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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; DAVID BERNHARDT, in his official capacity as Secretary of the Interior; and TARA SWEENEY in her official capacity as Assistant Secretary of the Interior – Indian Affairs,

Defendants.

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

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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## ISSUES PRESENTED

Did defendants violate the Indian Gaming Regulatory Act when they issued Secretarial Procedures authorizing the Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("the Tribe") to operate a casino on off-reservation land that is still under state jurisdiction?

Does it violate the Tenth Amendment if the Federal government unilaterally diminishes a state's territorial jurisdiction and shifts it to an Indian tribe without the state's consent?

Alternatively, and in an effort to avoid the constitutional issue, was the Governor's concurrence under 25 U.S.C. § 2719 vitiated when the California Legislature refused to ratify a compact for the proposed casino?

## I. INTRODUCTION and BACKGROUND

The primary issues presented involve territorial jurisdiction, which is one of the fundamental building blocks of governmental structure. More specifically, the questions presented require analysis of when and how territorial jurisdiction shifts from a sovereign state to the federal government, and in turn through the federal government to an Indian tribe.

These issues arise under the Indian Gaming Regulatory Act ("IGRA," 25 U.SC. §§ 2701, et seq.) as well as the Tenth Amendment (U.S. Const. amend. X). IGRA requires that before a tribe can engage in casino gambling, it must first obtain territorial jurisdiction over the proposed casino site. *See* 25 U.SC. § 2710(d). The Tenth Amendment protects state sovereignty, a key component of which is a state's territorial jurisdiction over land within its own borders.

The facts of this case are undisputed.

The proposed casino site, referred to in this memorandum as "the Yuba Parcel," is off-reservation land that has historically been under state jurisdiction. It was not "reserved out" when California was admitted to the Union, nor has there been any cession or voluntary transfer of jurisdiction by the state legislature. Although the United States obtained title to the Yuba Parcel

in 2013 when a third party transferred title to the federal government in trust for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria, that transaction did not alter California's historic territorial jurisdiction over the property. It only affected ownership of the property.[1]

The Yuba Parcel is not eligible for casino gaming under IGRA because neither the United States nor the Tribe has obtained territorial jurisdiction from the State of California. For that reason, the Secretarial Procedures purporting to authorize casino gambling there are invalid and subject to challenge under the Administrative Procedure Act.

In an effort to assist the court in avoiding a major constitutional issue on the transfer of territorial jurisdiction (see *Clark v. Martinez*, 543 U.S. 371, 380-82, 125 S.Ct. 716, 724-25 (2005) (canon of constitutional avoidance), plaintiffs offer an alternate theory that entitles them to relief: the Governor's concurrence, a necessary predicate for the proposed casino under 25 U.S.C. § 2719, was negated when the state legislature refused to ratify a compact for the subject casino. If the court were to decide the case on that basis, there is no need to decide the jurisdiction transfer issue under the Tenth Amendment.

Under any theory, the issues presented by this case arise amid a troubling and controversial context: an out-of-state company's acquisition of real estate long governed by the state, followed by a deed transferring the land to the federal government so the company can then partner with an Indian Tribe to engage in casino gaming that would be illegal if conducted by California residents. The notion that California's historic territorial jurisdiction over the acquired property can be stripped away without the state's legislative consent raises a profound issue of national importance that merits judicial attention.

[1] Plaintiffs have made clear throughout this litigation that they are not challenging the federal government's ability to take land into trust. Rather, they challenge the *effect* of such action, specifically vis-à-vis the situs state's territorial jurisdiction. *See*, e.g., ECF 1 at ¶¶s 47-48, 55.

In fact, a parallel case, raising the same basic issues, but involving the North Fork casino project which is located near Fresno, is now pending in the Ninth Circuit. *See Club One Casino, Inc. v. Department of the Interior*, 328 F.Supp.3d 1033 (E.D. Cal. 2018), on appeal as No. 18-16696 (9th Cir.). A ruling in the *Club One* case may well govern the outcome of this dispute. Even so, plaintiffs are prepared to make their record in this case, voice their arguments, and proceed with a separate appeal if necessary.

## II. SUMMARY OF ARGUMENT

Plaintiffs challenge the validity of the Secretarial Procedures under the Administrative Procedure Act, 5 U.S.C. §§ 551, *et seq.*, on an issue of law that arises out of undisputed facts. Plaintiffs' basic contention is simple: the Secretarial Procedures issued by defendants are arbitrary, capricious and in violation of law because defendants have never considered a key requirement under IGRA: whether the Tribe actually possesses territorial jurisdiction over the proposed casino site.

IGRA repeatedly requires that a tribe possess territorial jurisdiction over Indian lands before Class III gaming can occur there. In this case, the land is *off* reservation, and historically governed by state law. *See* Cal. Gov't Code § 110. Under long standing precedent, as well as the Tenth Amendment, the federal government has no power to unilaterally strip the state of any quantum of its territorial jurisdiction. *See Fort Leavenworth RR. v. Lowe*, 114 U.S. 525, 5 S.Ct. 995 (1885).

The law differentiates between *title* and *jurisdiction*. Although the federal government acquired title to the property from a private third party owner in 2013 (see *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Zinke*, 889 F.3d 584 (9th Cir. 2018), that transfer by itself did not shift jurisdiction. It merely changed the identity of the property's owner.

To shift jurisdiction, much more than a deed is required. Specifically, the federal jurisdiction transfer statute requires a formal cession of jurisdiction from the State of California and formal acceptance by the federal government. *See* 40 U.S.C. § 3112. There has been no cession of jurisdiction by the state and no acceptance by the federal government. As a result, there has been no jurisdictional shift. Indeed, federal law provides that without cession and formal acceptance by the United States, there is a conclusive presumption that the federal government does not have jurisdiction. 40 U.S.C. § 3112(c). At a minimum, the federal jurisdiction transfer statute and IGRA must be read together and reconciled. *See, e.g.*, *Epic Systems v. Lewis*, 138 S.Ct. 1612, 1624 (2018). When the two statutes are read in harmony, it becomes evident that IGRA (and the Indian Reorganization Act, for that matter) cannot force a jurisdictional transfer on a state without the state's consent.

And despite the court's prior comments that this case only involves the transfer of some, but not all, of the state's jurisdiction (*see* ECF 28 at 8-9), state consent is required for the transfer of even partial jurisdiction. *Kleppe v. New Mexico*, 426 U.S. 529, 542-543, 96 S.Ct. 2285, 2293-2294 (1976). Moreover, federal consent is required at the other end of the transfer in order to conclude the shift in sovereignty. *See Adams v. United States*, 319 U.S. 312, 314, 63 S.Ct. 1122, 1123 (1943). Alternatively, if the statute under which the land was acquired—the Indian Reorganization Act (IRA, 25 U.S.C. § 5108)—were construed to empower the federal government to unilaterally shift, and thereby diminish, the territorial jurisdiction of the State of California, the IRA would violate the Tenth Amendment to the United States Constitution. Simply put, the federal government does not possess the power to unilaterally appropriate, and by such action reduce, the territorial jurisdiction of a sovereign state. *See* generally, *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176, 129 S.Ct. 1436, 1445 (2009).

For these reasons the Secretarial Procedures are arbitrary, capricious and not in accordance with law. They should be struck down by this court pursuant to 5 U.S.C. § 706.

