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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' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** DATE: October 31, 2019 TIME: 2:00 p.m. COURTROOM: 2, 15th Floor JUDGE: Honorable Troy L. Nunley

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The United States Department of the Interior, David Bernhardt, Secretary of the United States Department of the Interior, and Tara Sweeney Assistant Secretary–Indian Affairs (collectively, "United States" or "Federal Defendants"), submit this Reply in Support of their Cross-Motion for Summary Judgment. Pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"), Plaintiffs challenge Secretarial Procedures mandated by IGRA and prescribed by the Secretary of the Interior ("Secretary") as arbitrary and capricious and in violation of law. ECF No. 31-1 (Pls.' Opening Mem. 13).[1] The agency action Plaintiffs challenge is one over which the Secretary lacks significant discretion. Plaintiffs, therefore, fail to meet their heavy burden to demonstrate that the Secretary's issuance of Secretarial Procedures for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("Tribe") was arbitrary, capricious or contrary to law under the APA. The United States requests that the Court deny Plaintiffs' Motion for Summary Judgment and grant the United States' Cross-Motion for Summary Judgment.

INTRODUCTION

Plaintiffs' ("Clubs") Opposition and Reply Memorandum, ECF No. 36 ("Pls.' Opp. & Reply Mem."), reveals a fundamental misunderstanding of the interplay between the Indian Reorganization Act ("IRA"), 25 U.S.C. § 5101 et seq., and the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 et seq., as well as the constitutional authority exercised in enacting these statutes. The Secretarial Procedures challenged by Plaintiffs are mandated by IGRA, leaving the Secretary virtually no discretion. As previously explained ECF No. 35 (U.S. Opening Mem. 17-19), in the course of the Tribe's good faith lawsuit against the State California, the State did not consent to the court appointed mediator's compact selection within the 60 days prescribed by IGRA. 25 U.S.C. § 2710 (d)(7)(B)(v), (vii). Thus, by statute, the mediator was mandated to notify the Secretary, who in turn was mandated to "prescribe . . . procedures . . .

[1] Where ECF pagination does not correspond with internal pagination, this brief follows the ECF pagination.

under which class III gaming may be conducted" without a tribal-state compact. *Id.* § 2710(d)(7)(B)(vii). The Clubs had no role in the bilateral lawsuit or the resultant 2016 "Secretarial Procedures for the Estom Yumeka Maidu Tribe of the Enterprise Rancheria," AR00001060-1195, under IGRA's remedial scheme.[2]

In the guise of challenging the Procedures the Clubs collaterally and improperly attack the jurisdictional consequences of the Secretary's 2013 trust acquisition of the Yuba Parcel under the IRA. The Clubs fail to account for years of litigation over the acquisition, concluding in the Ninth Circuit's affirmance of the Secretary's determination to acquire the Parcel in trust against myriad challenges. *See Cachil Band v. Zinke*, 889 F.3d 584 (9th Cir. 2018). The Clubs could have, but failed to join that litigation. Instead, they belatedly introduce new issues attendant to the fee-to-trust transfer while not challenging that final agency action directly. Their novel contention that land acquired in trust for a tribe effects a change in title, but not in jurisdiction, has been rejected. This Court previously rejected it in the context of denying the Clubs' motion to supplement the administrative record. ECF No. 28 at 8-9 (Order of March 4, 2019). The Court's sister court denied it on motions for summary judgment in the challenge to Secretarial Procedures issued for the North Fork Tribe. *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. Bernhardt, et al.*, No. 18-16696 (9th Cir. Filed Sept. 7, 2018) ("*Club One*"). As in *Club One* the Secretarial Procedures here present no tribal jurisdiction, constitutional, or other infirmity.

Instead, IGRA's requirement that the Tribe have jurisdiction over "Indian lands" for such lands to be eligible for Class III gaming was satisfied by the acceptance of the Yuba Parcel into federal trust. And, as both federal and state courts have found, no cession of state jurisdiction was required for the federal acquisition to effect a transfer of jurisdiction. *Club One* 328 F. Supp.

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[2] *See, e.g., North Fork Rancheria of Mono Indians v. State of California*, No. 1:15-cv-00419-AWI-SAB, 2016 WL 3519245, at *4-6 (June 27, 2016) (denying Picayune Rancheria of Chukchansi Indians' motion to intervene in North Fork Tribe's IGRA good faith lawsuit against the State of California).

3d at 1042; *Stop the Casino 101 Coalition v. Brown*, 230 Cal.App.4th 280, 289-90 (2014) (observing that acceptance by the federal government of land in trust for a tribe "thereby confers jurisdiction" on the tribe over the land (citing *City of Roseville v. Norton*, 219 F. Supp. 2d. 130 (D.D.C. 2002)). The Clubs' secondary attack on the Tribe's exercise of governmental power over the Yuba Parcel is equally mistaken. The Tribe unquestionably exercised such governmental power through enactment of its Gaming Ordinance and underlying Tribal Resolution and by undertaking its good faith lawsuit against the State of California. Any remand on this issue would be futile as the Tribe has now been exercising governmental authority over the Yuba Parcel for more than six years.

The Clubs cannot overcome the weight of authority contrary to their positions. They advance a false dichotomy whereby a fee-to-trust transfer either leaves the federal government and tribe with bare title to land fully subject to state jurisdiction or, conversely, the transfer strips a state of all jurisdiction in violation of the Tenth Amendment. Their construct obscures the nuanced jurisdictional reality that actually results. It also ignores that the Yuba Parcel is plainly "Indian country" under well-settled law. *See Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991) (land qualifies as Indian country "whether that land is denominated 'trust land' or 'reservation.'")

