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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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Date: **October 31, 2019**
Time: **2:00 PM**
Courtroom: **2, 15th Floor**
Judge: **Hon. Troy L. Nunley**

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INTRODUCTION

The government's opposition and cross motion clearly join the legal issue, for defendants admit, as they must, that IGRA requires a tribe to have territorial jurisdiction before it can engage in casino gambling on land within a sovereign state. The legal question is: when and how does territorial jurisdiction shift from a state to the federal government, and through the federal government to an Indian tribe?

I. No Statute or Constitutional Provision Says That Territorial Jurisdiction Automatically Shifts with a Change of Title

Defendants claim jurisdiction shifts automatically when they acquire land in trust for an Indian tribe. *See*, e.g., Defendants' Memorandum in Opposition (ECF No. 35, hereafter referred to as "Defts' Opp.") at pp. 14, 17 n.11. Yet no statute says that, nor does any provision of the United States Constitution. Equally important, there is a clear expression of Congressional intent with respect to jurisdictional transfers, and it requires a formal cession of jurisdiction to effect the change. That is the express mandate of 40 U.S.C. section 3112. Congress is presumed to have been aware of that requirement when it enacted *both* the Indian Reorganization Act in 1934[1] and IGRA in 1988. *Bowen v. Massachusetts*, 487 U.S. 879, 880, 108 S.Ct. 2722, 2725 (1988) ("[T]he well-settled presumption [is] that Congress understands the state of existing law when it legislates.").

[1] At the time the IRA was enacted, a predecessor statute to section 3112 provided that the federal government could not acquire property unless, among other things, "the consent of the legislature of the State in which the land or site may be, to such purchase, has been given." *See* Publ. L. No. 71-467, 46 Stat. 828 (1930). Clearly, more than the mere acquisition of title is necessary in order to shift territorial jurisdiction, and in the context in which it enacted the Indian Reorganization Act, Congress understood that a State would have to consent to any transfer of territorial jurisdiction from itself to the federal government, much less to an Indian tribe.

The government's response is to argue that section 3112 does not apply because it only covers grants of *exclusive* jurisdiction. Defts' Opp. at p. 25. The government then quickly pivots into a preemption mode. *Id.* ("But where, as here, conflicting state and local laws are preempted and the Federal Government does not seek additional jurisdiction over the Property…."). Defendant's argument misses the point. This is not a preemption case (*see* discussion, *infra* at pp. 20-28. It is a *jurisdiction* case. It is Congress, through IGRA, that has dictated the acquisition of territorial jurisdiction before casino gambling can ensue.

The way to acquire jurisdiction, as Congress has mandated in section 3112, is to obtain a cession from the situs state. *See* 40 U.S.C. § 3112(b). When section 3112 is read in conjunction with IGRA, as it must be (*see Epic Systems v. Lewis*, 138 S.Ct. 1612, 1624 (2018)), it is clear that to comply with IGRA's jurisdiction mandate, a cession must be obtained from the situs state. Section 3112(c) makes clear that absent such a cession, there is a *conclusive presumption* that jurisdiction has not shifted. 40 U.S.C. § 3112(c).

The notion that section 3112 does not govern a major jurisdictional transfer such as in this case is an argument without foundation. The statute certainly does not say that, nor do the cases that have construed it. They say the opposite. The protocol set forth in section 3112 applies to the acquisition of *any* jurisdiction by the federal government. As the Supreme Court has explained, section 3112 "created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction.'" *Adams v. United States*, 319 U.S. 312, 314, 63 S.Ct. 1122, 1123 (1943).

The assertion that Congress understood jurisdiction to shift automatically with a transfer of title—even title into trust—flies in the face of the express provisions of section 3112, the Tenth Amendment, and IGRA as well. If the jurisdictional transfer is automatic, why doesn't

IGRA simply state the casino gambling is allowed on land that is in trust for an Indian tribe? But IGRA does not say that; indeed, its express provisions require jurisdiction as well as the exercise of governmental power over trust lands before a compact can be requested, and before Secretarial Procedures can issue. We discuss these requirements, *infra* at pp. 15-18; *see also* Plaintiffs Opening Memorandum (ECF 31-1, hereafter referred to as "Pltffs' Mem.") at 25-26.

(a) Judge Ishii's Ruling Does Not Resolve This Case

Defendants also invoke Judge Ishii's ruling in a parallel case involving the North Fork casino project. *Club One Casino v. U.S. Dep't of Interior*, 328 F.Supp.3d 1033 (E.D. Cal. 2018), appeal docketed, No. 18-16696 (9th Cir.). While that ruling certainly speaks for itself, we hasten to add that it is currently on appeal to the Ninth Circuit, and is likely headed ultimately to the United States Supreme Court. Thus that ruling, while final at the trial court stage, is not the last word on these issues, which raise important and contested statutory and constitutional claims. As has been explained to the Ninth Circuit, there are several errors in Judge Ishii's analysis, not only with respect to the justiciability of the Tenth Amendment issues, but also as to the question of how territorial jurisdiction shifts from a state to the federal government. *See, e.g., Club One Casino*, No. 18-16696, ECF No. 13 at pp. 28-61, ECF No. 39 at pp. 7-30. Plaintiffs have already voiced those points here. *See* Pltffs' Mem. at 16-17, 29-31.[2]

(b) Jurisdiction Does Not Shift with Title

We explained in detail in our opening memorandum why the Secretarial Procedures fail as a matter of law because jurisdiction over the Yuba Parcel did not transfer with the change in

[2] The *Club One Casino* case raises identical issues to this case. The only significant factual difference between the two cases is that in *Club One Casino*, the People of California, via a statewide referendum vote, rejected a compact for the North Fork Casino, proposed near Fresno. Here, the Legislature refused to approve a compact for the Enterprise Casino.

ownership. *See* Pltffs' Mem. at pp. 11-25. Not only do defendants disagree with that analysis, but they go further, asserting that that the Secretarial Procedures are entitled to judicial deference. *See* Defts' Opp. at p. 10. Whatever one thinks of *Chevron* deference and its legal future (*cf. Kisor v. Wilkie*, 139 S.Ct. 2400 (2019)), this case involves a purely legal issue that does not depend on agency expertise; nor has there been a congressional delegation of decision-making authority with respect to the jurisdiction question (assuming Congress even has the power to do so under the Tenth Amendment). Thus, the prerequisites for *Chevron* deference are not present here. The legal questions surrounding territorial jurisdiction must be resolved in the first instance by a court of law, without deference to an administrative agency.