## III. STATEMENT OF PERTINENT UNDISPUTED FACTS

### (a) Plaintiffs and The Alleged Injury

Plaintiffs in this case are four state-licensed card clubs located within the same market area as the proposed casino authorized by the challenged Secretarial Procedures. California card clubs are limited in the gaming they can offer. They cannot offer Nevada-style casino gaming. They cannot operate slot machines and cannot host banking and percentage card games, all of which are more popular than non-banked card games. Thus, plaintiffs are at a competitive disadvantage if an Indian tribe is able to open a Nevada-style casino and operate casino-style games in the same area.

Plaintiff PARKWEST CORDOVA CASINO has been in operation at its present location since 2010, approximately 43 miles and less than an hour's drive from the Yuba Parcel. Plaintiff LODI CARDROOM has been in operation at its present location since May 2007, approximately 73 miles and an 72-minute drive from the Yuba Parcel. Plaintiff CAPITOL CASINO has been in operation at its present location since May 2000, approximately 36 miles and a 37-minute drive from the Yuba Parcel. Plaintiff ROGELIO'S has been in operation at its present location since August 1985, approximately 73 miles and a 75-minute drive from the Yuba Parcel. *See* Declarations of Clarke Rosa, John Park, Rogelio Garcia, filed herewith, at ¶¶ 2-9.

Each of the plaintiffs (as well as the surrounding community where they operate) will suffer if the Tribe opens a Nevada-style casino on the Yuba Parcel, with the resulting loss of jobs, revenue, and tax contributions. *Id*.

**(b) The Enterprise Casino Project & the Requirement of State Consent**

Because the proposed casino would operate on after acquired property—that is, land that was acquired after IGRA's adoption—there is a statutory requirement that the state, through its governor, consent to the project. In this instance, the Governor's concurrence occurred in 2012, prior to the time the federal government obtained title to the proposed casino site. *See Estom Yumeka Maidu v. State of California*, 163 F.Supp.3d 769, 772 (E.D. Cal. 2016) (concurrence in 2012; land acquired in 2013). However, the State Legislature negated the consent by refusing to ratify a compact that would allow this casino to operate. *Id.* at 774. See further discussion at pp. 10-11, *infra*.

**(c) The Yuba Parcel and its Ownership History**

The Yuba Parcel is located in Yuba County. It consists of 40 acres of "off-reservation" property located approximately four miles southeast of the Community of Olivehurst, near the intersection of Forty Mile Road and State Route 65 in Yuba County. AR 1074, 1169-1170. The site is approximately 34 miles from the Tribe's current Rancheria lands, which are located near the town of Oroville. *See* Declaration of Robert D. Links at ¶ 3 and Ex. A.

The federal government did not reserve jurisdiction over the Yuba Parcel when California was admitted to the Union. *See* 9 Stat. 452 (1850) (California Admission Act). The land was acquired by the United States in 2013. *Estom Yumeka*, 163 F.Supp.3d at 772; *see also, Cachil Dehe*, 889 F.3d at 590, 593. There is no evidence in the record that the Yuba Parcel was ever occupied, settled, or governed by the Enterprise Tribe prior to the transfer to the federal government. Rather, the land was previously owned by a private, out-of-state limited liability entertainment company. *See Cachil Dehe*, 889 F.3d at 590[2]. Like almost all other land within

[2] The Enterprise Tribe's out-of-state commercial partner is Yuba County Entertainment, LLC, a Delaware limited liability company (YCE). See http://www.enterpriserancheria.org/

California's borders, the Yuba Parcel is under the territorial jurisdiction of the state. *See* Cal. Gov't Code § 110.

The 2013 transfer conveyed legal title, not territorial jurisdiction. The means by which a state surrenders its territorial jurisdiction are consent (pursuant to the Enclaves Clause, U.S. Const. art. I, § 8, cl. 17) or by a state statute ceding all or a portion of jurisdiction to the federal government. *See Coso Energy Developers, v. County of Inyo*, 122 Cal. App. 4th 1512, 1521 (2004); *United States v. Davis*, 726 F.3d 357, 363 (2d Cir. 2013). There has been no consent or cession of jurisdiction with respect to the Yuba Parcel.

To date, defendants have not analyzed the issue of territorial jurisdiction with respect to the Yuba Parcel and, specifically, whether the United States, and through it the Enterprise Tribe, ever actually acquired territorial jurisdiction from the State of California. See ECF 28 at 8 ("Defendants do not dispute that they did not examine the title history of the Yuba parcel"); *Id.* at 9 ("Defendants are not obligated to review any materials beyond those pertaining to …trust status, such as title history of the land").

As we explain below, territorial jurisdiction is a major IGRA prerequisite. Because defendants did not consider it, and because the record does not show that the Enterprise Tribe ever acquired territorial jurisdiction over the Yuba Parcel from the State of California, defendants have acted arbitrarily, capriciously and in violation of law.

## IV. STANDARD OF REVIEW

This case arises under the litigation protocol of the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq*. In such cases, agency decisions may be set aside if they are "arbitrary,

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index.cfm?fuseaction+page&page_id=5034 (last accessed May 7, 2019). YCE purchased the Yuba Parcel and then gifted it to the federal government in 2013. *See Cachil Dehe*, 889 F.3d 584, 590, 593 (9th Cir. 2018).

capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A).

As the court in *Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 89 (D.D.C. 2006) noted:

> Under Fed. R. Civ. P. 56(c), summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." … In a case involving review of a final agency action under the Administrative Procedure Act, 5 U.S.C. § 706, however, the standard set forth in Rule 56(c) does not apply because of the limited role of a court in reviewing the administrative record…. Under the APA, it is the role of the agency to resolve factual issues to arrive at a decision that is supported by the administrative record, whereas "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." …. Summary judgment thus serves as the mechanism for deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review….

*Id*. (citations omitted).

While the court's role in an APA case has been described as "narrow" (*id.* at 90), the court "shall decide all relevant questions of law" and "interpret constitutional and statutory provisions" and shall hold unlawful and set aside agency action found to be "contrary to constitutional right" or in excess of statutory authority. 5 U.S.C. § 706; *see also County of Amador v. United States Department of the Interior*, 136 F. Supp. 3d 1193, 1198 (E.D. Cal. 2015).

The reviewing court must determine "whether the decision was based on a consideration of the relevant factors." *See Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc*., 419 U.S. 281, 285, 95 S.Ct. 438, 442 (1974). This inquiry must "be searching and careful." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861 (1989).

In this case, there was an obvious error: the failure to consider at any juncture the jurisdictional history of the subject property, specifically the fact that the State of California has never surrendered *any* of its territorial jurisdiction which means, in turn, that neither the United

States nor the Tribe ever acquired any portion of the state's sovereign authority over the subject parcel. Defendants thus missed a critical step in the process because without a tribe's territorial jurisdiction, land is not "IGRA eligible."

## V. PLAINTIFFS HAVE STANDING

Plaintiffs claim economic injury stemming directly from the challenged actions. *See* Declaration of John Park, at ¶¶ 4-5, 8-9; Declaration of Rogelio Garcia at ¶¶ 4-5; Declaration of Clarke Rosa at ¶¶ 4-5. 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*, 564 U.S. 211, 131 S.Ct. 2355 (2011). In *Bond*, the Supreme Court held that Tenth Amendment claims do not rest with the State alone; they can be asserted by private citizens as well. 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*, 564 U.S. at 222, 131 S.Ct. at 2365, *see also Upstate Citizens for Equality, Inc., v. United States*, 841 F.3d 556, 562 n. 15 (2d Cir. 2016), *cert denied*, 2017 WL 5660979.

