ERIC GRANT
Deputy Assistant Attorney General

JUDITH RABINOWITZ (Alaska State Bar No. 8912094)
Indian Resources Section
Environment & Natural Resources Division
United States Department of Justice
999 18 Street
South Terrace-Suite 370
Denver, CO 80202
Telephone: (303) 844-1349
judith.rabinowitz2@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CAL-PAC RANCHO CORDOVA, LLC, dba PARKWEST CORDOVA CASINO; CAPITOL CASINO, INC.; LODI CARDROOM, INC. dba PARKWEST CASINO LODI; and ROGELIO'S INC., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, in his official Capacity as Secretary of the Interior; and TARA SWEENEY in her official capacity as Assistant Secretary – Indian Affairs, Defendants.	Case No. 2:16-cv-02982-TLN-AC **UNITED STATES' NOTICE OF MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT** DATE: October 31, 2019 TIME: 2:00 p.m. COURTROOM: 2, 15th Floor JUDGE: Honorable Troy L. Nunley

TO THE COURT AND THE PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT the United States Department of the Interior, David Bernhardt, Secretary of the United States Department of the Interior ("Secretary"), and Tara

Sweeney Assistant Secretary-Indian Affairs, hereby file this motion, pursuant to Federal Rule of Civil Procedure 56 and Local Rule 260, and respectfully request that the Court enter summary judgment in their favor. For the reasons set forth in the accompanying Memorandum in support of Cross-Motion for Summary Judgment and in opposition to Plaintiffs' Motion for Summary Judgment, the claims brought by Cal-Pac Rancho Cordova, LLC, dba Parkwest Cordova Casino, Capital Casino, Inc., Lodi Cardroom, Inc. dba Parkwest Casino Lodi, and Rogelio's Inc. fail as a matter of law.

DATED this 12th day of July, 2019

ERIC GRANT
Deputy Assistant Attorney General

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

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

ERIC GRANT
Deputy Assistant Attorney General

JUDITH RABINOWITZ (Alaska State Bar No. 8912094)
Indian Resources Section
Environment & Natural Resources Division
United States Department of Justice
999 18 Street
South Terrace-Suite 370
Denver, CO 80202
Telephone: (303) 844-1349
judith.rabinowitz2@usdoj.gov

Attorneys for the United States

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CAL-PAC RANCHO CORDOVA, LLC, dba PARKWEST CORDOVA CASINO; CAPITOL CASINO, INC.; LODI CARDROOM, INC. dba PARKWEST CASINO LODI; and ROGELIO'S INC., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR; DAVID BERNHARDT, in his official Capacity as Secretary of the Interior; and TARA SWEENEY in her official capacity as Assistant Secretary – Indian Affairs, Defendants.	Case No. 2:16-cv-02982-TLN-AC **UNITED STATES' CONSOLIDATED MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** DATE: October 31, 2019 TIME: 2:00 p.m. COURTROOM: 2, 15th Floor JUDGE: Honorable Troy L. Nunley

Table of Contents

Table of Authorities

Federal Cases

Federal Statutes

Treatises

Constitutions

Pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), and Fed. R. Civ. P. 56 as applied in the APA context, the United States Department of the Interior, David Bernhardt,[1] Secretary of the United States Department of the Interior ("Secretary"), and Tara Sweeney Assistant Secretary-Indian Affairs (collectively, "United States" or "Federal Defendants"), respectfully submit this Memorandum of Points and Authorities in support of their Cross-Motion for Summary Judgment and in opposition to Plaintiffs' Motion for Summary Judgment. ECF No. 31 ("Mem."). For the reasons set forth below, and based upon the Administrative Record[2] of the challenged agency decision, Plaintiffs cannot carry their heavy burden to demonstrate that the Secretary's issuance of Secretarial Procedures for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("Tribe" or "Enterprise") in furtherance of the Tribe's economic development and self-determination goals, was arbitrary, capricious or contrary to law under the APA. Thus, the United States respectfully requests that the Court deny Plaintiffs' Motion for Summary Judgment and grant the United States' Cross-Motion for Summary Judgment.

INTRODUCTION

Plaintiffs Cal-Pac Rancho Cordova, LLC, dba Parkwest Cordova Casino, Capital Casino, Inc., Lodi Cardroom, Inc. dba Parkwest Casino Lodi, and Rogelio's Inc., ("Card Clubs" or "Clubs") are four state-licensed card clubs alleged to be located within 36 to 73 miles of the 40-acre parcel in Yuba County, California acquired in trust for the benefit of the Tribe in May of 2013 ("Yuba Parcel" or "Parcel"). The Card Clubs challenge Secretarial Procedures issued by the Secretary pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq. The IGRA-mandated Secretarial Procedures prescribe the parameters under which the Tribe may

---

[1] Pursuant to Fed. R. Civ. P. 25(d), Secretary Bernhardt has been automatically substituted for former Secretary Ryan Zinke, as has Assistant Secretary–Indian Affairs Tara Sweeney for Michael Black.

[2] The Administrative Record of the challenged Record of the challenged decision will be cited herein as "ARXXXXXX."

conduct Class III gaming activities on the Yuba Parcel. The Procedures were necessitated by IGRA's remedial provisions after the State of California's failure to negotiate in good faith for the conclusion of a Tribal-State gaming compact, as found by this Court. *Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal. v. State of California*, 163 F. Supp. 3d 769 (E.D. Cal. 2016) ("good faith lawsuit").

The Card Clubs contend the issuance of Secretarial Procedures violated IGRA's requirement that tribal jurisdiction obtain over trust lands intended for gaming. In their anomalous view, the government's trust acquisition of the Yuba Parcel only effected a title transfer such that the Parcel remains under state, rather than federal and tribal jurisdiction. The Clubs further contend that if the trust acquisition resulted in diminution of California's territorial jurisdiction without the State's consent, the Tenth Amendment would be violated. In the alternative, the Clubs offer as a means of avoiding this constitutional challenge, the theory that the California Legislature's failure to ratify the Governor's concurrence in the Enterprise Tribal-State Compact operated to invalidate that concurrence and thereby the Secretary's gaming eligibility determination for the Parcel. The Secretary's determination was made pursuant to the IGRA exception to the Act's general prohibition of gaming on land acquired in trust for tribes after October 17, 1988, known as a "two-part determination". 25 U.S.C. § 2719(b)(1)(A). Finally, the Clubs advance the rule-swallowing and federally preempted argument that because IGRA requires that Secretarial Procedures be "consistent with . . . relevant provisions of the laws of the State," the Procedures at issue are inconsistent with IGRA given California's requirement that Indian gaming be subject to a "compact."