Perhaps the most glaring weakness in the government's case is the fact that federal studies and federal guidelines make clear that territorial jurisdiction is not acquired automatically, by fiat or appropriation; it is acquired via the consent of the situs state. *See* Pltffs' Mem. at p. 13-17. This is not merely a theory proposed by plaintiffs; it is the positon of the federal government. To that end, even the Department of Justice, in its manual for federal attorneys, agrees. The manual states:

> The United States may hold or acquire property within the borders of a state without acquiring jurisdiction. It may acquire title to land necessary for the performance of its functions by purchase or eminent domain without the state's consent. …But it does not thereby acquire legislative jurisdiction by virtue of its proprietorship. *The acquisition of jurisdiction is dependent on the consent of or cession of jurisdiction by the state.*….

U.S. Dep't of Justice, *Criminal Resource Manual*, § 664 Territorial Jurisdiction (emphasis added and citations omitted), available at https://www.justice.gov/jm/criminal-resource-manual-664-territorial-jurisdiction (last accessed August 7, 2019).

Moreover the federal criminal code defines the "territorial jurisdiction of the United States" as:

> Any lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof, or any place purchased or otherwise acquired by the United States *by consent of the legislature of the State in which the same shall be*, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

18 U.S.C. § 7 (3) (emphasis added).

The long and short of the law is plain: territorial jurisdiction is not acquired unilaterally, automatically, or by osmosis. Territorial jurisdiction is acquired by way of a *voluntary transfer*, most commonly by a formal cession approved by the state legislature. There is no question that a statutory cession is the method that applies to this case. *See Coso Energy Developers v. County of Inyo*, 122 Cal.App. 4th 1512, 1521 (2004).[3]

(c) Trust Land Does Not Equal Tribal Jurisdiction

Nowhere does the Indian Reorganization Act say accepting property in trust creates territorial jurisdiction over that property, which is what IGRA requires. *Citizens Against Casino Gambling in Erie County v. Chaudhuri*, 802 F.3d 267, 285 (2d Cir. 2015), recognized that "neither the text of the IRA [the Reorganization Act] nor that of [another statute] explicitly states that lands that pass from fee to trust or restricted fee status are subject to tribal jurisdiction." Nonetheless, the Second Circuit *assumed* Congress must have silently so intended. *Id.* In doing so, the Second Circuit erred. *Cf. Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1013 (8th Cir. 2010) (non-Gaming Act case involving repurchase of former reservation lands in which the court noted: "There is a fundamental difference between

[3] The *Coso Energy* case explains that there are two other methods for the acquisition of jurisdiction: reservation upon a state's admission, and a federal purchase with the consent of the state. *See* 122 Cal.App. 4th at 1520. Although the court there referred to exclusive jurisdiction, the principles apply with full force to any diminution of a state's territorial jurisdiction. *See* Pltffs' Mem. at pp. 15, 19 nn.1-2.

acquiring land which has no historical connection to an existing reservation and reacquiring land which once formed part of a Tribe's land base").

Chaudhuri relied primarily on *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975). *Santa Rosa* predates modern preemption analysis by thirty-plus years, and it predates more recent decisions explaining that Congress does not possess unlimited power to usurp State jurisdiction. The Court has explained, again and again, that the federal government has the power to regulate individuals, not states. *See*, e.g., *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S.Ct. 1461, 1481 (2018); *Printz v. United States*, 521 U.S. 898, 920, 117 S.Ct. 2365, 2377 (1997); *New York v. United States*, 505 U.S. 144, 166, 112 S.Ct. 2408, 2423 (1992); *see also* discussion, *infra*, p. 21; *cf. United States v. California*, 921 F.3d 865, 888 (9th Cir. 2019) (the federal government cannot commandeer States to enforce federal law).

Nor did *Santa Rosa* involve a private party's land transfer to the United States or a claim that such a transfer unilaterally deprived the State of California of its existing territorial jurisdiction. Rather, *Santa Rosa* involved Indian reservation lands over which the tribe had acknowledged jurisdiction. How the tribe had gained that jurisdiction was not discussed in the court's opinion. At issue were local zoning ordinances restricting use of land subject to existing tribal jurisdiction. *Santa Rosa* says nothing about how an Indian tribe might acquire territorial jurisdiction from a sovereign state.

II. The Yuba Parcel is Not Indian Country

Another facet of the government's position is that the Yuba Parcel is "Indian country." *See* Defts' Opp. at p. 14-17. Judge Ishii took the same view. 328 F.Supp.3d at 1045-1046.

Judge Ishii reasoned, and the government apparently concurs, that in order to determine whether tribal jurisdiction exists under IGRA, "we must look to whether the land in question is Indian country." 328 F.Supp.3d at 1046. The logic is 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. *Id*.

But as we have explained previously, "Indian country" is not a term used in IGRA or the Indian Reorganization Act, and the Supreme Court has made clear that 18 U.S.C. section 1151, which defines the term, imposes strict requirements. *See* Pltffs' Mem. at pp. 32-33; *see also Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 118 S.Ct. 948 (1998). The *Venetie* decision makes clear that Judge Ishii's approach, and that advanced by the government in this case, is mistaken.

"Indian country" is defined by 18 U.S.C. section 1151(b), in pertinent part, as "all dependent Indian communities…." In *Venetie*, 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 954.

Cases underpinning *Venetie*'s analysis require tribal occupancy and settlement in addition to mere possession of beneficial title. *See 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 entertainment company partner are developing 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 a Delaware limited liability company, Yuba County Entertainment, LLC.

That IGRA aims to further 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." *Id.* 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.