## VI. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THE SECRETARIAL PROCEDURES ARE INVALID AS A MATTER OF LAW

### (a) Prior to considering plaintiffs' territorial jurisdiction point, the Court should consider an alternate argument in an effort to avoid the constitutional issue, namely that the State's concurrence under 25 U.S.C. § 2719 was negated by the Legislature's refusal to ratify a compact for the Enterprise casino.

Congress recognized that the adoption of IGRA might set off a land rush by tribes intent on acquiring new properties and expanding Indian gambling into hitherto unknown areas. To avoid that result, a provision was added to require state consent before casino gaming can occur on land acquired after 1988 (when IGRA enacted). See 25 U.S.C. 2719 (b)(1)(A).

Although California's Governor initially expressed support for the Enterprise casino, a legal controversy erupted over his authority to do so without legislative approval. That issue is now pending before the California Supreme Court. See *United Auburn Indian Community of the Auburn Rancheria v. Brown*, 4 Cal. App. 5th 36 (2016), *review granted*, No. S238544 (Jan. 25, 2017) (involving the Enterprise casino project); *Stand Up for California! v. State of California*, 6 Cal. App. 5th 686 (2016), *review granted*, No. S239630 (Mar. 22, 2017) (involving the proposed North Fork casino project near Fresno). If the Governor lacked authority to act unilaterally with respect to these casinos, then the purported "gubernatorial concurrence" is invalid and section 2719's consent requirement has not been satisfied.

Regardless of the Governor's legal power, any purported concurrence was negated prior to issuance of the challenged Secretarial Procedures. Consent was negated by the State Legislature's refusal to approve a compact for the Enterprise casino.

The instant Secretarial Procedures constitute the final federal administrative determination to allow casino gambling on the Yuba Parcel. The administrative activity that preceded issuance was intermediate in nature. It was not until issuance of formal Secretarial Procedures that the federal government took the final, consummating step to authorize gambling on the Yuba Parcel.

*See Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 1168-1169 (1997) and *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 911-12 (9th Cir. 2002) (no final agency action until "consummation" of agency's process).

The statutory prohibition regarding after-acquired lands is categorical. Casino gambling on such property is prohibited unless the Governor of the State "concurs in the Secretary's determination." 25 U.S.C. § 2719(a) & (b)(1)(A). The Governor must concur in the Secretary's *actual determination*, not in some speculative, preliminary determination that depends on future events. The Governor cannot concur in a determination that is not yet final. The Governor's consent must be in place concurrent with the Secretary's *final* gambling determination. That did not happen here. The Governor's purported concurrence occurred approximately nine months before the federal government acquired title to the Yuba Parcel, see *Estom Yumeka*, 163 F.Supp.3d at 772, and four years before the issuance of Secretarial procedures, which was the federal government's final, consummating step in the administrative process. In between those two events, of course, the legislature refused to ratify a gambling compact for this property.

As section 2719's concurrence requirement was not satisfied, the Secretary's decision must be reversed regardless of the Enterprise tribe's jurisdiction. This argument obviates the need to decide major issues of consequence under the Tenth Amendment. If the court accepts plaintiffs' "non-concurrence" argument, the question of territorial jurisdiction, and when and how it transfers, can wait for another day.

**(b) To Qualify For Issuance Of Secretarial Procedures, A Tribe Must Satisfy Two Preliminary Requirements: The Tribe Must Possess Territorial Jurisdiction Over the Casino Site And It Must Exercise That Jurisdiction**

If the court reaches the issue of territorial jurisdiction, it must take note of two key preliminary requirements under IGRA. First, the tribe must acquire territorial jurisdiction over the casino site and second, the tribe must actually exercise governmental power over the site.

These two requirements are central to IGRA and are repeated several times within the statutory framework. Prior case law makes it clear that without satisfying both of them, a tribe does not have Article III standing to invoke IGRA's provisions. *See Commonwealth of Massachusetts v. The Wampanoag Tribe of Gay Head*, 853 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). A cardinal rule of statutory construction requires that the Court "give effect, if possible, to every clause and word of a statute." *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 2125 (2001)(quoting prior cases).

IGRA expressly requires that Class III gaming is lawful on Indian lands only when authorized by a tribal ordinance or resolution "adopted by the governing body of the Indian tribe having jurisdiction over such lands." 25 U.S.C. § 2710(d)(1). In addition, before there can be a tribal-state compact to provide for Class III gaming, a request for compact negotiations must emanate from an "Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity … is to be conducted." 25 U.S.C. § 2701(d)(3)(A).

The dual requirements apply to the Secretarial Procedures challenged by plaintiffs. IGRA provides that when the state and a tribe have not agreed on a compact, after an appropriate finding by the court and completion of a statutory mediation process, "the Secretary shall prescribe, in consultation with the Indian tribe, procedures…under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." 25 U.S.C. § 2710(d)(7)(B)(vii).

IGRA's dual prerequisites are interrelated, as evidenced by the statutory definition of "Indian land." That term is defined in IGRA to include land "within the limits of any Indian

reservation," as well as land that has been taken into trust "and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(definition of "Indian land").

The proposed casino site is held in trust, but the question is whether it is land over which the Enterprise Tribe exercises government power. In order to do that, the tribe must first have *jurisdiction.* "[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have jurisdiction over that land." *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001). As another court has opined, "Absent jurisdiction, the exercise of governmental power is, at best ineffective, and at worst, invasion." *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D.Kan. 1996).

We consider below whether the Enterprise satisfies these two basic requirements. Given the fact that territorial jurisdiction undergirds the proper exercise of governmental power, we will analyze that issue first. After that, we will consider whether the Tribe has actually exercised jurisdiction (in the form of governmental power) over the Yuba Parcel.

**(c) The Tribe Does Not Possess Jurisdiction Over The Yuba Parcel, Which Remains Subject To The Territorial Jurisdiction Of The State Of California**

The Enterprise Tribe does not meet IGRA's jurisdiction prerequisite because the land-to-trust transfer whereby a private party deeded the proposed casino site to the United States shifted *title* only. It did not shift *territorial jurisdiction*. Only an affirmative release of the state's territorial sovereignty can do that. *See generally Ft. Leavenworth*, 114 U.S. at 538-539, 5 S.Ct. at 1002 ("jurisdiction cannot be acquired tortuously or by disseizin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state…."); *Davis*, 726 F.3d at 363-364; *United States v. Parker*, 36 F. Supp. 3d 550, 565-567 (W.D. N.C. 2014).

Indeed, states possess "primary jurisdiction" over all land within their borders. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998). As the Supreme Court has observed,

"Upon the admission of a state into the Union, the state doubtless acquires general jurisdiction, civil and criminal…throughout its limits, except where it has ceded exclusive authority to the United States." *Van Brocklin v. Tennessee*, 117 U.S. 151, 167-168, 6 S.Ct. 670, 679 (1886).

This doctrine is appropriate, for territorial sovereignty—the power to govern within specific borders through the exercise of general police power in the designated region—is a state's most prized possession. As the Supreme Court has observed, "States do not easily cede their sovereign powers." *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631, 133 S. Ct. 2120, 2132 (2013); *see also Silas Mason v. Tax Comm'n of State of Washington*, 302 U.S. 189, 199 58 S.Ct. 233, 240 (1937); *Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc.*, 64 F. Supp. 3d 872, 905 (E.D. La. 2014).

