be able to assume a greater degree of *self-government*, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974) (emphasis added). The Secretary holds title to the trust land pursuant to the Act, to fulfill the congressional purpose of facilitating tribal self-governance. *See, e.g., EEOC v. Peabody Western Coal Co.*, 773 F.3d 977, 983 (9th Cir. 2014) (recognizing that the IRA "was conceived as a means to

restore tribal sovereignty and to promote the tribes' self-governance and economic independence."). Holding the title to the land in trust serves as the "machinery" for providing tribes with that greater degree of self-government.

With no better authority on the side of their novel theory, the Clubs turn to the IRA's legislative history. They point out (Br. 48-49) that the original proposed bill that became the IRA included a "reference to 'jurisdiction,'" and that Congress deleted that reference before the bill was passed. The Clubs contend that because Congress included "broad" language that was then deleted, Congress did not intend for the IRA to provide for tribal and federal jurisdiction over lands taken into trust. No such conclusion may properly be drawn from the IRA or its history. To the contrary, a comparison of the language in the original bill with the Act's current language, shows that Congress intended to *broaden* the nature and scope of land acquisitions under the IRA.

Section 16 of the not-enacted version of the IRA provided that the Secretary "is authorized to proclaim new Indian reservations on lands purchased for the purposes enumerated in this act, or to add such lands to the *jurisdiction of existing reservations*." H.R. 7092, 73rd Cong. 2nd Sess., at 36-37 (1934) (emphasis added). In that provision, the clause referring to "jurisdiction" would have limited the Secretary's authority to acquiring lands for the purpose of *adding* them to the jurisdiction that was exercised over *already-existing reservations*. But the statute

as enacted does not contain that limiting language. It does not require the trust lands to be added to *existing* jurisdictions or reservations. In fact, its express language permits proclaiming *new* reservations on trust lands. *See* 25 U.S.C. § 5110 (authorizing the Secretary "to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act"). As explained above, moreover, whether trust land is proclaimed a reservation or not, the tribe has jurisdiction. As explained above, moreover, whether trust land is proclaimed a reservation or not, the tribe has jurisdiction. Thus, where, as here, "Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983); *Plata v. Schwarzenegger*, 603 F.3d 1088, 1096 (9th Cir. 2010).

2. Tribal and federal jurisdiction over the Madera Parcel arose without State consent or cession.

The Clubs argue (Br. 37-42) that tribal and federal jurisdiction over IRA trust lands arises only through state consent or cession of the state's jurisdiction over the lands. For this proposition, the Clubs cite the Enclave Clause of the Constitution and 40 U.S.C. § 3112. Neither applies here.

a. The Enclave Clause does not apply here.

The Enclave Clause of the Constitution provides a mechanism for the United States to acquire exclusive jurisdiction "over all Places purchased by the Consent

of the Legislature of the State in which the same shall be." U.S. Const. art. I, § 8, cl. 17, *quoted in* Br. 39). Under the Clause, Congress may acquire jurisdiction either by consensual acquisition of land, or by nonconsensual acquisition followed by the state's subsequent cession of legislative authority over the land. *Kleppe v. New Mexico*, 426 U.S. 529, 542 (1976). That provision is irrelevant here, as the United States does not rely on the Enclave Clause to take land into trust.

The federal government's authority to take land into trust for purposes of furthering Indian tribal sovereignty and self-government derives from the Indian Commerce Clause. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs."); *see also infra* p. 35-39. That authority is not a derivative legislative power from a state pursuant to the Enclave Clause. Acquiring land in trust under the Indian Commerce Clause does not require state consent or cession, as the Clubs suggest. Indeed, this Court has held squarely to the contrary: a "State's consent or cession is not required when Congress acts pursuant to its plenary authority to regulate the public lands." *Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990), *cert. denied*, 498 U.S. 1118 (1991). Congress' "plenary" authority here derives from the Indian Commerce Clause. *See, e.g.*, *Cotton Petroleum*, 490 U.S. at 192.

