IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF CONNECTICUT, ET AL.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.,

Defendants.

No. 1:17-cv-02564-RC

PLAINTIFFS MASHANTUCKET PEQUOT TRIBE AND STATE OF CONNECTICUT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL DISMISSAL

Throughout this case,[1] the Defendants have erroneously argued that mediator-selected compacts issued as secretarial procedures through the process set forth in 25 U.S.C. § 2710(d)(7)(B), specifically including the compact between Plaintiffs Mashantucket Pequot Tribe and State of Connecticut (the Pequot Compact), are not the legal equivalent of negotiated compacts[2] established under other provisions of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701, *et seq.* Accordingly, the Defendants contend that the statutory and regulatory

[1] Plaintiffs filed their Motion for Summary Judgment (Doc. 9) on December 22, 2017, Defendants filed their Motion for Partial Dismissal (Doc. 18) on February 5, 2018, and briefing was completed on March 5, 2018 with the filing of Plaintiffs' Opposition to Defendants' Motion for Partial Dismissal (Doc. 27).

[2] Throughout this brief, Plaintiffs use the term "negotiated compacts" to contradistinguish from mediator-selected compacts. This shorthand terminology is not intended to downplay the extensive negotiations between the State of Connecticut and the Pequot Tribe, which are described in detail in Plaintiffs' opposition to Defendants' motion for partial dismissal. *See* Doc. 27 at 6. At the conclusion of those negotiations, the State and the Tribe submitted their final compact proposals to a mediator as required by 25 U.S.C. § 2710(d)(7)(B)(iv), and the mediator selected the State's proposed compact after being informed that the Pequot Tribe was willing to accept it. *See* Doc. 27 at 6. While the State declined to accept its own proposal due to a pending *cert* petition, it is that heavily negotiated but not ultimately agreed-to compact that the Secretary promulgated as Secretarial Procedures.

provisions providing for the approval of amendments to negotiated compacts are inapplicable to the Pequot Compact. The Pequot Tribe and the State have already addressed the inherent absurdity of this argument in its prior filings and will not belabor that point here. Instead, Plaintiffs submit this supplemental brief to advise the Court that the Defendants, while asking this Court to draw a sharp legal distinction between the Pequot Compact and negotiated compacts, were simultaneously—and successfully—asking another federal district court to "reject [the] wholly unsupported theory that secretarial procedures are inferior" to negotiated compacts and contending that any reading of IGRA that would make compacts established through secretarial procedures "second-best" would wrongly render the remedial scheme leading to such compacts "a nullity, a mere charade." *Stand Up for California! v. U.S. Dep't of the Interior*, Case No. 16-cv-02681-AWI-EPG, Reply in Support of Federal Defendants' Cross-Motion for Summary Judgment (Doc. 52) at 3 & 6 (E.D. Cal. Oct. 6, 2017).[3] Having recently made and prevailed on this argument in another case, the Defendants are judicially estopped from maintaining the opposite position in this litigation.[4]

I. The *Stand Up* litigation.

In *Stand Up*, the plaintiffs challenged the Secretary of the Interior's issuance of secretarial procedures permitting the federally recognized North Fork Rancheria of Mono Indians to conduct Class III gaming on a parcel of land in Madera County, California. *Stand Up*

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[3] Copies of the *Stand Up* defendants' briefs in support of their cross-motion for summary judgment and that court's slip opinion are attached hereto for the Court's convenience.

[4] Previously, in response to the Plaintiffs' notice of supplemental authority regarding the *Club One* decision upholding the equal legal status of negotiated and mediator-selected compacts (*see* Doc. 50), the Defendants dismissively downplayed the importance of the "single paragraph" that the *Club One* court devoted to the issue and argued that even that paragraph was inconsequential dicta. *See* Doc. 50 at 1. That argument is unsustainable here, where the Defendants devoted several pages of their briefing in the *Stand Up* litigation to arguing for the equal treatment of negotiated and mediator-selected compacts and the *Stand Up* court relied heavily on that briefing in its outcome-determinative holding.

Slip Op. (Doc. 58) at *1 (July 18, 2018). The plaintiffs alleged that the procedures violated the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.* ("IGRA"), the Johnson Act, 15 U.S.C. §§ 1171, *et seq.*, and various federal environmental laws. *See Stand Up* Slip Op. at *9. Their Johnson Act argument is of particular relevance here.

The Johnson Act generally prohibits the possession or use of gaming devices on Indian lands. *See* 15 U.S.C. § 1175. IGRA provides an exception to this prohibition for "any gaming conducted under a tribal-state compact that – (A) is entered into under [25 U.S.C. § 2710(d)(3)] by a State in which gambling devices are legal, and (B) is in effect." 25 U.S.C. § 2710(d)(6). The *Stand Up* plaintiffs argued that secretarial procedures arrived at under 25 U.S.C. § 2710(d)(7)(B) are legally distinguishable from tribal-state compacts entered into under § 2710(d)(3). Therefore, they reasoned, the use of gaming devices under secretarial procedures (as opposed to a negotiated tribal-state compact) necessarily falls outside the scope of IGRA's Johnson Act exception and violates the Johnson Act. In short, the plaintiffs in the *Stand Up* case, like the federal Defendants here, contended that secretarial procedures were not a compact or the legal equivalent based on the fact that the section of IGRA at issue referred to "tribal-state compact" and not to a mediator selected compact issued as secretarial procedures.

The Department of the Interior and Secretary Zinke pilloried the *Stand Up* plaintiffs' effort to draw a distinction between negotiated compacts and secretarial procedures, arguing that "Secretarial Procedures are properly viewed as a full substitute for a Class III gaming compact" and that "IGRA is clear" on this point. *Stand Up* Mem. in Support of Federal Defendants' Motion for Summary Judgment (Doc. 41) at 14. The Department and Secretary went on to explain that viewing compacts established through secretarial procedures as a "second best" alternative "is not supported by [IGRA's] plain language or purpose" and "would render

[IGRA's] remedial process nonsensical and superfluous because it would make the result of a remedial process, Secretarial Procedures, less than a compact obtained with a state's consent." *Id.* at 15.

The federal defendants gave particularly short shrift to the argument—one they have advanced in this case—that a provision of IGRA that explicitly refers to tribal-state compacts is therefore inapplicable to secretarial procedures. *Stand Up* Doc. 41 at 15-16. Such a "contrived interpretation," they argued, "would make the whole remedial process a pointless exercise," leading to "absurd results," while a "common-sense and natural reading of IGRA *makes clear that Secretarial Procedures are to be treated the same as a tribal-state compact*." *Id.* at 16-17 (internal quotation omitted) (emphasis added).

The *Stand Up* court agreed with the federal defendants' position in that case. While it acknowledged that § 2710(d)(6) "does not expressly exempt gaming conducted pursuant to Secretarial Procedures from the reach of the Johnson Act" and that "[a]t first blush, Secretarial Procedures … do not appear to be a 'Tribal-State compact' for purposes of § 2710(d)(3)," the court quickly rejected such a technical reading of the statute because "the outcome that it proposes is absurd" and treating negotiated compacts and secretarial procedures differently "would undermine the carefully crafted statutory scheme and goals of IGRA and its remedial process." *Stand Up* Slip Op. at *11. Accepting the federal defendants' arguments that "gaming under Secretarial Procedures should be considered the functional equivalent of gaming under a Tribal-State compact" and that "[r]eading IGRA as a whole … makes clear that *Secretarial Procedures are designed to operate as a complete substitute to existence of an effective Tribal-State compact*," the court granted summary judgment for the defendants. *Id.* at **10 & 14 (emphasis added).

II. The federal defendants are judicially estopped from contradicting their successful arguments in the *Stand Up* case.

Having just successfully argued that compacts established through secretarial procedures are a complete and full substitute for negotiated compacts, even for purposes of statutory provisions referring only to tribal-state compacts entered into under certain provisions of IGRA, the Defendants are judicially estopped from arguing the opposite in this proceeding. And they certainly cannot argue with a straight face that their current position—the diametric opposite of the one that they argued in a federal court case decided less than two weeks ago—is entitled to deference.

The doctrine of judicial estoppel provides that a party that successfully asserts a position in litigation "may not thereafter, simply because his interests have changed, assume a contrary position."[5] *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation omitted); 18 Moore's Federal Practice § 134.30, p. 134-62 (3d ed. 2000) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) ("[A] party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory."). The Supreme Court has recognized the doctrine's value in "protect[ing] the integrity of the judicial process." *Id.* (internal quotation omitted); *see also Convertino v. U.S.*

[5] Judicial estoppel is not dependent on privity between the parties and, specifically, a party who was not involved in the prior proceeding can still seek judicial estoppel. *See, e.g., Ryan Operations G.P. v. Santiam-Midwest Lumber Co.,* 81 F.3d 355, 360 (3d Cir. 1996) ("Our conclusion that privity is not required for the application of judicial estoppel accords with the majority view."). As the *Ryan* court explained, "[u]nlike equitable estoppel … judicial estoppel does not require that the party urging estoppel demonstrate that she believed or relied upon the plaintiff's prior inconsistent statement. …While privity and/or detrimental reliance are often present in judicial estoppel cases, they are not required." (internal citations omitted).

Dep't of Justice, 674 F. Supp. 2d 97, 106-07 (D.D.C. 2009) (quoting *New Hampshire* and applying judicial estoppel).

While there are no bright line rules for when judicial estoppel applies, the Supreme Court has identified several factors that should inform a court's exercise of its discretion with respect to the doctrine. *New Hampshire*, 532 U.S. at 750. First, the party to be estopped must be asserting a position "clearly inconsistent" with its prior position. *Id.* Second, it is important that a court adopted the party's prior position, "so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled." *Id.* (internal quote omitted). The Court also should consider whether allowing the assertion of the inconsistent provision would give the inconsistent party an unfair advantage or unfairly prejudice the opposing party. *Id.* at 751. These factors are illustrative of what courts should consider, but they are not "inflexible prerequisites or an exhaustive formula." *Id.* With some limitations not applicable here, the doctrine of judicial estoppel applies with equal force against the government as it does to private litigants. *See, e.g., County of San Miguel v. Kempthorne*, 587 F. Supp. 2d 64, 73 (D.D.C. 2008).[6]

All of the factors identified by the *New Hampshire* Court weigh overwhelmingly in favor of applying judicial estoppel in this case. As explained above, there is no question that the Defendants' current position is entirely inconsistent with their position in *Stand Up*. Here, the Defendants have argued that because the Pequot Compact was established through secretarial procedures under § 2710(d)(7), the Tribe "does not have a tribal-state compact approved under § 2710(d)(8)" and "IGRA's requirements for approval or disapproval of compacts … do not

[6] This is not an instance, for example, when the "shift in the government's position is the result of a change in public policy," *San Miguel*, 587 F. Supp. 2d at 73, because the diametrically opposite positions taken by the government were adopted essentially simultaneously.

apply." Def. Motion for Partial Dismissal (Doc. 18) at 8. In other words, the Defendants contend that because the provisions for approving compact amendments refer to negotiated compacts entered into under § 2710(d)(8), they necessarily do not apply to mediator-selected compacts promulgated as secretarial procedures under § 2710(d)(7). Accordingly, the Defendants contend, the procedural safeguards that IGRA and its regulations establish with respect to the approval of compacts and compact amendments have no relevance to mediator-selected compacts established as secretarial procedures, and the Defendants are free to indefinitely delay, deny, or simply ignore amendments to procedures for any or no reason. This is directly inconsistent with their argument in *Stand Up*, where they correctly asserted that IGRA's Johnson Act exception, despite referring only to negotiated compacts under § 2710(d)(3), also necessarily applied to mediator-selected compacts promulgated as secretarial procedures under § 2710(d)(7).

Secretarial procedures, as the Defendants argued in *Stand Up!*, are "intended to provide a full substitute for a compact, and nothing in IGRA's language provides for a 'second class' compact."[7] *Stand Up*, Doc. 41 at 17; *see also id.* at 14 ("IGRA is clear that Secretarial Procedures are a full and complete substitute for a tribal-state compact."). That is precisely the Pequot Tribe's argument in this case, yet now, because it is advantageous to their litigation position of the moment, the Defendants ask this Court to treat the Pequot Compact as a second class compact. The Defendants' current argument – in essence – is that IGRA treats mediator-selected compacts wholly differently and that Secretarial Procedures are *not* a full and complete

[7] Distinguishing between negotiated tribal-state compacts and mediator-selected compacts adopted as secretarial procedures is particularly absurd in this case. Here, the Mohegan Tribe and the Pequot Tribe negotiated and executed nearly identical agreements with the State of Connecticut to amend their respective compacts, which are also nearly identical, including the provisions in each addressing how to amend the compact. If applying IGRA's amendment provisions to the Mohegan Compact amendments but not to the Pequot Compact amendments doesn't make compacts adopted as procedures second class, it is not clear what would.

substitute for a tribal-state compact. Their position here is wholly irreconcilable with the one that they just took and the Court adopted in the *Stand Up* case.

The second factor identified by the Supreme Court in *New Hampshire*—that a court have relied upon the party's prior, inconsistent position—is plainly satisfied. The *Stand Up* court recited the federal defendants' relevant arguments at length in its order and sided with them completely on this issue. *See Stand Up*, Doc 58 at 9-14. If this Court were to accept the Defendants' new position, ruling that IGRA does indeed treat mediator selected compacts established through secretarial procedures as "second class compacts" that are not entitled to the same protections, safeguards, and legal status as negotiated compacts, its decision necessarily "would create the perception that either the first or the second court was misled." *New Hampshire*, 532 U.S. at 750. Preventing such scenarios, and thereby protecting the reputation and integrity of the judicial process, is one of the chief purposes of judicial estoppel. *See id.* at 749.

The third *New Hampshire* factor, whether the party asserting inconsistent positions will derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped, is also acutely present here. The Defendants claim that their position is entitled to deference and must be upheld if it is "reasonable." Doc. 32 at 8. This argument, if correct, boldly underscores the need for this Court to apply judicial estoppel. Allowing the Defendants to careen from inconsistent position to inconsistent position, depending on the exigencies of the moment, while also claiming that each current litigation position is entitled to deference would effectively inoculate them against litigation defeat in any case where a statutory interpretation was at issue. The Defendants could adopt whichever argument suited their needs in any given case and prevail based on deference to their "reasonable" position. This would give the Defendants—and any

similarly situated federal agency defendants—an insurmountable litigation advantage and make a mockery of the litigation process, which is precisely what the doctrine of judicial estoppel means to prevent. *See, e.g., In re Cassidy*, 892 F.2d 637, 641 (7th Cir. 1990) ("Judicial estoppel is a doctrine intended to prevent the perversion of the judicial process."). This Court can avoid giving its imprimatur to such an outcome only by applying judicial estoppel in this case and preventing the Defendants from asserting a position that they so recently and resoundingly opposed.