Courts have long recognized the general immunity from state regulation enjoyed by Indians on their trust lands, a consequence of the "Federal policy of Indian advancement" attendant to the lands' status. *See Santa Rosa Band of Indians v. Kings Cty.*, 532 F.2d 655, 666 (9th Cir. 1975).[3] At the same time, the Supreme Court has made clear that state jurisdiction in Indian country, including trust land, coexists with federal and tribal jurisdiction to the extent it is not preempted by the necessity to protect tribal interests. *See Nevada v. Hicks*, 533 U.S. 353, 361

[3] *See generally* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §6.03[1] at 511-13 (Nell Jessup Newton ed., 2012).

(2001). Thus the Clubs' "either or" jurisdictional proposition does not comport with the case law and the Yuba Parcel's trust and Indian country status does not present any Tenth Amendment, Enclave Clause or 40 U.S.C. § 3112 violation.

Finally, the Clubs' position is fundamentally at odds with IGRA's express contemplation of Class III tribal gaming on recently acquired trust lands according to specified requisites. *See* 25 U.S.C. § 2719. Formal cession of state jurisdiction over such lands is simply not one of the requisites identified by Congress in IGRA. Nor did Congress require such cession in connection with the Secretary's IRA authority to acquire land in trust for tribes. Unsurprisingly, challenges akin to the Clubs' here have uniformly failed. *See, e.g., City of Roseville,* 219 F. Supp. 2d. at 154 (finding in light 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"); *Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 572 (2d Cir. 2016) ("Because federal and Indian authority do not wholly displace state authority over land taken into trust pursuant to § 5 the IRA, the Enclave Clause poses no barrier to the entrustment that occurred here."). The Clubs point to no cases where a court has required evidence of a formal cession of state jurisdiction before deciding that land held in trust for a tribe is subject to federal and tribal jurisdiction, that trust land is Indian country, or that state laws and regulations interfering with tribal use and governance of such land are preempted.[4]

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[4] The Interior Department's longstanding interpretation of the Secretary's IRA trust acquisition authority is reflected in its November 13, 2013 Federal Register announcement of the final rule revising its fee-to-trust implementing regulations. Section IV of the Notice (Comments on the Proposed Rule and Responses), sets forth that "One commenter asserted that a State must cede jurisdiction over land for it to come under tribal jurisdiction." The Department's response was categorical: "No such requirement exists." *See* Land Acquisition: Appeals of Land Acquisition Decisions, 78 FR 67928-01 (Nov. 13, 2013).

The Secretarial Procedures were validly issued. Federal Defendants should be granted summary judgment and the Clubs' motion should be denied.

ARGUMENT

I. The Secretarial Procedures Did Not Bring About an Impermissible Jurisdictional Shift on the Yuba Parcel, Nor are They Contrary to the Enclave Clause or 40 U.S.C. § 3112

a. The Clubs' Collateral Attack on the Trust Acquisition of the Yuba Parcel - a Separate Agency Decision They Do Not Challenge in the Complaint - Must be Rejected

The Clubs, while purporting to challenge the Secretarial Procedures that did nothing to effect the jurisdictional status of the Yuba Parcel, collaterally attack the prior trust acquisition, which is a separate agency action not challenged by the Clubs in their complaint. This tactic has been roundly rejected by a unanimous en banc decision of the Ninth Circuit. *See Big Lagoon Rancheria v. California*, 789 F.3d 947, 953 (9th Cir. 2015) ("parties cannot 'use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions'" quoting *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012)). The court's observation in *Big Lagoon* that allowing such collateral attacks on the Secretary's decisions to acquire land in trust "would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes," *Id.* at 954, applies with equal potency here. The Clubs' belated challenge to the jurisdictional consequences of the Secretary's trust acquisition of the Yuba Parcel must be rejected.

b. Neither the IRA nor IGRA Require Any Cession of State Jurisdiction

i. The IRA and IGRA were enacted pursuant to the Indian Commerce Clause, and their enactment and operation do not require state cessions

The Clubs argue that no federal power exists sufficient to allow the federal government, through acquisition of land in trust for a tribe, to displace state territorial jurisdiction without state consent. They misapprehend Congress's legislative power with respect to Indian tribes, which power is exclusive and plenary, and not derivative of any powers of the states. *United States v. Lara*, 541 U.S. 193, 194, 200 (2004). The Clubs conflate the derivative legislative powers Congress may acquire from a state under the Enclave Clause with the distinct constitutional powers applicable here. The Supreme Court in *Kleppe v. New Mexico*, 426 U.S. 529 (1976), distinguished *non*-derivative sources of power in the Constitution from "derivative legislative powers" that Congress may acquire from a state pursuant to the Enclave Clause. *Id*. at 541-43. Non-derivative sources of power do not rely upon state cessions. Congress exercised non-derivative power when enacting the IRA and IGRA.