The use of the word "jurisdiction" in IGRA is entirely logical because in order for a tribe to have lawmaking authority over land, the tribe must possess legislative jurisdiction over it. But legislative jurisdiction (also known as territorial jurisdiction; *see* U.S. Const. art. I, § 8, cl. 17; *Surplus Trading Co. v. Cook*, 281 U.S. 647, 652, 50 S.Ct. 455, 456 (1930)) does not transfer by osmosis and it does not shift with a mere change in title.

General lawmaking authority over territory within a state's borders only transfers when the state affirmatively relinquishes it to the federal government. The formal process for effectuating such a transfer is cession. *Id*. If there has been no cession of jurisdiction, the federal government owns the land in question as an "ordinary proprietor."[3]

[3] As the Supreme Court noted in the *Ft. Leavenworth* case, *supra*: "Where lands are acquired without [a state's] consent, the possession of the United States, unless political jurisdiction be ceded in some other way, is simply that of an ordinary proprietor." *Ft. Leavenworth*, 114 U.S. at 531, 5 S.Ct. at 998. To this end, courts have noted that "the relinquishment of a state's sovereign jurisdiction over its own lands is not to be taken lightly." *Parish of Plaquemines*, 64 F. Supp. 3d at 905 (citing *Silas Mason Co.*, 302 U.S. at 199, 58 S.Ct. at 240); *see also State ex rel. Laughlin v. Bowersox*, 318 S.W.2d 695, 699 (Mo. 2010). Moreover, "all of the Court's decisions are remarkably consistent in the level of

The cession process itself has two distinct parts. First, the state in question must agree to cede its territorial jurisdiction (or a portion of it) to the federal government. Second, the federal government, for its part, must formally accept the cession. *See* 40 U.S.C. § 3112. Unless that process is completed, there is a *conclusive presumption* that jurisdiction has not shifted. 40 U.S.C. § 3112(c).

It is no answer to say that the consent requirement only applies to a transfer of exclusive jurisdiction (*see e.g.*, ECF 33 at 8, n.5 )("Consent by a state is only required when the United States takes 'exclusive jurisdiction over land'"). The requirement of a formal state cession applies to *any* transfer of jurisdiction, whether the federal government seeks exclusive or only partial or concurrent jurisdiction. *See Ft. Leavenworth*, 114 U.S. at 531, 5 S.Ct. at 998; *Kleppe*, 426 U.S. at 542, 96 S.Ct. at 2293; *Parker*, 36 F. Supp. 3d at 567, *see also* 40 U.S.C. § 3112; *Adams*, 319 U.S. at 314, 63 S.Ct. at 1123; *Paul v. United States*, 371 U.S. 245, 264, 83 S.Ct. 426, 437-438 (1963).

**(d) Jurisdiction Principles**

Territorial sovereignty embodies the state's ability to apply its own law to land within its borders.[4] Judicial precedent and governing statutes have erected high barriers to protect that vital power. The United States Supreme Court has established that the federal government cannot take a state's legislative jurisdiction without the state's clear consent. *Ft. Leavenworth*,

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solicitousness that they show for a state's sovereign jurisdiction." *Parish of Plaquemines*, 64 F. Supp. 3d at 905.

[4] The federal Constitution establishes a system of dual sovereignty. "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist, No. 45, p. 292 (Rossiter ed. 1961).); *see also Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 530-540, 132 S. Ct. 2566, 2577-2580 (2012); U.S. Const. amend. X. In California, the basic rule is that state sovereignty and jurisdiction extends to all land within the state's borders. Cal. Gov't Code § 110.

114 U.S. at 538-39, 5 S.Ct. at 1002 ("the state shall freely cede the particular place to the United States . . . ").

The Supreme Court has applied this principle consistently through the years. In *Collins v. Yosemite Park & Curry Co*., 304 U.S. 518, 528, 59 S.Ct. 1009, 1014 (1938), for example, the Court wrote "the Acts of cession and acceptance of 1919 and 1920 are to be taken as declarations of the agreements, reached by the respective sovereignties, State and Nation, as to the future jurisdiction and rights of each in the entire area of Yosemite National Park." And in *Pacific Coast Dairy, Inc. v. California Dept. of Agriculture*, 318 U.S. 285, 293, 63 S.Ct. 628, 630 (1943), the Court examined pertinent state cession statutes before concluding that Moffett Field was under exclusive federal jurisdiction. Lower courts, both state and federal, have taken a similar approach to parsing jurisdictional status. *See, e.g., Haining v. The Boeing Co.*, 2013 WL 4874975 at *2 (C.D. Cal.); *Taylor v. Lockheed Martin Corp.*, 78 Cal. App. 4th 472, 479-80 (2000); *Davis*, 726 F.3d at 364; *United States v. Johnson*, 994 F.2d 980, 984 (2d Cir. 1993); *Parker*, 36 F. Supp. 3d 550.

**i. How Does Jurisdiction Transfer From One Sovereign To Another?**

Past decisions reveal only three basic situations in which the federal government, and through it an Indian tribe, can acquire jurisdiction over land within a state:

1) The parcel is reserved by the United States at the time the state is admitted into the Union;[5]

[5] 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

2) The land is acquired pursuant to the Enclaves Clause (U.S. Const. art. I, § 8, cl. 17); or

3) The state in question expressly cedes jurisdiction to the federal government.

*See generally*, *Ft. Leavenworth*, 114 U.S. at 528, 541-42, 5 S.Ct. at 997, 1004; *Silas Mason Co.*, 302 U.S. at 197, 58 S.Ct. at 239; *Surplus Trading Co.*, 281 U.S. at 651-52, 50 S.Ct. (1930); *Paul*, 371 U.S. at 264, 83 S.Ct. at 437-438; *Davis*, 726 F.3d at 363 n.2.

The opportunity for the first method ceases once statehood is achieved,[6] and the latter two methods share the requirement—missing here—of an explicit and unambiguous state consent to transfer jurisdiction to another sovereign. The transfer, after statehood, of a state's territorial jurisdiction poses questions of state and federal law. The question of whether a state had made the cession is determined by state law. *See Ft. Leavenworth*, 114 U.S. at 527, 5 S.Ct. at 996; *see also Coso Energy Developers*, 122 Cal. App. 4th at 1520-1523; Cal. Gov't Code §§ 110-127.) Whether the United States has accepted the cession, is determined according to federal law, and in that respect, the United States Code confirms that when there is a cession of jurisdiction from a state, it does not alone create a transfer of sovereign authority unless and until the United States formally accepts the cession. *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 Davis*, 726 F.3d at 364.

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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").

[6] The land in question was not "reserved out" when California was admitted as a state. *See* 9 Stat. 452 (1850).