The Plaintiffs therefore respectfully request that the Court apply the doctrine of judicial estoppel and determine that Defendants are precluded from contending that mediator-selected compacts adopted as Secretarial Procedures are not the legal equivalent of tribal-state compacts under IGRA, including the provisions and regulations governing compact amendments.

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Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STAND UP FOR CALIFORNIA!, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants, and North Fork Rancheria of Mono Indians, Intervenor Defendant.	Case No. 16-cv-02681-AWI-EPG

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This lawsuit is Stand Up For California!'s (Stand Up) second lawsuit, in federal court, related to a parcel of land that the Secretary of the Interior (Federal Defendants) holds in trust for the North Fork Rancheria of Mono Indians. Four of Stand Up's claims challenge the mandatory issuance of Secretarial Procedures under Indian Gaming Regulatory Act (IGRA), the Johnson Act, the National Environmental Policy Act (NEPA), and the Clean Air Act (CAA). Stand Up also raises a FOIA claim but does not allege that the administrative record is incomplete.

IGRA authorizes tribes to engage in Class III gaming, which includes most casino games such as blackjack and roulette as well as slot machines, in states where the tribe is located, where the state allows gaming of that nature, and where the state and tribe negotiate a tribal-state compact. 25 U.S.C. §§ 2703(7(B)(ii), (8), 2710(d)(1). When a state "might choose not to negotiate, or to negotiate in bad faith, Congress included a complex set of procedures designed to protect tribes from recalcitrant states." *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299 (9th Cir. 1998). If, as in this case, the tribe bringing a good-faith suit prevails on its claims and other means for the state to consent to a compact, including one selected by a mediator, are unsuccessful, the Secretary "shall prescribe" Secretarial Procedures "consistent with the proposed compact selected by the mediator . . . ., the provisions of [IGRA], and the relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii). The Secretarial Procedures mandated by IGRA were lawfully issued in July 2016.

Stand Up's first three claims contend that the Secretarial Procedures are inconsistent with the Johnson Act, NEPA, and the CAA. There is no lawful reason for the Secretary to withhold Secretarial Procedures, which IGRA mandates be issued, under any of those statutes. Stand Up's fifth claim contends that the Secretarial Procedures are invalid because it argues the Governor's

concurrence is invalid. Stand Up has already litigated and lost, in federal court, and against the same defendants, the validity of the Governor's concurrence.

First, Stand Up's Johnson Act challenge ignores the fact that Secretarial Procedures are a full substitute for a tribal-state compact. Class III gaming does not violate the Johnson Act. Stand Up's argument ignores IGRA's text and purpose (producing an absurd result) and Ninth Circuit case law. Second, the Secretary did not violate NEPA by prescribing the procedures without performing a NEPA analysis. Prescribing Secretarial Procedures is not subject to NEPA because it is not a major federal action subject to NEPA, IGRA does not allow the Secretary to do so, the Secretary is not the legally relevant cause of any environmental effects, and the Secretary has already conducted an Environmental Impact Statement for the trust-acquisition decision. Third, the Secretary did not violate the CAA for related reasons.
In this case, four of Stand Up's claims challenge the Secretarial Procedures which IGRA mandated that the Secretary prescribe as a result of North Fork's successful good-faith lawsuit against the state of California. The Secretary was not required to make a CAA conformity determination before prescribing the procedures because the prescription of Secretarial Procedures is exempt from the conformity requirements. Fourth, Stand Up's argument concerning its FOIA claim does not allege that the Administrative Record is incomplete. It does not effect the other claims. Fifth, Stand Up once again challenges the validity of the Governor's concurrence in federal Courts. It has previously asserted this before, lost, and failed to appeal this issue. Stand Up is collaterally estopped from litigating this issue again. Even if they were not, their claim would fail under federal law. The Secretary was not required to consider the validity of the Governor's concurrence when prescribing Secretarial Procedures.

Federal Defendants respectfully request that the Court deny Stand Up's motion for summary judgment and grant Federal Defendants' cross-motion for summary judgment.

BACKGROUND

Stand Up seeks to relitigate many of same claims and issues in order to challenge the Secretarial Procedures prescribed as a result of a judgment issued by this Court and the subsequent operation of IGRA. *See North Fork Rancheria of Mono Indians v. California*, 1:15cv00419-AWI-SAB, 2015 WL 11438206, at *12 (E.D. Cal. Nov. 13, 2015) (North Fork's good-faith lawsuit under 25 U.S.C. § 2710 against California).

This Court set forth much of the relevant background for this case in its order granting North Fork's motion to intervene in this lawsuit. *See* Doc. 23 (Order entered March 8, 2017); *see also North Fork*, 2015 WL 11438206, at *1-4. Another court has also extensively examined and set forth facts relevant to Stand Up's original challenge to the Secretary's two-part determination and the Governor's concurrence. *Stand Up for California! v. U.S. Dep't of the Interior* (*Stand Up I*), 919 F. Supp. 2d 51, 54-61 (D.D.C. 2013) (denying Stand Up's request for preliminary injunction); *Stand Up for California! v. U.S. Dep't of the Interior* (*Stand Up II*), 71 F. Supp. 3d 109, 112-15 (D.D.C. 2014) (dealing with administrative record issues); and *Stand Up for California! v. U.S. Dep't of the Interior* (*Stand Up III*), 204 F. Supp. 3d 212 (D.D.C. 2016) (granting summary judgment on most claims for Federal Defendants and North Fork, and dismissing the other claims). The following additional background supplements what this Court has already explained in its prior rulings.

I. THE SECRETARY'S TWO-PART DETERMINATION, THE GOVERNOR'S CONCURRENCE, AND FEDERAL ACQUISITION OF THE MADERA SITE AS TRUST LAND

California voters authorized, via constitutional amendment, casino-style or Las Vegas style Indian gaming under IGRA in March 2000.[1] 2000 Cal. Legis. Serv. Prop. 1A- Gambling on Tribal Lands (Ca. 2000); *amending* Cal. Const. art. IV, § 19(f). Since the enactment of Proposition 1A, the Secretary has considered a number of land-into-trust applications for gaming purposes in California. North Fork is a federally recognized Indian tribe located in Madera County. *See* Restoration of Federal Status to 17 California Rancherias, 49 Fed. Reg. 24,084 (June 11, 1984); Indian Tribal Entities Recognized and Eligible to Receive Services, 50 Fed. Reg. 6,055, 6057 (Feb. 13, 1985). In 2005, North Fork submitted a fee-to-trust application for the Madera site to Interior for the purpose of developing a resort hotel and casino. AR00000160. North Fork did so in order to meet its need for economic development, self-sufficiency, and self-governance, and to provide its Tribal citizen population with employment, educational opportunities, and critically needed social services. This application was supplemented by North Fork's 2006 request for a Secretarial determination of the Madera site's eligibility for gaming pursuant to IGRA.

One way that land taken into trust after IGRA's enactment is eligible for gaming, is if the Secretary issues a favorable two-part determination finding that gaming on the newly acquired lands is in the best interest of the Indian tribe and its members and that such gaming would be non-detrimental to the surrounding community, and if "the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719

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[1] IGRA divides gaming into three classifications, only one of which—Class III—is at issue in this case. *See Amador Cty. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011) ("The Act divides gaming into three classes . . . Class III, which includes most casino games such as blackjack and roulette as well as slot machines . . ."). Class III includes most casino-style gaming. *Id.*; *see also* 25 U.S.C. 2703(8) (defining "class III gaming" as "all forms of gaming that are not class I gaming or class II gaming"); *id.* § 2703(6)-(7) (defining "class I gaming" and "class II gaming").

1 (b)(1)(A). In this matter, on September 1, 2011, the Secretary issued a favorable two-part
2 determination and, pursuant to IGRA, the Assistant Secretary—Indian Affairs wrote to Governor
3 Jerry Brown on September 1, 2011, to inform him of that determination and to request the
4 Governor's concurrence. On August 30, 2012, the Governor concurred with the Secretary's
5 "determination to allow 305 acres in Madera County to be placed in trust for the North Fork
6 Rancheria of Mono Indians for the purpose of establishing a class III gaming facility."
7
8 AR00000317.
9 The Secretary took the Madera site into federal trust for North Fork on February 5, 2013.
10 The Madera site is held in trust today.
11
12 **II. THE 2012 COMPACT AND ISSUANCE OF SECRETRIAL PROCEDURES**
13 Where state law allows class III gaming pursuant to IGRA, as California does pursuant to
14 its Constitution, Cal. Const. Art. IV, § 19(f), IGRA anticipates that a tribe seeking to engage in
15 class III gaming will first attempt to obtain a compact with the state. 25 U.S.C. § 2710(d)(1)(C).
16 After receiving a tribal request to negotiate over a class III gaming compact, IGRA mandates that
17 "the State shall negotiate with the Indian tribe in good faith to enter into such a compact." 25
18 U.S.C. § 2710 (d)(3)(C). California has waived its sovereign immunity, Cal. Gov. Code §
19 98005, to lawsuits by tribes alleging that the State has failed to conduct "negotiations with the
20 Indian tribe for the purpose of entering into a Tribal-State compact . . . in good faith." 25 U.S.C.
21 § 2710(d)(7)(A). IGRA provides a remedial process for tribes that prevail on their claim that a
22 state has failed to negotiate in good faith. *Id.* § 2710(d)(7)(B)(iv-vii). The remedial process is
23 designed to produce a compact through mediation between a tribe and state. *Id.* §
24 2710(7)(B)(iv). If the state and tribe do not reach agreement during mediation they must each
25 submit a proposed compact to the mediator, who shall select from the two proposed compacts the
26
27
28

one that best comports with IGRA, applicable federal law, and the findings and order of the court. *Id.* Thereafter the state has 60 days to consent to the selected compact. *Id.* § 2710(d)(7)(B)(vi)-(vii). If the state does not consent, the mediator shall forward the selected compact to the Secretary, who "shall prescribe, in consultation with the Indian tribe, procedures," *id.* § 2710(d)(7)(vii), under which class III gaming may be conducted by the tribe.

Although North Fork and the Governor executed a compact in 2012 (2012 Compact) governing class III gaming, the 2012 Compact is no longer in effect. AR00002187. The 2012 Compact was ratified by the California legislature on May 2, 2013, via Assembly Bill No. 277 (AB 277). AB 277 (Hall), (2013-2014 Reg. Sess.) (Cal. July 3, 2013) *chaptered at* 2013 Stat. Ch. 51; Cal Gov. Code § 12012.5. On July 3, 2013, the Governor approved AB 277. In compliance with 25 C.F.R. § 293, the California Secretary of State submitted the 2012 Compact to the Secretary for review and approval. AR00002187. The Assistant Secretary—Indian Affairs, took no action within 45-days and subsequently published notice that the 2012 Compact was "considered to have been approved" by operation of IGRA. Notice of Tribal-State Class III Gaming Compact Taking Effect, 78 Fed. Reg. 62649-01 (Oct. 22, 2013). In a November 4, 2014 referendum, California voters opted to overturn AB 277[2] and following the 2014 referendum, California refused to recognize the validity of the 2012 Compact or enter into further negotiations with North Fork for a new compact. AR00002187.

As a consequence North Fork filed suit against California pursuant to IGRA's remedial provision, 25 U.S.C. § 2710(d)(7). On November 13, 2015, this Court ruled that California had

[2] Legal disputes regarding the 2012 Compact are "effectively moot" in light of the "Secretarial Procedures prescribed by the Secretary," because the 2012 Compact is no longer in effect. *Stand Up III*, 204 F. Supp. 3d at 247.

failed to "enter into negotiations with North Fork for the purpose of entering into a Tribal-State compact within the meaning of § 2710" and ordered the parties to conclude a compact within 60 days. *North Fork*, 2015 WL 11438206, at *12. The parties did not conclude a compact within 60 days and the Court appointed a Mediator. The Mediator selected a compact to which the State did not consent and, as required by IGRA, the Mediator notified the Secretary of the State's failure to consent and submitted the selected Compact to the Secretary for conversion to Secretarial Procedures. AR0000001-03, 2187.

On July 29, 2016, the Secretary fulfilled IGRA's mandate by prescribing procedures and sending a letter notifying the Tribe and the State that Secretarial Procedures were prescribed and in effect. AR00002188.

III. LEGAL BACKGROUND

Stand Up has brought claims beyond IGRA, under NEPA, CAA, and the Johnson Act. The following legal background is relevant:

IGRA. As described above, IGRA allows gaming on land that is taken into trust after IGRA's enactment if, among other alternatives, the Secretary finds that the gaming on the land "would be in the best interest of the Indian tribe and its members," and "would not be detrimental to the surrounding community," and "if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A). If the Secretary makes a favorable determination, the land will be gaming-eligible if the governor concurs within one year (with a possible 180-day extension). 25 C.F.R. § 292.23(b).

NEPA. For "major Federal actions significantly affecting the quality of the human environment, a detailed statement" must be produced by the relevant federal agency, concerning

the environmental impact, unavoidable adverse environmental effects, and alternatives to the proposed action. 42 U.S.C. § 4332(C). NEPA does not apply where "existing law applicable to the agency's operations expressly prohibits or makes compliance impossible." 40 C.F.R. § 1500.6. Moreover, if an agency's action is not a major federal action, then no environmental review is necessary.

CAA. The Clean Air Act's implementing regulations exempt agencies from the requirement to conduct a conformity determination where the agency's action does not cause new emissions that exceed specified emissions rates. 40 C.F.R. § 93.153(b), (c)(1).

Johnson Act. The Johnson Act makes it "unlawful to manufacture, recondition, repair, sell, transport, possess, or use any gaming device . . . within Indian country as defined in section 1151 of title 18 . . . ." 15 U.S.C. § 1175(a). Gambling devices include slot machines. *Id.* § 1171(a). IGRA, which was enacted after the Johnson Act, specifies that the Johnson Act does not apply "to any gaming conducted under a Tribal-State compact" which is "in effect" and entered into by a State in which "gambling devices are legal." 25 U.S.C. § 2710(d)(6). IGRA requires the Secretary to authorize class III gaming activities pursuant to Secretarial Procedures that are "consistent with the proposed compact selected by the mediator," "the provisions of this chapter," and "the relevant provisions of the laws of the State." *Id.* § 2710(d)(7)(B)(vii).