Moreover, cases construing the Enclave Clause instruct that state consent is needed only when the federal government takes "exclusive" jurisdiction over land within a state. *See, e.g., Paul v. United States*, 371 U.S. 245, 263 (1963); *Alaska v. United States*, 213 F.3d 1092, 1095 (9th Cir. 2000). Here, the government did not seek exclusive jurisdiction for the trust lands, and it was not required to do so; thus, the Enclave Clause is not implicated. *See, e.g., Upstate Citizens*, 841 F.3d at 572 ("Because federal and Indian authority do not wholly displace state authority over land taken into trust pursuant to § 5 of the IRA, the Enclave Clause poses no barrier to the entrustment that occurred here.").

b. 40 U.S.C. § 3112 does not apply here either.

The Clubs also contend (Br. 42-44) that state consent or concession is required under 40 U.S.C. § 3112(b), which governs "Acquisition and acceptance of jurisdiction" by the United States. In the Clubs' view, applies when the federal government seeks exclusive *or* partial jurisdiction over state land. The Clubs are wrong.

Section 3112(b) merely sets forth the requirements for federal government *acceptance* of jurisdiction over land. This makes sense because when the federal government assumes exclusive jurisdiction, it assumes significant jurisdictional responsibility over such land. *See Silas Mason Co. v. Tax Commission*, 302 U.S. 186, 207-08 (1937) ("The mere fact that the Government needs title to property

within the boundaries of a State . . . does not necessitate the assumption by the Government of the burdens incident to an exclusive jurisdiction."). Section 3112(b) ensures that all parties to a consent or cession understand and agree to a particular transfer of jurisdictional responsibilities. *See United States v. Johnson*, 994 F.2d 980, 984 (2d Cir. 1993) (explaining that Section 3112, formerly codified as 40 U.S.C. § 255, was enacted in accord with Supreme Court decisions noting that "the United States could not be forced to accept unwanted legislative jurisdiction").

The Clubs make much of the fact that partial or concurrent jurisdiction can result under Section 3112(b), not just exclusive jurisdiction. Br. 54-55. They believe the statute must cast a wider net than the Enclave Clause, "appl[ying] to the transfer of *any* jurisdiction." *Id*. at 54 (emphasis added). But the Clubs fail to recognize that the circumstances under which partial or concurrent jurisdiction arises for purposes of Section 3112(b) still have origins in a federal government request for *exclusive* jurisdiction under the Enclave Clause.

As explained in *United States v. Parker*, 36 F. Supp. 3d 550 (W.D.N.C. 2014), on which the Clubs rely, when the United States seeks exclusive jurisdiction under the Enclave Clause, "a State may *condition its 'consent'* upon its *retention* of jurisdiction over the lands *consistent with the federal use*." *Id.* at 567 (emphasis added) (quoting *Paul*, 371 U.S. at 264-65). When there is a conditional state

consent, "the legislative jurisdiction acquired may range from exclusive federal jurisdiction . . ., to concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority." *Id.* (quoting *Kleppe*, 426 U.S. at 542). Before Congress enacted Section 3112(b), the "quantum of jurisdiction the federal government derive[d]" over property it acquired within a state was "not always . . . clear." *See id.* (citing *Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 528 (1885)); *see also United States v. Davis*, 726 F.3d 357, 363-64 (2d Cir. 2013) ("Until 1940 [i.e., the passage of Section 3112], acceptance of jurisdiction over lands acquired by the United States was *presumed* in the absence of evidence to the contrary.") (emphasis added); *Atkinson v. Tax Commission*, 303 U.S. 20, 23 (1938) (pre-Section 3112 case holding that United States' "[a]cceptance" of jurisdiction "may be presumed in the absence of evidence of a contrary intent.").