For there to be the necessary superintendence, "the Federal Government must take some action setting apart the land for the use of the Indians 'as such,' and that it is *the land in question,* and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." *Id.* at 53 n.5, 118 S.Ct. at 954 (italics in original).[4]

III. The Cases Cited by Defendants Do Not Support A Rule that Jurisdiction Transfers with Title

The various cases cited by the government do not alter the analysis. For example, both *United States v. John*, 437 U.S. 634, 98 S.Ct. 2541 (1978) and *United States v. McGowan*, 302 U.S. 535, 58 S.Ct. 286 (1938) involved land with a long history of Indian occupation and governance. In *John*, it was the Choctaw Reservation in Mississippi, established for at least a

[4] In *Venetie*, the Supreme Court certainly did not say that once land is taken into trust it automatically becomes "Indian country." Quite the opposite: there must be proof, among other things, that there has been extensive federal "superintendence." *Id.* at 522 U.S. at 529-30, 118 S.Ct. at 954. Moreover, the use of the term "Indian country" is out of place in this case. That term is not included in IGRA, which instead refers to "Indian lands," and requires the acquisition of territorial jurisdiction as well as the actual exercise of governmental power over the land in question before the land qualified for casino gambling. If defendants' theory were correct, IGRA would be worded much differently that it is. So would the Indian Reorganization Act, the Indian Commerce Clause, and the Tenth Amendment.

generation prior to the case reaching the Supreme Court, *see John*, 437 U.S. at 649, 98 S.Ct. at 2549, while in *McGowan*, the Reno Indian colony in Nevada was purchased in 1916 and occupied well prior to the dispute in that case. Moreover, these cases involved land set aside for Indian housing and general welfare, not for a casino to conduct gambling—a business that would be patronized primarily by non-members and that would be illegal if conducted by an ordinary Californian.

City of Sherrill v. Oneida, 544 U.S. 197, 125 S.Ct. 1478 (2005) gets closer to the mark but does not mandate a different conclusion. There, the tribe claimed that it was exempt from state taxation on property it had purchased in the open market and which had been part of the tribe's original reservation, last owned by the tribe in 1805. "For two centuries, governance of the area . . . has been provided by the State of New York and its county and municipal units." *Id.* at 202, 125 S.Ct. at 1483. The Supreme Court concluded that mere ownership did not dislodge State jurisdiction. "[T]he tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." *Id.* at 203, 125 S.Ct. at 1483. In dicta, the Court commented that the tribe could *reacquire* lost sovereignty over the land through the Reorganization Act's land-to-trust process, *see id.* at 220-21, 125 S.Ct. at 1493-94. But the Court did not consider whether sovereignty could be reacquired without State consent. *See Webster v. Fall*, 266 U.S. 507, 511, 45 S.Ct. 148, 149 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"); *United States v. Pepe*, 895 F.3d 679, 688 (9th Cir. 2018) ("cases are not precedential for propositions not considered").

Defendants' citation of cases expressing broad principles does not begin to answer the particular legal question at issue. The mantra that Indian tribes have sovereignty over their territory (Defts' Opp. at 14) does not mean that the federal government can wrest sovereignty from a state and transfer it to a tribe. The cases cited by the government help make the point. For example, defendants cite *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 US. 316, 128 S.Ct. 2709 (2008), and include a quotation, but they ignore the fact that the Supreme Court *rejected* tribal authority in that case based on a limited view of "inherent tribal sovereignty" that stems from the Court's prior ruling in *Montana v. United States*, 450 US 544, 101 S.Ct. 1245 (1981). In *Plains Commerce Bank*, the Court specifically explained that:

> We have frequently noted, however, that the "sovereignty that the Indian tribes retain is of a unique and limited character." *Id.*, at 323, 98 S.Ct. 1079. It centers on the land held by the tribe and on tribal members within the reservation."

544 U.S. at 327, 128 S.Ct. 2718

Moreover, said the Court, tribes do not have inherent power to impose law on non-members, even on their reservation:

> But tribes do not, as a general matter, possess authority over non-Indians who come within their borders: "[T]he inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe." *Montana,* 450 U.S., at 565, 101 S.Ct. 1245. As we explained in *Oliphant v. Suquamish Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978), the tribes have, by virtue of their incorporation into the American republic, lost "the right of governing ... person[s] within their limits except themselves." *Id*., at 209, 98 S.Ct. 1011….
>
> *This general rule restricts tribal authority over nonmember activities taking place on the reservation….*

Id. at 328, 128 S.Ct. 2718-19 (emphasis added).

This is a far cry from the proposition, expressed repeatedly by defendants, that the minute land is transferred in trust by a private party, the beneficiary tribe can govern all activity on it, including activity by nonmembers. In *Plains Commerce Bank*, the Court explained the

limits on retained tribal sovereignty and the restrictions imposed by the *Montana* doctrine (see 544 U.S. at 327-330, 128 S.Ct. at 2718-20), which we have explored elsewhere. See Pltffs' Mem. at 33-34. *Plains Commerce Bank* by no means diminishes plaintiffs' position.

Another example is *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994 (8th Cir. 2010). See Defts' Opp. at p. 16. If anything, that case further bolsters plaintiffs' core point, for it involved land that was set aside by treaty before South Dakota's statehood. *See* 606 F.3d at 998 (reservation created by treaty in 1858). The 1889 South Dakota admission statute specifically reserved jurisdiction over the land to the federal government. *See* 25 Stat. 676, 677. A careful reading of the case reveals that the Yankton Sioux dispute centered on the alleged diminishment of a reservation (*see, e.g.*, 606 F.3d at 1005). The case certainly did not say, hold, or intimate that the federal government could, after statehood, strip a state of any or all of its historic territorial jurisdiction.

And of course, the *Venetie* case (cited at Defts' Opp. at pp. 15-16 and discussed above) does not advance defendants' positon. Aside from the fact defendants omitted an important phrase from one of the included quotations,[5] the fact is, the land in dispute in *Venetie* did *not* qualify as "Indian country." *See* Pltffs' Mem. at 32-33; *see also*, discussion, *infra* at 9-10.

Finally, we arrive at *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016), *cert. denied*, 2017 W5660979 (2017). Like *City of Sherrill*, *Upstate Citizens* involved land that had previously been occupied and governed by the Oneida Indian tribe, *see*

[5] Defendants quote *Venetie* as follows: "primary jurisdiction over land that is Indian country rests with the Federal government and the Indian tribe inhabiting it, and not with the states." Defts' Opp. at p. 16, quoting 522 U.S. at 527 n.1. What the Court really said in the cited footnote was: "*Generally speaking*, primary jurisdiction over land…."*Id*. (Emphasis added.) The expression of a general proposition does not equate to application of that point in all circumstances. The present dispute, involving land that has been under the California's exclusive police power since statehood, and which has never been ceded to another sovereign, obviously does not fit within that general rule, if it even exists.