Both the IRA (pursuant to which the Secretary acquired the Yuba Parcel into trust), and IGRA (pursuant which the two-part gaming eligibility determination was made for the Parcel and the Secretarial Procedures prescribed for the Tribe) were enacted pursuant to the Indian Commerce Clause, U.S. Const., art. I, § 8, cl. 3. (Congress shall have power "[t]o regulate Commerce with . . . the Indian tribes"). The "central function of the Indian Commerce Clause . . . is to provide Congress with plenary power to legislate in the field of Indian affairs." *Lara*, 541 U.S. at 200 (citations omitted). The Clubs misperceive (Pls.' Opp. & Reply 28-29) the consequences of the Indian Commerce Clause. They both oversimplify and exaggerate in asserting that because the Clause does not specifically reference "territorial jurisdiction" it cannot "strip a sovereign state of its lawmaking authority" through acquisition of land into trust "without cession from the situs state." The Indian Commerce Clause has long been interpreted as granting Congress broad general powers to legislate in the field of Indian affairs. *See, e.g.*,

Ramah Navajo School Bd., Inc. v. Bureau of Revenue of New Mexico, 458 U.S. 832, 837 (1982) (describing the "broad power of Congress to regulate tribal affairs under the Indian Commerce Clause).

Because Congress's plenary Indian affairs authority derives from the Indian Commerce Clause,[5] legislation in exercise of that non-derivative constitutionally based power cannot require state cessions. Instead, such legislation brings into play the Supremacy Clause. As the Supreme Court long ago established in *M'Culloch v. Maryland*, 17 U.S. 316, 436 (1819), pursuant to the Supremacy Clause, "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress to carry into execution the powers vested in the general government." *See also Blackburn v. United States*, 100 F.3d 1426, 1435 (9th Cir. 1996) ("states may not directly regulate the Federal Government's operations or property"). This means that state laws that interfere with the IRA's purpose to establish the machinery whereby Indian tribes can self-govern, including the right to govern the use of their lands, must therefore give way. *Upstate Citizens for Equal.*, 841 F.3d at 570; *Carcieri v. Kempthorne*, 497 F. 3d 15, 20 (1st Cir. 2007), *rev'd in part, Carcieri v. Salazar*, 555 U.S. 379 (2009); *Santa Rosa Band*, 532 F.2d at 658-59; *City of Roseville*, 219 F. Supp. 2d. at 154. And any attempt of the state to regulate gaming on Indian lands is similarly preempted. *See Estom Yumeka Maidu Tribe of the Enterprise Rancheria of Cal. v. California*, 163 F. Supp. 3d 769, 778 (E.D. Cal. 2016) (IGRA "'is intended to expressly preempt the field in the governance of gaming activities on Indian lands,'" (citing S. REP. 100-446, 6, 1988 U.S.C.C.A.N. 3071, 3075–

[5] The Supreme Court has also identified the Treaty Clause, U.S. Const. Art. II, cl. 2, as a source of Congress's "broad general powers to legislate in respect to Indian tribes." *Lara*, 541 U.S. at 200-01.

76), and such "preemptive effect is consistent with the plenary power afforded to the federal government over Indian affairs").

State cession of jurisdiction is simply not a prerequisite to exercise of Indian Commerce Clause powers. Such a requirement would substantially divest the federal government of its Indian affairs powers. *See. e.g., Kleppe*, 426 U.S. at 542-43 (1976) (conditioning the operation of federal law on federal lands upon state consent "would place the public domain of the United States completely at the mercy of state legislation") (internal citation and quotation marks omitted); *Fort Leavenworth R.R. Co. v. Lowe*, 114 U.S. 525. 539 (1885) (federal buildings on state lands "will be free from any such interference and jurisdiction of the state as would destroy or impair their effective use for the purposes designed").

ii. The Transfer of Jurisdiction over the Yuba Parcel Does Not Implicate the Enclave Clause or 40 U.S.C. § 3112

The Clubs' latest brief kicks off with a manifestly false frame. They contend (Pls.' Opp. & Reply Mem. 9) that the United States conceded in its opening Memorandum that "IGRA requires a tribe to have territorial jurisdiction before it can engage in casino gambling." No such concession was made as regards the meaning the Clubs ascribe to "territorial jurisdiction." They deploy the term to connote jurisdiction formally shifted "from a state to the federal government, and through the federal government to an Indian tribe", *id.* Contrary to the Clubs' contention, the United States concedes only what Section 2703(4)(B) of IGRA actually says: tribal gaming may take place on "Indian lands" defined as land "title to which" is "held in trust by the United States for the benefit of any Indian tribe," (which the Yuba Parcel is) . . . and over which "an Indian tribe exercises governmental power", (which the Enterprise Tribe does). Nowhere in IGRA is reference made to "territorial jurisdiction."

In the same vein, the Clubs persist in the contention that the Enclave Clause and 40 U.S.C. § 3112 govern the jurisdictional consequences of land taken into trust for a tribe. They are mistaken. As explained by the court in *Geyser v. United States*, No. CV 17-7315-DMG (ASX), 2018 WL 6990808, at *11 (C.D. Cal. Aug. 30, 2018), 40 U.S.C. § 3112 sets forth a process for the federal government to acquire jurisdiction "not previously obtained" from states to exercise derivative powers over land it acquires. "By its own terms, Section 3112's consent (or cession) requirement does not apply where federal authority to acquire the land stems from another non-derivative source." *Id*.; *see* § 3112(b) – authorizing acquisitions of jurisdiction "not previously obtained" (i.e., not obtained through conflict preemption). Thus the *Geyser* Court reasoned that, as regarded the challenged fee-to-trust acquisition, "the Government's ability to acquire land in trust under the IRA is not a derivative power that comes from the state. Rather, it derives from Congress' 'plenary and exclusive' power over Indian affairs, which 'is drawn both explicitly and implicitly from the Constitution itself.'" *id.*, (citing *Lara*, 541 U.S. at 200; *Morton v. Mancari*, 417 U.S. 535, 551–52 (1974)). As such, the power to acquire the land in trust for the Tribe was "previously obtained" and there was no need for California's consent. *Id.*