After the enactment of Section 3112(b), however, a state's transfer of jurisdiction over real property did not take effect for federal purposes until it was formally *accepted* by the federal department that would have control over the land. *See Parker*, 36 F. Supp. 3d at 567. In *Adams v. United States*, 319 U.S. 312, 314 (1943), the Supreme Court explained that Section 3112 "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." The Clubs take the *Adams* explanation out of context and argue (Br.

54) that it stands for the proposition that Section 3112 establishes an *independent* requirement for state consent (separate and apart from the Enclave Clause) for the transfer of partial or concurrent jurisdiction. But, as we have shown, the partial or concurrent jurisdiction arises from the nature of a state's consent under the *Enclave Clause*: if that consent is conditioned on the state retaining jurisdiction, partial or concurrent jurisdiction ensues. Thus, because the Enclave Clause is the source of the jurisdiction even for purposes of Section 3112(b), the state consent requirement is triggered only when the federal government seeks exclusive jurisdiction.

The Clubs cite (Br. 38) *United States v. Gliatta*, 580 F.2d 156 (5th Cir. 1978), for the categorical proposition that "[a]bsent the state's consent . . . the United States does not obtain exclusive or concurrent jurisdiction." *Id*. at 158 n.6 (internal quotation marks omitted). But the Clubs ignore that the quoted sentence applies to the *general* principle regarding federal jurisdiction over lands. That principle does not apply when Congress provides for federal jurisdiction in another enactment. *See, e.g., United States v. Urrabazo*, 234 F.3d 904, 907 n.4 (5th Cir. 2000) ("[O]ur decision in *United States v. Gliatta* commands the conclusion that when Congress passes an appropriations act . . . the United States *has jurisdiction* to regulate that property." (emphasis added)).

In *Gliatta*, the defendant was convicted of violating federal postal regulations by driving in an unsafe manner in a post office parking lot. 580 F.2d at

157. At the time of the violations, the federal government lacked exclusive or concurrent jurisdiction over postal premises. *Id*. The defendant argued that, without such jurisdiction, the federal government lacked jurisdiction to try him for the alleged violations. *Id*. at 157-58. The Fifth Circuit rejected that argument, holding that Congress had provided for federal jurisdiction in a separate congressional enactment. *Id*. at 159-60. But as a preliminary matter, the court considered several of the authorities on which the Clubs rely here for the *general* proposition that state consent is required for the federal government to acquire exclusive or concurrent jurisdiction over land within state borders. *Id*. at 158-59 (citing the Enclave Clause; *Kohl v. United States*, 91 U.S. 367 (1875); *Surplus Trading Co. v. Cook*, 281 U.S. 647 (1930); *Adams*, 319 U.S. 312); *see also* Br. 39, 40, 42, 54. The court declined to apply those authorities; it referred to the issue raised by the defendant as the "exclusive jurisdiction red herring"; and it concluded that Congress had provided another "mechanism by which the United States, or its instrumentality . . . could maintain order on postal facilities . . . *without resorting to the somewhat byzantine process of securing exclusive or concurrent federal jurisdiction over such property*." *Id*. at 159 (emphasis added).

Gliatta demonstrates that the general premise on which the Clubs rely that federal and tribal jurisdiction over state lands arises only with state consent or cession is false. The IRA, like the congressional enactment in *Gliatta*, provides a

statutory "mechanism" by which the United States (and, as discussed above, tribes) may obtain jurisdiction over lands within state boundaries without state consent.

The Clubs also cite (Br. 41-42) a treatise from the Government Accounting Office and a Department of Justice Resource Manual for the proposition that the federal government's ownership of property does not translate into unilateral assumption of any degree of jurisdiction. But the section of the Report on which the Clubs rely concerns the creation of federal enclaves, and the Report explicitly states that "Indian reservations are not federal enclaves." 3 *Principles of Federal Appropriations Law* 13-111 3d ed. 2008, *available at* http://www.gao.gov/special.pubs/d08978sp.pdf (last accessed Mar. 30, 2019). The Justice Department Resource Manual addresses the state consent and cession requirement for the federal government to acquire jurisdiction over land for which it has obtained *only title* by way of purchase or eminent domain. *Criminal Resource Manual* § 664 (Territorial Jurisdiction), *available at* https://www.justice.gov/jm/criminalresource-manual-664-territorial-jurisdiction (last accessed Apr. 1, 2019). That circumstance has no relevance here. *See supra* p. 20-21.