841 F.3d at 562-64, and not the naked "reservation shopping" that occurred here. Nonetheless, *Upstate Citizens* sweepingly stated 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." 841 F.3d at 569. But *Upstate Citizens* did not consider (and neither did any other case) the impact of 40 U.S.C. § 3112 or of the requirement that the Reorganization Act be construed to avoid an inference of congressional interference with State jurisdiction. Nor did the Second Circuit ever explain how the purely *federal* act of taking land into trust constituted an act by the *State* in *ceding* jurisdiction. Against this backdrop, Chief Justice Marshall's words remind us that a cession of territorial jurisdiction is "the free act of the states." *United States v. Bevans*, 16 U.S. 336, 388 (1816).

At a minimum, the substantial factual distinction between *Upstate Citizens* and this case calls for a different result as to whether any jurisdiction is created or transferred under the Reorganization Act by the mere transfer of a private person's fee title to the United States to hold in trust for a tribe. *See Upstate Citizens*, 2017 WL 5660979 at *1-2 (Thomas, J., dissenting from denial of certiorari). To the extent that *Upstate Citizens* stands for a universal proposition that the mere transfer of fee title to the United States creates some degree of tribal jurisdiction supplanting what previously had been State jurisdiction, it is wrong and should not be followed.[6]

[6] Several First Circuit decisions appear, at first blush, to embrace the concept that federal land acquisition alone creates tribal jurisdiction. E.g., *Massachusetts v. Wampanoag Tribe of Gay Head*, 853 F.3d 618, 624-25 (2017); *Carcieri v. Kempthorne*, 497 F.3d 15 (1st Cir. 2007), rev'd on other grounds sub nom. *Carcieri v. Salazar*, 555 U.S. 379 (2009); *Narragansett*, 19 F.3d at 700-03. But *Gay Head* and *Narragansett* both involved lands obtained by the tribes in agreed-upon land settlement acts and concessions by the parties that underlying jurisdiction exists. *Carcieri* was reversed by the United States Supreme Court on statutory grounds dictating that the Reorganization Act did not apply. Any discussion regarding the Reorganization Act, much less the Tenth Amendment issue, thereupon became moot.

IV. Exercise of Governmental Power is a Separate Requirement for Trust Land to Become Gaming Eligible

The Gaming Act requires more than tribal jurisdiction. It also requires actual tribal *governance*—the "exercise[] [of] governmental power," 25 U.S.C. § 2703(4)—over non-reservation lands. This requirement prevents using a tribe's imprimatur to authorize casino gambling on land with only a minimal pre-existing relationship to the tribe. Exercise of governmental power is an independent requirement not satisfied simply by the land being held in trust by the United States.

The Department of the Interior has made clear that these two requirements must be satisfied before trust land is gaming eligible. In 2005, George Skibine, then Acting Deputy Assistant Secretary for Policy and Economic Development for Indian Affairs at the Department of the Interior, testified about the Department's role in taking land into trust and the procedure used when the land is for gaming purposes. He stated:

> It is also important to emphasize that before trust land can be used for gaming, even if acquired for another purpose, it must meet other requirements of IGRA, which include a determination that the land in question is "Indian land" over which the tribe exercises jurisdiction and over which it exercises governmental power; receive approval of a gaming ordinance by the Chairman of the National Indian Gaming Commission; and receive approval of tribal/state gaming compact…

See U.S. Senate Comm. on Indian Affairs, *Testimony Of George T. Skibine at Oversight Hearing Concerning Taking Land Into Trust*, May 18, 2005 (available at https://www.doi.gov/ocl/native-american-land, last accessed July 30, 2019).

In the *Club One Casino* case, Judge Ishii erred when he noted that "the 'exercise of governmental power' clause" is not "analytically significant enough to merit mention." 328 F.Supp.3d at 1047. The holding in *Club One Casino* that "the Madera Site is [Gaming Act

entitled] Indian land *because* it is in trust for North Fork," *id.* (emphasis added), mashed together two independent requirements, jurisdiction and governance.[7]

The exercise of governmental power is analytically significant, and it does merit mention: it is a separate, substantial requirement that must be satisfied before casino gambling may be approved on trust lands. *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702-03 (1st Cir. 1994); *Chaudhuri*, 802 F.3d at 286; *see Cheyenne River Sioux Tribe v. State of South Dakota*, 830 F. Supp. 523 (D.S.D.), *aff'd*, 3 F.3d 273 (8th Cir. 1993); 25 C.F.R. § 502.12.

(a) Enterprise Tribe's Single Gaming Ordinance Does Not Satisfy the Governmental Power Prerequisite to Gaming on Trust Land

In this case, the only purported exercise of "governmental power" over the Yuba Parcel is the underlying gaming ordinance adopted by the Enterprise Tribe before it acquired a beneficial interest in the Yuba Parcel. That is not enough to satisfy the statutory test. IGRA requires "concrete manifestations" of governmental power. 25 U.S.C. § 2703(4); *Narragansett*, 19 F.3d at 702-03. Tribal governance activities that have been found to satisfy the second prong of the statutory test typically have been ongoing, continuous governance separate and apart

[7] By relying on the mere trust status of the land to carry the day, Judge Ishii also appeared to mash together the concepts of title, jurisdiction and the exercise of governmental power. The decision in *Club One Casino* appears to be an outlier in that regard. *See, e.g.*, *Kansas v. United States*, 249 F.3d 1213 (10th Cir 2001). In *Kansas*, the Tenth Circuit noted: "Similarly, adjudicating the question of whether a tract of land constitutes 'Indian lands' for Indian gaming purposes is 'conceptually quite distinct' from adjudicating title to that land. One inquiry has little to do with the other as land status and land title 'are not congruent concepts' in Indian law.'…. A determination that a tract of land does or does not qualify as 'Indian lands' within the meaning of IGRA in no way affects title to the land. Such a determination 'would merely clarify sovereignty over the land in question.'……" 249 F.3d at 1225 (internal citations omitted).

from casino gambling; stated differently, the land must be actively governed by the tribe after it has been acquired.

For example, in *Cheyenne River Sioux Tribe v. South Dakota*, 830 F. Supp. 523 (D.S.D. 1993), *aff'd* 3 F.3d 273 (8th Cir. 1993), the court stated several factors relevant to a determination of whether off-reservation trust lands constitute "Indian lands" under IGRA. The factors include: (1) whether the lands are developed; (2) whether the tribal members reside in those areas; (3) whether any governmental services are provided and by whom; (4) whether law enforcement on the lands in question is provided by the tribe; and (5) other indicia as to who exercises governmental power over those lands.