IV. RELATED ACTIONS

Stand Up has brought two other actions related to this matter, one of which was its lawsuit raising nearly identical claims in the U.S. District Court for the District of Columbia in 2012, the other in California State Court in 2013.

A. Stand Up's Related Action in the District of Columbia

Stand Up and several other plaintiffs (collectively, "Stand Up") challenged the Secretary's two-part determination and trust decision in the United States District Court for the District of Columbia. *See Stand Up I*, 919 F. Supp. 2d at 54. The *Stand Up III* Court denied Stand Up's and Picayune Rancheria of Chukchansi Indians' motions for summary judgment, granted the defendants' motions for summary judgment on all of Picayune's claims, granted the defendants' motions for summary judgment on most of Stand Up's claims, and dismissed Stand Up's remaining claims as moot and/or for failure to join an indispensable party. *Stand Up III*, 204 F. Supp. 3d at 247. Picayune also challenged the same action in the same court; that case was consolidated with Stand Up's. *Stand Up I*, 919 F. Supp. 2d at 55 n.5. Stand Up later amended its complaint to challenge the Secretarial determination and trust decision on new grounds: that the Governor's concurrence was invalid, the 2014 referendum rendered the 2012 Compact and the decision invalid, and the CAA. 1st Am. Compl., *Stand Up for California! v. U.S. Dep't of the Interior*, No. 12-cv-2039 Doc. 56 (D.D.C. June 27, 2013); 3d Am. Compl. *id.* Doc. 103 (D.D.C. Dec. 3, 2014).

After the administrative record for the challenged decisions were filed, the Federal Defendants sought and were granted a partial remand without vacatur to cure a procedural defect regarding a notice requirement for the CAA conformity determination. *See id.*, Doc. 63 (Aug. 1, 2013); *id.* Doc. 77 (Dec. 16, 2013). The conformity determination was reissued by Federal Defendants in April of 2014.

After the parties filed cross-motions for summary judgment, on September 6, 2016, the court issued a decision rejecting Stand Up and Picayune's claims. *Stand Up III*, 204 F. Supp. 3d at 212, *appeal docketed Nos.* 16-5327, 16-5328 (D.C. Cir. Nov. 15, 2016). Stand Up appealed the summary judgment decision but not the ruling that California was an indispensable party.

B. Stand Up's Related Action in the Courts of California

Stand Up has also brought a lawsuit in California state court which challenges the Governor's authority, under California law, to concur in the Secretary's two-part determination. *Stand Up for California! v. Brown*, No. MCV062850 (Cal. Super. Ct. Madera Cty. Compl. filed Mar. 27, 2013). Although the Superior Court ruled against Stand Up, the Fifth Appellate District reversed. *Stand Up for California! v. California*, 211 Cal. Rptr. 3d 490 (Ct. App. 2016), review granted (Mar. 22, 2017). On March 22, 2017, the California Supreme Court granted review of the case and ordered that further action was deferred pending disposition of the *United Auburn* case. *See Stand Up for California v. State*, 390 P.3d 781 (Cal. 2017). Because the California Supreme Court has granted review, the Fifth District's decision "has no binding or precedential effect, and may be cited for potentially persuasive value only." Cal. Rules of Court 8.1115(e)(1).

C. Other Cases in the Eastern District of California

Two other cases have been filed in the Eastern District of California purporting to challenge the Secretary's issuance of procedures. Those include *Picayune Rancheria of Chukchansi Indians v. U.S. Dep't of the Interior*, No. CV 16-0950-AWI-EPG (E.D. Cal. filed July 1, 2016) and *Club One Casino, Inc. v. U.S. Dep't of the Interior*, No. CV 16-01908-AWI-EPG (E.D. Cal. filed Dec. 21, 2016). Additionally, *Cal-Pac Rancho Cordova, LLC v. United States Dep't of the Interior*, No. CV 16-02982-KJM-KJN (E.D. Cal. Filed Dec. 21, 2016), involves an APA challenge to a separate prescription of Secretarial Procedures.

D. Cases in California State Courts

1. *Picayune Rancheria of Chukchansi Indians v. Brown*, 178 Cal. Rptr. 3d 563, 229, Cal. App. 4th 1416 (Ct. App. 2014). Picayune's California Environmental Quality Act challenge to the Governor's concurrence in the Secretary's decision to take the Madera site into trust for

North Fork was rejected by the Superior Court and Court of Appeal. The California Supreme Court denied review.

2. *Picayune Rancheria of Chukchansi Indians v. Brown*, No. MCV 072004, (Cal. Super. Ct. Madera Cty., filed Mar. 21, 2016). This is Picayune's second complaint in state court challenging the Governor's concurrence. The court initially granted North Fork and California's demurrers but on January 10, 2017, vacated its order pending the outcome of the two other California court actions described below.

3. *United Auburn Indian Cmty. v. Brown*, 208 Cal. Rptr. 3d 487, 4 Cal. App. 5th 36 (Ct. App. 2016). This is a challenge to the Governor's concurrence in a Secretarial determination regarding the Enterprise Rancheria of Maidu Indians. The Superior Court ruled for California and the Court of Appeal for the Third District affirmed, and determined that the Governor's concurrence was valid. On January 25, 2017, the California Supreme Court granted review and the case is undergoing merits briefing.

STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56, summary judgment may be granted when the court finds, based on the pleadings, depositions, and affidavits and other factual materials in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a), (c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In cases brought pursuant to the Administrative Procedure Act (APA), there is no need for "fact finding" because "the court's review is limited to the administrative record . . . ." *Nw Motorcycle Ass'n v. U.S. Dep't of Agriculture*, 18 F.3d 1468, 1472 (9th Cir. 1994); *Lacson v. U.S. Dep't of Homeland Sec.*, 726 F.3d 170, 171 (D.C. Cir. 2013) ("determining the facts is generally the agency's responsibility, not ours").

To the extent a plaintiff states a claim under the APA, the reviewing Court should uphold an agency action unless the plaintiff demonstrates that the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance in law," 5 U.S.C. § 706(2)(A), "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right," *id.* § 706(2)(C), or "without observance of procedure required by law." *Id.* § 706(2)(D). The scope of review under the arbitrary and capricious standard is "narrow" and "a court is not to substitute its judgment for that of the agency." *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011). (Citations omitted).

ARGUMENT

Stand Up's Complaint raises five claims. The first alleges violations of the Johnson Act. This claim fails because it contradicts a plain reading of IGRA's text, purpose, legislative history, Ninth Circuit case law, and common sense. Stand Up's second claim alleges the Secretary failed to comply with NEPA, but this claim fails on the merits because the Secretary was not required to prepare a NEPA analysis before issuing the Secretarial Procedures. Stand Up's third claim alleges that the Secretary violated the CAA, but the Secretary was not required to make a CAA conformity determination before prescribing the procedures because the prescription of Secretarial Procedures is exempt from the conformity requirements. Stand Up's fourth claim concerns FOIA, and Stand Up has not indicated that its FOIA claims effect any of its other claims. Stand Up's Fifth Claim challenges the lawfulness of the Secretarial Procedures. That claim fails for three independent reasons. First, Stand Up is collaterally estopped from bringing a claim based on the Governor's concurrence. The District Court for the District of Columbia has already ruled against Stand Up on this issue and Stand Up did not appeal. Second, the Secretarial Procedures are lawful. Third, the Secretary was not required to consider the

concurrence's validity in issuing the Secretarial Procedures. Fourth, Stand Up's claim is an impermissible collateral attack on the Madera Site's underlying gaming eligibility (an issue that Stand Up has already litigated). Fifth, Stand Up impermissibly seeks to exceed the administrative record. Sixth, the validity of the Governor's concurrence under state law has no bearing on this case and, to the extent it does, the concurrence is valid.

Federal Defendants respectfully request summary judgment be entered against Stand Up on all of their claims.

I. THE ISSUANCE OF SECRETARIAL PROCEDURES DOES NOT VIOLATE THE JOHNSON ACT (CLAIM I)

Stand Up contends that IGRA and the Johnson Act prohibit the Secretary from issuing Secretarial Procedures that authorize slot machines. Pls.' Mem. at 8, Doc. 29. This is a misreading of IGRA, which contains a waiver of the Johnson Act. 25 U.S.C. § 2710(d)(6). IGRA authorizes class III gaming, including slot machines, that are 1) authorized by tribal "ordinance or resolution;" 2) "located in a State that permits such gaming for any purpose by any person, organization, or entity;" and 3) "conducted in conformance with a Tribal-State compact entered into by the Indian [T]ribe and the State." 25 U.S.C. § 2710(d)(1)(A)-(C). When a State fails to negotiate in good faith a Tribal-State compact, a tribe may sue the state and, as happened here, when a Court finds the State did not negotiate in good faith and the State did not consent to the compact selected by the mediator, the Secretary "shall prescribe . . . procedures." *Id.* § 2710(d)(7)(B)(vii). Critically, IGRA states that "under [Secretarial Procedures] class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." *Id.* § 2710(d)(7)(B)(vii). The plain language of IGRA authorizes class III gaming, including slot machines, pursuant to Secretarial Procedures. The Secretarial Procedures authorized class III gaming activities that are also authorized under California law—this includes slot machines.

AR00002202-03. The inquiry need not go any further. Stand Up's convoluted argument that IGRA and the Johnson Act conspire to deny the Secretary any authority to issue Secretarial Procedures that include slot machines is contrary to IGRA when it is read in whole, contradicts IGRA's purpose and the relevant caselaw, is not supported by legislative history, and would fail even if IGRA were ambiguous. The administrative record demonstrates that "Secretarial Procedures are properly viewed as a full substitute for a Class III gaming compact." AR00002295. There is no basis in statute or authority to suggest that Secretarial Procedures—a remedy for a state's failure to comply with this Court's orders to negotiate in good faith and conclude a gaming compact—cannot authorize the same activities that a tribal-state compact can authorize. *See* 25 U.S.C. § 2710 (d)(7)(B)(iii-iv).

A. Stand Up's Argument Contradicts IGRA's Plain Meaning and Language

IGRA is clear that Secretarial Procedures are a full and complete substitute for a tribal-state compact. Just as compacts are exempt from the criminal prohibitions in IGRA and the Johnson Act, 25 U.S.C § 2710(d)(6), 18 U.S.C. § 1166(c)(2), so too are Secretarial Procedures.

The plain reading of IGRA refutes Stand Up's argument that the Johnson Act prohibits slot machines when the Secretary has issued procedures as a result of IGRA's remedial process. The Johnson Act, "shall not apply to any gaming conducted under a Tribal-State compact that — is entered into under paragraph (3) by a State in which gambling devices are legal, and is in effect." 25 U.S.C. § 2710(d)(6). IGRA describes Tribal-State compacts and provides a remedial provision that allows tribes to obtain a compact when a State does not negotiate in good faith. Ultimately, such cases may result in the prescription by the Secretary of "procedures which are consistent with the proposed compact selected by the mediator . . . and under which class III

gaming may be conducted on the Indian lands over which the tribe has jurisdiction." 25 U.S.C. §2710(d)(7)(vii).

Stand Up's argument relies on reading 25 U.S.C. § 2710(d)(6) as if other provisions of IGRA, specifically IGRA's remedial provision, *id.* § 2710(d)(7), did not exist. But statutory language "cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Mich. Dep't. of Treasury*, 489 U.S. 803, 809 (1989). (Citations omitted). Stand Up's reading of IGRA would render its remedial process nonsensical and superfluous because it would make the result of a remedial process, Secretarial Procedures, less than a compact obtained with a state's consent (even consent obtained after the mediator selected a compact). Stand Up's position is "at odds with one of the most basic interpretive canons, that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . .'" *Corley v. United States,* 556 U.S. 303, 314 (2009) (citing *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). Stand Up attempts to conjure intent and language out of thin air to suggest that "Secretarial procedures are a 'second best' alternative." Pls.' Mem. at 19. Its reading of IGRA's remedial scheme is that if a tribe prevails then it gets a "second best" prize for winning its good faith suit. That is not supported by the statute's language or purpose.

Stand Up's argument is essentially that because the text of IGRA does not say "Compact and Secretarial procedures" in 25 U.S.C. § 2710(d)(6), Secretarial Procedures are a "second best." However, the fact that only slot machines are singled out demonstrates its absurdist reading. If Stand Up's argument were applied to the rest of IGRA, Secretarial Procedures would accomplish nothing and would allow no class III gaming at all. For example, IGRA authorizes

class III gaming "only if such activities are . . . conducted in conformance with a Tribal-State compact." 25 U.S.C. § 2710(d)(1)(C). That provision doesn't mention Secretarial Procedures either. Stand Up does not argue that provision should be interpreted the same way it thinks 25 U.S.C. § 2710(d)(6) should be interpreted, thus its interpretation would render Secretarial Procedures completely meaningless, allowing no class III gaming. Stand Up seeks to foist upon the statute a contrived interpretation that, if applied to the entire statute, would render IGRA's entire remedial scheme a nullity.

Stand Up's argument also plainly contradicts an additional portion of IGRA's statutory language. IGRA provides that "the Secretary shall prescribe . . . procedures — which are consistent with the proposed compact selected by the mediator . . . — [and] the provisions of this chapter . . . ." 25 U.S.C. § 2710(d)(7)(B)(vii)(I). First, the compact selected by the mediator allowed slot machines. Stand Up's suggestion would nullify Congress's command for Secretarial Procedures consistent with the one selected by the mediator by precluding slot machines. Yet it admits that the mediator can select a compact that allows slot machines. Pls.' Mem. at 11. Congress demanded that the Procedures be consistent with the compact selected by the mediator and said nothing about slot machines. Moreover, Congress also wrote that the compact should be consistent with "the provisions of this chapter," which includes the Johnson Act waiver. IGRA does not require the Secretary to modify the Procedures to be consistent with other federal laws, including the Johnson Act.

IGRA's plain language and meaning make clear that class III gaming under Secretarial Procedures is equivalent to class III gaming under a compact. Stand Up's reading would make the whole remedial process a pointless exercise. If an interpretation of a statute "would produce absurd results" then that interpretation should "be avoided if alternative interpretations consistent

with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). "When a natural reading of the statutes leads to a rational, common-sense result, an altercation of the meaning is not only unnecessary, but also extrajudicial." *Ariz. State Bd. for Charter Sch. v. U.S. Dep't of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) ("[W]ell-accepted rules of statutory construction caution us that 'statutory interpretations which would produce absurd results are to be avoided'" (quoting *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004)). It would be very odd for Congress to take pains to identify and exempt from the Johnson Act activities undertaken consistent with a tribal-state compact, and then to not apply that exemption to the product of the judicial remedy for a state's failure to negotiate a tribal-state compact in good faith. A common-sense and natural reading of IGRA makes clear that Secretarial Procedures are to be treated the same as a tribal-state compact.