Again, the Clubs' insistence on state cession as a necessary predicate to federal and tribal jurisdiction over trust land mistakenly posits a wholesale ouster of state jurisdiction, which is at odds with the actual shared tribal, federal and state jurisdiction that exists on tribal trust land. *See Upstate Citizens for Equal.*, 841 F.3d at 571 (rejecting argument that state cession of jurisdiction is a prerequisite for trust land because "the federal government does not obtain such categorically exclusive jurisdiction over the entrusted lands"); *Kleppe*, 426 U.S. at 543 ("The Federal Government does not assert exclusive jurisdiction over the public lands in New Mexico, and the State is free to enforce its criminal and civil laws on those lands. But where those state laws

conflict with . . . legislation passed pursuant to the Property Clause, the law is clear: The state laws must recede."). State consent is only required when Congress seeks to establish an exclusive federal enclave, which is not the case when land is acquired in trust for tribes. *See Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930) (describing Indian reservations as "typical illustration[s]" of federal set asides that do *not* constitute federal enclaves). Case law notwithstanding, the Clubs brazenly proclaim (Pls.' Opp. & Reply Mem. 13) that "[t]here is no question that statutory cession is the method that applies to this case."[6]

Further, as explained, fee-to-trust transfers do not "strip" states of their lawmaking authority or jurisdiction over such trust land. Instead state legislative authority over trust land remains, except to the extent it conflicts with federal law and the "firm federal policy of promoting tribal self-sufficiency and economic development." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980).[7]

iii. Jurisdiction Transferred Upon Acceptance of Trust Title

The Clubs' assertion (Pls.' Opp. & Reply 10) that Congress, through IGRA "dictated the acquisition of territorial jurisdiction" from the State before tribal gaming can occur is belied by the Act itself. The alleged "dictate" is nowhere to be found in IGRA, and the Act does not support the Clubs' insistence (Pls' Opp. & Reply 13) that federal and tribal jurisdiction over trust

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[6] As in their opening papers, the Clubs rely (Pls.' Opp. & Reply 12-13) on cribs from Justice Department Manuals *not* addressed to the circumstances here where land has been acquired in trust for a tribe pursuant to the IRA, the authority for which is a distinct constitutional provision investing Congress with plenary authority over Indian affairs. They likewise rely on a part of the criminal code *not* addressed to criminal jurisdiction in "Indian country", which includes trust land such as the Yuba Parcel.

[7] In this connection the Clubs erroneously assert (Pls.' Opp. & Reply 18) that the United States claimed that upon transfer into trust "the beneficiary tribe can govern all activity on it, including activity by nonmembers." To the contrary we acknowledge retained, non-preempted state jurisdiction.

land hinges entirely on state cession of jurisdiction.[8] Instead, and again, IGRA's definitions of "Indian lands" upon which tribal gaming may occur include "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe". 25 U.S.C. § 2703(4)(B). *The Yuba Parcel is held in trust by the United States for the benefit of the Enterprise Tribe*. The "Indian lands" definition says nothing about acquisition of state territorial jurisdiction, nor do IGRA's exceptions for after-acquired lands say anything about it. *See* 25 U.S.C. § 2719. The various exceptions (including the two-part exception pursuant to which the Yuba Parcel was acquired) are animated around such lands being acquired in trust. The Act reflects Congress's understanding that pursuant to the IRA, trust status automatically imbues land with federal and tribal jurisdiction in addition to whatever non-conflicting state jurisdiction exists. *See City of Roseville*, 219 F. Supp. 2d at 151 ("The Enclave Clause requirement of state consent is thus irrelevant where the Congressional authority to act stems from some other constitutional source.') (Citing *Nevada v. Watkins*, 914 F.2d 1545, 1554 (9th Cir. 1990)). IGRA lends no credence to the Clubs' position that Congress somehow *sub silentio* intended that either the Enclave Clause or 40 U.S.C. § 3112 come into play when the Secretary takes land in trust for tribes under the IRA.

Moreover, the Clubs' proposition (Pls.' Opp. & Reply 9) that in enacting the IRA Congress understood that state consent would be required to shift territorial jurisdiction, is at odds with the constitutionally grounded authority for the IRA and the IGRA described above.

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[8] The Clubs' citation (Pls.' Opp. & Reply 10, 25-26) to *Epic Systems v. Lewis*, 138 S.Ct. 1612, 1624 (2018) does not advance their cause. The Court in *Lewis* stated that "[r]espect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work." Ironically this is precisely what the Clubs ask this Court to do, that is find an irreconcilable conflict between 40 U.S.C. § 3112 and the IRA based upon their false dichotomy that an IRA trust acquisition results in a title only transfer, or, if not, entirely ousts state jurisdiction.

Their theory also disregards the text of the Acts. The jurisdictional shift that occurs upon trust acquisition is reflected in the IRA through both its unqualified prohibition on state and local taxation of the acquired land, and its establishment of federal responsibility to prevent alienation of such land. Section 5108 of the IRA states that "[t]itle to any lands or rights acquired pursuant to this Act . . . shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights *shall be exempt from State and local taxation*." (Emphasis added). Section 5126 of the IRA (Mandatory application of Sections 5102 and 5124) makes Section 5102 (Existing periods of trust and restrictions on alienation extended) applicable to, inter alia, "(1) all Indian tribes, and (2) all lands held in trust by the United States for Indians." Accordingly, the IRA's federal protection against alienation applies to the Enterprise Tribe and to the Yuba Parcel acquired in trust for its benefit. Such protection against alienation attaches to tribal trust land immediately upon acquisition by the Secretary. The Clubs' transfer of title but not jurisdiction theory cannot be squared with these provisions of the IRA. One provides tribes with jurisdictional immunity from State and local taxation, and the other imposes jurisdictional requirements upon the federal government as trustee. Neither require cession nor any other role on the part of the states. Congress could have assigned such roles textually, but it chose not to.