Contrary to the Clubs' contentions, the Secretarial Procedures did not violate IGRA's tribal territorial jurisdiction requirement. Instead, as found by Judge Ishii in the parallel

challenge to secretarial procedures issued for the North Fork Tribe, coincident with the United States' trust acquisition of the Yuba Parcel, the Tribe acquired jurisdiction over it. *See Club One Casino Inc., et al. v. U.S. Dept. of Interior,* 328 F. Supp. 3d 1033, 1044-47 (E.D. Cal. 2018), *on appeal, Club One Casino, Inc., et al., v. Zinke, et al.*, No. 18-16696 (9th Cir. Filed Sept. 7, 2018) ("*Club One*"). This Court too has already rejected the Clubs' "solely title transfer" theory in the context of denying their motion to supplement the administrative record. ECF No. 28 at 8-9 (Order of March 4, 2019). The Clubs' Tenth Amendment claim need not be addressed for the reasons articulated by Judge Ishii in *Club One*: the agency action alleged to have violated that Amendment (the fee-to-trust acquisition) was not challenged in the Clubs' Complaint, and is not properly before the Court. *Club One*, 328 F. Supp. 3d at 1042. Arguably, because the Clubs' Tenth Amendment claim need not be addressed, neither should their alternative constitutional avoidance claim be heard. But even if it were, the claim would fail. IGRA's remedial provisions were designed to address just such vagaries of state law and processes (here the California Legislature's failure to ratify the Governor's concurrence) in order to effectuate Congress's overriding purpose to further tribal self-sufficiency through gaming. In *Club One* Judge Ishii also rejected the notion that Secretarial Procedures could be invalidated by a state law compact requirement, correctly observing that to treat Secretarial Procedures as anything other than equivalent to a Tribal-State compact would render IGRA's remedial process "meaningless." *Club One*, 328 F. Supp. 3d at 1050.

STATUTORY BACKGROUND

A. The Indian Reorganization Act

In accepting the Yuba Parcel into trust, the Secretary acted pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5101 et seq. The IRA was enacted in 1934 as part of

the federal government's return to a policy supporting "principles of tribal self-determination and self-governance." *Cty of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). The prior federal policy of allotment under the General Allotment Act of 1887, 25 U.S.C. § 331 et seq., resulted in staggering losses of tribally owned lands, diminishing Indian land holdings from 138 million acres in 1887 to 48 million acres in 1934, a loss of 90 million acres. *See Cty of Yakima*, 502 U.S. at 276; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973) (describing Congress's IRA purposes as aimed at revitalization of tribal self-government and economies and halting the loss of tribal lands); Cohen's Handbook of Federal Indian Law § 1.05, at 81 (Nell Jessup Newton ed., 2012). The Act authorizes the Secretary to acquire "any interest in lands," whether "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, title to the land is held by the United States "in trust for the Indian tribe." *Id.* The Supreme Court long ago described this arrangement as providing "the 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).

B. The Indian Gaming Regulatory Act

IGRA was enacted in 1988 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 not contiguous to a 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."

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).[3] 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). 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 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).[4]

---

[3] 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).

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's mandatory mediation process is triggered. 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.* Upon the mediator's submission of 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). Essentially the Secretary is to convert the selected compact into procedures and has limited discretion to make modifications to ensure the procedures are consistent with IGRA, the proposed compact selected by the mediator, and relevant state law. *Id.* § 2710(d)(7)(B)(vii)(I). IGRA's remedial provisions reflect Congress's determination that state involvement in tribal gaming not become a means for states to thwart the rights of tribes to further their governmental and economic self-sufficiency through gaming.

---

[4] Congress intended with this provision to allow "a means by which differing public policies of these respective governmental entities can be accommodated and reconciled." S. Rep. No. 100-446, at 6 (1988), *reprinted* in 1988 U.S.C.C.A.N. 3071, 3076. The compact process is a mechanism through which a tribe "affirmatively elects to have State laws and State jurisdiction extend to tribal lands" as "Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities." *Id*. at 5-6. This legislative history also reveals Congress's understanding that the tribal-state compact process could be used as a "justification by a State for excluding Indian tribes from such gaming. . . ." *Id*. at 13. IGRA's conflict resolution (remedial) process was included in anticipation that states might attempt to deny tribes "any legal right they may now have to engage in class III gaming." *Id*. at 14.

FACTUAL BACKGROUND

A. The United States Acquires the Yuba Parcel in Trust for the Tribe and the Secretary Makes a Gaming Eligibility Determination

The Estom Yumeka Maidu Tribe of the Enterprise Rancheria is a federally recognized tribe[5] based in the area of Oroville California. In 1915 the United States purchased a 40-acre parcel approximately 10 miles northeast of Oroville. That parcel is still held in trust for the Tribe. A second 40-acre parcel purchased the same year was lost to the Tribe on account of its sale, pursuant to Congressional authorization, to California for construction of the Oroville dam. *See, Cachil Band v. Zinke*, 889 F.3d 584, 589 (9th Cir. 2018).

In order to augment its land base and further its sovereign responsibility to provide economic development for its tribal members, on August 13, 2002, Enterprise submitted an IRA "fee-to-trust" application to the Secretary. *Cachil Band* 889 F.3d at 590-91, 96. The request sought trust acquisition of another 40-acre parcel in Yuba County for the purpose of constructing a casino, hotel and related infrastructure. At the time of the application the Parcel was owned by the Tribe's development partner Yuba County Entertainment. In 2006, the Tribe supplemented its application with a request that the Secretary also determine the Parcel's eligibility for gaming under IGRA, once it was in trust. *Estom Yumeka Tribe*, 163 F. Supp. 3d at 772.

Several years of administrative review ensued including environmental review pursuant to the National Environmental Procedure Act (NEPA). In 2010 Interior published a Final

---

[5] In 1979, the United States began publishing in the Federal Register a list of "Indian Tribal Entities" with which it had maintained a sovereign, government-to-government relationship over the years. *See* 44 Fed. Reg. 7235 (Jan. 31, 1979). The Tribe was identified on the first such Federal Register list, and has continued to appear on every subsequent iteration. *Id*.; *see also* 84 Fed. Reg. 1200, 1201 (Feb 1, 2019) (current version listing "Enterprise Rancheria of Maidu Indians of California").