B. Stand Up's Argument Is Contrary to IGRA's Purpose and the Caselaw Interpreting IGRA

Stand Up's argument that Secretarial Procedures are "second best" to compacts is not only inconsistent with IGRA's plain language and meaning, but also its purpose. Pls.' Mem. at 19. When a tribe prevails in a good-faith lawsuit pursuant to IGRA's remedial provision the result is that "once the Secretary of the Interior prescribes procedures to govern gaming that are consistent with [the mediator's] selection, [the tribe] will be authorized to build the casino and engage in the gaming that it seeks." *Big Lagoon Rancheria v. California*, 789 F.3d 947, 956 (9th Cir. 2015). IGRA's remedial provision protects the interests of tribes by providing a judicial remedy for a state's failure to negotiate a compact in good faith. It is intended to provide a full substitute for a compact, and nothing in IGRA's language provides for a "second class" compact. "The purpose of [IGRA] is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal

1 governments." 25 U.S.C. § 2702(1). Secretarial Procedures carry out that purpose. There is no
2 "second best" system provided for class III gaming in IGRA. This Court should reject Stand
3 Up's attempt to impose one.
4 Indeed, the only reasonable reading of IGRA consistent with its purpose treats Secretarial
5 Procedures as a complete remedy for a state's failure to negotiate a compact in good faith and,
6 ultimately, failure to consent to the last, best offer compact selected by the Mediator. 25 U.S.C.
7 § 2710 (d)(7)(iii–vi). "To guard against the possibility that states might choose not to negotiate,
8 or to negotiate in bad faith, Congress included a complex set of procedures designed to protect
9 tribes from recalcitrant states." *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299
10 (9th Cir. 1998). "If a court finds that a state has failed to negotiate in good faith, IGRA
11 empowers the Court to order additional negotiations and, if necessary, to order the parties into
12 mediation in which a compact will be imposed." *Rincon Band of Luiseno Mission Indians of*
13 *Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010). (Citation omitted).
14 Moreover, in a case examining whether certain electronic machines were class III or class II
15 gaming devices, the Ninth Circuit held that "[i]f the machines in dispute here are excluded from
16 Class II, they fall within Class III, and can be operated by the Band only pursuant to a compact
17 or to procedures prescribed by the Secretary of the Interior." *Sycuan Band of Mission Indians v.*
18 *Roache*, 54 F.3d 535, 542 (9th Cir. 1994). (Citations omitted).
19 IGRA's remedial provision is nowhere described as producing a "second best" allowance
20 for Indian gaming which would exclude slot machines from Secretarial Procedures. The only
21 interpretation consistent with IGRA's purpose is that Secretarial Procedures stand in the stead of
22 a tribal-state gaming compact.
23 C. IGRA Is Not Ambiguous, But If It Were, Stand Up's Argument Is Still Wrong
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IGRA is not ambiguous, and the result here is clear. But even if it were ambiguous, "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted for their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). (Citations omitted). The Ninth Circuit has applied this canon to IGRA and, specifically, 25 U.S.C. § 2710, the portion of the act at issue here. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 731 (9th Cir. 2003). The *Blackfeet* canon applies to "federal statutes that are 'passed for the benefit of dependent Indian tribes,'" and where there is ambiguity in the statute. *Id.* "IGRA is undoubtedly a statute passed for the benefit of Indian tribes." *Id.* at 729. *See also* S. Rep. No. 100-446 at 15 *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (1988) (noting Congress's expectation that this canon would apply to IGRA); to the extent there is ambiguity about whether Secretarial Procedures are a full substitute for a tribal-state compact, the *Blackfeet* canon applies here, and requires that any ambiguity be interpreted in favor of Indian tribes.

D. Legislative History Supports the Secretary's Position

Stand Up's discussion of legislative history remarkably avoids discussing Secretarial Procedures and instead offers up its own views about the history of Indian gaming since the passage of IGRA. To the extent that legislative history is relevant, it should address the provisions at issue, not any party's irrelevant views regarding the propriety of Indian gaming and slot machines. Fortunately, Congress did describe a "carefully crafted" remedial process which was designed "to meet tribal concerns that States may refuse to allow them to initiate class III gaming." 134 Cong. Rec. 25,377-25,378 (1988) (statement of Rep. Vucanovitch). The "need to provide some incentive for States to negotiate with tribes in good faith" is satisfied by the remedial process. S. Rep. 100-446 at 13. Stand Up's quotations of Senators Reid and Inouye make no mention of Secretarial Procedures and Stand Up's interpretation of them largely implies

that there is no remedial process in IGRA. Yet, IGRA contains a remedial provision. Stand Up's citation of legislative history does nothing to help their case.

Moreover, nothing in the legislative history singles out slot machines for special treatment. If Congress wanted to ban slot machines, or limit them to certain types of compacts, it could have done so in its text. It did not do so in 1988, and has not done so since.

II. ISSUANCE OF THE SECRETARIAL PROCDEDURES DID NOT VIOLATE NEPA (CLAIM II)

The operation of IGRA required the Secretary to prescribe procedures "consistent with the proposed compact selected by the mediator . . ., the provisions of this chapter, and the relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)B)(vii)(I). There is no statutory prong requiring the Secretary to conduct a NEPA analysis. Stand Up, however, asserts that the Secretary was required to prepare a NEPA analysis, claiming that the Secretarial Procedures are a "major federal action," Pls.' Mem. at 23, and that the Secretary had discretion requiring him to comply with NEPA. Neither argument is consistent with controlling law. First, Secretarial Procedures, like the tribal-state compacts for which they are a complete substitute, are not major federal actions under NEPA. Second, even if a NEPA analysis was required, the Secretary already prepared an EIS for the acquisition of the Madera Site which would satisfy any NEPA obligations.

A. Secretarial Procedures Do Not Require the Secretary to Produce a NEPA Analysis

There are three independent reasons to enter summary judgment for Federal Defendants on Stand Up's NEPA claim. First, issuance of Secretarial Procedures is not a "major federal action." The Secretary is not the relevant cause of any environmental effects that trigger NEPA. Second, NEPA's rule of reason applies here; Secretarial Procedures should not constitute a major federal action because, given the Secretary's lack of discretion, preparing a NEPA analysis

would not produce any information relevant to the issuance of the Procedures. Third, subjecting the issuance of Secretarial Procedures to NEPA conflicts with IGRA, and an agency need not adhere to NEPA when doing so would create an irreconcilable and fundamental conflict with IGRA.

1. Secretarial Procedures Are Not a Major Federal Action Under NEPA.

NEPA requires an environmental analysis for "major [f]ederal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). Secretarial Procedures are not a major federal action, which is an "action[] with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. The relevant "effects" of a major federal action are those that "are caused by the action." *Id.* § 1508.8. No NEPA analysis is necessary here because the Secretary is not the relevant cause of any alleged environmental effects. The Secretary lacks discretion over the Secretarial Procedures' alleged environmental effects and therefore cannot be the cause of those effects. IGRA mandates the issuance of procedures, including the content of those procedures, and the Secretary cannot alter them in response to any analysis prepared pursuant to NEPA. NEPA does not require the Secretary to prepare an environmental analysis before prescribing procedures.

NEPA requires more than a "but for" relationship to make an agency prepare a NEPA analysis. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). Instead, there must be a "reasonably close causal relationship" between any environmental effect and the alleged cause. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *Public Citizen*, 541 U.S. at 767. In *Public Citizen* the Supreme Court held that when an agency is subject to a statutory mandate that requires it to take a particular action, the agency has "no authority to prevent the effect." *Id.* It analogized NEPA's close causal relationship between the

environmental effect and the alleged cause to the "familiar doctrine of proximate cause from tort law." *Id.* An agency that "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions . . . cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770. Therefore, it need not analyze the effect. In *Public Citizen*, the Supreme Court analyzed causation under NEPA, regarding rules promulgated by the Department of Transportation to regulate cross-border Mexican trucking operations. *Id.* at 759. The Court found that the agency lacked "statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety," and therefore had "no discretion to prevent the entry of Mexican trucks." *Id.* at 759-60, 770. In that case, only the President, not the agency, "could authorize (or not authorize) cross-border operations from Mexican motor carriers, and because" the agency had "no discretion to prevent the entry of Mexican trucks, its [environmental assessment] did not need to consider the environmental effects arising from the entry." *Id.* at 770. *See also EarthReports v. FERC*, 828 F.3d 949, 955 (2016) (following *Public Citizen*); *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016) (same); *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016) (same).

This case is analogous to *Public Citizen*. "IGRA, indeed, requires the Secretary to [issue procedures] if the state does not agree to the mediator-selected compact." Pls.' Mem. at 26 (citing 25 U.S.C. § 2710(d)(7)(B)(vi)). However, IGRA does not grant the Secretary the "discretion that brings the Secretarial Procedures within NEPA's purview." *Id.* IGRA specifically describes the procedures' content. The procedures must be "consistent with the proposed compact selected by the mediator," "the provisions of this chapter," and "the relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Like *Public Citizen*, where the relevant statute obligated the agency to allow entry of Mexican trucks if they satisfied

the statute's specific criteria, *Public Citizen*, 541 U.S. at 766, the Secretary was required by IGRA to issue Secretarial Procedures consistent with IGRA's specific criteria.

Stand Up does not articulate, nor could they, how those requirements make the Secretary the proximate cause of any environmental effect. Stand Up instead discusses all the ways that the Secretarial Procedures are consistent with the proposed compact selected by the mediator. Pls.' Mem. at 26-27 ("in prescribing the procedures, the Secretary maintained the provisions from the proposed compact . . . ."). For example, the compact selected by the mediator authorized 2,500 slot machines and two facilities and so did the secretarial Procedures. *Compare* AR000022 *with* AR00002203-2204. The Secretary did not and was not authorized to evaluate the environmental impacts of this, but instead was required to prescribe procedures "consistent with a mediator's selected compact, IGRA, and the relevant provisions of state law." AR00002188. Stand Up asks this Court to assume that NEPA grants the Secretary some authority to alter IGRA's requirement to prescribe procedures "consistent with the proposed compact selected by the mediator," but there is no basis for that assertion. Stand Up's analogy to *Natural Resources Defense Council, Inc. v. Berklund*, 458 F. Supp. 925 (D.D.C. 1978), fails because there the Secretary had some discretion over the content of a coal lease.[3] That case also predates *Public Citizen*, which is controlling in this case. Here, Congress required that the Secretarial Procedures be consistent with the very terms that Stand Up complains should have spawned a NEPA analysis.

The Secretary did, however, modify Section 8.2 of the compact selected by the mediator, in order to allow the State to opt into the regulatory responsibilities in the compact and providing

[3] To the extent Stand Up relies upon *Sierra Club v. Mainella*, 459 F. Supp. 2d 76 (D.D.C. 2006), that case involved whether an agency was "constrained by its own regulations from considering impacts," not whether a statute imposed such constraints. *Id.* at 105.

that, in the State's absence, that the National Indian Gaming Commission would step in. AR000062, 2245. The Secretary explained that he did this in order to issue procedures "consistent with . . . the provisions of this chapter," stating that "[t]he mediator's selected compact provides the State Gaming Agency with authority to regulate the Tribe's class III gaming activities. The Secretary, however, cannot unilaterally obligate the State to carry out those regulatory responsibilities under these Secretarial Procedures." AR00002245. The Secretary had good reason to make this change: IGRA required it and imposing those duties on the State of California could raise Tenth Amendment issues. Once again, the Secretary was not the proximate cause of an effect under NEPA, because he had no discretion to avoid making the change to the Procedures. Fundamentally, however, it is very hard to see how such a change could have any environmental effects whatsoever.

In short, the Secretary is constrained by IGRA from considering the environmental effects of the Secretarial Procedures. As a result, Federal Defendants are entitled to summary judgment on this issue.

2. The Rule of Reason Applies Because an EIS Would Serve No Purpose.

If the Court determines that the Secretarial Procedures are a major federal action, then NEPA's rule of reason applies and the Secretary was still not required to conduct an environmental analysis. *Public Citizen* recognized the "rule of reason." *Public Citizen*, 541 U.S. at 767. "Where the preparation of an EIS would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS." *Id.* (Citations omitted). Because of IGRA's mandate the Secretary had no discretion in this case, and as a result, NEPA analysis would have had no impact, no use, and provided no useful information. "The law does not require the doing of a futile act." *Ohio v.*

Roberts, 448 U.S. 56, 74 (1980), *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36 (2004).

"NEPA remains subject to a 'rule of reason' that frees agencies from" preparing a NEPA analysis "on 'the environmental impact of an action it could not refuse to perform.'" *Alaska Wilderness League v. Jewell,* 788 F.3d 1212, 1225 (9th Cir. 2015) (quoting *Public Citizen*, 541 U.S. at 769-70). The rule of reason guides "every aspect" of an agency's NEPA compliance, *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991) and "[w]here an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency" does "not need to consider the environmental effects arising from those actions." *Alaska Wilderness League*, 788 F.3d at 1225. (Citations omitted). Stand Up's argument is essentially that the Secretary could have done more paperwork even if it would have accomplished nothing. "NEPA's purpose is not to generate paperwork - even excellent paperwork - but to foster excellent action." 40 C.F.R. § 1500.1(c). Thus, the "informational role" of an EIS (or other NEPA document) is "to ensure that the larger audience can provide input as necessary to the agency making the relevant decision." *Public Citizen*, 541 U.S. at 768 (quotation marks and citation omitted). Where there is no relevant decision before the agency, there is no opportunity for the public to provide input that might improve that decision, and further NEPA documentation would serve no goal of the statute. The rule of reason applies here because the Secretary lacks authority under IGRA to change the Secretarial Procedures in light of any environmental information discovered as a result of performing a NEPA analysis.