The *Cheyenne* factors do not require a full-fledged governmental structure, but rather, "many strides in the direction of self-government." *Narragansett*, 19 F.3d at 703. Along that line, the First Circuit determined in *Massachusetts v. Wampanoag Tribe of Gay Head*, 853 F.3d 618 (2017) that the Wampanoag Tribe had exercised sufficient governmental power. The court considered many activities. *See* Pltffs' Mem. p. 26. The Wampanoag Tribe had passed numerous ordinances which "deal 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." 853 F.3d at 626. The tribe also employed a judge. *Id.*

Here, in sharp contrast, the record discloses only the single gaming ordinance adopted by the Enterprise Tribe—an ordinance that was adopted *before* the Tribe became beneficial owner of the Yuba Parcel. As such, the gaming ordinance does not begin to meet the test as expressed by the above authorities. IGRA requires that there be ongoing, continuous, substantial governmental activity, and it must be in evidence in the record before a compact can be requested and before Secretarial Procedures can properly issue. *See Mechoopda Indian*

Tribe of Chico Rancheria v. Schwarzenegger, 2004 WL 1103021 at *4-*5 (E.D. Cal. 2004) (meeting IGRA requirement is a standing requirement, and a prerequisite to requesting authority to engage in casino gambling).

The intent behind IGRA was to ensure a tribal government properly in place to govern gambling activity. The purpose was to preclude just this sort of ploy whereby a tribe does not have such a structure in place, and instead acts as conduit for a private-entity to manage and conduct off-reservation gambling. Because the Yuba Parcel does not qualify as "Indian lands" under 25 U.S.C. section 2703(4), the issuance of the instant Secretarial Procedures was illegal as a matter of law.

V. The Tenth Amendment Issues are Properly Before the Court

To the extent defendants contend the Tenth Amendment issues cannot be presented to this court, they are wrong.[8]

(a) Plaintiffs Have Timely Raised Their Tenth Amendment Claim

Defendant's core point is that if jurisdiction shifts with title, then plaintiffs should have challenged the fee-to-trust transfer rather than wait for issuance of Secretarial Procedures. But plaintiffs had no standing to challenge the fee-to-trust transfer, as the mere transfer of title did not, in and of itself, injure them. *See Stop the Casino 101 Coalition v. Salazar*, 2009 WL 1066299 at *3 (N.D. Cal. 2009), *aff'd*, 384 F. App'x. 546 (9th Cir. 2010) (until IGRA gambling approval process is completed, injury is premature and speculative).

[8] One glaring error in the *Club One Casino* case was Judge Ishii's conclusion that the plaintiffs lacked standing to raise 10th Amendment claims. That was a clear mistake given the Supreme Court's ruling in *Bond v. United States*, 564 U.S. 211, 131 S.Ct. 2355 (2011). To their credit, the federal defendants in *Club One* did not press the 10th Amendment standing issue on appeal (*see Club One Casino, Inc., v. Dept. of Interior*, No. 18-16696 (9th Cir.), docket no. 27 at pp. 32-32 n.5) and defendants do not raise it here either.

The government should not be allowed to say to plaintiffs "heads we win, tails you lose." Plaintiffs cannot be put in a too early/too late, no-win, Catch-22 that deprives them of standing to address a real and concrete injury visited on them by unlawful federal action. Stated another way, plaintiffs cannot be criticized for waiting to file suit until their constitutional injury crystalized into concrete harm. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136 (1992) (for standing, plaintiff must have suffered an injury that is "concrete and particularized"). In this case, once defendants took final action—by issuing Secretarial Procedures—plaintiffs' injury became concrete, generating Article III standing. Any other rule would mean that plaintiffs would not have standing to challenge the jurisdictional effect of the fee-to-trust transfer when it takes place, and would face a fait accompli in raising their jurisdictional challenge after it has occurred. The law does not impose such impossibilities.

(b) The State of California is Not an Indispensable Party to Plaintiffs' Tenth Amendment Claim

The government seeks to dodge the Tenth Amendment in this case. It does so in part, as noted earlier, by asserting that plaintiffs are too late to raise the issue. *See* Defts' Opp. at p. 26. But defendants go even further, asserting that plaintiffs cannot make their Tenth Amendment argument without joining the state as an indispensable party. *See* Defts' Opp. at p. 31.

Defendants are mistaken because a party is indispensable only if that party (1) has a legally protected interest (2) that cannot be protected or (3) precludes effective relief in that party's absence. *White v. University of California*, 765 F.3d 1010, 1026 (9th Cir. 2014). That is not the case here. If, as plaintiffs demonstrate, the federal government had no authority to act (because there was no acquisition of territorial jurisdiction and/or no adequate exercise of governmental power), a judicial determination to that effect fully protects California's interests and affords complete and effective relief. California would only be an indispensable party if

plaintiffs were *attacking* the state's action. *See Stand Up for California! v. Dept. of Interior*, 204 F. Supp. 3d 212 (D.D.C. 2016) (California indispensable party to claim that Governor acted unlawfully). Plaintiffs are not doing that. Rather, they contend that defendants had no power to act, that the issuance of these Secretarial Procedures is invalid. That challenge is appropriately made at this time, in this case.

VI. This is Not a Preemption Case

A key strand of defendants' argument is that California's historic territorial jurisdiction over the Yuba Parcel has been preempted. *See* Defts' Opp. at pp. 16 n.10, 25. But as we shall explain, this is not a preemption case.

First and foremost, preemption does not apply here because plaintiffs are not invoking a state law or procedure that frustrates a federal program. Instead, plaintiffs are reading, and applying, IGRA by its express terms—IGRA requires that an Indian tribe have territorial jurisdiction over a casino site prior to requesting a compact; the jurisdiction requirement carries over as a prerequisite to the issuance of Secretarial Procedures. *See, e.g.*, 25 U.S.C. § 2710(d)(7)(A)(iv). Without territorial jurisdiction over the casino site, it is constitutionally impossible under the Tenth Amendment to force Class III gaming on a state that does not want it. And in this case there can be no doubt about the state's opposition; the Legislature refused to approve a compact for the Enterprise Casino.

(a) A State's Territorial Jurisdiction Cannot be Preempted

Preemption also does not apply because a state's territorial jurisdiction is not something that can be consumed by the Supremacy Clause. It is a fundamental part of our Constitutional structure, a part of the national framework that respects both the sovereignty of the federal government as well as the territorial integrity of the sovereign states that comprise the Union. *See New York v. United States*, 505 U.S. 144, 155-156, 112 S.Ct. 2408, 2417 (1992); *Printz*, 521

U.S. at 918-922; 117 S.Ct. at 2376-2378. The Court made clear in these cases that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *See Printz*, 521 U.S. at 920, 117 S.Ct. at 2377 (quoting *New York*, 505 U.S. at 155-156).