Environmental Impact Statement (FEIS). *Cachil Band*, 889 F.3d at 590-93. Thereafter, a gaming eligibility analysis was undertaken. Given IGRA's general gaming prohibition for lands acquired in trust after 1988, the Tribe sought a determination as to the Yuba Parcel's qualification for Class III gaming under one of the Act's exceptions. The Secretary conducted the statutorily required consultation and made a "two-part determination." *See* 25 U.S.C. § 2719(b)(1)(A). On September 1, 2011, the Assistant Secretary–Indian Affairs issued a Record of Decision (ROD) for that determination, concluding that once in trust, the Parcel would be eligible for gaming under the statutory exception. The Assistant Secretary then requested the concurrence of then Governor Jerry Brown in the two-part determination. The Governor concurred by letter on August 30, 2012. *Estom Yumeka Tribe*, 163 F. Supp.3d at 773.

In November of 2012, Interior issued a Record of Decision (ROD) on the Tribe's fee-to-trust application for the Parcel under the IRA. 25 U.S.C. § 5108. The ROD concluded that acquiring the Yuba Site in trust would "provide the Tribe with the best opportunity for attracting and maintaining a significant, stable, long-term source of governmental revenue, and accordingly, the best prospects for maintaining and expanding tribal governmental programs to provide a wide range of health, education, housing, social, cultural, environmental, and other programs, as well as employment and career development opportunities for its members." *Cachil Band*, 889 F.3d 584 at 593 (quoting Interior's IRA ROD). The Yuba Parcel was finally taken into federal trust for the Tribe on May 15, 2013.

B. Secretarial Procedures are Issued after the California Legislature Fails to Ratify the Tribal-State Compact Signed by the Governor

Concurrent with the above-described administrative review and decisionmaking, the Tribe sought to negotiate a Class III gaming compact with the State of California. The backdrop to this effort included the March 2000 ratification by California voters of Proposition 1A, which

allowed for Class III gaming on Indian lands and has been described as "effectively [giving] tribes a state constitutional monopoly over casino gaming in California." *See Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1023 (9th Cir. 2010). The proposition established a two-part process for the negotiation and ratification of tribal-state gaming compacts authorizing California's Governor to negotiate and conclude compacts, subject to ratification by the Legislature. Cal. Const., art. IV, § 19(f).[6]

While the Tribe allegedly requested the State engage in compact negotiations in the early 2000s, it was not until 2012, subsequent to the Secretary's 2011 determination that the Yuba Parcel proposed for trust would be gaming-eligible under 25 U.S.C. § 2719(b)(1)(A), that negotiations were seriously underway. Before concurring in the Secretary's two-part determination, the Governor sought the Tribe's agreement to a tribal-state compact consistent with other Tribal-State compacts in California. After further negotiation the Governor signed a compact with the Tribe on August 30, 2012, and on the same date also concurred in the Secretary's gaming eligibility determination for the Yuba Parcel under § 2719(b)(1)(A). The Governor's office then forwarded the compact to the California Legislature. Once Interior acquired the Yuba Parcel in trust in May of 2013, the Tribe informed the Governor's office and the Legislature of the acquisition, urging that the compact be ratified. The Legislature took no action toward compact ratification during 2013. The compact fared no better in the first half of 2014, and then became ineligible for legislative ratification by its own terms on July 1, 2014. *Estom Yumeka Tribe*, 163 F. Supp. 3d at 773-74.

---

[6] This procedure is codified at Cal. Gov. Code § 12012.25(c) and (d), which provides that compacts "shall be ratified by a statute approved by each house of the Legislature," while "[t]he Governor is the designated state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts . . . ."

The Tribe then sought relief under § 2710(d)(7)(A)(i) of IGRA's remedial scheme. A good faith lawsuit was filed in this Court, which found no support for the State's argument that the Legislature is not subject to IGRA's good faith mandate. *Estom Yumeka Tribe*, 163 F. Supp. 3d at 786. The State and Tribe were then ordered to proceed under 25 U.S.C. § 2710(d)(7)(B)(iii) to conclude a gaming compact within 60 days. *Id*. at 786-87. The Tribe and State failed to do so, which triggered IGRA's requirement that the parties submit to a court-appointed mediator their last best compacts offers. § 2710(d)(7)(B)(iv). The mediator found the Tribe's proposed compact to best comport with IGRA, and so forwarded it to the State for its consent. AR00000441-43. The State failed to consent within the IGRA-mandated 60 days, § 2710(d)(7)(B)(vii), and the Tribe's compact was then submitted to the Secretary pursuant to the same section. AR00000444. On August 12, 2016, the Secretary issued the "Secretarial Procedures for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria." AR00001060-1195.

STANDARD AND SCOPE OF REVIEW

Summary judgment is the appropriate mechanism for reviewing agency decisionmaking under the record review principles embodied in the APA. *Turtle Island Restoration Network v. U. S. Dept. of Commerce*, 878 F.3d 725, 732 (9th Cir. 2017); *City & Cty. of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997); *Occidental Eng'g Co. v. Immigration & Naturalization Serv.*, 753 F.2d 766, 769–70 (9th Cir.1985); *Club One*, 328 F. Supp. 3d at 1041. While Fed. R. Civ. P. 56 provides the mechanism for resolving APA record-review cases, the Rule's standard of review is not appropriate. *California v. U.S. Dep't. of Labor*, 76 F. Supp. 3d 1125, 1135 (E.D. Cal. 2014) (citing *South Yuba River Citizens League v. Nat'l Marine Fisheries Serv.*, 723 F. Supp.2d 1247, 1256 (E.D. Cal. 2010) (noting that the usual summary judgment standards do not apply)). Under the APA a reviewing court does not resolve factual issues but

instead determines whether, as a matter of law and based on the administrative record, the agency was permitted "to make the decision it did." *See Sierra Club v. Mainella*, 459 F. Supp. 2d 76, 90 (D.D.C. 2006) (quoting *Occidental Eng'g Co.*, 753 F.2d. at 769). *See also Ranchers Cattlemen Action Legal Fund v. U.S. Dep't. of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007); *San Luis & Delta-Mendota Water Auth. v. Salazar*, 760 F. Supp. 2d 855, 868 (E.D. Cal. 2010) , *aff'd in part rev'd in part*, 747 F.3d 581 (9th Cir. 2014)) (describing summary judgment as a mechanism for determining whether agency action is supported by the administrative record and otherwise consistent with the APA review standard). Thus, a court "is not required to resolve any facts in a review of an administrative proceeding." *Occidental*, 753 F.2d at 769. Instead, in reviewing an agency action, the relevant legal question for a court reviewing a factual determination is "whether the agency could reasonably have found the facts as it did." *San Francisco*, 130 F.3d at 877; *Occidental*, 753 F.2d at 769.[7]

Review is based on the administrative record designated by the agency. Courts do not engage in de novo proceedings. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.") (Citation omitted). The record consists of all documents directly or indirectly considered by the relevant decision makers. *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989). Courts "normally refuse to consider evidence that was not before the agency because 'it inevitably leads the reviewing court to substitute its judgment for that of the agency."' *Ctr. for*

[7] For these same reasons Local Rule 260(e) instructing that each motion shall be accompanied by a Statement of Undisputed Facts does not apply. *See San Joaquin River Grp. Auth. v. Nat'l Marine Fisheries Serv.*, 819 F. Supp. 2d 1077, 1084 (E.D. Cal. 2011) (noting that "[i]n APA cases "such statements are generally redundant because all relevant facts are contained in the agency's administrative record.")