**ii. Title and Jurisdiction are Two Different Things**

Any argument that federal acquisition of the property in trust for the Tribe automatically changes territorial jurisdiction rests on a widely-held misconception that once the federal government accepts title to land in trust for an Indian tribe, the land is automatically removed from the control of state law. That notion improperly conflates the concepts of *title* and *jurisdiction.* It also flies in the face of the time-honored concept, embedded in appellate precedent and accepted by the federal government itself, that states have primary jurisdiction on all lands within their borders, even where fee title is held by the federal government. *See* Principles of Federal Appropriations Law (Ofc. the General Counsel, U.S. Gov't Acct'g Ofc., 3d ed. (2008), vol. III, ch. 13 (the "GAO Report")(available at http://www.gao.gov/special.pubs/d08978sp.pdf (last accessed May 6, 2019).); *see also Balderama v. Pride Industries, Inc.*, 963 F. Supp. 2d 646, 657 (W.D. Tex. 2013). The GAO Report notes:

> Almost all federally owned land is within the boundaries of one of the 50 states. This leads logically to the question: who controls what? 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 (condemnation), *the mere fact of federal ownership does not withdraw the land from the jurisdiction of the state in which it is located.... Acquisition of land and acquisition of federal jurisdiction over that land are two different things*.

GAO Report at ch. 13, 13-101 (emphasis added and citations omitted); *see also Davis*, 726 F.3d at 364; *Parish of Plaquemines*, 64 F. Supp. 3d at 901; *Parker*, 36 F. Supp. 3d at 565.

It is not uncommon for the federal government to own land in a state, but the government holds 97% of such lands as a mere proprietor. *See* Haines, Federal Enclave Law, at 56 (Atlas Books 2011). Unless there has been a formal cession, the state retains legislative jurisdiction to pass laws of general application that govern those lands. *See Silas Mason Co.*, 302 U.S. at 197;

*see also Davis*, 726 F.3d at 364; *Parish of Plaquemines*, 64 F. Supp. 3d at 901; *State ex rel. Laughlin v. Bowersox*, 318 S.W. 695 (Mo. 2010).[7]

The rules governing territorial jurisdiction as between the states and the federal government are deeply rooted in the Constitution. The Tenth Amendment reserves to the states those powers not delegated to the United States. Under the Admission Clause (U.S. Const. art. IV, § 3), and the Equal Footing Doctrine, the territorial jurisdiction of a state cannot be diminished without the consent of the state's legislature. *See Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176, 129 S.Ct. 1436, 1445 (2009); *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205, 104 S.Ct. 1751, 1755-56 (1984). Moreover, the Enclaves Clause (U.S. Const. art. I, § 8, cl. 17) provides for the creation of areas of federal jurisdiction for specified purposes—such as military installations—but only with the express consent of the affected state. *See Kleppe*, 426 U.S. at 542, 96 S.Ct. 2293[8]*; Parker*, 36 F. Supp. 3d at 565.

These rules serve to preserve the integrity of state government. It is not for the federal government to weigh local interests and step in to regulate local matters; indeed, there is no such thing as a general federal police power. *See Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519,

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[7] The 2008 GAO Report cited above also notes that: "For the land over which the United States has not obtained exclusive, partial, or concurrent jurisdiction by consent or cession, federal jurisdiction is said to be 'proprietorial.'" *Id.* at 13-116. The report is consistent with a prior federal analysis of territorial jurisdiction which was published in 1957. *See Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States* (June 1957) at Part II, 45-46 ("the 1957 Report"); the full report is available at http://constitution.org/juris/fjur/fedjurisreport.pdf (last accessed May 6, 2019). An early opinion of the Attorney General of the United States is to the same effect. *See also*, 14 Ops. Atty. Gen. 557 (1875)(available at 1875 WL 4391).

[8] As the Court said in *Kleppe*, *supra*: "Congress may acquire derivative legislative power from a State pursuant to art. I, s 8, cl. 17, of the Constitution by consensual acquisition of land, or by nonconsensual acquisition followed by the State's subsequent cession of legislative authority over the land. … In either case, the legislative jurisdiction acquired may range from exclusive federal jurisdiction with no residual state police power… to concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority…." 426 U.S. at 542, 96 S.Ct. 2293 (internal citations omitted).

530-540, 132 S. Ct. 2566, 2577-2580 (2012). Rather, local issues (such as whether to authorize casino gambling) are properly regulated by individual states, which can determine which activities serve the health, safety and welfare of their residents, and which do not. *Id*.

**iii. These Jurisdictional Principles Apply to Indian Lands the Same as all Other Federal Lands**

The Supreme Court applied these principles of jurisdiction when ruling on two companion cases involving Indian lands in Alaska and Indian fishing rights on those lands. The state had laws prohibiting use of fish-traps, and in both cases the Indians claimed they were not subject to the state laws on their lands. The court ruled differently in each case, and the rulings were based on whether the tribe or the state had jurisdiction. In *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 82 S.Ct. 552 (1962), the Court held that Alaska lacked jurisdiction to enforce state anti-fish-trap laws on an Indian reservation because the federal government reserved jurisdiction at the time of the state's admission. *See* 369 U.S. at 57-58, 82 S.Ct. 560-61. However, in the companion case, *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562 (1962), the Court held that Alaska could enforce the same anti-fish-trap laws over Indians from a different village not designated a reservation because "off-reservation" fishing rights are subject to state regulation. *See* 369 U.S. at 62-63, 70, 75, 82 S.Ct. 564, 568, 570-71.

Neither tribal occupancy nor tribal ownership of land within state borders alters territorial jurisdiction. The decision in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 134 S.Ct. 2024 (2014), makes the point. In that case, the State of Michigan confronted a situation where a tribe had purchased land and opened a casino there. The state sued the tribe for injunctive relief to shut down the casino because it was in violation of Michigan law.

Although the Supreme Court held that the tribe enjoyed sovereign immunity (the vote was 5-4 on that issue), the majority also held that *the land was still subject to state law*. As

Justice Kagan observed: "Unless federal law provides differently, 'Indians going beyond reservation boundaries' are subject to any generally applicable state law." *Id.* at 795-797, 134 S.Ct. at 2034-2035. Further, the Court noted that the state had a bevy of remedies at its disposal to enforce state law against the gambling activity, including application of criminal statues against tribal officials and persons who engaged in illegal gambling. A salient teaching of the *Bay Mills* case—in addition to the tribal immunity ruling—is that land in question was not subject to the tribe's territorial jurisdiction despite ownership, occupancy and use for the tribe's benefit. It was still under state jurisdiction and subject to state law.

**iv. Historic Examples of Tribal Jurisdiction**

Where tribes do have sovereignty over their lands it is not because the federal government acquired the land and placed it into trust, but rather because the lands were held for and occupied by the tribes at the time the state was created. In a nutshell, the lands never became a part of the state in which they were situated.[9] Thus the following unbroken pattern emerges in the case law:

- *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 the union with a stipulation that Indian rights to their lands would remain unimpaired;
- *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (1959), involved the Navajo Indian Reservation established by an 1868 treaty in the territory that became Arizona 44 years later; and

[9] *See* state admission statutes cited on page 16-17 and note 5, *supra*.

- *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245 (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, *see* 450 U.S. at 548, 101 S.Ct. at 1249 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, 107 S.Ct. 1083 (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.[10]

The undisputed facts in this case command the conclusion that the Enterprise Tribe does not have territorial jurisdiction over the proposed casino site. The land in question was not "reserved out" when California joined the Union, nor did the Enterprise Tribe ever occupy or govern the site. Absent a formal cession by the state and compliance with 40 U.S.C. § 3112, jurisdiction does not shift from the State of California to the Federal government or the Enterprise Tribe. And without such a shift, the subject property is not eligible for Class III gaming under IGRA.