As the Court most recently noted:

> In sum, regardless of the language sometimes used by Congress and this Court, *every form of preemption is based on a federal law that regulates the conduct of private actors, not the States.*

Murphy, 138 S.Ct. at 1481 (emphasis added).

In *Murphy*, the Court also noted that preemption "is based on the Supremacy Clause, and that Clause is not an independent grant of legislative power to Congress." 136 S.Ct. at 1479. The Court went on to say that for preemption to apply, the specific provision "must represent the exercise of a power conferred on Congress by the Constitution; pointing to the Supremacy Clause will not do." *Id*. In this case, there is no specific federal power set forth in the Constitution that allows the national government to take away a state's territorial sovereignty merely by acquiring property and placing it in trust.

(b) Under the Constitution, There is No Federal Power to Unilaterally Strip a State of its Territorial Jurisdiction. As a Result, There Is No Preemptive Power in this Case

In order to trigger preemption analysis, there must be a specific federal power at issue. Defendants' argument is that the Supremacy Clause permits the federal government to take some or all of a state's territorial jurisdiction and transfer it to an Indian tribe. By so arguing, defendants assert that the Indian Reorganization Act and/or IGRA authorize an action that the Supreme Court has said is forbidden.

As recognized in *Murphy*, *Printz* and *New York*, however, the federal government cannot preempt a state. The Federal government is one of limited powers. *See Nat'l Fed. of*

Indep. Business v. Sebelius, 567 U.S. 519, 533 132 U.S. 2566, 2577 (2012) ("In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder….And the Federal Government 'can exercise only the powers granted to it.'" (quoting *McCulloch v Maryland*, 17 U.S. 316, 405 (1819). Under our constitutional system, unless a specific power is allotted to the legislative or the executive branch, it is retained by the states. The Tenth Amendment clearly states: "The powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people." U.S. Const. amend. X.

If the Constitution does not specifically delegate to the federal government to power to strip a state of its territorial jurisdiction—which it does not—the Supremacy Clause cannot fill that void. In short: if there is no power to act, there can be no preemption.

(c) The Indian Commerce Clause Cannot Rescue Defendants' Preemption Argument

The Indian Commerce Clause cannot save defendants. That provision grants Congress the authority to regulate "Commerce … with the Indian tribes" (U.S. Const. art. I, § 8, cl. 3), but says *nothing* about territorial jurisdiction, must less a federal power to strip a sovereign state of its lawmaking authority when the federal government acquires title and places land in trust without a cession from the situs state. As the Supreme Court has noted, "[t]he 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, 84, 97 S.Ct. 911, 919 (1977). If the Framers had intended such a broad power—one with an obvious impact on federal-state relations—it would be expressly mentioned somewhere in the text of the Constitution.

But nothing in the Constitution affords Congress such extraordinary power. A constellation of constitutional provisions compels restricted Federal power—*see, e.g.*, U.S.

Const. art. I, § 8, cl. 17 (requiring State consent to federal enclaves), art. IV, § 3 (barring involuntary reduction or combination of State territory), as well as the Tenth Amendment. States "retain[] a residuary and inviolable sovereignty.… This is reflected throughout the Constitution's text…." *Printz*, 521 U.S. at 919, 117 S.Ct. at 2376; *see Franchise Tax Bd. of California v. Hyatt*, 139 S.Ct. 1485 (2019) (inherent structure of Constitution precludes sovereign States from being sued in other States' courts). Nothing allows Congress to delegate to the Executive—in this instance, the Secretary—the authority to determine when State jurisdiction is to be displaced.

Although the Tenth Amendment does not negate *express* grants of congressional power contained elsewhere in the Constitution, there is no express grant to Congress—stated *anywhere*—that it may assume jurisdiction over State land without State consent and unilaterally transfer such jurisdiction to another sovereign, including an Indian tribe. If the federal government cannot do so for national defense (it cannot; *see* U.S. Const. art. I, § 8, cl. 17), it cannot do so for any lesser purpose such as promoting Indian casino gambling run by out-of-state corporate interests. Are we to believe that, in ratifying the Constitution, the States willingly granted to the new federal government the power to unilaterally take away a sovereign State's jurisdiction over its territory so long as it was done on behalf of an Indian tribe? There is not an iota of evidence that even the Constitution's strongest advocates—Hamilton, Madison, Jay—contemplated that. *See* The Federalist No. 42 (James Madison) (no mention of territorial jurisdiction, much less its transfer from a sovereign state to Indians); Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 Yale L. Rev. 1012, 1022-23 (2015) ("The ratification debates that followed ignored the Indian Commerce Clause. The only sustained discussion appeared in Federalist No. 42, where James Madison praised the change from Article IX,

observing that the elimination of the earlier qualifiers resolved earlier contentions over the division of authority").

The Indian Commerce Clause may be many things, but it is not an unlimited grant of authority to seize jurisdiction over State lands without State consent. It certainly does not support defendants' preemption point.

(d) Congressional Intent Expressly Refutes Defendants Preemption Argument

Case law teaches that preemption is a by-product of Congressional intent. As the District of Columbia recently summarized:

> The starting assumption … is that federal law does not override "the historic police powers of the States," absent the "clear and manifest" intent of Congress. …

Sickle v. Torres Advanced Enterprise Solutions, LLC, 884 F.3d 338, 346 (D.C. Cir. 2018) (citations omitted).

Here, we have a "clear and manifest" intent of Congress expressed in section 3112. Congress has established a conclusive presumption that jurisdiction has not shifted unless the cession protocol set forth in section 3112 has been followed. As noted above, these rules cover *any* transfer of jurisdiction, whether it be partial, concurrent or exclusive. *Adams*, 319 U.S. at 314-315, 63 S.Ct. at 1123.

A state's territorial integrity does not interfere with the ability of Congress to exercise its power under the Indian Commerce Clause or the IRA. Congress can acquire property for tribes, provide benefits for tribes, and set rules for how tribes transact business. Congress can allow a tribe to set rules for its members. But what Congress cannot do is tell a state that its historic legislative authority over land within state borders has been magically transferred to an Indian tribe because Congress says so.