3. The Clubs' record-based grievances do not alter the well-established principles that control in this case.

The Clubs complain (Br. 28-29) that there is no record evidence showing that the Secretary considered whether the Tribe had jurisdiction over the Madera

Parcel before issuing the Secretarial Procedures. At the outset, the Clubs cite the district court's finding that the "administrative record contains no evidence that any governmental entity had affirmatively concluded that [the Tribe] had territorial jurisdiction over the Madera Site." Br. 28 (quoting 1 ER 10). But the Clubs fail to acknowledge that the court went on to point out that such record evidence was not necessary because the court had determined that tribal jurisdiction existed even in the absence of record evidence. Similarly, in citing the Government's Statement of Material Facts and Responses submitted to the district court as an "admission," Br. 28-29 (citing 2 ER 50-51), the Clubs fail to acknowledge that the Government clarified its position: for purposes of the Tribe's jurisdiction, the lack of specific record evidence is not dispositive because, as a threshold matter, the Tribe's jurisdiction over its trust lands lies as a matter of law. *See* DCt. Dkt. No. 37-1.

Under the APA, an agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law "only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1256-1257 (9th Cir. 2017). Here, as shown above, tribal jurisdiction over trust lands is largely driven by applicable legal authorities and

precedents rather than particular factual findings by the Secretary. Moreover, nothing in IGRA requires the Secretary to render a formal, written determination as to tribal jurisdiction, and the Secretary may reasonably rely on the implicit grant of jurisdiction that operates as a matter of law under the IRA. *See Santa Rosa*, 532 F.2d at 666 n.17. There is nothing arbitrary or capricious in this circumstance.

The Clubs next fault the district court (Br. 29) for the amount of record evidence that it considered in determining the nature of the Tribe's "exercise of government power," *see* 25 U.S.C. § 2703(4)(B), over the Madera Parcel.[4] The Clubs' selective focus on a vague required "amount" of record evidence ignores that (1) the court *did* consider evidence and concluded that "there is sufficient evidence in the administrative record such that it was not arbitrary or capricious for the Secretary to conclude that North Fork [Tribe] exercised governmental power over the Madera Site," 1 ER 22; (2) the court found that the "term 'exercising governmental power' is undefined by IGRA and the case law considering the phrase is sparse," 1 ER 20 (internal quotation marks omitted); and (3) in concert with its consideration of the evidence, the court reasonably turned to case law, conducting a vigorous analysis to resolve this issue. *See* 1 ER 20-23.

[4] IGRA defines "Indian lands" as "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe . . . and over which an Indian tribe *exercises governmental power*." 25 U.S.C. § 2703(4)(B) (emphasis added).

For these reasons, issuance of the Secretarial Procedures was proper under IGRA because the statute's requirement that the Tribe "have jurisdiction" over the Madera Parcel was satisfied.

II. The Clubs' alternative Tenth Amendment argument lacks merit.

The Clubs argue in the alternative (Br. 45-53) that, assuming the IRA creates tribal jurisdiction upon the Secretary's acquisition of trust land, the IRA violates the Tenth Amendment. Because the Clubs' lawsuit arises under the APA, the Clubs must challenge a "final agency action." *Gill v. United States Department of Justice*, 913 F.3d 1179, 1184 (9th Cir. 2019). But the Clubs argue only that the Tenth Amendment bars "the Secretary's action." Br. 53. Although the Clubs do not specify the action to which they are referring, their specific arguments indicate that they are challenging the Secretary's 2013 decision to take the Madera Parcel into trust for the Tribe pursuant to the IRA. Indeed, that is what the district court ruled. 1 ER 13. And the district court also ruled that the Clubs' complaint does not challenge that final agency decision. *Id.* The Clubs do not dispute either of those rulings. Thus, the very basis of the Clubs' Tenth Amendment claim is not before this Court. But in any event, the Clubs' Tenth Amendment challenge to the agency's trust decision fails on the merits.[5]