3. Preparing a NEPA Analysis Would Conflict With IGRA.

Preparing a NEPA analysis for the Secretarial Procedures would create "an irreconcilable and fundamental conflict with the substantive statute at issue." *Jamul Action Comm. v.*

Chaudhuri, 837 F.3d 958, 963 (9th Cir. 2016) (quoting *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 648 (9th Cir. 2014)); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Okla.*, 426 U.S. 776, 788 (1976). The Ninth Circuit has held that performing a NEPA analysis for NIGC's approval of a gaming ordinance creates an irreconcilable conflict between NEPA and IGRA. *Jamul Action Comm.*, 837 F.3d at 964. NIGC must approve a gaming ordinance within "90 days after the date . . . any tribal gaming ordinance or resolution is submitted" to the Chairman of NIGC." *Id.* (citing 25 U.S.C. § 2710(e)). Preparing a NEPA analysis takes far longer than that. *Id.* Therefore, the Ninth Circuit held that even if NIGC's approval of a gaming ordinance was a major federal action, NIGC was not required to prepare an EIS because there is an irreconcilable statutory conflict between NEPA and IGRA. *Id.* at 962. Although there is not a hard deadline imposed on the Secretary to prescribe Procedures, the Ninth Circuit has recognized that the remedial process is intended to "permit the tribe to process gaming arrangements on an expedited basis." *Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1041. This Court has also recognized this expedited process. *See North Fork Rancheria of Mono Indians v. California,* 2016 WL 4208452, at *8 (E.D. Cal. Aug. 10, 2016) (Ishii, J.) (discussing 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii)). A NEPA process is inherently at odds with the timeframe anticipated by IGRA's remedial process. When a tribal-state compact is submitted to the Secretary, IGRA provides only 45 days to approve or disapprove the compact. 25 U.S.C. § 2710(d)(8)(C). Applying NEPA to Secretarial Procedures, but not a tribal-state gaming compact which must be approved or disapproved in 45 days, would be a perverse result.

Critically, IGRA specifies that the Secretary shall prescribe class III gaming procedures that are consistent with the proposed compact selected by the mediator," "the provisions of this

chapter," and "the relevant provisions of the laws of the state." 25 U.S.C. § 2710(d)(7)(B)(vii)(I). There is no authority granted to the Secretary to consider a NEPA analysis. Requiring the Secretary to add an environmental assessment to the existing requirements for procedures would create an irreconcilable conflict between NEPA and IGRA.

B. To the Extent NEPA Analysis Is Necessary the Existing EIS Is Sufficient

The Secretary has already prepared (and Stand Up has already challenged and lost its challenge) an EIS for the Secretary's trust acquisition of the Madera site. The fee-to-trust decision was not "based upon any particular Tribal-State Compact" or whether class III gaming occurred under a tribal-state compact or Secretarial procedures. *Stand Up III*, 204 F. Supp. 3d at 256. The record relating to that decision is not before this Court; if the Court needs that record Federal Defendants will provide it. The Secretarial Procedures already incorporate the existing EIS by reference, AR00002264, and its mitigation measures. AR00002270-71. No environmental analysis pursuant to NEPA was necessary to issue the Secretarial Procedures, but even if it were, the existing NEPA analysis prepared for the Secretary's trust acquisition is sufficient. NEPA allows an agency to fulfill its requirements using an existing NEPA document if "it adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c). An agency does not need to prepare a new NEPA analysis if the action and its effects have already been "covered sufficiently by an earlier environmental document." *id.* § 46.300. Because the Secretary was required by IGRA to prescribe procedures consistent with the compact selected by the mediator, there are some differences between the Secretarial Procedures and the proposed alternative analyzed in the EIS: like the mediator's selected compact the Secretarial Procedures provide for two facilities instead of one and 2,500 slot machines instead of 2,000. Nevertheless, there is no requirement to evaluate these changes

1 because the rule of reason applies to reviewing the adequacy of an EIS, *Pac. Coast Fed'n of*
2 *Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1099 (9th Cir. 2012), and the new circumstances
3 have no bearing on the proposed action or its impacts. *Westlands Water Dist. v. Dep't of*
4 *Interior*, 376 F.3d 853, 873 (9th Cir. 2004).

5 Stand Up has already challenged the existing EIS. It lost. The EIS for the trust
6 acquisition examined "class III gaming on the Madera Site, with significant related development
7 in terms of hotel, restaurant and transportation space." *Stand Up III*, 204 F. Supp. 3d at 257.
8 Stand Up has not demonstrated that more analysis is necessary.

9 **III. THE CONFORMITY REQUIREMENTS OF THE CAA DO NOT APPLY TO THE SECRETARY'S ACTION IN ISSUING THE PROCEDURES (CLAIM III)**

10 A. The Clean Air Act and Conformity Regulations

11 The Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), establishes a joint state and
12 federal program to control the Nation's air pollution by prescribing national primary and
13 secondary ambient air quality standards. *See* 42 U.S.C. § 7409. The United States
14 Environmental Protection Agency ("EPA") establishes national ambient air quality standards
15 ("NAAQS") for certain pollutants, *id.*, and each air quality control region in each state is later
16 designated as "attainment," "nonattainment," or "unclassifiable" with respect to each NAAQS.
17 *Id.* § 7407(d)(1)(A). Each State must adopt and submit to EPA for approval a state
18 implementation plan ("SIP") that provides for the implementation, maintenance, and
19 enforcement of the NAAQS in a designated air quality region. *Id.* § 7410(a)(1). Federal agency
20 actions must conform to these plans:

21 > No department, agency, or instrumentality of the Federal Government shall engage in,
22 > support in any way or provide financial assistance for, license or permit, or approve, any
23 > activity which does not conform to [a SIP] after it has been approved or promulgated
24 > under section 7410 of this title.

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Id. § 7506(c)(1). "Conformity" to a SIP generally means that the anticipated emissions from a proposed activity will not frustrate an implementation plan's purpose of attaining and maintaining the NAAQS. *See id.* §§ 7506(c)(1)(A)-(B).

EPA has promulgated regulations to assist federal agencies in determining the conformity of their actions with SIPs. *See* 40 C.F.R. § 93.150-165 ("General Conformity Regulations"). In relevant part, these regulations implement the statutory requirement for a conformity determination for proposed federal actions in nonattainment areas. *Id.* § 93.153(b). A determination must be prepared for each pollutant (and its specified precursors) where the total emissions caused by the proposed federal action would equal or exceed specified emissions levels. *Id.* The Agency, however, exempted certain actions from the provisions of the rule, including "[r]ulemaking and policy development and issuance." *Id.* § 93.153(c)(2)(iii).

Stand-Up argues that the Secretary was required to make a CAA conformity determination under 42 U.S.C. § 7506(c)(1) before prescribing the procedures. EPA, however, has exempted rulemaking, including administrative adjudications, and policy development and issuance from the scope of the conformity requirements. 40 C.F.R. § 93.153(c)(2)(iii). The Secretary's action in prescribing the procedures at issue is a rulemaking or administrative action that establishes the requirements and limits for the operation of class III activities at the facility. Accordingly, this action is exempt from the conformity requirements.

Furthermore, the argument that the Secretary was required to conduct a conformity analysis is inconsistent with the plain language of IGRA. IGRA specifies that the procedures are to be "consistent with the proposed compact selected by the mediator under clause (iv), the provisions of [IGRA], and the relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)(vii)(I). This language does not give the Secretary the discretion to alter provisions of

the mediator-selected compact based on conformity with the relevant SIP. Congress limited the Secretary's consideration to IGRA, thereby excluding consideration of other federal statutes. There is no basis for the suggestion that, in later enacting CAA Section 7506(c)(1), Congress intended to broaden the federal laws to be considered in prescribing the procedures to include the CAA. "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Therefore, the suggestion that the Secretary cannot prescribe procedures under IGRA without ensuring that the procedures will conform to the applicable SIP must be rejected.

In addition, applying the conformity requirements of CAA Section 7506(c)(1) when the Secretary prescribes Procedures would subject those Procedures to requirements that do not apply to a compact negotiated by the Tribe and the State. First, IGRA section 2710(d)(8)(B) provides that the Secretary can disapprove a negotiated compact only if it violates IGRA; "any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands;" or "the Trust obligations of the United States to Indians." A compact negotiated by a State and a Tribe cannot violate the requirements of CAA Section 7506(c)(1). The obligations under that section apply only to federal agencies; the Tribe and State, of course, are nonfederal actors. For this reason, the Secretary could not disapprove a negotiated compact on the ground that the compact violated CAA Section 7506(c)(1). An argument that the Secretary's decision to approve or disapprove a negotiated compact is itself subject to the requirement to make a conformity determination under this section of the CAA would create a direct conflict between the CAA and IGRA. In IGRA, Congress provided that a negotiated compact will be considered approved if the Secretary does not either approve or disapprove the compact within 45 days. 25

U.S.C. § 2710(d)(8)(C). A conformity determination could not be completed within that time frame. Therefore, requiring such a determination would create a conflict between the CAA and IGRA. Under these circumstances, the conflict must be resolved in favor of the specific statute – IGRA. *See Jamul Action Comm.*, 837 F.3d at 964-65 (NEPA does not apply to National Indian Gaming Commission's action in approving a tribal gaming ordinance under 25 U.S.C. 2710(e) where IGRA required the Commission to act within 90 days and it was impossible to complete a NEPA analysis in that time).

Nothing in IGRA Section 2710 supports the conclusion that Congress intended that Secretary-prescribed procedures must comply with requirements under the CAA that would not apply to a negotiated compact. Therefore, Stand Up's effort to convince the Court to impose such an additional burden should be rejected.

IV. THE SECRETARY DID NOT VIOLATE FOIA (CLAIM IV)

Stand Up has asserted violations of FOIA but none of its assertions relate to the administrative record or its completeness. Stand Up's motion and memorandum has not asserted that this claim has any bearing on its other claims, nor could it. Should the relevant agency respond to Stand Up's request prior to the completion of this briefing or the issuance of a decision, Federal Defendants will alert the Court and brief the effects of that response.

V. THE SECRETARIAL PROCEDURES ARE LAWFUL (CLAIM V)

There are multiple reasons why summary judgment should be entered against Stand Up on its fifth claim.

Collateral Estoppel: Stand Up unambiguously challenged the Governor's concurrence in *Stand Up III*. No. 12-cv-2039, 3d Am. Compl., *Stand Up III.*, Doc. 103, ¶¶ 63, 68. In that Complaint, Stand Up alleged that the concurrence constituted a "legislative act for which" the

Governor "lacked authority under California law, thereby rendering the Governor's concurrence and the Secretary's" two-part determination "null and void." *Id.* ¶ 63. Stand Up alleged that if the Governor's concurrence was invalid, "the Secretary's decision to take the [Madera Site] into trust . . . is arbitrary, capricious, and an abuse of discretion . . . ." *Id.* at ¶ 68. Now, in this case, Stand Up's fifth claim alleges that the "prescription of Secretarial procedures" was unlawful because the Madera Site is not eligible for gaming because the Governor of California lacked authority to concur in the determination under 25 U.S.C. § 2719(b)(1)(A). First. Am. Compl., Doc. 13, ¶ 73. In *Stand Up III*, the district court dismissed Stand Up's claims, holding that the state of California was a necessary and indispensable party. Stand Up is collaterally estopped from reasserting this claim.

Stand Up's Claim fails under federal law: Stand Up's claim fails on the merits for a variety of reasons. 1) The issuance of Secretarial Procedures was lawful. 2) The Secretary was entitled to rely on the facial validity of the concurrence. 3) Stand Up seeks to collaterally attack the Madera Site's gaming eligibility, and this is not permissible. 4) This case must be decided on the record before the Court. 5) The validity of the Governor's concurrence under state law has no bearing on this case and, to the extent it does, the concurrence is valid.

A. Collateral Estoppel Bars Stand Up's Fifth Claim

Stand Up has already challenged, and lost, its claim that the Governor's concurrence was invalid. Stand Up alleged that "the Governor's concurrence is invalid" and therefore the Secretary's "decision to take the [Madera Site] into trust is . . . arbitrary, capricious, and an abuse of discretion, not in accordance with the law. . . ." 3d Am. Compl., *Stand Up III*., No. 12-cv-2039, Doc. 103, ¶ 68; see also ¶ 63, 111. After briefing on whether California was an indispensable party, the court ruled that Stand Up's claims "in any way involving the Governor's

concurrence must be dismissed due to the absence of an indispensable party." *Stand Up III*, 204 F. Supp. 3d at 254. The Court held that "California's interest would be directly affected by the relief sought by the plaintiffs, who ask this Court to make determinations about the propriety and continuing viability of [the] Governor['s] action significantly affecting the State's statutory obligations, relationship with its citizens and federally-recognized Indian tribes, and fiscal interests." *Id.* at 253. Claims in "any way involving the Governor's concurrence" were dismissed by that court. *Id.* at 254.

That court also confirmed the reasonableness of the Secretary's actions. "Indeed, neither the IGRA nor the IRA require the Secretary to determine the validity of the Governor's concurrence under California law." *Id.* at 255. Stand Up also seeks to relitigate that issue in this case. The issue of whether California was a necessary and indispensable party was fully litigated and briefed by all parties to this case. The determination of this issue was necessary to *Stand Up III's* judgment to dismiss certain claims filed by Stand Up. *Id.* *Stand Up III*'s holding that California is an indispensable party should not be relitigated here. "Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties." *Beauchamp v. Anaheim Union High Sch. Dist.*, 816 F.3d 1216, 1225 (9th Cir. 2016) (citation omitted). For claim preclusion to apply: "(1) the issue must be identical to one alleged in prior litigation; (2) the issue must have been "actually litigated" in the prior litigation; and (3) the determination of the issue in the prior litigation must have been "critical and necessary" to the judgment." *Id.* at 1225 (quoting *Clark v. Bear Stearns & Co. Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992)); *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011).