Court interpretations underscore that transfer of jurisdiction is coincident with transfer of title into trust for a tribe. For example, state standing to challenge trust acquisition decisions has been found on the basis of the immediate jurisdictional consequence of the trust transfer:

> *As an immediate consequence of placing the four disputed parcels into trust*, Roberts County will lose $254.92, $259.34, $1300.86, and $1474.80, respectively, in annual property taxes. It is reasonably certain the State will be deprived of additional tax revenues, because the State is "categorical[ly]" prohibited from laying a direct tax "on a tribe or on tribal members inside Indian country." *Okla. Tax Comm'n v. Chickasaw Nation,*

> 515 U.S. 450, 458, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995). Thus, the State has a direct and tangible economic interest in the agency's decision.

South Dakota v. U.S. Dep't of Interior, 665 F.3d 986, 990 (8th Cir. 2012). (Emphasis added). In the same vein the court in *Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp. 2d 1, 7 (D.D.C. 2008) observed that:

> Alaska alleges a recognized imminent injury—*the loss of its sovereignty over land taken into trust status*—that would be caused if the action were to be resolved in favor of the plaintiffs. *See City of Sault Ste. Marie*, 458 F. Supp. at 468 (finding the loss of taxing and regulatory authority to be sufficient injury to establish standing). Accordingly, Alaska, possessing a recognized injury that is judicially redressable, has standing under Article III to intervene in this case.

(Emphasis added).

Similarly, the Supreme Court, in rejecting the Oneida Nation of New York's argument that the Nation's reacquisition of parcels within its former reservation rendered the parcels exempt from city taxation, expressly endorsed the IRA's trust acquisition provision as the vehicle to effect the jurisdictional shift sought: "Section 465 [now codified at 25 U.S.C. § 5108] provides the proper avenue for [the Oneidas] to reestablish *sovereign authority over territory* last held by the Oneidas 200 years ago." *City of Sherrill, N.Y. v. Oneida Indian Nation of N. Y.*, 544 U.S. 197, 221 (2005). (Emphasis added). In so doing the Court cited to its prior decision in *Cass Cty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-15 (1998) (stating that through Section 465 of the IRA "Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax exempt."). The Court did not qualify such reestablishment of tribal sovereign authority and exemption from state and local jurisdiction upon state consent or cession. Instead the Court specifically cited the Interior Department's land acquisition regulations, 25 C.F.R. 151, to catalogue the ways in which the regulations "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control

over territory" including "'[jurisdictional problems and potential conflict of land use which may arise.'" In so noting the Court plainly assumed the transfer *from* state and local jurisdiction *to* that of primary federal and tribal jurisdiction upon trust acquisition. The Clubs seek (Pls.' Opp. & Reply 17) to diminish the significance of *Sherrill* alleging that the Court "did not consider whether sovereignty could be reacquired without [s]tate consent." There is no reason to believe the Court would have embraced the IRA's fee-to-trust provision if it thought the provision insufficient to reestablish the Nation's "sovereign authority over territory", which plainly encompasses jurisdiction over territory.

The Clubs' solely title transfer theory also cannot be squared with the federal government's fiduciary duty to prevent alienation of trust lands acquired pursuant to the IRA. *See Bear Claw Tribe v, Inc., v. United States*, 36 Fed. Cl. 181, 192 (1996), *aff'd* 37 Fed. Cl. 633 (1997) (National Industrial Recovery Act, unlike the Indian Reorganization Act did not obligate United States to prevent alienation). *Hydaburg Coop. Ass'n v. United States*, 667 F.2d 64 (1981) (distinguishing duty of federal government to hold acquired Indian lands so as to prevent alienation, from assets and Indian enterprises to which fiduciary responsibility did not run). If the Clubs' theory were correct, the federal government could not exercise its fiduciary duty to prevent alienation of tribal trust land absent cession of jurisdiction by the state in which trust lands are situated, an absurd result.

Like the IRA, IGRA contains no textual requirement of state cession or consent to federal acquisition of land into trust for tribes. Instead the resulting "Indian country" is immediately subject to primary jurisdiction "rest[ing] with the federal government and the Indian tribe inhabiting it, not with the state." *Carcieri*, 497 F.3d at 20-21 (citing *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1988)). While the court in *Carcieri* did note the

limited role IGRA provides for states, that role pertains solely to the state governor's concurrence with a decision by the Secretary regarding whether certain "after acquired" trust lands, such as the Yuba Parcel here, may be used for gaming, not whether acquisition of such lands effects a jurisdictional shift in the first instance. *Carcieri*, 497 F.3d at 20 n.1 (citing 25 U.S.C. § 2719(b)(1)(A)). As with the IRA, IGRA's text belies the Clubs' contorted jurisdiction theory. Congress specifically anticipated gaming on trust lands acquired after IGRA's enactment. And, because Congress understood that such trust acquisitions under the IRA effect a jurisdictional shift to primary federal and tribal jurisdiction, it gave the states a say in Class III gaming they would not otherwise have had. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58 (1996). IGRA after all was enacted in response to the Supreme Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-22 (1987). The Court in *Cabazon* found that California's attempt to civilly regulate tribal gaming impermissibly infringed on tribal government. *See also Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 794 (2014) (Congress adopted IGRA in response to *Cabazon's* holding that "States lacked any regulatory authority over gaming on Indian lands").