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[5] Relying on *Oregon v. Legal Services Corp.*, 552 F.3d 965 (9th Cir. 2009), the district court held that, insofar as the Clubs sought to "vindicate the State of California's partial divestment of jurisdiction by operation of the IRA," "they lack

A. The Tenth Amendment is not implicated by placing trust lands under tribal jurisdiction.

The Clubs argue (Br. 45-53) that, if the IRA creates tribal jurisdiction over acquired lands, then the Act violates the Tenth Amendment. The constitutional problem purportedly rises because (1) Congress "by federal fiat" divests states of jurisdiction that they acquired at statehood; and (2) the Indian Commerce Clause does not "expressly" authorize the federal government to "take sovereignty from a state without that state's consent." Br. 52-53. These arguments lack merit.

The essence of the Clubs' "statehood" argument (Br. 24, 46-49, 52) is that tribal jurisdiction over lands within state boundaries exists only as to lands that were reserved to a tribe at the time of statehood. But the Clubs offer no authority for the proposition that time of statehood is a requisite factor for determining the scope of state or tribal jurisdiction when lands are taken into trust. And the Clubs gain no ground by observing (Br. 50) that in admitting new states to the Union, Congress has typically reserved federal or tribal jurisdiction over existing Indian lands. Absent some indication that these pre-admission reservations were thought to preclude additional post-admission reservations, the Clubs' observation lacks significance.

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standing to do so." 1 ER 13. But in *Bond v. United States*, 564 U.S. 211, 225 (2011), which post-dates *Oregon*, the Supreme Court concluded that a federal action that undermines a state's sovereign interests "can cause concomitant injury to persons." The United States does not assert a standing argument here.

As the district court correctly pointed out, for purposes of determining whether land is Indian country—and thus whether the Tribe has "jurisdiction" within the meaning of IGRA—the Supreme Court has not differentiated between lands taken into trust before or after statehood. 1 ER 19. For example, *United States v. John*, 437 U.S. 634, 649 (1978) and *United States v. McGowan*, 302 U.S. 535, 537-39 (1938), involved Indian lands that were taken into trust (*John*) and set aside (*McGowan*) for the tribes *after* the affected states established statehood. In both cases, the Court held that tribal and federal jurisdiction was established as a result of the lands being secured for the tribes. The Court did not identify the timing of statehood as having any relevance in deciding whether the tribe had jurisdiction over the lands.

Finally, the Clubs cite *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), in support of their assertion that Congress may not independently divest a state of jurisdiction over lands acquired at statehood. That case has no application here. In *Hawaii*, the issue was whether a congressional resolution limited the State's authority to sell land that was ceded to the State in fee when it was admitted to the Union. *Id.* at 172, 174. The Supreme Court held that the resolution did not limit the State's authority. In reaching that decision, the Court refused to interpret the resolution as placing a "cloud" on the State's title to its lands because (1) the resolution would create "grave constitutional concerns" if it purported to cloud

Hawaii's title to its sovereign lands; and (2) the resolution revealed no indication of congressional intent to cloud title. *Id*. at 175-76. None of the Court's concerns in *Hawaii* is implicated here. The State of California did not hold title to the lands of the Madera Parcel at the time of the trust acquisition, and the federal trust acquisition did not cloud or remove the State's title to any land.

B. The Constitution, under the Indian Commerce Clause, provides Congress with the power to take land into trust for Indian tribes.