Biological Diversity v. U.S. Fish & Wildlife Serv., 450 F.3d 930, 943 (9th Cir. 2006) (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)).

When, as here, an agency designates an administrative record, that designation is afforded a presumption of regularity. *See Nat. Res. Def. Council v. Zinke*, No. 1: 05-cv-01207-LJO-EPG, 2017 WL 3705108, at *3 (E.D. Cal. Aug. 28, 2017); *San Luis & Delta-Mendota v. Jewell*, No. 1:15-cv-01290-LJO-GSA, 2016 WL 3543203, at *2 (E.D. Cal. June 23, 2016) (citing *McCrary v. Gutierrez*, 495 F. Supp. 2d 1038, 1041 (N.D. Cal. 2007)). This presumption derives from the fact that "the agency determines what constitutes the whole administrative record, because it is the agency that did the considering, and that therefore is in a position to indicate initially which of the materials were before it -- namely, were directly or indirectly considered." *Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 5 (D.D.C. 2006) (quotation marks and citation omitted).

APA review is circumscribed and deferential. Agency decisionmaking may only be set aside if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, …[ ] in excess of statutory jurisdiction, or without observance of procedure required by law." *Turtle Island*, 878 F.3d at 732 (quoting 5 U.S.C. § 706(2)(A), (C)-(D)). Thus, "[t]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *Club One*, 328 F. Supp. at 1041 (quoting *Ranchers Cattlemen*, 499 F.3d at 1115, regarding the "highly deferential" standard of review that presumes the agency action to be valid such that it should be affirmed "if a reasonable basis exists for its decision.") Additionally, as noted by the Ninth Circuit in *Cachil Band* "[t]he 'arbitrary and capricious' standard is particularly deferential in matters implicating predictive judgments." *Cachil Band* 889 F.3d at

602 (quoting *Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177, 1188 (D.C. Cir. 2018)).

Finally, review of agency decisionmaking implicating the rights of an Indian tribe includes the special, Indian-favoring canons of construction. Under these canons, statutory silence or ambiguity should not be interpreted to the detriment of Indians. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). Instead, statutes and treaties establishing Indian rights and privileges should be construed liberally in favor of the Indians, with any ambiguities resolved in their favor. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 200 (1999); *see also Cty. of Yakima*, 502 U.S. at 269; *Doe v. Mann*, 415 F.3d 1038, 1047 (9th Cir. 2005); *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003).

ARGUMENT

I. The Secretarial Procedures Complied with IGRA and are Entitled to Deference Under the APA

Pursuant to IGRA, Secretarial procedures may be issued for the conduct of Class III gaming on "Indian lands over which the Indian tribe *has jurisdiction*."[8] The Card Clubs contend (1) that the Tribe did not have jurisdiction over the Yuba Parcel at the time the Secretary issued the Secretarial Procedures for the Tribe's Class III gaming on the Parcel; (2) that the Secretary did not consider whether the Tribe possessed such jurisdiction; and (3) that the Tribe has not exercised governmental power over the Parcel. Just as Judge Ishii rejected these contentions in *Club One*, so too should they be rejected here. *See Club One*, 328 F. Supp. 3d at 1045 (noting

[8] *See also* 25 U.S.C. § 2710(d)(1)(A)(i) ("the Indian tribe having jurisdiction over such lands"); § 2710(d)(3)(A) (the "Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted").

that "shift of jurisdiction to an Indian tribe resulting from a fee-to-trust determination is enough to satisfy the 'having jurisdiction over' Indian lands requirement of § 2710(d)(1)(A)(i)").

A. The United States' IRA acquisition of the Yuba Parcel in trust for the Tribe operated to establish the Tribe's jurisdiction over it

Indian tribes are "dependent nations that exercise inherent sovereign authority." *Michigan v. Bay Mills Indian Cmty*, 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*. Tribal sovereignty persists "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).

Relevant to the instant challenge, this well-recognized sovereignty extends to *land*. The Ninth Circuit 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*, 919 F.3d 1135, 1147-48 (9th Cir. 2019) (emphasis added) (quoting *United States v. Antelope*, 430 U.S. 641, 645 (1977)). Moreover, "managing tribal land" is plainly a component of a "tribe's sovereign interests." *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 334 (2008); *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").

Adhering to these same principles, the First Circuit, for example, has held 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) (noting that "*jurisdiction* is an integral aspect of [a tribe's] retained sovereignty." (emphasis

added)). Similarly, the Second Circuit held in connection with the Seneca Nation Settlement Act that Congress intended restricted fee lands purchased with funds from the Act to be subject to the Seneca Nation's tribal jurisdiction including "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). These decisions are reinforced by precedent elucidating the characteristics and jurisdictional significance of "Indian country," which the Yuba Parcel is.

B. The Yuba Parcel is Indian Country over which federal and tribal jurisdiction are primary

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 Vill. of Venetie Tribal Gov't*, 522 U.S. 520-21, 527-31, 533 (1998). [9] 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. 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

[9] "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 while 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. 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; *Okla. Tax Comm'n 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.").

"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"). The Yuba Parcel unquestionably is Indian country. Order of March 4, 2019 at 8; *Club One* 328 F. Supp. 3d 1033, at 1046 (noting that lands held in trust by the United States for tribes are Indian country within the meaning of 18 U.S.C. § 1151, quoting *United States v. Sohappy*, 770 F.2d 816, 822 (9th Cir. 1985)).