iv. As Trust Land the Yuba Parcel is "Indian country"

In their effort to rewrite the jurisdictional rules applicable to tribal trust land the Clubs maintain (Pls.' Opp. & Reply 14-15) that the Yuba Parcel is not "Indian country". It plainly is. (U.S. Opening Mem. 24-26). The Clubs strain to distinguish the Parcel from other trust land in their bid to disregard the substantial body of precedent illuminating the jurisdictional status of Indian country, which unquestionably includes trust land. *See, e.g.*, *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1006, 1010–11 (8th Cir.2010) (recognizing that lands taken in trust pursuant to the IRA are Indian country, and the "general rule Indian country falls under the

primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states"). (Citation omitted). Their argument reduces to their theory that trust acquisition of the Yuba Parcel effected a title but not jurisdictional change combined with their assertion that there is "essentially no federal superintendence" over the Parcel. They are wrong on both accounts.

The Yuba Parcel is both trust land and Indian country consistent with *Venetie*. The land was affirmatively set aside by the federal government for the benefit of the Tribe by virtue of its acquisition under the IRA. *Id.* 522 U.S. 520 at 529 (a "set aside" is manifested the government "retaining title to the land and permitting the Indians to live there"). The Parcel is superintended generally by virtue of the federal government's fiduciary responsibility to prevent alienation of the trust parcel. The Secretary's certification and publication of the Tribe's Liquor Control Statute is a specific manifestation of superintendence. *See* Enterprise Rancheria of Maidu Indians of California Liquor Control Statute, 80 Fed. Reg. 77370 (Dec. 14, 2015) also attached to Rabinowitz Declaration as Exhibit 1. The notice explains that "Pursuant to [ ] 18 U.S.C. 1161, as interpreted by the Supreme Court in *Rice v. Rehner*, 463 U.S. 713 (1983), the Secretary of the Interior shall certify and publish in the Federal Register notice of adopted liquor control ordinances *for the purpose of regulating liquor transactions in Indian country*." (Emphasis added).

Ironically, in contending (Pls.' Opp. & Reply 15) that "the Enterprise Tribe and its entertainment company partner are developing a commercial gambling operation on [the] parcel," the Clubs concede the Tribe's ongoing exercise of governmental power over the Parcel as well as the ongoing federal superintendence that they dispute. Their bald assertion that "[t]he federal government 'has not actively controlled' the land, the project or the business, and has no

plans to do so," betrays a misunderstanding of both the Secretary's and the NIGC's ongoing oversight and approval role today. Contrary to the Clubs' conjecture, because, as they note, the Tribe is partnering with a gaming management company, the NIGC must approve a gaming management contract between the Tribe and its partner before any Class III gaming can be conducted on the Yuba Parcel. *See* 25 U.S.C. § 2710 (d)(9) ("An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title."). Further undermining the Clubs' portrait is the fact of the NIGC's ongoing civil enforcement authority including to enforce tribal gaming ordinances (such as the Enterprise Tribe's approved Gaming Ordinance) and conduct site visits and audits. *See* 25 U.S.C. § 2713. Thus, the Yuba Parcel plainly meets the federal superintendence requirement articulated in *Venetie* as an "Indian community [ ] sufficiently "dependent" on the Federal Government," such that "the Federal Government and the Indians involved, rather than the States, are to exercise primary jurisdiction over the land in question." *Venetie*, 522 U.S. at 531. (Footnote omitted).

In their zeal to cast the Parcel as something less than Indian country, the Clubs attack the legitimacy of the Tribe's effort to realize IGRA's tribal self-sufficiency and economic development goals on its trust land, patronizingly opining (Pls.' Opp. & Reply 16) that "[a] gambling casino to be managed by a private company and patronized primarily by nonmembers of the tribe hardly qualifies." The Clubs' private opinions bear no relationship to the actual analysis conducted by the Department contained in the Record of Decision ("ROD") for approval of the Yuba Parcel's trust acquisition. As set forth by the Ninth Circuit in *Cachil Band*, 889 F.3d at 593:

> [T]he BIA issued a Record of Decision under the IRA ("IRA ROD") in November 2012 pursuant to 25 U.S.C. § 5108. The IRA ROD concluded the trust acquisition on the Yuba Site 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.'

c. The Tribe Exercises the Requisite Governmental Power under IGRA

The Clubs reprise (Pls.' Opp. & Reply 21-24) their mistaken attack on the IGRA mandated Secretarial Procedures as somehow arbitrary and capricious or contrary to law, fastening upon alleged deficiencies in the Tribe's exercise of governmental power over the Yuba Parcel. Yet the mandatory nature of the Secretarial Procedures undercuts their argument. As Judge Ishii observed in *Club One*, it is doubtful that the Secretary was even required to verify such exercise of governmental power "in light of the fact that those same requirements were necessary in order for [the Tribe] to initiate its good faith negotiation litigation against the State to begin with". *Club One*, 328 F. Supp. 3d at 1043 n.10 (comparing 25 U.S.C. § 2710(d)(3)(A) with 25 U.S.C. § 2710(d)(7)(B)(vii)(II)). In any event, by the time this Court through the appointed mediator required the Secretary to issue procedures, the Enterprise Tribe had unquestionably exercised governmental authority respecting the Yuba Parcel by bringing and prevailing in its good faith lawsuit. That suit was a clear manifestation of exercise of the Tribe's sovereign power to vindicate its right to conduct gaming on the Parcel.