As explained in our opening summary judgment brief, territorial jurisdiction does not evaporate the minute land is placed into trust. *See* Pltffs' Mem. at pp. 18-25; see also discussion *supra* at pp. 3-8. That has never been the law and there is no case on record that establishes Congressional power to diminish a state's historic territorial sovereignty instantaneously and without state consent. Indeed, if defendants are correct, why is the Enclaves Clause included as part of the federal Constitution? And why did Congress bother to enact 40 U.S.C. section 3112? And why does IGRA require the acquisition of jurisdiction with respect to trust land?

(e) The State's Interest in Territorial Sovereignty is Paramount under the Tenth Amendment

Defendants' mistaken preemption analysis is faulty for another reason: it fails to consider whether "the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334, 103 S.Ct. 2378, 2386 (1983). Here the state interests easily qualify, for there can be no greater state interest than the inherent power to legislate over land within its borders. The power to govern, as noted previously, is a state's most prized possession (*see* Pltffs' Mem. at pp. 13-14), evidenced by the ancient principle that each state "is entitled to the sovereignty and jurisdiction over all the territory within her limits." *Lessee of Pollard v. Hagan*, 44 U.S. 212, 228 (1845); *Texas v. White*, 74 U.S. 700, 725 (1869) ("But the perpetuity and indissolubility of the Union, by no means implies the loss of distinct and individual existence, or of the right of self-government by the States…. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."). As the Court more recently observed, the Constitution "leaves to the several States a residuary and inviolable sovereignty." *New York*, 505 U.S. at 188, 112 S.Ct. at 2434 (quoting the Federalist, No. 39, at 256).

Defendants' attempt to import preemption under the circumstances of this case runs directly counter to the Ninth Circuit's observation that it can be "treacherous" to import "notions of preemption" automatically or via lockstep analysis. *Barona Band of Mission Indians v. Yee*, 528 F.3d 1184, 1189 (9th Cir. 2008). What is required is a "careful balancing of various interests." *Id.* As the Supreme Court has noted, "there is no rigid rule by which to resolve the question of whether a particular state law may be applied to an Indian reservation or to tribal members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142, 100 S.Ct. 2578, 2583 (1980). Here, of course there is no specific "state law," such as a local tax statute, that applies, and for that reason, the *Bracker* line of cases is inapplicable. To the extent "Indian preemption" is a concept under the Constitution, it has been often confined to tax cases and, as noted, cannot trump the territorial sovereignty of a state, particularly in a case (such as this one) that does not involve land historically occupied, settled or governed by an Indian tribe.

(f) Defendants' Preemption Argument Ignores State Sovereignty and the Established Principles of Jurisdictional Transfer

Defendants do not discuss the foregoing principles in any detail. Instead, they proclaim in the course of their preemption discussion that "[i]n short the tribe acquires *jurisdiction* over the land" when title shifts to the federal government. Defts' Opp. at p. 22.

That is a startling assertion, for it nullifies the Constitutional structure of the Nation. The Supreme Court has repeatedly articulated that "each State is a sovereign entity in our federal system." *Seminole Tribe v. Florida*, 517 U.S. 44, 54, 116 S.Ct. 1114, 1122 (1996) (citing *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504 (1890)); *see also Murphy*, 138 S.Ct. at 1475 ("…that is why our system of government is said to be one of 'dual sovereignty.'"); *Printz*, 521 U.S. at 919 (states retained "a residuary and inviolable sovereignty."… This is reflected throughout the Constitution's text."); and *New York*, 505 U.S. at 156 ("If a power is an attribute

of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.").

All of this having been said, casino gaming under IGRA is not permanently foreclosed. What is required is the step defendants missed; specifically, a jurisdictional transfer pursuant to 40 U.S.C. section 3112.

The existence of section 3112 is telling here, for several reasons. First and foremost, it represents a manifestation of Congressional intent, which is a touchstone in preemption analysis. *See, e.g., Arizona v. United States*, 567 U.S. 387, 400, 132 S.Ct. 2492, 2501 (2012) ("In preemption analysis, courts should assume that "the historic police powers of the States" are not superseded "unless that was the clear and manifest purpose of Congress."). Equally important, section 3112 must be considered and reconciled with IGRA's jurisdictional mandate. Section 3112 gives true meaning to Tenth Amendment principles for it leaves the transfer of jurisdiction within control of the host state, which must voluntarily cede it. That approach is particularly important in a case such as this which involves state-governed farmland transferred to the United States by a private third party. California's territorial jurisdiction, which can be surrendered by the state via cession under section 3112, cannot be appropriated unilaterally by federal action. To do so, would allow IGRA and/or the IRA to trample section 3112 and the Tenth Amendment, and that would be contrary to established rules of statutory interpretation and preemption doctrine.

The Court's discussion in *Epic Systems, Inc. v. Lewis*, 138 S.Ct. 1612, is instructive with respect to statutory reconciliation between section 3112 and IGRA:

> When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at "liberty to pick and choose among congressional enactments" and must instead strive "'to give effect to both.' " … A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing "'a clearly expressed congressional

> intention'" that such a result should follow. …. The intention must be "'clear and manifest.'" … And in approaching a claimed conflict, we come armed with the "stron[g] presum[ption]" that repeals by implication are "disfavored" and that "Congress will specifically address" preexisting law when it wishes to suspend its normal operations in a later statute.
> …
> These rules exist for good reasons. Respect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work. More than that, respect for the separation of powers counsels restraint. Allowing judges to pick and choose between statutes risks transforming them from expounders of what the law *is* into policymakers choosing what the law *should be*. Our rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them.

138 S.Ct. at 1624 (emphasis by the Court; internal citations omitted).

This analysis has direct application to this case. The court should harmonize IGRA with section 3112 by declaring that compliance with the latter is the way to satisfy the jurisdiction predicate set forth in the former in a case where the land in question remains under the state's territorial jurisdiction.

In summary, there are multiple reasons to reject defendants' preemption analysis. Constitutional structure dictates that territorial jurisdiction is not something that can be preempted. It can be ceded voluntarily by a sovereign state, but not taken by federal fiat.