The "jurisdictional history" of the Yuba Parcel should have been central to defendants' inquiry prior to issuance of Secretarial Procedures. It should also be central to the court's

[10] 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, 107 S.Ct. at 1086 n.1, and it appears that the tribes may have occupied the lands prior to California's statehood in 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, 65 S.Ct. 690, 692-93 (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 262. In any event, the lands would also be deemed Indian lands under tribal jurisdiction. *See City of Sherrill v. Oneida*, 544 U.S. 197, 219-21, 125 S.Ct. 1478 (2005)(applying equitable doctrines of laches and acquiescence to issue of tribal territorial jurisdiction when historical facts support such an approach).

inquiry here as to the propriety of those procedures. The Supreme Court has made it clear that individualized review of a property's provenance is crucial in this area. "The conceptual clarity of Mr. Chief Justice Marshall's view in *Worcester v. Georgia*, [31 U.S.] 515, 556-561 (1832) , has given way to more individualized treatment of particular treaties and specific federal statutes, including statehood enabling legislation, as they, taken together, affect the respective rights of States, Indians, and the Federal Government." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148, 93 S.Ct. 1267, 1270 (1973).

The Secretary should have reviewed the factual details of the history of the parcel, tracing title, occupancy, and state jurisdiction back to statehood. That is the only way defendants could have properly considered all of the "relevant factors" under IGRA.

There is ample judicial precedent for conducting this very type of review. The Supreme Court has noted the importance of a parcel's "jurisdictional history" particularly when assessing the rights of an Indian tribe. *See Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 603, 97 S.Ct. 1361, 1371-72 (1977). The court there noted that "[t]he longstanding assumption of jurisdiction by the State over an area that is over 90% non-Indian both in population and in land use, not only demonstrates the parties' understanding … but has created justifiable expectations which should not be upset…." *Id.* at 605, 97 S.Ct. at 1372.

The Ninth Circuit has noted that "the inquiry into the interaction between tribal sovereignty on the one hand, and state or federal sovereignty on the other, has always been historical in nature." *United States v. Enas*, 255 F.3d 662, 668 n.3 (9th Cir. 2001).

In this same vein, the First Circuit also looked at a parcel's jurisdictional history in a recent IGRA case. The court made particular note of IGRA's jurisdiction requirement and observed that a tribe must exercise governmental power in order to trigger IGRA. The court then said: "Meeting this requirement does not depend upon the Tribe's theoretical authority, but upon

the presence of concrete manifestations of that authority. Consequently, an inquiring court must assay the jurisdictional history of the settlement lands." *Commonwealth of Massachusetts v. Wampanoag*, 853 F.3d 618, 625 (2017).[11] The First Circuit then noted a series of governmental actions taken by the tribe on the land in dispute. *Id.* at 625-626. Here, in sharp contrast, the record contains no history at all of the Enterprise Tribe exercising *any* governmental authority over the subject parcel.

There is no evidence in the administrative record that the Enterprise Tribe ever governed this site prior to the transfer to the federal government in 2013. One would expect that if defendants had information that the Enterprise Tribe *had* governed this site, it would have been reflected in the record. But no such information is there, and without some historical provenance, it is impossible to demonstrate that the Tribe possesses territorial jurisdiction over this property. See *United States v. Sadekni*, 2017 WL 807024 (D. S.D. 2017)(reciting jurisdiction transfer rules).

**v. There Has Never Been A Specific Finding That The Enterprise Tribe Has Territorial Jurisdiction Over The Proposed Casino Site**

At the heart of plaintiffs' case is the fundamental point that a change in legal title does not change territorial jurisdiction, even if the new property owner is the federal government. Something more is required; namely, a voluntary surrender of territorial authority by the state where the land is situated.

[11] In *Wampanoag*, the First Circuit was quoting from its earlier decision in *Narragansett*, 19 F.3d at 702-703. It should also be noted that when the *Wampanoag* court said that "inquiry into governmental power need not detain us," it was because the parties there *stipulated* that the state, a nearby town, as well as the tribe had exercised jurisdiction over the property. *See* 853 F.3d at 625. Needless to say, there is no such stipulation here.

In the context of the Enterprise casino proposal, there has never been a specific finding that any surrender of jurisdiction has occurred. Instead, the court has substituted the proposition that jurisdiction transfers automatically once land is placed in trust. The Constitution does not say that, no statute says that, and no Supreme Court decision has ever squarely held that.

## VII. THE TRIBE HAS NOT EXERCISED GOVERNMENTAL POWER OVER THE YUBA PARCEL AS REQUIRED BY 25 U.S.C. § 2703(4)

IGRA defines Indian lands as "any lands title to which is … held in trust by the United States for benefit of any Indian tribe….and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4). Courts have recognized that because the statute is phrased in the present tense, a tribe must *presently* exercise governmental power over the proposed casino site *before* requesting a compact for Class III gaming. *See Narragansett*, 19 F.3d at 701-703; *see also Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, 2014 WL 1103021 (E.D. Cal. 2004) ("The statute's use of present tense denotes current jurisdiction over the Indian lands").

Previous decisions have also clarified that in assessing the requirement of exercising governmental power, the focus is on what things the tribe has actually done, as opposed to things it may have the authority to do in the future. Thus, the First Circuit said in *Narragansett* that "a tribe must exercise governmental power in order to trigger the Gaming Act. Meeting this requirement does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority." *Narragansett*, 19 F.3d at 702-703. The *Narragansett* court then recounted the ways in which the tribe satisfied this requirement with respect to the property at issue in that case: (1) establishment of a housing authority; (2) obtained status equivalent to the state for purposes of the Clean Water Act, after having been recognized by the Environmental Protection Agency; (3) availed itself of benefits under the Indian Self –

Determination and Education Assistance Act by administering programs for job training, education, community services, social services, real estate protection, conservation, public safety, and the like. *Id.*

The First Circuit undertook a similar analysis recently in another case that involved IGRA. In *Massachusetts v. Wampanoag Tribe of Gay Head*, 853 F.3d 618, the court noted the following with respect to the actual exercise of governmental power over the proposed casino site: (1) a housing program that receives HUD assistance construction of approximately 30 units of housing under that program; (2) an intergovernmental agreement with the EPA; (3) operation of a health care clinic with the aid of the Indian Health Service; (4) administration of programs for education with scholarships financed with Bureau of Indian Affairs funding; (5) social services with a human services director responsible for child welfare work; a conservation policy (the tribe had two conservation rangers to enforce its policy); and (6) a public safety program. In addition, the court noted that the tribe had passed numerous ordinances and employed a judge. The adopted ordinances dealt with such diverse topics as building codes, health, fire, safety, historic preservation, fish, wildlife, natural resources, housing, lead paint, elections, judiciary, criminal background checks, and the reporting of child abuse and neglect. *See Wampanoag*, 853 F.3d at 625-626.

The instant case stands in sharp contrast. The present administrative record does not disclose *any* exercise of governmental power over the casino site, and for that reason, the land in question does not meet the definition of "Indian lands" set forth in 25 U.S.C. § 2703(4).

## VIII. THE AUTHORITY CITED BY THE COURT IN CONNECTION WITH RULING ON PLAINTIFFS' MOTION TO SUPPLEMENT DOES NOT SQUARELY ADDRESS THE TRANSFER OF JURISDICTION ISSUE

The court's discussion of the territorial jurisdiction issue in the Order Denying Plaintiffs' Motion to Supplement the Administrative Record (*see* ECF 28 at 8-9), does not change the

analysis. The court wrote that "when 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." *See* ECF 28 at 9 (citing *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 569 (2d Cir. 2016), *cert. denied*, 583 U.S. ___ (2017), 2017 WL 5660979. First of all, the quoted phrase is a curious twist of language. A cession of jurisdiction is not something that occurs via fiat. It is a voluntary act; indeed, Chief Justice John Marshall called it "the free act of the states." *United States v. Bevans*, 16 U.S. 336, 388 (1818).