Further, Judge Ishii was correct that IGRA's second definition of "Indian lands" addressed to trust lands over which an Indian tribe "exercises governmental power," does not define the meaning or scope of such exercise. *Club One*, 328 F. Supp. 3d at 1047. His observation that "[n]either the Supreme Court nor the Ninth Circuit found the 'exercise of

governmental power' clause analytically significant enough to merit mention," *Id*. at 1048,[9] underscores how discordant the Clubs' contentions are with the spirit of IGRA. In *Massachusetts v. Wampanoag Tribe of Gay Head*, 853 F.3d 618, 626 (1st Cir. 2017) (citing 25 U.S.C. § 2702),[10] the First Circuit grappled with a similar view advanced by the Town of Aquinnah. In rejecting the Town's position, the court correctly found that the Town "g[ot] it backwards" and turned the logic of IGRA's Section 2702 "on its head" by insisting that the Tribe's exercised governance be fully developed in order for the Tribe to realize the benefits of gaming under IGRA. Instead, the court read Section 2703(4) of IGRA against the backdrop of the Act's core purpose that tribal gaming be a means to "promot[e] tribal economic development, self-sufficiency, and strong tribal governments." *Id.* The Clubs advance a view similarly divorced from the spirit and text of IGRA and in disregard of IGRA's explicit contemplation of gaming on recently acquired trust lands. *See* 25 U.S.C. § 2719 (including exceptions to the general prohibition on tribal gaming on lands acquired in trust after October 17, 1988, reflective of the varied circumstances of tribes and various tribal land restoration policies of the government).

The Clubs are wrong in their insistence (Pls.' Opp. & Reply 22-24) that the Tribe's approved Gaming Ordinance and underlying Tribal Resolution were insufficient for IGRA's

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[9] The Clubs disingenuously attempt to ascribe Judge Ishii's observation about the Supreme Court's and Ninth Circuit's treatment of the clause to Judge Ishii himself, going so far as to claim he erred. (Pls.' Opp. & Reply 21). They also postulate that the "exercise of governmental power" clause in the second "Indian lands" definition, reflects a Congressional concern that tribes might underhandedly use their "imprimatur" to bring about casino gaming on land over which they have "only a minimal pre-existing relationship". Nothing in the IRA or IGRA supports the thread permeating the Clubs' papers that there are different classes of trust land, (Pls.' Opp. & Reply 16, 19, 21, 32), nor are their salvos availing (e.g. Pls.' Opp. & Reply 20) describing the Tribe as engaged in "naked reservation shopping".

[10] *See also Mashantucket Pequot Tribe v. State of Conn.*, 913 F.2d 1024, 1033 (2d Cir. 1990) (IGRA's terms reflect an intent to ensure tribes may expeditiously conduct Class III gaming either through a compact or pursuant to Secretarial Procedures to realize the benefits contemplated by Congress).

purposes at issuance of the Secretarial Procedures.[11] *See Club One*, 328 F. Supp. 3d at 1049 (finding Tribe had "exercised governmental power over" trust land through enactment of a gaming ordinance and thereby "legislating with respect" to the land). Again, IGRA's Section 2703(B) definition of "Indian lands" does not specify any particular kind or quantum of exercise of governmental power. And to the extent the definition is ambiguous it should be interpreted liberally in accordance with the applicable Indian-favoring canons of construction. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985); *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). Additionally, and expectedly, there are today many more manifestations of the Tribe's exercise of governance over the Yuba Parcel.[12]

II. The Tenth Amendment Imposes No Barrier to the Secretarial Procedures

Assuming the Clubs' have standing, something Judge Ishii did not assume vis-s-vis the non-Indian gaming operators' Tenth Amendment challenge to the Secretarial Procedures issued

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[11] Their claim (Pls.' Opp. & Reply 22) that the only "purported exercise of 'governmental power' over the Yuba Parcel" is the Tribe's gaming ordinance adopted by the Tribe "before it acquired a beneficial interest in the Yuba Parcel," disregards that after the trust acquisition the Tribe amended, and the NIGC approved, the Tribe's Gaming Ordinance. The Tribe's Amended Gaming Ordinance is available on the NIGC's website: *https://www.nigc.gov/images/uploads/gamingordinances/enterpriserancheria-ordappr20130813.pdf* (site last accessed September 13, 2019)

[12] For example, the Procedures will govern the conduct of Class III gaming at the Tribe's Yuba Parcel casino currently near completion. Pursuant to Section 8.2 (Assistance By State Gaming Agency) of the Procedures, the State of California has a significant regulatory role in any Class III gaming conducted by the Tribe. AR00001115-16. In September of 2016 the State provided confirmation to the Tribe (with copies to the Secretary and the NIGC) that in accordance with Section 8.2 (b) of the Procedures, the State Gaming Agency will assume regulatory responsibilities with respect to the Tribe's Class III gaming activities. The Tribe in turn, executed Tribal Resolution # 16-11 to "Acknowledge, Consent, and Agree to the State's Notice of the State Gaming Agency's Assumption of Responsibilities . . .". *See* attached Exhibits to Rabinowitz Declaration.

for the North Fork Tribe in the *Club One* litigation,[13] their Tenth Amendment challenges to the Procedures are mistaken. First, as previously explained, their opening brief asserts (Pls.' Mem. 39) that any the construction of Section 5108 of the IRA resulting in divestiture of the state's territorial jurisdiction would violate the Tenth Amendment. The problem is the Clubs did not, and do not here challenge the final agency action that gave rise to the jurisdictional shift complained of.[14] Thus their claim does not comport with the requirements of the APA. Again, it was the Secretary's 2013 fee-to-trust transfer of the Yuba Parcel that reordered jurisdiction over the parcel, not the Secretarial Procedures. Judge Ishii identified the same flaw in the *Club One* plaintiffs' lawsuit and correctly rejected their Tenth Amendment claim as not properly before his court. This Court should do the same.