Crucially, and contrary to the view pressed by the Card Clubs, as a consequence of lands being deemed Indian country "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); *see also 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" (citing *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998))); *Yankton Sioux*, 606 F.3d at 1006 (stating as a general rule that "Indian country falls under the primary civil, criminal, and regulatory *jurisdiction* of the federal government and the resident Tribe rather than the states." (Emphasis added and citation omitted). In the same vein, the Ninth Circuit long ago observed that acquisition of trust lands for a tribe restricts state jurisdiction over such lands. *See Santa Rosa Band of Indians v. Kings Cty.*, 532 F.2d 655, 666 (9th Cir. 1975) (noting Congress's intent that Indian trust lands acquired under the IRA "be held . . . *free of state regulation*") (emphasis added).[10] Moreover, the Circuit Court was untroubled by the lack of an express

[10] The Ninth Circuit 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

provision in the IRA exempting trust lands from state regulation, reading 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.[11]

C. The Card Clubs' challenges to tribal and federal jurisdiction over the Yuba Parcel lack merit

1. The contention that the Tribe has not exercised governmental power over the Yuba Parcel is wrong

Fastening on IGRA's second definition of "Indian lands" addressed to trust lands "over which an Indian tribe exercises governmental power," § 2703(4)(B), the Clubs complain (Mem. 24-26) both that the Tribe has not exercised governmental power over the Yuba Parcel, and that the administrative record lacks evidence that Interior gave the matter any consideration. Contrary to the Clubs' contentions, but for the Tribe's exercise of its governmental power in seeking a Tribal-State compact with California to govern gaming on the Parcel, the Clubs could not have

---

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. Dist. Court of Sixteenth Judicial Dist.*, 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." (citing *William v. Lee*, 358 U.S. 217, 220 (1959))).

[11] Other Circuit Courts have likewise held that the creation of tribal jurisdiction is implicit in the acquisition of trust lands for tribes. 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).; *see also Citizens Against Casino Gambling*, 802 F.3d at 285 (agreeing with the Ninth Circuit's holding in *Santa Rosa* that "an express provision" in the IRA was "unnecessary" and that exemption from state regulation is "implicit in the grant of trust lands under existing legal principles"). And as put by the Eighth Circuit "land held in trust under [the IRA] is effectively removed from state jurisdiction," given that "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.

mounted this lawsuit. For the same reason their critique of the administrative record for alleged failure to disclose any evidence of the Tribe's exercise of governmental power over the Parcel rings hollow.

In any event, as Judge Ishii observed in *Club One*, the "term 'exercising governmental power' is undefined by IGRA and the case law considering the phrase is sparse." *Club One*, 328 F. Supp. 3d at 1047 (citing *Commonwealth v. Wampanoag Tribe of Gay Head*, 144 F. Supp. 3d 152, 166 (D. Mass. 2015)). His canvas of relevant cases revealed that many circuit courts "simply conclude that land is Indian land [per IGRA] when it is held in trust by the United States for the benefit of a tribe without asking if a tribe exercises governmental power over that land," *id.* at 1047-48 (collecting cases), and that "[n]either the Supreme Court nor the Ninth Circuit found the 'exercise of governmental power' clause analytically significant enough to mention." *Id*. at 1048. On this latter basis Judge Ishii held that "the Madera Site is Indian land because it is in trust for North Fork." *Id*. Notwithstanding, he went on to assess the North Fork Tribe's exercise of governmental power over the Madera Parcel against the suggestions of two circuit courts that some manifestation of exercise of governmental authority be identified. *Id*. Even through this lens Judge Ishii found that, prior to the Secretary's issuance of Procedures, there was a sufficient manifestation of exercised governmental power vis-à-vis the Madera Site in the North Fork in the Tribe's enactment of a gaming ordinance and an underlying Tribal Resolution. *Id*. at 1049. That same manifestation of pre-Procedures exercise of governmental powers occurred here.

While the Card Clubs failed to raise the alleged need for documented evidence of exercised governmental power over the Parcel in their Compliant, the Complaint references the fact that in issuing the ROD to acquire the Yuba Parcel in trust for the Tribe, Kevin Washburn,

then Assistant Secretary – Indian Affairs, stated that "The Tribe will assert civil/regulatory jurisdiction." ECF No. 1, Cmpl. ¶45. That statement, reflecting the reality that once in trust, the Tribe not only would have jurisdiction over the Parcel, but would assert (exercise) governance over it, comports with the understanding and interpretation of the legal consequences of the combined IRA and IGRA decisionmaking by the relevant agencies – the Interior Department and the National Indian Gaming Commission ("NIGC").[12] Indeed, the NIGC determined first in 2004, and then again in 2013, to approve the Tribe's gaming ordinance in anticipation of the Tribe's casino project. *See* NIGC Chairwoman Tracie Steven's August 13, 2013 Letter to Tribal Chairperson Nelson approving Tribe's Amended Ordinance, and attached Tribal Resolution and Gaming Amended Gaming Ordinance. (Available on NIGC website [https://www.nigc.gov/general-counsel/gaming-ordinances]).[13] As in *Club One*, "in the time before the Secretarial Procedures were issued" the Tribe had enacted an ordinance with respect to the Yuba Parcel and thus "exercised governmental power over" the Parcel "by legislating with respect to it." *Club One*, 328 F. Supp. 3d at 1049. The Tribe's gaming ordinance and its underlying Tribal Resolution are the proper subject of judicial notice. *Id.* at n.15 (stating the court's determination to take judicial notice of both the North Fork Tribe's enacted Resolution

---

[12] The agencies are also mindful of the fact that IGRA's exceptions to the general prohibition on gaming on so-called "after acquired lands" are designed to build fairness into the Act to address, for example, recently restored tribes, and tribes whose extant lands are so diminished or unusable that realization of IGRA's economic potential requires that they petition the Secretary under the IRA for acquisition of additional and/or more suitable lands in trust. *See, e.g, Cty of Amador v. U.S. Dep't of Interior*, 872 F.3d 1012 (9th Cir. 2017).

[13] The Tribe's July 2013 Resolution adverts, inter alia, to the Tribal Constitution empowering the Tribal Council to pass legislative rules and regulations including gaming ordinances; the Tribe's intent to engage in Class II and III gaming; the need to conform its prior ordinance to IGRA and the Tribal-State compact it had entered with Governor Brown; and the Assistant Secretary–Indian Affairs' final determination to accept the Yuba Parcel in trust for gaming purposes. *See* https://www.nigc.gov/general-counsel/gaming-ordinances Enterprise Rancheria of Maidu Indians 9/28/04.

and Tribal Ordinance, citing *N. Cty. Cmty. All. Inc., v. Salazar*, 573 F.3d 738, 746 (9th Cir. 2009)).[14]

Relatedly, Judge Ishii reasoned in *Club One,* that while as here, the administrative record of the Northfork Secretarial Procedures lacked an express governmental conclusion that the Northfork Tribe had territorial jurisdiction over the Madera Parcel (thus confirming its qualification as "Indian lands" under IGRA), there was no need for such evidence given his prior determination in the Northfork good faith lawsuit that there was no dispute between the State and the Tribe regarding the gaming-eligibility of the Parcel. *Club One*, 328 F. Supp. 3d at 1048-49. He further concluded that both the court-appointed mediator and the Secretary reasonably relied on that determination as part of the administrative record leading up to the Secretarial Procedures. *Id.* at 1049. Similarly, in the good faith lawsuit underlying the challenged Secretarial Procedures here, this Court premised its ability to issue a judgment on the pleadings on there being no material facts in dispute. *Estom Yumeka, Tribe* 163 F. Supp. 3d at 775. California had not challenged the Yuba Site's gaming-eligibility under § 2703 (4)(B). As such, the Yuba Site's unquestioned status as IGRA "Indian lands" over which the Tribe exercises governmental power