The Clubs argue (Br. 52-53) that because the Indian Commerce Clause does not include "express permission" for the federal government to acquire land in trust for a tribe without state consent or cession, Congress lacks authority to do so. The Clubs' sole basis for this argument is the Tenth Amendment. But the Supreme Court has made clear that the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550 (1985). Thus, Congress may exercise its enumerated constitutional powers, including its Indian Commerce Clause power, to enact statutes that preempt to some degree a states' own regulatory authority. Here, that means that aspects of state sovereignty may be preempted by the IRA and as well as IGRA.

In *Garcia*, the Court rejected as "unworkable" a reading of the Tenth Amendment under which courts were charged with identifying certain distinctive

state functions with which Congress was not permitted to interfere. *Id*. at 532; *see also id.* at 550 ("[W]e have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under" a constitutionally enumerated power). The Court concluded that the states did not require judicial protection for such distinctive functions, because the Constitution's structure already provides political safeguards that are ordinarily adequate to protect the interests of the states. *Id*. at 552-54.

Here, it makes no difference that the Constitution does not contain "express," particularized "permission" for the Secretary to acquire land under the IRA. The federal government possesses the constitutionally "delegated" powers necessary to avoid offending the Tenth Amendment. The "Constitution grants Congress *broad general powers* to legislate in respect to *Indian tribes*" under "powers . . . consistently described as 'plenary and exclusive.'" *Lara*, 541 U.S. at 200 (emphasis added). The Supreme Court has "traditionally identified the Indian Commerce Clause . . . as [one of the] sources of that power." *Id*.; *see also, e.g., Cotton Petroleum*, 490 U.S. at 192 (reiterating that the Clause provides Congress with "plenary power to legislate in the field of Indian affairs."). Because such power is conferred on the federal government, the Tenth Amendment does not reserve such authority to the States. There is no dispute that the IRA "legislates" with respect to Indian tribes. It follows that the IRA was enacted pursuant to

powers conferred on the federal government under the Indian Commerce Clause, and therefore that the Act does not violate the Tenth Amendment. *See Carcieri v. Kempthorne*, 497 F.3d 15, 39-40 (1st Cir. 2007) *rev'd on other grounds*, 555 U.S. 379 (2008) ("Because Congress has plenary authority to regulate Indian affairs, Section [5] of the IRA does not offend the Tenth Amendment.").

The Clubs contend that the Indian Commerce Clause does not afford Congress the "power to unilaterally abrogate" States' territorial jurisdiction and integrity. Br. 45 (citing *Seminole Tribe*, 517 U.S. at 62). *Seminole Tribe* does not so hold. It is an Eleventh Amendment case in which the issue was whether the Indian Commerce Clause granted Congress authority to unilaterally abrogate the states' sovereign immunity to suit under IGRA. The Court held that the Clause did not grant such authority, reasoning that the *Eleventh Amendment* specifically protects the states' sovereign immunity, and that the Clause does not grant Congress the power to abrogate that immunity. *Id.* at 59-60. Thus, IGRA could not eliminate the states' immunity by granting federal courts jurisdiction over states. *Id.* at 75. Here, by contrast, the Indian Commerce Clause does grant Congress the very power that it exercised in enacting the IRA.

Indeed, this Court has already rejected an attempt, similar to that of the Clubs, to invoke *Seminole Tribe* for Tenth Amendment purposes. In *Gila River Indian Community v. United States*, 729 F.3d 1139 (9th Cir. 2013), Congress

enacted a statute that authorized the Secretary to acquire land in trust for a tribe. *Id*. at 1153. Like the Clubs here, the plaintiffs in *Gila River* argued that the statute exceeded Congress' power under the Indian Commerce Clause and thus violated the Tenth Amendment by diminishing the state's sovereign control over its land without the state's consent. *Id*. The plaintiffs invoked *Seminole Tribe*, but this Court rejected that effort as being "unpersuasive" in the face of the "*broad powers* delegated to Congress under the Indian Commerce Clause." *Id.*