If the Court determines to hear the claim it should be rejected for the reasons previously set forth. (U.S. Opening Mem. 35-42). The Clubs again advance (Pls.' Opp. & Reply 34), albeit tepidly, their "compact only" argument (i.e. that in enacting Proposition 1A Californians voted to allow tribal casino gaming via "compacts" as opposed to Procedures). Again, Judge Ishii correctly rejected the "no compact: no gaming" argument observing that "[t]he Court will not

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[13] *See Club One*, 328 F. Supp. 3d at 1042 (determining not to reach alleged Tenth Amendment violation in connection with jurisdictional shift attendant to IRA fee-to-trust determination for North Fork Tribe both because that determination was not challenged and because, to the extent the claim sought to vindicate divestment of the State of California's jurisdiction over the trust land, plaintiffs lacked standing to do so.

[14] The Clubs' claim (Pls.' Opp. & Reply 24) that they were somehow prevented from joining the litigation challenging the fee-to-trust determination rings hollow. *See Citizens for a Better Way v. U.S. Dept. of Interior*, No. 2:12-cv-3021-TLN-AC, 2015 WL 5648925 (E.D. Cal. Sept. 24, 2015) (cataloguing all the challengers to the Secretary's determination to acquire the Yuba Parcel in trust, including Plaintiffs Citizens for a Better Way et al., comprised of three local advocacy groups, five local residents, and a local restaurant who had, by December of 2012 filed suit in the district court for the District of Columbia, as had the United Auburn Indian Community, which two suits were by January of 2013, transferred to and consolidated with the Colusa Indian Community's suit before this Court.

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." *Club One*, 328 F. Supp. at 1050.

As with their other assertions, in advancing their Tenth Amendment challenge the Clubs ignore or misinterpret the combined implications of the Indian Commerce and Supremacy Clauses of the Constitution. As established, Congress had authority to enact the IRA and IGRA by virtue of the Indian Commerce Clause and, as a result, has the non-derivative authority to limit a state's exercise of jurisdiction with respect to Indians on trust land. The Clubs, however, argue (Pls.' Opp. & Reply 28) that because the Indian Commerce Clause does not contain the word "jurisdiction," Congress lacks authority to acquire land in trust for a tribe without a cession of jurisdiction from the state. Their reliance on the Tenth Amendment for this assertion ignores the fact that "the Constitution does not carve out express elements of state sovereignty that Congress may not employ its delegated powers to displace." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985) ("In short, we have no license to employ freestanding conceptions of state sovereignty when measuring congressional authority under the Commerce Clause.").

Instead, the Tenth Amendment only reserves to the states those powers not expressly delegated to the federal government in the Constitution. *New York v. United States*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States."). Thus, contrary to the Clubs' formulation (Pls.' Opp. & Reply 37) that 40 U.S.C. § 3112 and the Tenth Amendment mandate a transfer of jurisdiction from the situs state in order for the Tribe to acquire jurisdiction over the Yuba Parcel, the Tenth Amendment inquiry is whether the Constitution delegates to Congress the authority to take land in trust for Indian tribes and whether Congress acted within that power.

Again, courts characterize Congress's Indian Commerce Clause powers in sweeping terms. The "Constitution grants Congress *broad general powers* to legislate in respect to Indian tribes" and those powers have consistently been described as 'plenary and exclusive.'" *Lara*, 541 U.S. at 200 (emphasis added). Because the Constitution delegates such sweeping power to Congress, and there is no "state sovereignty" exception to Congress' Commerce Clause power, the Tenth Amendment is not implicated. *Gila River Indian Cmty., v. United States*, 729 F.3d 1139, 1153-54 (9th Cir. 2013); *United States v. Jones*, 231 F.3d 508, 515 (9th Cir. 2000).

The Clubs' reliance (Pls.' Opp. & Reply 32) on *Seminole Tribe*, to argue that the Tribe acquiring jurisdiction over the Yuba Parcel by virtue of the federal trust acquisition "nullifies the Constitutional structure of the Nation," is similarly mistaken. In *Gila River Indian Cmty*, the plaintiffs challenged the Gila Bend Act, which authorized the Secretary to acquire land in trust for a tribe. 729 F.3d at 1153. Like the Clubs here, the plaintiffs contended the Act exceeded Congress's Indian Commerce Clause powers in violation of the Tenth Amendment by diminishing the state's control over land without its consent. *Id.* The Ninth Circuit rejected the plaintiffs' reliance on *Seminole Tribe* as "unpersuasive" when viewed against the "*broad powers* delegated to Congress under the Indian Commerce Clause." *Id.* (emphasis added and citation omitted). Citing to *Garcia's* counsel against "employ[ing] freestanding conceptions of state sovereignty when measuring congressional authority" under a constitutionally enumerated power, the court found the Gila Bend Act "well within congressional power under the Indian Commerce Clause" and not, as the Clubs urge here, "trumped by the Tenth Amendment." *Id.* at 1153-54. This Court should follow that lead and reject the Clubs' Tenth Amendment challenge.

CONCLUSION

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

Respectfully submitted this 13th day of September, 2019

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