VII. IGRA's Remedial Provisions Must be Read in Concert with Tenth Amendment Principles and the Dual Sovereignty Structure of the Constitution

Defendants urge that the Secretarial Procedures are valid because they are authorized by IGRA's remedial mediation protocol to which the State of California has consented. *See* Defts' Opp. at pp. 30-32. But that argument ignores two things. The first is that when California voters decided to allow certain tribal casinos when they enacted Proposition 1A in 2000, they voted to allow them via *compacts* "in accordance with federal law." Cal. Const. art. IV, § 19(f). Federal law includes not only IGRA, but related federalism principles as well. Secondly, IGRA's

remedial protocol contains the very requirements that plaintiffs have cited. Defendants invoked 25 U.S.C. section 2710(d)(7)(B)(vii) when they issued the challenged Secretarial Procedures. That subsection reiterates the two core requirements found elsewhere in IGRA: first, that the proposed casino be located on "Indian lands," and second, that the Indian tribe in question must have territorial jurisdiction over those lands. Thus, section 2710(d)(7)(B)(vii)(II) refers to "class III gaming" that is to be "conducted on the Indian lands over which the Indian tribe has jurisdiction."

It is no answer for the government to argue that plaintiffs' case is foreclosed because the Secretary *assumed* the jurisdiction prerequisite was in place; if the Secretary was *wrong* on an issue of law, the court should set the determination aside under the APA (5 U.S.C. § 701 allows challenges to actions that are "contrary to law"). Relying on an obvious legal error made earlier in the administrative process doesn't erase the error, but rather, compounds it. Moreover, if the jurisdiction prerequisite was not in place, the Enterprise Tribe did not have Article III standing to invoke IGRA's remedial provisions in the first place, and thus the prior determination in *Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal. v. State of California*, 163 F. Supp. 3d 769 (E.D. Cal. 2016) does not foreclose legal review of the crucial legal issue in this case. See *Mechoopda Indian Tribe*, 2004 WL 1103021 at *3-6.[9]

[9] In *Mechoopda Indian Tribe*, Judge Shubb analyzed the standing issue and relied in part on Sixth Circuit precedent, noting that for standing under IGRA "the party must be in Indian tribe *and* it must have land over which it exercises jurisdiction…." 2004 WL 1103021 at *5 (emphasis by the court, citing *Match–E–Be–Nash–She–Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616, 618 (6th Cir. 2002). The *Engler* court, in turn, said that "[h]aving jurisdiction over land for the casino is a condition precedent to negotiations and federal jurisdiction." *Id.* The *Mechoopda Indian Tribe* decision, and the precedent it relied on, is on point on this issue and is not limited as defendants assert. See Defts' Opp. at p. 20 n.14. The standing rules set forth in that case did not depend on any unique Stipulated Judgment – that circumstance was the context in which the court applied the standard, not the basis for the standard itself. Moreover, standing is an issue that cannot be waived or conceded; it must be determined by the court. See *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 95 118

The Secretarial Procedures in this case cannot pass muster because territorial jurisdiction did not shift with the change in title, and additionally, because the Enterprise Tribe had not exercised the requisite governmental power over the property in question at the time the Secretarial Procedures were requested or issued. *See* discussion, *supra* at pp. 3-5, 15-18. Where these prerequisites have not occurred, the federal government cannot ride roughshod over the state's territorial power to govern the subject property. In such cases, state law applies to the land. *See Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 795-796, 134 S.Ct. 2024, 2034-2035 (2014).

CONCLUSION

IGRA expressly requires that a tribe must acquire territorial jurisdiction over the proposed casino site and, in addition, that the tribe must exercise governmental power over the site. Far from seeking to avoid, circumvent, frustrate or obfuscate federal law, plaintiffs seek only to apply these mandates and square IGRA with the Tenth Amendment. The first principle at work in this case is that "[i]f the statutory language is plain, we must enforce it according to its terms." *See King v. Burwell*, 135 S.Ct. 2480, 2483 (2015). The court must read the words "in their context and with a view to their place in the overall statutory scheme." *Id.*

In this regard it is instructive to note what IGRA doesn't say. It does not say tribes can game on land held for their benefit, or on trust land generally. If IGRA had said that, defendants might have more force to their argument. But the statute doesn't read that way. It clearly says that casino gaming can only occur on land over which the tribe has jurisdiction. 25

S.Ct. 1003, 1013 (1998). And the fact that the State of California may have waived its 11th Amendment immunity (see Cal. Gov't Code § 98005) is beside the point. That waiver is not determinative of a given plaintiff's standing to sue in a particular instance.

U.S.C. § 2710(d)(1)(A)(i), § 2710(d)(1)(B)(vii)(II). IGRA also expressly defines "Indian land" as property over which a tribe "exercises governmental power." 25 U.S.C. § 2703(4)

Defendants cannot so easily shake free from IGRA's plain language or the Constitutional structure that governs relations between the Federal government and sovereign states. IGRA means what it says, and so does the Constitution.

To meet IGRA's requirements, a transfer of jurisdiction from the situs state is required. Section 3112 and the Tenth Amendment mandate the same conclusion. Indeed, under the Tenth Amendment to the Constitution, all powers not delegated to the national government are retained by the states, and by the People.

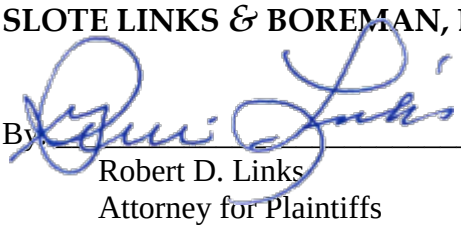
The only way to accomplish a jurisdictional transfer is via a state's voluntary cession of its sovereign power. That occurs by following either the Enclaves Clause or 40 U.S.C. section 3112. It does not happen automatically under either IGRA or the IRA or the Indian Commerce Clause. It cannot occur via the unilateral assertion of power by the federal government. As the Supreme Court said long ago, "jurisdiction cannot be acquired tortuously or be disseizin of the state." *Ft. Leavenworth R.R. v. Lowe*, 114 U.S. 525, 538-539 (1885). It is no answer to say that the Supreme Court's admonition only covers the acquisition of exclusive jurisdiction under the Enclaves Clause; the principle is broader than that, and is entirely consistent with the country's dual sovereignty structure as discussed in *Murphy*, *Printz* and *New York*, *supra*.

Defendants never followed the governing protocol for a jurisdictional transfer, and never analyzed this issue in the course of issuing Secretarial Procedures. Nor was there any assessment of the tribe's purported exercise of governmental power over the site prior to the challenged issuance of Secretarial Procedures. As a result of those failures, the Secretarial Procedures are invalid as a matter of law and should be struck down.

For these reasons, plaintiffs' motion for summary judgment should be GRANTED, and defendants' cross motion DENIED.

Dated: August 12, 2019

SLOTE LINKS & BOREMAN, LLP

By: 

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