There is another reason for distinguishing *Upstate Citizens*: the plaintiffs in that case challenged the government's authority to take land into trust for an Indian tribe, based on a flawed proposition that is the exact opposite of the argument plaintiffs make here. The *Upstate Citizens* plaintiffs argued that taking the land into trust would by itself effect a change in jurisdiction. The defendants in *Upstate Citizens* agreed, and the court simply recited the proposition in its ruling without any citation of authority. Here, plaintiffs challenge the premise that the federal government can unilaterally alter a state's territorial integrity without state consent. Indeed, in California, a legislative cession is required to surrender the state's territorial jurisdiction, *See* Cal. Gov't Code § 110; *Coso Entergy Developers v. Count of Inyo*, 122 Cal.App.4th 1512, 1521 (2004).

## IX. THE SECRETARIAL PROCEDURES ARE NOT CONSISTENT WITH STATE LAW AND THUS VIOLATE IGRA

The People of the State of California never authorized a tribal casino under these circumstances, and if the Secretarial Procedures are allowed to stand, it will mark a radical wrong turn in the jurisprudence of IGRA.

The whole point of the statutory framework is to prevent unilateral imposition of a gambling casino on a state that does not want it. It is in this vein that IGRA permits the use of

Secretarial Procedures *only* when they are "consistent with … the relevant provision of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii)(I).

In California, those laws are crystal clear. Tribal gambling can only occur pursuant to a *compact* duly ratified by the legislative process. The state constitution expressly provides that the Legislature has no power to authorize Nevada-style gambling in California. Cal. Const., art., IV, § 19(e). The only exception is a narrow one. Notwithstanding the Article IV, section 19(e), "the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally-recognized Indian tribe on Indian lands in California in accordance with Federal law." Cal. Const., art. IV, § 19(f). The provision concludes: "Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts." *Id.*

The rule in California is simple: no compact, no casino gaming.

This construct hews to the will of the People of California, who authorized casino gaming only in a narrow set of circumstances: *via a compact duly negotiated and legislatively ratified.* What the People did not approve was a federal "cram down" of casino gaming against their will.

In this case, such a cram down has occurred, and it happened after the state legislature declined to ratify a compact for the Enterprise Casino. State law—in the form of California's organic constitution—does not authorize this casino and, to the extent these Secretarial Procedures attempt an end run on the California Constitution, they must fall in light of section 2710 which permits Secretarial Procedures only when they are consistent with state law.

## X. IF THE INDIAN REORGANIZATION ACT WERE CONSTRUED TO ALLOW THE FEDERAL GOVERNMENT TO UNILATERALLY STRIP A STATE OF TERRITORIAL JURISDICTION, THE STATUTE WOULD BE UNCONSTITUTIONAL

Nothing in the language of Indian Reorganization Act (25 U.S.C. § 5108) states that when the Secretary takes title to land in trust for Indians, the state loses a quantum of the historic territorial jurisdiction it previously exercised over the land. Rather, section 5108 refers only to acquisition of "title."[12] To the extent, section 5108 is construed to force a divestiture of any portion of the state's territorial jurisdiction over the Yuba Parcel, it would violate the Tenth Amendment which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

"The Constitution created a Federal Government of limited powers." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2239 (1991). As Justice Story put it: "Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities." 3 *J. Story Commentaries on the Constitution of the United States* 752 (1833).

The Supreme Court has consistently followed that understanding:

> It is incontestable that the Constitution established a system of "dual sovereignty." Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty."

[12] 25 U.S.C. § 5108 provides in pertinent part that: "The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians…..Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. § 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation." This exempts Indian trust lands from state taxation, and nothing more, consistent with *McCulloch v. Maryland*, 17 U.S. 316 (1819).

> This is reflected throughout the Constitution's text including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3 . . . Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

*Printz v. United States*, 521 U.S. 898, 918-19, 117 S.Ct. 2365, 2376-77 (1997) (internal citations omitted). This is "a fundamental structural decision incorporated into the Constitution." *Murphy v. NCAA*, 138 S.Ct. 1461, 1475 (2018). "'[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.'" *Id.* at 1477 (federal government may not "commandeer" States to do its bidding).

Under California law, a cession of territorial jurisdiction requires a vote of the legislature. *See* Cal. Gov't Code §§ 110, *et seq.*; *Coso Energy Developers v. County of Inyo*, 122 Cal. App. 4th 1512, 1521 (2004). It would be ironic indeed if a program (IGRA) described as "cooperative federalism" (*see Artichoke Joe's v. Norton*, 216 F.Supp. 2d at 1092 and 353 F. 2d at 715) permitted the federal government to impose Secretarial Procedures without a compact sanctioned by the legislature. IGRA cannot run roughshod over the "dual sovereignty" structure of the Constitution and trample the principles underlying the Tenth Amendment. Cf. *Printz*, 521 U.S. at 918-919, 117 S.Ct. at 2376-77 (1997); *Murphy v. NCAA*, __ U.S. __, 138 S.Ct. 1462, 1475 (2018) (dual sovereignty reflects "a fundamental structural decision incorporated into the Constitution").

No Supreme Court authority has ever held that, as an exception to these fundamental rules governing federal-state powers, the federal government has the power to unilaterally acquire title to land within the borders of a state and thereby automatically divest the state of any

of its legislative jurisdiction over that land without the state's consent. Nor has any Supreme Court case held that under the Indian Commerce Clause (U.S. Const. art. I, § 8, cl. 3), Indian lands are treated differently than other lands insofar as the acquisition of territorial jurisdiction from a state is concerned, or that the federal government can acquire land in trust for Indians and thus automatically displace state jurisdiction and replace it with federal and tribal jurisdiction so a tribe can engage in business activities prohibited under state law.

**(a) Congress' Plenary Power is not Unlimited**

Cases hold that the Indian Commerce Clause provides "Congress with plenary power to legislate in the field of Indian affairs." *See Cotton Petroleum Corp. V. New Mexico,* 490 U.S. 163, 192, 109 S.Ct. 1698, 1715 (1989). However, cases also hold that Congress' power has limitations. "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *Delaware Tribal Business Comm. v. Weeks,* 430 U.S. 73, 73-74, 97 S.Ct 911, 913 (1977). The cases cited by the court in ECF 28 do not hold to the contrary, nor do they hold that the federal government can unilaterally strip a state of some or all of its territorial jurisdiction.

In *Upstate Citizens*, *supra,* cited by the court (ECF 28 at p. 8), the Second Circuit observed: "Tribal jurisdiction — that is, the rights of the tribe and the federal government to assert jurisdiction over territory, largely displacing state government — *generally* follows from the land's reservation status." *Upstate Citizens for Equality,* 841 F.3d at 561 n. 4 (emphasis added). The qualification "generally" is not explained by the Second Circuit, but the case now before this court is an obvious exception. Indians have sovereignty over "reserved" lands which they were allowed to retain when the state was created, but not over lands historically subject to state territorial jurisdiction which have been purchased by private business partners in an attempt to operate businesses prohibited under state law. The land at issue is not the Enterprise Tribe's

reservation. It is ordinary farmland, previously privately owned, that the Tribe wishes to utilize for a commercial purpose.