Each element for issue preclusion is satisfied here. Stand Up was a plaintiff in *Stand Up III* and had sued Federal Defendants; North Fork was a defendant-intervenor. That is identical to

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this case. In each case, Stand Up has alleged that the Governor's concurrence was invalid. In Stand Up's first challenge the Court examined whether California was a necessary and indispensable party to claims based on Stand Up's allegations that the Governor's concurrence was invalid; the issue was actively litigated. *Stand Up III*, 204 F. Supp. 3d at 254. Finally, that determination was necessary to its judgment to dismiss some of Stand Up's claims pursuant to Rule 19. *Id.*

B. The Secretary's Issuance of Secretarial Procedures Was Lawful

1. The Issuance of Secretarial Procedures Was Mandatory and Lawful.

Simply put, IGRA required the Secretary to issue Secretarial Procedures as a result of IGRA's remedial process. IGRA explicitly provides a cause of action "initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A)(i). If "the court finds that the State has failed to negotiate in good faith with the Indian tribe" then "the court shall order the State and the Indian Tribe to conclude such a compact" within 60 days. *Id.* § 2710(d)(7)B)(iii). "If a State and an Indian tribe fail to conclude a Tribal-State compact" then "the Indian tribe and the State shall each submit to a mediator . . . a proposed compact that represents their last best offer for a compact." *Id.* § 2710(d)(7)(B)(iv). The mediator then selects the compact that "best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court." *Id.* The selected compact is then submitted to the tribe and State, *id.* § 2710(d)(7)(B)(v), and if "a State consents to a proposed compact" then "the proposed compact shall be treated as a Tribal-State compact." *Id.* § 2710(d)(7)(B)(vi). But, if the "State does not consent . . . to a proposed compact submitted by the mediator . . . the mediator shall notify the Secretary and the

1 Secretary shall prescribe, in consultation with the Indian tribe, procedures." *Id.* §
2 2710(d)(7)(B)(vii). It is undisputed that this is the process that occurred here; the result is the
3 prescription of the Secretarial Procedures now challenged. AR00002186-02325. Accordingly,
4 the Secretary was obligated by "shall" to do what IGRA mandated:
5
6 prescribe, in consultation with the Indian tribe, procedures--(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter,
7 and the relevant provisions of the laws of the State, and (II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.
8
9 25 U.S.C. § 2710(d)(7)(B)(vii). This is what the Secretary did.
10
11 IGRA's command that "the Secretary *shall prescribe* . . . procedures," *id.* (emphasis
12 added), is mandatory, if IGRA's remedial process has failed to result in a tribal-state compact.
13 *Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("Congress used 'shall' to impose discretionless
14 obligations"); *Lexecon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)
15 ("[T]he mandatory 'shall' . . . creates an obligation impervious to . . . discretion.") (citation
16 omitted); *United States v. Monsanto*, 491 U.S. 600, 607 (1989) (using "shall" in a statute
17 expressed Congress' "intent that forfeiture be mandatory in cases where the statute applied.");
18 *Black's Law Dictionary*, at 1375 (6th ed. 1990) ("As used in statutes . . . [shall] is generally
19 imperative or mandatory.") "The word 'shall' is ordinarily 'The language of command.'" *Serv.*
20 *Emps. Int'l Union. v. United States*, 598 F.3d 1110, 1113 (9th Cir. 2010) (quoting *Anderson v.*
21 *Yungkau*, 329 U.S. 482, 485) (1947). While courts do not read "shall" as mandatory when such a
22 reading impinges upon administrative enforcement discretion, *see Wood v. Herman*, 104 F.
23 Supp. 2d 43, 47 (D.D.C. 2000) ("While it is a recognized tenet of statutory construction that the
24 word 'shall' is usually a command, this principle has not been applied in cases involving
25 administrative enforcement decisions." (Citation omitted)), no such reading is permissible here.
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The Secretary's issuance of Secretarial Procedures was not "arbitrary, capricious, [or] an abuse of discretion," 5 U.S.C. § 706(2)(A), because the Secretary had no discretion on the question of whether to issue Secretarial Procedures. North Fork brought a good-faith suit against California. It prevailed. IGRA stated that the Secretary "shall prescribe" procedures if the State failed to consent to the compact selected by the mediator. That is what the Secretary did. In the letter accompanying the procedures, the Secretary recognized his mandatory "duty under IGRA to prescribe Class III gaming procedures." AR00002186; 2188 ("IGRA requires the Secretary to prescribe procedures"). When a statute mandates an agency action, it cannot be found to be arbitrary, capricious, or an abuse of discretion. *Public Citizen*, 541 U.S. at 770 (decision was not arbitrary, capricious, or abuse of discretion when the agency "has no discretion"). There is simply no basis, under the APA's deferential standard of review, to find that the Secretarial Procedures violate IGRA and the APA.

Stand Up correctly admits that "the Secretary cannot refuse to prescribe procedures." Pls.' Mem. at 14. Mandatory actions cannot be determined to be arbitrary, capricious, or an abuse of discretion. *Id.* The Secretary properly fulfilled his mandate under IGRA by prescribing Secretarial Procedures that are consistent with the compact submitted to him by the Court appointed mediator in *North Fork*. 2015 WL 11438206, at * 2; AR00002187. Stand Up has not demonstrated that the Secretary's action was arbitrary, capricious, or an abuse of discretion.

Stand Up's argument that validity of the Governor's concurrence is relevant to IGRA's requirement that Secretarial Procedures "are consistent with . . . the relevant laws of the State . . .," 25 U.S.C. § 2710(d)(7)(vii), is wrong. This provision says that the Secretarial Procedures, which govern class III gaming in lieu of a tribal-state compact, must be consistent with the

relevant state laws. Stand Up makes no showing that the validity of the Governor's concurrence under state law is relevant to the Secretarial Procedures.

The Secretary did, however, consider the *relevant* provisions of state laws, i.e., those laws having significant and demonstrable bearing on whether the Secretarial Procedures were "consistent with the State's regulatory role in class III gaming under numerous existing compacts with tribes in the State." AR00002187. The Secretary considered the relevant state law and found that the Secretarial Procedures are "consistent with the State's regulatory role in Class III gaming under numerous existing compacts with tribes in the State." *Id.* "Under IGRA, these Secretarial Procedures are properly viewed as a full substitute for a Class III gaming compact[.]" *Id.* at AR00002295. The state laws that are relevant to Secretarial Procedures are those which set forth the conditions of gaming. Those are the laws that Secretarial Procedures must be consistent with.

Stand Up has failed to allege that the Secretarial Procedures are unlawfully prescribed because they are inconsistent with any provision of state law actually relevant to the conditions of gaming. The Governor's concurrence has nothing to do with this remedial provision of IGRA—it involves the Secretary's two-part determination. Stand Up's argument that the Secretary should have considered the Governor's concurrence before issuing the Secretarial Procedures is simply contrary to the plain text of IGRA.

2. The Secretary was entitled to rely on the validity of the Concurrence.

Federal Defendants are entitled to summary judgment because the Secretary was not required by IGRA, or any other federal statute, to make a determination of whether the Governor's facially valid concurrence was valid as a matter of California law.

Federal law does not require federal officials to look behind the actions of state officials to determine whether those officials complied with state law. In *United States v. Lawrence*, the Ninth Circuit held that the Secretary was entitled to rely upon actions by the Governor of Washington "whether or not the Governor's proclamation was valid under Washington law." 595 F.2d 1149, 1151 (9th Cir. 1979) (citation omitted). *Lawrence* involved state retrocession of jurisdiction over Indian lands under 25 U.S.C. § 1323, which allowed states to retrocede jurisdiction over Indian lands in certain matters to the United States. An executive order allowed the Secretary to accept any retrocession by publishing it in the federal register. Exec. Order No. 11435, 33 Fed. Reg. 17,339 (Nov. 23, 1968). In 1971, the Governor of Washington proclaimed retrocession of jurisdiction over the Suquamish Port Madison Indian Reservation. The Ninth Circuit concluded that the Governor's authority to retrocede jurisdiction was irrelevant, citing "the plenary power of the federal government over Indian affairs" and "the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action. *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191 (1978).

Other retrocession cases support the Secretary's reliance on the validity of the Governor's concurrence. In *Omaha Tribe of Nebraska v. Vill. of Walthill*, 334 F. Supp. 823 (D. Neb. 1971), the court determined that the relevant question was "not whether the state resolution was valid under state law, but whether it was valid under federal law." *Id.* at 831. "If the elected representatives . . . acted beyond their power in sending the Secretary of the Interior a notice offering a retrocession of jurisdiction over certain Indian country, then they must answer to the people of the state for their negligence." *Id.* at 832.

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It is critical to distinguish between (1) whether the Governor's concurrence is valid as a matter of state law and (2) whether a federal cause of action lies against the Secretary for relying on a facially valid Governor's concurrence that plaintiffs allege violates state law. IGRA does not mandate that the states follow a particular procedure to issue a Governor's concurrence. *See* 25 U.S.C. § 2719(b)(1)(A) ("but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination"). There is no other standard in IGRA by which the Secretary may determine whether he has received a Governor's concurrence. In other portions of IGRA Congress specifically mentions the State, and not merely the Governor. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,367 (May 20, 2008) ("section 2719 of IGRA only requires the Governor's concurrence" and does not require "the consent of the State . . . ."). To the extent that any party attacks the Secretary's reliance on a Governor's concurrence in a two-part determination, it must do so based on IGRA, not some arbitrary standard that suits their case. The standard to be applied is simple —"the Governor of the State in which the gaming activity is to be conducted concurs . . . ." 25 U.S.C. § 2719(b)(1)(A). This does not mean that a state court cannot find that the Governor violated her own authority. That, however, is not a standard that applies to the Secretary when he must evaluate whether the "Governor of the State" concurred in his two-part determination. In this case, the Governor of California concurred.

Stand Up's attempts to distinguish the retrocession cases are misplaced. Like the retrocession cases, the federal government has plenary power over Indian affairs, *see Oliphant*, 544 F.2d at 1012, including authority to acquire land in trust for Indian tribes and authorize gaming on Indian lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204 n.1, 207 (1987), *superseded by statute*, *Michigan v. Bay Mills Indian Cmty*., 134 S. Ct. 2024

(2014). Further, as in the retrocession cases, the Secretary has an interest in being able to rely on the validity of the Governor's concurrence. In this case, the need for finality is accentuated by the investments made by Tribes who build casino operations on trust land relying on the concurrence. Additionally, like the retrocession cases, the Secretary was not given authority to second guess the Governor's determination. IGRA specifically states that the Governor, and only the Governor, need concur. 25 U.S.C. § 2719(b)(1)(A). The retrocession cases did not involve a statute that allowed the Secretary to second guess the governors of different states, either.

This matter, and the retrocession cases, are also distinguishable from *Pueblo of Santa Ana.* v. *Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997). In that case, the Tenth Circuit examined whether, under New Mexico law, the Governor of New Mexico had unilateral authority to bind that state to a tribal-state compact absent legislative ratification. *Id.* Stand Up's argument challenges whether a Governor's concurrence in the Secretary's two-part determination is valid. There are important differences. A Governor's concurrence occurs only once and its effect is to remove the restrictions imposed by IGRA on tribal land use, and does not require the State to take further regulatory action. Retrocession was, similarly, a one-time event which altered jurisdiction over land. Binding a state to a gaming compact can impose ongoing regulatory obligations on the state. This case, like *Oliphant*, fundamentally involves "the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action." *Oliphant*, 544 F.2d at 1012.

Pueblo of Santa Ana did not involve the Governor's concurrence in a two-part determination. *Pueblo of Santa Ana*, 104 F.3d at 1548. Instead, it involved a tribal-state gaming

compact. *Id.* In that case, the Supreme Court of New Mexico had ruled that the gaming facilities were operating under tribal-state compacts that were invalid. The Indian tribes operating the casinos brought an action for a declaratory judgment that would establish their right to continue gaming under those compacts. This case, instead, concerns whether the Secretary lawfully issued Secretarial Procedures, which are a full substitute for a tribal-state gaming compact. Stand Up's use of a state court action involving the Governor's concurrence under state law, in a different provision of IGRA, is simply not applicable to either *Pueblo of Santa Ana*, or the Secretarial Procedures.

Stand Up also overstates the role of state law in the purposes of IGRA. While IGRA does "provide a legal framework within which tribes could engage in gaming," it also sets "boundaries to restrain aggression by powerful states." *Rincon Band*, 602 F.3d at 1027. Secretarial Procedures issue only after a State has an opportunity to prove to a court that it attempted to negotiate a tribal-state compact in good faith. The Secretarial Procedures carefully considered the relevant provisions of state law, and took care to avoid a situation where "the State may not be willing to fulfill" the regulatory role it normally fulfills for tribal-state compacts. AR00002187-88.

Here, regardless of whether the retrocession cases or *Santa Ana Pueblo* are applicable, the Secretary's two-part determination, which is not challenged here, relied on the facially valid Governor's concurrence. Stand Up advances many reasons why it believes the Secretary should not have relied upon it, but it fails to advance a workable framework for how the Secretary might delve into each State's law and determine whether each State's governor acted lawfully. It cannot do so, because the plain language of IGRA refers to the "Governor's" concurrence, not

that of the legislature or a state court. If a Governor mishandles a concurrence, that is a political question for the voters of the state to address as they choose.

3. Stand Up Cannot Collaterally Attack the Madera Site's Gaming Eligibility; It Has Already Done So And Lost.

The Secretary was not required to reissue the two-part determination that Stand Up challenged in *Stand Up III* when he issued Secretarial Procedures. Accordingly, Stand Up's argument that the California Supreme Court's prospective decision may change the Madera Site's gaming eligibility and retroactively make the Secretarial Procedures invalid should be rejected. Stand Up's argument is essentially an impermissible collateral attack on a decision made in 2012 under a different provision of IGRA. Stand Up is already litigating this issue in the District of Columbia. *Stand Up III*, 204 F. Supp. 3d at 254.

The Ninth Circuit has held that "parties cannot 'use a collateral proceeding to end-run procedural requirements governing appeals of administrative decisions.'" *Big Lagoon Rancheria* 789 F.3d at 953 (quoting *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012)). The practical application of that holding is that parties cannot "attack collaterally the [Secretary's] decision to take" land "into trust outside the APA" because doing so "would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government." *Id.* at 954. To challenge a land-into-trust decision a party must "file the appropriate APA action." *Id.* In this case, Stand Up has not challenged the agency action that took the Madera site into trust but has challenged the Secretarial Procedures. Claim V is an attempt to collaterally attack an agency action that is not challenged in this case. Accordingly, summary judgment is appropriate on this claim.

Moreover, IGRA does not grant Stand Up a private right of action to challenge the eligibility of Indian land for gaming or to enjoin gaming conducted under Secretarial Procedures.