---

[14] The Clubs' claim (Mem. 25-26) that the Tribe must have exercised such power before requesting that the State engage in compact negotiations is mistaken. Notably, and as this Court recounted, the State of California took the opposite position with the Tribe. The Governor specifically sought compact concessions from the Tribe before he would concur in the Secretary's two-part determination that the Yuba Site would meet the IGRA Section § 2719(b)(1)(A) exception, and before the Secretary's final trust determination and acquisition of the Yuba Parcel. *Estom Yumeka Tribe*, 163 F. Supp. 3d 769, 773-74. Moreover, their reliance on *Narragansett Indian Tribe*, 19 F.3d 685 and *Massachusetts v. Wampanoag Tribe of Gay Head*, 853 F.3d 618 (1st Cir. 2017) is inapposite as those cases involved interpretation of the unique circumstances and jurisdictional schemes involved in the Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §§ 1701–1716, and the Indian Claims Settlement Act of 1987, 25 U.S.C. §§ 1771–1771i, not applicable here. Reliance on *Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, 2004 WL 1103021 (E.D. Cal. 2004) is similarly misplaced as that case came down to interpretation of a unique Stipulated Judgment entered between the Mechoopda Tribe and the federal government. *Id.* at 8-12.

is part of the administrative record backdrop properly relied upon by the Secretary in prescribing Procedures.

Given the backdrop of this Court's decision in the good faith lawsuit combined with the weight of authority confirming tribal jurisdiction over lands acquired in trust for tribes' benefit, the Clubs cannot meet their burden under the APA. 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, 1256-57 (9th Cir. 2017). (Citation omitted). As demonstrated, tribal jurisdiction over trust lands is overwhelmingly confirmed by applicable *legal* authorities obviating the need for a particular factual finding by the Secretary. And, in any event, nothing in IGRA requires the Secretary to render a formal, written determination as to tribal jurisdiction. Instead, the Secretary reasonably relied on the grant of jurisdiction that operates as a matter of law under the IRA. *See Santa Rosa*, 532 F.2d at 666 n.17. Further, any doubt in evaluating whether a tribe exercises sufficient governmental power should be resolved in the tribe's favor. *See Club One*, 328 F. Supp. 3d at 1048 (citing *Wampanoag Tribe*, 853 F.3d at 626).

For these reasons, issuance of the Secretarial Procedures was proper under IGRA because the statute's requirements that the Tribe have jurisdiction and exercise governmental power over the Yuba Parcel were satisfied.[15]

---

[15] Importantly, even if the Court were to remand the matter back to the Secretary for consideration of the Tribe's exercise of governmental power over the Yuba Parcel, the Secretary would certainly conclude that such exercise was manifested by the Tribe's legislating (i.e. passing a Tribal resolution and enacting and

2. The Card Clubs' "solely title transfer " theory is wrong

The Clubs contend (Mem.18-20) that when the Secretary acquired the Yuba Parcel in trust under the IRA the federal government acquired mere *title* to the land, and not jurisdiction. This "solely title transfer" proposition is mistaken, as made clear by the Ninth Circuit 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 (citing *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 175 (1973)). In other words, acquiring land into trust for a tribe does not only accomplish a change in land title, it entrusts the tribe with the "power to regulate the Indian use or governance" of the land. In short the tribe acquires *jurisdiction* over the land. *Id.* (Emphasis added.)

The Clubs' solely title transfer 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*, 417 U.S. at 542 (emphasis added). The United States holds title to trust land pursuant to the Act, to fulfill the congressional purpose of facilitating tribal self-governance which presupposes tribal jurisdiction to accomplish the same. *See, e.g., EEOC v. Peabody W. 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."). (Citation omitted). Thus holding title to the land in

---

amending its gaming ordinance intended to govern gaming on the Parcel) and the fact that the Parcel has now been in trust for the Tribe for over six years. As such, any remand would be futile and any error should be considered harmless. *See Club One*, 328 F. Supp. at 1042.

trust serves as the "machinery" for providing tribes with that greater degree of self-government.[16]

3. Tribal and federal jurisdiction arose over the Yuba Parcel irrespective of State consent or cession

The Clubs argue (Mem.14-17) that tribal and federal jurisdiction over the Yuba Parcel (or any IRA trust lands for that matter) depends on state consent or state cession of jurisdiction over the Parcel. They rely on the Enclave Clause of the Constitution and 40 U.S.C. § 3112 for this extraordinary proposition. Neither applies here.

i. The Enclave Clause has no application here

The Enclave Clause 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 [s]ame shall be." U.S. Const. art. I, § 8, cl. 17. 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). The United States does not rely on the Enclave Clause to take land into trust and it is therefore irrelevant to the acquisition of the Yuba Parcel.

Contrary to the Clubs' contention, the federal government's authority to take land into trust in furtherance of tribal sovereignty and self-government derives from a separate source: the

---

[16] The Clubs' citation (Mem. 18) to a treatise from the Government Accounting Office and a Department of Justice Resource Manual for the propositions that acquisition of property in trust for a tribe does not shift territorial jurisdiction do not advance their arguments. 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 www.gao.gov/special.pubs/d08978sp.pdf. (Emphasis added.) 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/criminal-resource-manual-664-territorial-jurisdiction. That circumstance has no relevance here.

Indian Commerce Clause, U.S. Const. art. 1 § 8, cl. 3. *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."). (Citation omitted). Plainly this Indian Commerce Clause power is not a derivative legislative power from a state pursuant to the Enclave Clause. As an exercise of Indian Commerce Clause powers, land acquisition for tribes does not require state consent or cession, as claimed by the Clubs. Relatedly, the Ninth Circuit has held that 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). The "plenary" authority here derives from the Indian Commerce Clause. *Cotton Petroleum*, 490 U.S. at 192.