**(b) The Yuba Parcel does not constitute "Indian Country" as the Supreme Court has defined the term**

It is no answer to the jurisdiction issue to say that the Yuba Parcel is "Indian Country." ECF 28 at p. 8. The term "Indian Country," is not used in the Reorganization Act (the statute under which title was acquired) or in IGRA itself. The logic seems to be that any land over which a tribe has jurisdiction is "Indian Country"; that lands held in trust "are Indian Country"; and therefore, there is tribal jurisdiction over any lands held in trust for an Indian tribe. But Supreme Court precedent makes clear that such logic is mistaken. "Indian country" is defined by 18 U.S.C. § 1151(b), in pertinent part, as "all dependent Indian communities . . . ." In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 530, 118 S.Ct. 948, 954 (1998), the Court explained that the two key components to the term "dependent Indian communities" are whether there has been "both a federal set-aside and federal superintendence" over the land in question. *Id*. at 530, 118 S.Ct. at 948.

Cases underpinning *Venetie*'s analysis require tribal occupancy and settlement in addition to mere possession of beneficial title. *Id*. at 532-34, 118 S.Ct. at 955-56 (discussing examples). Plus, the required "federal superintendence" is missing unless the Federal Government actively manages the property. *Venetie* cited examples where "the Federal Government actively controlled the lands in question, effectively acting as a guardian for the Indians." *Id*. at 533, 118 S.Ct. at 956.

Here, in sharp contrast, the Enterprise Tribe and its business partner intend to develop a commercial gambling operation on a parcel of California farmland with essentially *no* federal superintendence. The federal government has not "actively controlled" the land, the project, or

the business, and has no plans to do so. The business will be managed by YCE pursuant to its agreement with the Tribe. That IGRA is aimed at tribal self-sufficiency and economic development does not suffice: "Our Indian country precedents ... do not suggest that the mere provision of 'desperately needed' social programs can support a finding of Indian country. Such health, education, and welfare benefits are merely forms of general federal aid; considered either alone or in tandem ... they are not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence." *Venetie*, 522 U.S. at 534, 118 S.Ct. at 956. A gambling casino to be managed by a private company and patronized primarily by nonmembers of the tribe hardly qualifies under the formula set forth in *Venetie*.

**(c) Inherent Tribal Sovereignty Does not shift territorial jurisdiction**

It is also no answer to assert (*see* ECF 28 at p. 8) that inherent tribal sovereignty fills the jurisdictional gap. Although Indian tribes have unique attributes of inherent sovereignty "over both their members and their territory," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332, 103 S.Ct. 2378, 2385 (1983), a tribe's "inherent sovereignty" refers to the right to govern internal affairs, such as who may become a member, adoption rules, and so forth. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 322 n.18, 98 S.Ct. 1079, 1085 (1978). But the "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564, 101 S.Ct. 1245, 1248 (1981).

Tribes do not have "inherent sovereignty" over non-members. *See id.* at 564, 101 S.Ct. at 1248; *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938-939 (9th Cir. 2009) ("As a general rule, tribes do not have jurisdiction, either legislative or adjudicative, over nonmembers"). Nor does such authority extend beyond the reservation. "Absent express federal

law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 993 (9th Cir. 2014) (quoting *Mescalero Indian Tribe v. Jones*, 411 U.S. 145, 148-49, 93 S.Ct. 1267, 1270 (1973)).

Inherent tribal sovereignty does not give tribes a free hand to participate in conduct otherwise barred by state law (gambling) with nontribal members (the public at large) on land outside tribal jurisdiction. *E.g.*, *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 134 S.Ct. 2024. The lands over which tribes have sovereignty that displaces a state's territorial jurisdiction are those held for and occupied by the tribes at the time the State was created, or otherwise ceded by the state to the federal government.[13]

The court's reliance on the decision in the parallel *Club One Casino* case, *supra*, 328 F.Supp.3d 1033; *see* ECF 28 at p. 8, prompts a cautionary note. That decision, issued by another judge in this district, is now on appeal to the Ninth Circuit. We respectfully disagree with the district court's decision in that case and it is far from a binding appellate precedent at this juncture.

The federal government insists that the People of California must allow a casino project to proceed, despite the fact that there is no territorial jurisdiction, no compact, and further,

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[13] *E.g.*, *Worcester v. Georgia*, 31 U.S. 515 (1832) (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 (1866) (Kansas accepted admission into the union with a stipulation that Indian rights to their lands would remain unimpaired); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269 (1959) (Navajo Indian Reservation established by an 1868 treaty in the territory that became Arizona 44 years later); *Montana v. United States*, 450 U.S. 544, 548, 101 S.Ct. 1245, 1248 (1981) and *Big Horn Cnty Electric Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000) (Crow reservation in Montana established by the 1868 Second Treaty of Fort Laramie and "reserved out" when Montana became a state twenty-one years later, Enabling Act, 25 Stat. 676 (1889)); *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304 (2001) (Fallon Paiute-Shoshone reservation, which was on Indian land set aside in 1861, prior to Nevada's statehood in 1864 (*see* 12 Stat. 209-214 [Nevada Territory Act], 13 Stat. 30 [Statehood Act])); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204 & n.1, 107 S.Ct. 1083, 1086 (1987) (lands were formally set apart for the Cabazon North Fork tribe 1876 and 1891, that the tribes had occupied prior to 1850).

despite the fact that the State Legislature never approved this particular casino project. We respectfully submit that forcing such a casino on the State and its People is an act that vastly exceeds Congressional power under IGRA as well as the Tenth Amendment. The Framers would not believe that a state's sovereignty could be overridden by Secretarial Procedures issued by an unelected Federal official in a case where there has been no cession of any portion of the state's historic sovereignty over the land in question. No federal power stretches that far under the Constitution.

## CONCLUSION

The record upon which defendants acted fails to include a crucial factor—the acquisition of territorial jurisdiction—that must be in place before IGRA's protocol can be triggered. Without that key factor in place, the Secretarial Procedures were not authorized by IGRA and defendants' issuance of them was arbitrary and capricious, as well as "otherwise not in accordance with law."

The disruption of a state's historic territorial sovereignty is an issue of grave dimension, as the Supreme Court readily observed in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 129 S.Ct. 1436 (2009). There the Court confronted a claim that a federal statute divested the State of Hawaii of title to certain lands. The Court flatly rejected that assertion, noting that the subject statute "would raise grave constitutional concern if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission the Union." *Id.* at 176, 129 S.Ct. at 1445. The Court went further and declared in a unanimous opinion that:

> We have emphasized that "Congress cannot, after statehood, reserve or convey … lands that have already been bestowed upon a State." *Idaho v. United States*, 533 U.S. 262, 280, n. 9, 121 S.Ct. 2135 … (2001) …; *see also id.* at 284, 121 S.Ct. 2135 (Rehnquist, C.J., dissenting) ("[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event ... to suggest that subsequent events somehow can diminish what has already been bestowed").

*Id*. The same concerns pertain here.

The court should GRANT summary judgment in favor of plaintiffs and declare that the Secretarial Procedures challenged herein are arbitrary and capricious and were issued in violation of law. At a minimum, the Court should remand this case to the administrative agency for a proper assessment of the territorial jurisdiction issue.

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