1 *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000)
2 ("where IGRA creates a private cause of action, it does so explicitly"). To the extent that a tribe
3 engages in gaming without a compact or Secretarial Procedures, "if a tribe opens a casino on
4 Indian lands before negotiating a compact, the surrounding State cannot sue; only the Federal
5 government can enforce the law." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2034
6 n.6 (2014). (Citation omitted). To the extent Stand Up contends that any gaming in the future
7 might be unlawful, only the federal government can act to enforce the law.
8
9 4. <u>This Case Must Be Decided On The Record Before the Court.</u>
10 The California Court of Appeal's December 2016 decision provides no basis to determine
11 that the Secretarial Procedures are arbitrary, capricious, or an abuse of discretion. "A reviewing
12 court must review the administrative record before the agency at the time the agency made its
13 decision." *Nat'l Wildlife Fed'n v. U.S. Army Corps of Engineers*, 384 F.3d 1163, 1170 (9th Cir.
14 2004) (citation omitted). "Review of an agency action is limited to the record considered and
15 relied upon by the agency at a time the decision is made." *Wilderness Soc'y v. Dombeck*, 168
16 F.3d 367, 377 (9th Cir. 1999) (citing *Nat'l Wildlife Fed'n v. Burford*, 871 F.2d 849, 855 (9th Cir.
17 1989). In *San Luis & Delta-Mendota Water Auth. v. U.S. Dep't of Interior*, the Court held that
18 decisions issued by the California Court of Appeal after the challenged agency action had taken
19 place could not be considered because the decisions were not part of the record that was
20 considered and relied upon by the agency. 624 F. Supp. 2d 1197, 1212 (E.D. Cal. 2009).
21 Stand Up argues that its Fifth claim is based upon what the California Supreme Court
22 holding will be when it eventually issues a decision on Stand Up's state court litigation. Yet,
23 there is an administrative record before the Court and the decision that has yet to be issued by the
24 California Supreme Court is not a part of that record. Like *San Luis & Delta-Mendota Water*
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1 *Auth.*, a court decision that post-dates the administrative record cannot be used to challenge an
2 agency action. *Pueblo of Santa Ana* does not help Stand Up here, either. That case was not an
3 APA case. No one alleged that the Secretary had acted improperly when approving compacts
4 that were later invalidated by New Mexico's courts. 104 F.3d at 1557. Simply put, Stand Up
5 cannot rely on a yet-to-be issued state court decision to challenge the Secretarial Procedures. No
6 matter the result of Stand Up's state court litigation, it cannot retroactively invalidate the
7 Secretarial Procedures.
8
9 5. That Validity of the Governor's Concurrence Under State Law Has No
10 Bearing On This Case and, to the Extent It Does, the Concurrence is
11 Valid.

12 This Court need not consider Stand Up's state court action. If the Court believes it must
13 reach the question of whether the Governor's concurrence is valid as a matter of state law, it
14 should order supplemental briefing and determine whether the Governor's concurrence is valid
15 as a matter of state law. As explained in Federal Defendants' opposition to Stand Up's motion
16 for a stay, it is entirely unnecessary to delay resolution of this case while the California State
17 Courts consider other cases.
18

19 **CONCLUSION**

20 Federal Defendants respectfully request that this Court grant their motion for summary
21 judgment and deny Stand Up's motion for summary judgment.
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25 DATED this 19th day of July, 2017.
26

Respectfully submitted,
27 JEFFREY H. WOOD
Acting Assistant Attorney General
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/s/ Joseph Nathanael Watson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 19, 2017, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STAND UP FOR CALIFORNIA!, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants,

and

North Fork Rancheria of Mono Indians,

Intervenor Defendant.

Case No. 16-cv-02681-AWI-EPG

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In the end, this case presents the Court with a single issue: when the Indian Gaming Regulatory Act ("IGRA") requires the Secretary of the Interior ("Secretary") to prescribe Secretarial Procedures for a tribe because a state has failed to act in good faith, whether the tribe is penalized because the Secretary lacks the authority to prescribe Procedures that include gaming devices that are otherwise permissible in the state. IGRA contemplates casino-type or "Class III" gaming occurring pursuant to a Tribal-State compact and provides the details regarding what compacts must encompass, how they are approved, and what remedies a tribe has where a state fails to negotiate in good faith. By contrast, Secretarial Procedures are given brief treatment, as the last stop in a remedial process for a tribe confronted by a state that refuses to negotiate a compact in good faith or to negotiate at all. Based on this lack of detail, Plaintiffs ("Stand Up") in their first claim urge this Court to draw implicit distinctions, with far-reaching consequences, between the Secretary's authority pursuant to compacts and Procedures based on a lack of specificity in IGRA. Specifically, they claim that the Johnson Act prohibits certain forms of gaming under Procedures but not pursuant to compacts. This approach in effect penalizes a tribe when a state engages in bad faith and forces the Secretary to promulgate Procedures.

Stand Up's second and third claims attempt to further mine the purported distinction between Procedures and compacts by claiming that Secretarial Procedures are subject to review under the National Environmental Protection Act ("NEPA") as well as the Clean Air Act ("CAA"), even though the same is concededly not true in the case of a Tribal-State compact. And finally, Stand Up asks this Court to find that the Secretary is barred from issuing Procedures unless and until every other requirement for Class III gaming under IGRA has been met, which is not true for compacts. Stand Up's theory is not that the North Fork Rancheria of Mono Indians ("Tribe" or "North Fork") cannot game until all of IGRA's requirements are met, but that the Secretarial Procedures themselves must be vacated if Stand Up can prevail in challenging the Tribe's compliance with other requirements of IGRA.

These arguments are a brazen attempt to transform the mechanism that Congress designed to counteract state intransigence into a weapon to be used strategically to constrain tribal gaming. None of this is supported by the plain language of IGRA, and Plaintiffs' challenges to the Secretarial Procedures issued for the Tribe should be rejected and the Court should grant Defendants' motions for summary judgment.

ARGUMENT

I. THIS COURT SHOULD REJECT STAND UP'S WHOLLY UNSUPPORTED THEORY THAT SECRETERIAL PROCEDURES ARE INFERIOR AND CANNOT AUTHORIZE THE USE OF SLOT MACHINES.

Stand Up's newly minted theory, that IGRA authorizes two different types of Class III gaming—one for Tribal-State compacts and another, inferior and restrictive, type under the Secretarial Procedures—should be rejected. Stand Up seeks to narrowly construe a particular subsection in § 2710(d), 25 U.S.C. § 2710(d)(6), which waives the Johnson Act's (15 U.S.C. § 1175) restriction on the use of gambling devices in Indian county, such that it only applies to Class III gaming under Tribal-State compacts and not Secretarial Procedures.[1] Their argument, would, if adopted, mean that slot machines may never be authorized through Secretarial Procedures. It would read "Class III" gaming in two entirely different ways, a result that is contrary to bedrock statutory interpretation principles and IGRA's congressional purpose. It would, indeed, force this Court to add limitation language to the legislation. And it would lead to the perverse result that states would be incentivized to refuse to negotiate in good faith, knowing that their intransigence will be rewarded by a ban on certain types of Class III gaming – an outcome completely opposite from the remedial purpose intended by Congress. Defendants are entitled to summary judgement in their favor with respect to Stand Up's Johnson Act claim.

Stand Up's theory would result in "Class III" gaming having a different meaning for Secretarial Procedures. An elementary principle of statutory construction requires that terms

[1] Moreover, the Interior Department has consistently held the view that Class III gaming under the Secretarial Procedures does not differ from Class III gaming under a Tribal-State compact. That interpretation should be accorded deference.

within the same statute should be given the same meaning. *See, e.g.*, *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) ("identical words used in different parts of the same act are intended to have the same meaning"). Congress used the same term, "class III gaming," with regard to both Tribal-State compacts and Procedures. 25 U.S.C. § 2710(d)(7)((B)(vii)(II) expressly says Secretarial Procedures apply to all "class III gaming [to be] conducted on Indian lands." The term "class III gaming" is not limited here, and nowhere else does the statute provide a separate definition for the purposes of Secretarial Procedures. Stand Up's "plain language" reading of IGRA means the statute requires Secretarial Procedures to allow "class III gaming [to be] conducted" on Indian lands, 25 U.S.C. § 2710(d)(7)((B)(vii)(II), while *simultaneously* making unlawful Secretarial Procedures that authorize Class III gaming utilizing devices banned by the Johnson Act. It would apply exclusively the language at 25 U.S.C. § 2710(d)(6) to effectively override 25 U.S.C. § 2710(d)(7)((B)(vii)(II)'s plain meaning and unconditioned authorization of Class III gaming pursuant to Secretarial Procedures, making "class III gaming" mean different things in the same statute. That interpretation flouts the statutory interpretation principle and must be rejected.

Stand Up's theory violates the principle that courts may not add limitation language to statutes. Courts lack authority to add restrictive terms to statutes. *Overseas Educ. Ass'n, Inc. v. FLRA*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley, J., concurring). Yet this would happen if this Court added "except slot machines" to 25 U.S.C. § 2710(d)(7)((B)(vii)(II).

Stand Up's theory is inconsistent with the statutory scheme. It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food and Drug Administration v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989)). That means that "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation." *Brown & Williamson*, 529 U.S. at 132; *see also Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014). In addition, courts "must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a

1 provision in a manner that renders other provisions of the same statute inconsistent, meaningless
2 or superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). Stand Up's theory, in contrast,
3 requires reading 25 U.S.C. § 2710(d)(6) without context. It would, among other things, mean
4 that IGRA simultaneously authorizes Class II gaming, which includes devices banned by the
5 Johnson Act, 25 U.S.C. § 2703 (7)(A)(i), even as it prohibits use of the same devices for Class
6 III gaming. In no sense can this convoluted reading of IGRA be sustained, let alone understood
7 as tracking its plain language.

8 *Not one word of legislative history supports Stand Up's theory, and the congressional*
9 *purpose refutes it*. "[U]nderstanding the historical context in which a statute was passed can help
10 to elucidate the statute's purpose and the meaning of statutory terms and phrases." *County of*
11 *Amador v. Dep't of Interior,* No. 15-17253, D.C. No. 2:12-cv-01710-TLN-CKD, slip op. at 20
12 (9th Cir. Oct. 6, 2017) attached as Exh. 1 to Kintz Declaration. Congress enacted IGRA with the
13 stated purpose "to provide a statutory basis for the operation of gaming by Indian tribes as a
14 means of promoting tribal economic development, self-sufficiency, and strong tribal
15 governments." 25 U.S.C. § 2702(1). In an effort to read into IGRA a distinction between the
16 scope of Class III gaming under Tribal-State compacts and under Secretarial Procedures, Stand
17 Up alleges, without support in either statutory text or legislative history, that Congress
18 envisioned Secretarial Procedures as allowing only a stunted form of Class III gaming as a result
19 of a tribe failing to convince a state to agree to a compact. This would penalize tribes for the
20 state's failure to negotiate in good faith. The legislative history behind IGRA's gaming compact
21 provision and the remedial process that can result in Secretarial Procedures does not suggest that
22 Secretarial Procedures are anything but a substitute for a gaming compact where a state refuses
23 to agree to a compact. *See S. Rep. 100-446* at 14-15 (1988) (IGRA's remedial process designed
24 to "encourage States to deal fairly with tribes as sovereign governments"); *United States v.*
25 *Spokane Tribe of Indians*, 139 F.3d 1297, 1299-300 (9th Cir. 1998) (through gaming compacts
26 "IGRA shifted power to the states" to regulate tribal gaming but remedial process subjected
27 "recalcitrant states" to suit, "thereby forcing them to enter into a compact"). If Congress
28

1 intended otherwise, it could have said so directly. *County of Amador*, No. 15-17253 at 16 n.8
2 (citing *Zachary v. Cal. Bank & Tr.*, 811 F.3d 1191, 1198-99 (9th Cir. 2016)).

3 Rather than attempting to square its construction of IGRA and the Johnson Act waiver
4 under § 2710(d)(6) with IGRA's legislative history, Stand Up instead attempts to distort the
5 state's role in regulating tribal gaming through gaming compacts. Stand Up argues, [Dkt. 46 at
6 15-18], that states cannot be forced to enter compacts and that where a state demonstrates it
7 negotiated in good faith but was unable to arrive at a compact, the tribe cannot engage in Class
8 III gaming. That is true, but also irrelevant since Secretarial Procedures emerge only where a
9 court has concluded a state did not negotiate in good faith. 25 U.S.C. 2710(d)(7)(B)(iii).
10 Nothing indicates that IGRA is meant to reward states that negotiate compacts in bad faith by
11 drastically limiting the Class III gaming available in Secretarial Procedures.

12 Stand Up also points to 25 U.S.C. § 2710(d)(1)(B), which requires that Class III gaming
13 only be allowed "in a State that permits such gaming for any purpose by any person,
14 organization or entity . . . ." But that is a limitation on all Class III gaming, and simply does not
15 speak to whether Congress intended Secretarial Procedures to offer a curtailed form of Class III
16 gaming that would otherwise be permitted under a Tribal-State compact. In any event,
17 California law now permits the use of slot machines, so this provision is not pertinent here. In
18 sum, Stand Up's attempts to shoehorn its construction of Class III gaming into IGRA's remedial
19 scheme fail and further conflict with IGRA's overall purpose.

20 *Stand Up's theory makes no sense.* But reading IGRA as treating Secretarial Procedures
21 as a variant of a Tribal-State compact that emerges when a state in bad faith refuses to agree to
22 any compact does. The Johnson Act waiver extends to Class III gaming under Tribal-State
23 compacts as well as their substitute, Secretarial Procedures. Section 2710(d)(7)(B)(vii)(II),
24 instead of contradicting the other provision, dictates a requirement that must be followed when
25 the Secretary prescribes Procedures: that such Procedures provide that "class III gaming may be
26 conducted on the Indian lands over which the Indian tribe has jurisdiction." This common sense
27 reading avoids the strained interpretation advanced by Stand Up, which requires concluding that
28 the mention of Class III gaming means something different depending on whether it is used in

connection with compacts or Procedures (in effect, sometimes including devices banned by the Johnson Act, and sometimes not).

Stand Up's theory suffers from other defects. Under its reading of IGRA, the word *only* within § 2710(d)(1) would be rendered inoperative because § 2710(d)(7)(B)(vii)(II) also authorizes Class III gaming under different circumstances. Additionally, if Stand Up were correct—that the Secretary's authority to authorize Class III gaming through the issuance of Secretarial Procedures does not stem from § 2710(d)(1), but from another provision within IGRA viewed as an "exception" to § 2710(d)(1)—this would mean that when the Secretary issues Procedures, he is not bound by the other requirements within § 2710(d)(1). Stand Up essentially reads Secretarial Procedures "Class III gaming" under § 2710(d)(1)(c) to mean "gaming, except for gaming devices restricted under the Johnson Act, regardless of whether a state permits such gaming by operation of state law or whether the tribe has issued an ordinance approved by the National Indian Gaming Commission." And Stand Up reads Tribal-State compact "Class III gaming" under § 2710(d)(1) to mean "gaming, notwithstanding the restrictions under the Johnson act, as long as the state permits such gaming under state law and the tribe has an authorized ordinance." But IGRA does not say this, and nothing empowers Stand Up to add language to and infer meaning into IGRA that is not present in the statute as written by Congress.