Further, cases construing the Enclave Clause make clear 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 simply 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.").

ii. 40 U.S.C. § 3112 likewise has no application here

Plaintiffs further rely (Mem. 17) on 40 U.S.C. § 3112. That statute allows the federal government to seek exclusive or partial jurisdiction over state land, § 3112(b), but further makes clear that nothing requires the government to do so, § 3112(a), and that the default is that there is no exclusive or partial jurisdiction over federal land absent federal acceptance of such

jurisdiction, § 3112(c). In other words, § 3112 does not make exclusive jurisdiction a prerequisite to the exercise of federal authority but rather provides clarity for understanding when the federal government has assumed exclusive jurisdiction over land. *See Adams v. United States*, 319 U.S. 312, 314 (1943) ("The Act 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."); *Pratt v. Kelly*, 585 F.2d 692, 695 (4th Cir. 1978) ("It is now clear that ownership of land by the United States does not imply a transfer of either total or partial jurisdiction except so far as necessary for the United States to accomplish the purposes for which the land was transferred.").

Where the United States assumes exclusive jurisdiction, state law does not apply at all, even if such law does not conflict with the federal purpose for acquiring the land. *Silas Mason Co. v. Tax Comm'n*, 302 U.S. 186, 197 (1937) (where the "United States has acquired exclusive legislative authority," the effect is to "debar the State from exercising any legislative authority including its taxing and police power in relation to the property and activities of individuals and corporations within the territory"). But where, as here, conflicting state and local laws are preempted and the Federal Government does not seek additional jurisdiction over the Property, the usual rule applies: Because trust land is not a federal enclave of exclusive jurisdiction, when the United States acquired title to the Property for the benefit of the Tribe, "the State [retained] legislative authority . . . *consistent with federal functions*." *Id*. at 198 (emphasis added).

The acquisition of the Yuba Parcel in trust for the Tribe, and any preemption of state and local jurisdiction that occurred as a result, is entirely lawful and the Clubs cannot demonstrate otherwise.

II. The Card Clubs' Tenth Amendment challenge is not properly before the Court and lacks merit in any event

The Clubs argue (Mem. 29) that if the IRA is construed to divest the "any portion of the state's territorial jurisdiction over the Yuba Parcel, it would violate the Tenth Amendment [ ]." Their lawsuit is brought under the APA and thus must demonstrate that they are challenging a "final agency action." *Gill v. United States Department of Justice*, 913 F.3d 1179, 1184 (9th Cir. 2019). The only final federal action that gives rise to the jurisdictional shift complained of, the fee-to-trust acquisition of the Yuba Parcel, is not challenged in their Complaint. Faced with the same circumstance in *Club One*, Judge Ishii determined not to consider the Tenth Amendment claim because "the agency action that purportedly violates the Tenth Amendment –the fee-to-trust determination made pursuant to the IRA—is not challenged in this action therefore the question is not properly before the Court." *Club One,* 328 F. Supp. 3d at 1042. The question likewise is not properly before this Court. *Id.*[17]

A. The Tenth Amendment is not implicated in fee-to-trust acquisitions for tribes

Assuming, *arguendo*, the Clubs' Tenth Amendment claim could be heard, it would fail in any event. The Tenth Amendment violation purportedly arises because interpreting trust acquisition of land under the IRA to effect a jurisdictional shift equates to a unilateral divestment

[17] Moreover, the Ninth Circuit has held that "parties cannot 'use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions.'" *Big Lagoon Rancheria v. California*, 789 F.3d 947,953 (9th Cir. 2015) (quoting *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012)). In other words, parties cannot "attack collaterally the [Secretary's] decision to take" land "into trust outside the APA" because doing so "would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government." *Id*. at 954. In order to challenge a fee-to-trust decision a party must "file the appropriate APA action." *Id*. Here the Card Clubs have not challenged the agency action resulting in the trust acquisition of the Yuba Parcel, but instead attack the Parcel's status as "Indian lands" under IGRA. Their attack is collateral and fails to state a cause of action.

of state legislative jurisdiction over land acquired at statehood, beyond the scope of Indian Commerce Clause powers. (Mem. 30-31). Such reliance on the Tenth Amendment to challenge a fee-to-trust acquisition for tribal gaming has previously been rejected. *See City of Roseville v. Norton*, 219 F. Supp. 2d 130, 154 (D.D.C. 2002) (holding against the backdrop of Congress's plenary Indian affairs powers stemming from the Constitution that "the Tenth Amendment does not reserve authority over Indian affairs to the States."

The essence of the Card Clubs' "statehood" argument (Mem. 31, 34, n.13) is that tribal jurisdiction over lands within state boundaries can only exist as to lands that were reserved to a tribe at the time of statehood. 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 under the IRA. Just because Congress at times reserved federal or tribal jurisdiction over existing Indian lands in admitting new states to the Union, it does not follow that post-admission reservations or acquisitions are precluded. The Clubs' reliance on the statement from *Upstate Citizens*, 841 F.3d at 561 n. 4, that "[t]ribal jurisdiction [ ] generally follows from the land's reservation status" ignores the ruling in that case and seeks to assert a distinction not embraced by that court or otherwise found in the case law. From this statement the Clubs baldly assert that Indians can only have sovereignty over "reserved" lands "they were allowed to retain when the state was created," and that the Yuba Parcel "is not the Enterprise Tribe's reservation." (Mem. 31-32). Contrary to their contention, the Supreme Court has analyzed the matter more liberally. *See, e.g., Okla. Tax Comm'n*, 498 U.S. at 511 ("we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes" (citing *United States v. John*, 437 U.S. 634, 648-49 (1978))).

The Supreme Court's *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y*, 544 U.S. 197 (2005) decision likewise undermines the Clubs' "statehood" argument. The decision expressly notes that the IRA may be used to establish or reestablish tribal sovereignty over land that had long fallen under the State's control. The tribe in *City of Sherrill* had purchased and asserted sovereign control over portions of its reservation lands that centuries earlier had been purchased by the State of New York. *Id*. at 203-211. The Supreme Court held that equitable doctrines precluded the tribe from asserting the same sovereignty it may once have held over the lands due to the extensive time under state sovereign control. *Id*. at 221. However, the Court also made clear 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*., implicitly rejecting both the Clubs' "time-of-statehood" theory and their "solely title transfer" theory as to lands taken into trust under the IRA.[18]

The Clubs are also wrong in their assertion (Mem. 32-33) that the Yuba Parcel is not Indian country as a basis for bolstering their Tenth Amendment argument. As correctly observed in *Club One*, 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. *Club One*, 328 F. Supp. 3d at 1046 (citing *John*, 437 U.S. at 649 and *United States v. McGowan*, 302 U.S. 535, 537-39 (1938)). *John* and *McGowan* involved lands secured for tribes *after* the affected states had achieved

[18] Similarly, the Clubs' assertion (Mem. 33) that "inherent tribal sovereignty" is "no answer" nor does it fill an alleged "jurisdictional gap," makes little sense as regards their Tenth Amendment challenge. Their aim appears to imply that the Tribe somehow aims to "participate in conduct otherwise barred by state law" on "land outside tribal jurisdiction," and to reprise their theory that the only lands over which tribes have sovereignty that can displace a state's territorial jurisdiction, are those that were occupied by the tribes at the time of statehood or "otherwise ceded by the state to the federal government." (Mem. 34).