The Clubs also quote (Br. 45-46) Justice Thomas' lone dissent from denial of certiorari in *Upstate Citizens for Equality, Inc. v. United States*, Nos. 16-1320 and 17-8, 2017 WL 5660979 (U.S. Nov. 27, 2017), questioning Congress' plenary power under the Indian Commerce Clause. That opinion obviously does not control here, and the Supreme Court has long held that under the Indian Commerce Clause, Congress "has the *exclusive and absolute* power to regulate commerce with the Indian tribes." *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876) (emphasis added); *see also Morton*, 417 U.S. at 551 (opining that Congress has plenary power "to deal with the special problems of Indians," including the power to legislate on their behalf); *County of Oneida v. Oneida*

Indian Nation of New York, 470 U.S. 226, 234 (1985) ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law.").[6]

The Clubs argue that all of the cases that "appear to recognize Congressional power [under the Indian Commerce Clause] to create tribal sovereignty over lands that previously were under State jurisdiction," fall into one of *only two* categories: cases involving the acquisition of lands that were previously part of a tribe's express reservation, and cases involving the acquisition of lands for the purpose of replacing reservation lands lost due to a federal action. Br. 49. The Clubs do not argue this point so much as they merely identify a single case for each category. In any event, the Clubs identify no authority that recognizes these categories, or any *limits* on other categories, with respect to Congress' power under the Indian Commerce Clause. Moreover, the limitation that the Clubs seek to impose is refuted by several Supreme Court cases in which tribal sovereignty was recognized as to trust lands that were *not* previously part of the tribe's reservation and were not acquired to replace lost reservation lands. *See, e.g., McGowan*, 302 U.S. at 536-538; *Oklahoma Tax Commission*, 498 U.S. at 511; *John*, 437 U.S. at 646-49.

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[6] The Clubs assert (Br. 44-45) that Congress' power to regulate commerce with Indian tribes "should be comparable to that Congress possesses to regulate interstate or foreign commerce." The Supreme Court expressly rejected this assertion in *Cotton Petroleum*: "It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications." 490 U.S. at 192.

The Clubs attempt to distinguish *McGowan* and *John*, claiming that those cases involved "land with a long history of Indian occupation and governance." Br. 55-56; *see also* Br. 56-57 (citing *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), and *Upstate Citizens*, 841 F.3d 556, for the same proposition). But there is no such relevant distinction. In *McGowan*, the Court concluded that land taken in trust by the United States for an Indian tribe was Indian country because it was validly set apart for use of the Indians. 302 U.S. at 536-38. In *John*, the Court held that "lands . . . declared by Congress to be held in trust by the Federal Government for the benefit of . . . Indians" is treated as Indian country for purposes of federal criminal jurisdiction. 437 U.S. at 646-47, 649. That holding did not depend upon any particular amount of time that the tribes occupied—or did not occupy—the lands acquired in trust.

In *City of Sherrill*, moreover, the Supreme Court noted expressly that the IRA may be used to grant tribal sovereignty over areas that had long been controlled by the State. The tribe in *City of Sherrill* purchased and asserted sovereign control over portions of its reservation lands that had been purchased by the State of New York centuries earlier. 544 U.S. at 203-11. The Supreme Court held that equitable doctrines precluded the tribe from asserting the same sovereignty that it may once have held over those lands due to the extensive amount of time those lands had been under state sovereign control. *Id*. at 221

(emphasis added). But the Court also stated that *the IRA* "provides the proper avenue for [the tribe] to reestablish sovereign authority over territory last held by the [tribe] 200 years ago," *id*. at 220, implicitly rejecting the Clubs' theory as to lands taken into trust under the IRA.

In sum, the Constitution provides Congress with authority to take land into trust for Indian tribes, and Congress' enactment of the IRA was a proper exercise of such authority that was in no way abrogated by the Tenth Amendment.