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, with no indication that the timing of statehood had any relevance to tribal had jurisdiction over the lands. Secondly, the Clubs ironically and erroneously rely on *Venetie*, a case involving non-trust lands, to argue the Yuba Parcel, which *is* trust land, hasn't been set aside (which it has via trust acquisition), nor superintended (which it has been via, at a minimum, Secretarial and NIGC decisionmaking). *See, also Roberts*, 185 F.3d at 1131 ("we believe official 'reservation' status is not dispositive and lands owned by the federal government in trust for Indian tribes are Indian country pursuant to 18 U.S.C. § 1151."); Cohen's Handbook of Federal Indian Law §3.04[2][c] at 195 (Nell Jessup Newtown ed., 2012) ("Notwithstanding the *Venetie* decision, off-reservation trust or restricted lands set aside for Indian use should be considered Indian country under the dependent Indian community section of the statute. They are by definition set aside for Indian use and subject to pervasive federal supervision.")

Finally, the Clubs cite *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), (Mem. at 35-36) in support of their assertion that Congress may not divest a state of jurisdiction over lands acquired at statehood. That case, however, has no application here. *Hawaii* involved the issue of whether a congressional resolution limited the State's authority to sell land that was ceded to the State in fee upon its admission to the Union. *Id.* at 172, 174. The Supreme Court held that the resolution did not limit the State's authority refusing to interpret the resolution as placing a "cloud" on the State's title to its lands. The Court reasoned that the resolution would create "grave constitutional concerns" if it purported to cloud Hawaii's title to its sovereign lands, and that the resolution revealed no indication of congressional intent to cloud title. *Id*. at 175-76. The Court's concerns in *Hawaii* are not implicated here. The State of California did not

hold title to the Yuba 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.

The Clubs' have not demonstrated that the Secretarial Procedures present a Tenth Amendment violation.

III. The Secretarial Procedures Comport with IGRA's State Law Consistency Requirement

The Card Clubs contend (Mem. 27-28) that California state law prohibits gaming via secretarial procedures because "the rule in California is simple: no compact, no casino gaming," relying on language in the California constitution permitting Class III gaming activities "to be conducted and operated on tribal lands subject to [tribal-state gaming] compacts." Cal. Const. art. IV. § 19(f).[19]

The Clubs' argument that gaming pursuant to procedures is not gaming under a "compact" and is thus contrary to California law and IGRA, has already been considered and rejected is this district. *Club One* 328 F. Supp. at 1049-50. Judge Ishii correctly found this syllogism undercut by *Hotel Emps. and Rest. Emps. Intern. Union v. Davis*, 21 Cal.4th 585, 88 Cal. Rptr.2d 56, 981 P.2d 990 (1999). In *Hotel Employees,* the California Supreme Court addressed California's waiver of immunity as designed to give effect to IGRA's remedial framework.[20] *Hotel Employees*, 21 Cal.4th at 615, 88 Cal.Rptr.2d 56, 77, 981 P.2d 990, 1011

---

[19] Class III gaming under IGRA is only allowed "in a State that permits such gaming for any purpose by any person, organization or entity . . . ." 25 U.S.C. § 2710(d)(1)(B). And, as regards secretarial procedures, the Secretary must prescribe procedures that, in accord with this provision, are "consistent with . . . the relevant provisions of the law of the State." *Id.* § 2710(d)(7)((B)(vii)(I).

[20] The waiver states in relevant part as follows:

[T]he State of California ... submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's

(observing that section 98005 "in providing the state's consent to such a suit, is obviously intended to restore to California tribes the remedy provided in IGRA"). Secretarial procedures are "part of the remedial process that gives it teeth," and if tribal gaming pursuant to procedures could not occur then the purpose of the remedial process "restoring leverage to tribes to sue recalcitrant states" and thereby force them into a compact "would be wholly eroded." *Club One* 328 F. Supp. at 1050. Judge Ishii's rebuke of the *Club One* plaintiffs' proffer of the same "no compact: no gaming" argument applies equally here: "The Court will not read IGRA to have created (or the State of California to have waived immunity as to) an empty remedial process. Such an outcome must be rejected." *Id*.

Finally, the Card Clubs' purported alternative constitutional avoidance argument (Mem. 11), cannot be heard in the absence of the State of California, an indispensable non-party to this claim. *See Stand Up for California! v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212, 251-54 (2016) (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"). In any event, the contention (Mem. 10) that the requirements of §2719(b)(1)(A) have not been met because Governor Brown's concurrence was allegedly negated by the California Legislature's failure to ratify the Enterprise compact lacks merit. By the Clubs' contorted logic the Governor could only concur in a final agency determination. They then spin the Secretary's two-part determination as merely intermediary to the final gaming eligibility determination, which, they argue, was issuance of the Secretarial Procedures to which the Governor did not concur. Of

---

refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party. Cal. Ann. Code § 98005

course IGRA does not provide for a governor's concurrence in secretarial procedures, which, after all, only come into play upon a state's recalcitrance. As with their "compact only" argument, this "non-concurrence" argument must be rejected as it would "wholly erode" IGRA's remedial process.

Contrary to the Clubs' contention, at the time the Governor's concurrence was indisputably in effect, the Secretary had issued a final agency decision on the gaming eligibility of the Yuba Parcel under § 2719(b)(1)(A) of IGRA. And contrary to their framing, that final agency action was wholly independent of the final action (Secretarial Procedures) challenged here. After the Secretary received the Governor's concurrence, IGRA required nothing more for the Secretary to proceed on the assumption that the Tribe could conduct gaming on the Parcel. *See, e.g., United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979) (upholding validity of a retrocession based on prior the determination that "acceptance of the retrocession by the Secretary, pursuant to the authorization of the President, made the retrocession effective, whether or not the Governor's proclamation was valid under Washington law"). Indeed, the Secretary proceeded to acquire the Yuba Parcel in trust for gaming. In any event, IGRA does not authorize the Secretary to look behind a governor's concurrence to determine its validity. 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 IGRA.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court grant its Cross-Motion for Summary Judgment, deny the Card Clubs' Motion for Summary Judgment, and enter a judgment upholding the issuance of the Secretarial Procedures.

Respectfully submitted this 12th day of July, 2019

ERIC GRANT
Deputy Assistant Attorney General

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

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