III. The Clubs' newly crafted issues on appeal are waived and fail in any event.

The Clubs argue for the first time in this litigation (Br. 25-28) that even if the Tribe had jurisdiction over the Madera Parcel, the Secretary did not satisfy the Secretarial two-part determination requirements of IGRA Section 2719(b)(1)(A). *See supra* p. 3-4. First, the Clubs assert vaguely that the Secretary's determination under this provision "does not reflect consultation with appropriate State and local officials." Br. 25 (internal quotation marks omitted). Second, the Clubs contend (Br. 26-27) that Governor's concurrence in the Secretary's determination was "effectively withdr[awn]" before the Secretary issued the Secretarial Procedures for gaming on the Madera Parcel. Both of these arguments are forfeited. And in any event, each argument fails for independent reasons.

As to the Clubs' challenge to the Secretary's consultation under Section 2719(b)(1)(A), the Clubs did not raise this factbound challenge in the district court,

nor did the court address it on its own. The issue should therefore be deemed forfeited. *Avila v. Willits Environmental Remediation Trust*, 633 F.3d 828, 840 (9th Cir. 2011). In any event, the Clubs' sole grievance (Br. 25) is that, during the consultation process, some entities opposed the Tribe's gaming proposal. But IGRA does not require that the Section 2719 consultation process yield unanimous approval of gaming on the newly-acquired lands.

Nor did the Clubs raise any issue in the district court with respect to the Governor's purported withdrawal of his concurrence in the Secretary's 2719 determination, and the district court did not address it. This issue is likewise forfeited. *Avila*, 633 F.3d at 840. But in any event, the State of California would be an indispensable party to a proper claim that Governor's concurrence is invalid, but the State is not a party in this suit. *White v. University of California*, 765 F.3d 1010, 1026-28 (9th Cir. 2014); *see also Stand Up for California!*, 204 F. Supp. 3d at 251-54 (holding that the State of California was "undoubtedly a necessary party to this lawsuit, to the extent that the plaintiffs challenge the Governor's concurrence" and dismissing for lack of an indispensable party any claims that "in any way involv[ed] the Governor's concurrence").

The Clubs fare no better on the merits of this new argument. They contend that the requirements of Section 2719(b)(1)(A) have not been met because the Governor allegedly withdrew his concurrence in the Secretary's Section 2719

determination. But when the Governor's concurrence was undisputedly in effect, the Secretary issued a final agency decision for its Section 2719 determination and concluded that the Tribe was eligible to conduct gaming on the Madera Parcel under IGRA's exception. *See* 25 U.S.C. § 2719(b)(1)(A); *supra* p. 3-4. That final agency action was separate from, and wholly independent of, the final action challenged here. After the Secretary received the Governor's concurrence, IGRA required nothing more for the Secretary to finally conclude that the Tribe could conduct gaming on the Parcel. *See United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979). In fact, IGRA does not authorize the Secretary to look behind a governor's concurrence, to determine its validity, before finalizing the two-part determination. Accordingly, even if the Clubs' lawsuit challenged the Secretary's two-part determination, which it does not, they have failed to state a claim upon which relief could be granted under Section 2719.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

There is one related case within the meaning of Rule 28-2.6: *Stand Up for California v. U.S. Department of the Interior*, 9th Cir. No. 18-16830.

The case challenges the Secretarial Procedures at issue here. The district court granted summary judgment in the Government's favor. Plaintiffs appealed, contending the district court erred in concluding (1) that IGRA's exception to the Johnson Act, 15 U.S.C. § 1171, et seq., applies to gaming conducted under Secretarial Procedures, and (2) that in issuing the Procedures, the Secretary was not required to conduct a review under the National Environmental Policy Act, 42 U.S.C. § 4321, et seq. or Clean Air Act, 42 U.S.C. § 7401, et seq.

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 18-16696

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