Adoption of Stand Up's theory would give states incentives to negotiate in bad faith. This would be an obvious result of a ruling that Procedures may not authorize slot machines otherwise permissible under Class III gaming. Stand Up would impose a rule that even when a federal court has concluded that a state has failed to negotiate in good faith, the Secretary is powerless to remedy that failure, and Procedures that result are, at best, second-best. That result would make the remedial scheme a nullity, a mere charade.

Any ambiguities found within IGRA must be construed in favor of Tribes. In earlier briefing, Federal Defendants noted that if an ambiguity were to be found with respect to the scope of IGRA's authorization of Class III gaming under the Secretarial Procedures, the *Blackfeet* canon would apply, requiring that any ambiguity be interpreted in favor of Indian tribes. *See Montana*, 471 U.S. at 766; *see also Rincon Band of Luiseno Mission Indians of*

1 *Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010) ("In passing IGRA,
2 Congress assured the tribes that the statute would always be construed in their best interests.").
3 [Dkt. 41 at 26].[2] Rather than refuting the application of the *Blackfeet* canon, Stand Up's only
4 response is that the Court should disregard application of the canon because IGRA is not
5 ambiguous. [Dkt. 46 at 20]. Federal Defendants agree with Stand Up that IGRA is not
6 ambiguous and that its meaning is clear – that the language of IGRA coupled with IGRA's
7 overall purpose unequivocally authorize Class III gaming under the Secretarial Procedures to the
8 full extent it is authorized pursuant to a Tribal-State compact. But to the extent this Court
9 regards Stand Up's reading as a viable alternative on some level, the *Blackfeet* canon requires
10 adoption of the statutory reading that does not read IGRA against the interests of tribes.
11
12 **II. THE SECRETARIAL PROCEDURES ARE VALID**

13 **A. Stand Up's Fifth Claim is Barred Based on Issue Preclusion**

14 In spite of Stand Up's efforts to argue its fifth claim is not barred by issue preclusion, this
15 Court has already analyzed and rejected similar efforts made by Picayune, the other plaintiff in
16 the District of Columbia case, to challenge the Secretarial Procedures on the basis of invalidity of
17 the Governor's concurrence. *Picayune Rancheria of Chukchansi Indians v. United States*
18 *Department of Interior*, No. 1:16-CV-0950-AWI-EPG, 2017 WL 3581735, at *9 (E.D. Cal. Aug.
19 18, 2017). Identical to Stand Up's claim here, the Picayune's sixth cause of action in *Picayune*
20 sought challenge "because the Governor's concurrence was invalid . . ., issuance of secretarial
21 procedures for conducting class III gaming on the Madera Site was inconsistent with IGRA."
22 2017 WL 3581735, at *5. Like Stand Up does here, Picayune attempted to argue that collateral
23 estoppel principles do not apply because the validity of the concurrence has been conclusively
24 decided by California Court of Appeals. *Id.* at *5. In rejecting this, the Court recognized that the
25 District of Columbia action held that "'claims [that] in any way involve[ ] the Governor's
26 concurrence must be dismissed due to the absence of an indispensable party,' namely the State of
27 California." 2017 WL 3581735, at *7 (quoting *Stand Up*, 204 F.Supp.3d at 247 n.16). Thus, the

28 [2] Page references to documents in ECF refer to the ECF pagination, not the original pagination.

Court in *Picayune* determined that Picayune was "precluded from re-litigating whether California is an indispensable party to claims challenging the validity of the Governor of California's concurrence with the Secretary's two-part determination," *Picayune*, 2017 WL 3581735, at *14. For the same reasons, Stand Up is precluded from raising the issue here and Stand Up's fifth cause of action must be dismissed on the grounds that the State of California is a necessary and indispensable party to those claims.[3]

B. Stand Up's Challenge to the Secretarial Procedures is An Impermissible Attack on Prior Agency Action

Stand Up acknowledges that its challenge to the validity of the Secretarial Procedures cannot result in an invalidation of the two-part determination or a change in the trust status of the Madera Site, but argues that it is not seeking to collaterally attack those decisions. Yet, Stand Up's basis for challenging the Secretarial Procedures rests on the very premise that the Secretary was under some obligation to *re-evaluate prior determinations made by the Secretary* about the Tribe's gaming eligibility on the Madera Site (based on the validity of the Governor's concurrence) made in the context of those earlier decisions. This is exactly the type of scenario that the collateral attack doctrine is designed to prevent. "The collateral attack doctrine prevents litigants from 'relitigat[ing] the merits of . . . previous administrative proceedings' or 'evading . . . established administrative procedures' by raising a claim that is 'inescapably intertwined with a review of the procedures and merits surrounding' an underlying agency order." *Ctr. for Biological Diversity v. U.S. Envt'l. Prot. Agency*, 847 F.3d 1075, 1092 (9th Cir. 2017) (citing *Americopters, LLC v. FAA*, 441 F.3d 726, 736 (9th Cir. 2006)). And "[a]t its core, the doctrine prohibits a plaintiff from using a later order that implements a prior agency action as a vehicle to undo the underlying action or order." *Ctr. for Biological Diversity*, 847 F.3d at 1092. Nothing in IGRA's remedial process, other provisions of IGRA, or other federal laws, require the Secretary to "delve into the validity of the Governor's concurrence" before it issues Secretarial Procedures.

[3] Despite the Court's decisions being issued on August 18, 2017, ten days before Stand Up's deadline to file its response, Stand Up fails to grapple with, attempt to distinguish, or even cite to the Court's decision.

Rather, the validity of the Governor's concurrence relates to the threshold determination of the Tribe's gaming eligibility on the Madera Site, a determination made in the context of and "inextricably intertwined" with the underlying two-part determination and trust decision. The Secretarial Procedures, on the other hand, are the result of Congress's mandate, established under a wholly separate section of IGRA that was supervised by this Court, that the Secretary "shall" issue Class III gaming procedures after receiving the mediator's compact selection. *Compare* 25 U.S.C. § 2719 (b)(1)(A) and 25 U.S.C. § 2710(d)(7)(A)(vii). The Procedures are not a vehicle to relitigate the issues of the unrelated prior agency decision that Stand Up disagrees with regarding the gaming eligibility of the Madera Site, and for this reason, Stand Up is prohibited from doing so under the collateral attack doctrine.

Moreover, Stand Up's theory – that the potential invalidation of the Governor's concurrence with the Secretary's determination that gaming on the Madera Site will be in the Tribe's best interest and not detrimental to the surrounding community, 25 U.S.C. 2719(b)(1)(A), also invalidates the Secretarial Procedures – is simply wrong. In order to engage in Class III gaming, several conditions must be met. The gaming (1) must be on "Indian lands," (2) must be conducted pursuant to an ordinance approved by the Chairman of the National Indian Gaming Commission, and (3) must be conducted pursuant to a Tribal-State compact (or Secretarial Procedures). 25 U.S.C. § 2710(d)(1)(A,C). Here the Governor's two-part concurrence makes the Madera Site Indian lands eligible for gaming while the Secretarial Procedures meet the requirement that gaming be conducted in "conformance with a Tribal-State compact." If the two-part concurrence is overturned and that in turn makes the Madera Site ineligible for gaming, that does not mean the Secretarial Procedures must be vacated. At most it means the Tribe must take steps to make the Madera Site gaming eligible before gaming pursuant to the Secretarial Procedures may commence. In short, the two-part concurrence provides no basis for overturning the Secretarial Procedures.

C. The Secretary was Entitled to Rely on the Governor's Facially Valid Concurrence

Even if the Secretary were under some obligation to consider the validity of the Governor's concurrence before issuing the Procedures, the Secretary was entitled to rely on the facial validity of the Governor's 2012 concurrence. Stand Up argues that administrative record demonstrates that the Secretary was aware that the concurrence was being challenged and "could potentially be invalidated under state law."[4] [Dkt. 46 at 43]. But even if this were the case, it is not clear what Stand Up thinks the Secretary should have done with this information or how it would have altered IGRA's mandate that the Secretary "shall prescribe" Procedures "which are consistent with the proposed selected compact . . . the provisions of this chapter, and the relevant provisions of the law of the State." 25 U.S.C. § 2710(d)(7)(B)(vii)(I).

Stand Up contends that the provision requiring the Secretary to ensure the mediator-selected compact is consistent with state law required the Secretary to ensure that the Governor's concurrence was consistent with state law. [Dkt. 46 at 46]. Even assuming the Secretary's obligation to looking into "the relevant provisions of the law of the state" went beyond the scope of verifying the mediator-selected compact complies with state law regulation and oversight of gaming, which Federal Defendants contend it does not, at the time that the Secretary issued the Procedures, the Governor's concurrence had not been determined to be invalid under state law.[5] And even today, more than a year after the Secretary prescribed the Procedures, the issue is still

[4] Stand Up cites *Butte County v. Hogan*, 613 F.3d 190 (D.C. Cir. 2010) in support of its argument that the Secretary's failure to consider the validity of the Governor's concurrence violated the Administrative Procedure Act, but *Butte County* does not support that argument. That case involved a situation in which the Department summarily declined to review evidence submitted to the agency by an interested party in violation of 5 U.S.C. § 555(e), which requires that upon an agency's receipt of an interested party's written request, an agency must at least provide a "brief statement of the grounds for the denial." Those facts are not present here. To the extent that Stand Up cites *Butte County* for the proposition that an agency cannot simply ignore contrary record evidence, it has provided no support, other than conjecture, that the Secretary ignored contrary record evidence.

[5] Stand Up in effect argues that the Secretary cannot issue Procedures until every other requirement for Class III gaming is met, because otherwise such the Procedures might approve Class III gaming in violation of IGRA and potentially state law. But as noted above, while gaming may not occur on the Madera Site until all relevant requirements of IGRA are met, that does not mean that Secretarial Procedures, which will only apply to gaming on Indian lands, may not issue until the Indian lands requirement of IGRA is satisfied. Each is a separate, independent prerequisite of Class III gaming.

1 pending before the state courts. Stand Up admits that the record reflects that at the time the
2 Secretary issued the Procedures, both state superior court cases had concluded that the Governor
3 had the authority under state law to concur. *Id.* at 46; [AR00000456-474, AR00000228]. Even
4 if there were a pending appeal to the California Court of Appeals on this issue at the time the
5 Secretary issued the Procedures, this would not have given the Secretary the ability to second
6 guess the Governor's previously-submitted concurrence or otherwise delve into state law and
7 attempt to make a determination of its validity. *See, e.g., Pueblo of Santa Ana v. Kelly*, 104 F.3d
8 1546, 1557 (10th Cir. 1997) ("Congress did not intend to force the Secretary to make extensive
9 inquiry into state law to determine whether the person or entity signing the compact for the state
10 in fact had the authority to do so.") At best, Stand Up's argument seems to be that the Secretary
11 should have waited to see how the state court adjudication resolved before issuing the
12 Procedures. Nothing obligates the Secretary to do so. And notwithstanding the pending
13 California Court of Appeals challenge to the Governor's concurrence at the time of the issuance
14 of the Procedures, federal law imposes no obligation on the Secretary to look beyond the
15 Governor's concurrence to ensure its validity under state law. *United States v. Lawrence*, 595
16 F.2d 1149, 1151 (9th Cir. 1979); *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd*
17 *on other grounds*, 435 U.S. 191 (1978). In fact, requiring the Secretary to look behind the
18 Governor's concurrence would amount to stripping the Governor's actions of a presumption of
19 regularity that would otherwise attach. *See Red Top Mercury Mines, Inc. v. United States*, 887
20 F.2d 198, 202-203 (9th Cir. 1989) ("There is a presumption of regularity in the performance of
21 their duties by government officials.").
22 Finally, contrary to Stand Up's broad assertion that *Pueblo of Santa Ana v. Kelly*, 104
23 F.3d at 1557, stands for the proposition that the Tenth Circuit has rejected application of
24 retrocession cases to IGRA, that case specifically dealt with the validity of a Tribal-State
25 compact under IGRA, which constitutes a contractual agreement between a state and tribe
26 imposing affirmative duties on the state. In contrast, the Governor's concurrence pursuant to 25
27 U.S.C. § 2719(b)(1)(A), like a Governor's retrocession, "is a one-time event between the state
28

and the United States." *Pueblo of Santa Ana*, 104 F.3d at 1555 (citing *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1294 (D.N.M. 1996)).

III. THE ISSUANCE OF SECRETARIAL PROCEDURES DOES NOT VIOLATE THE NATIONAL ENVIRONMENTAL POLICY ACT

The Secretary's prescription of Procedures by which North Fork may conduct Class III gaming does not violate the NEPA. Since the Secretary's action does not constitute a major federal action, NEPA's requirements are not triggered. And to the extent that NEPA was triggered, the existing environmental impact statement prepared for the land-into-trust decision satisfies any such obligation. In an effort to support its position that the Secretarial Procedures are a major federal action to which a new NEPA analysis must be done, Stand Up makes several assertions regarding facts and legal principles that it claims Defendants ignore, namely that the mediator does not have the authority to authorize Class III gaming; that the land-into-trust decision for the Madera Site is a separate and independent decision; and Stand Up's interpretation of the provisions of the Procedures. [Dkt. 46 at 22]. Stand Up is incorrect that Defendants ignore these facts; more importantly, none of them, alone or cumulatively, justify adoption of Stand Up's theory.

A. The Secretarial Procedures are not a major federal action triggering NEPA

To be a major federal action under NEPA, an action must be the legally relevant cause of the alleged environmental effects. *See* 40 C.F.R. §§ 1508.18; 1508.8. NEPA requires more than a "but for" causal relationship; it requires a "reasonably close causal relationship." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004). And such a relationship does not exist when an agency lacks discretion to prevent an effect due to its limited statutory authority. *Id.* at 770.

Here, once certain statutory provisions have been met, IGRA requires the Secretary to prescribe Procedures allowing a tribe to conduct Class III gaming, and only affords the Secretary a limited scope of review in doing so. This Court has recognized that IGRA compels the Secretary's issuance of such Procedures: "Once the Court ordered initiation of the IGRA remedial process, *the Secretary was without discretion*. Once the Secretary was presented with the tribal-state compact selected by the mediator and rejected by the state, *the Secretary was*

required to prescribe procedures under which class III gaming could be conducted on the Madera Site." *Picayune Rancheria of Chukchansi Indians*, 2017 WL 3581735, at *13 (emphasis added). In such circumstance, IGRA states that the Secretary "*shall* prescribe . . . procedures . . . which are consistent with the proposed selected compact . . . the provisions of this chapter, and the relevant provisions of the law of the State." *Id.* § 2710(d)(7)(B)(vii)(I) (emphasis added). By IGRA's express terms, the Secretary is required to issue Procedures consistent with the mediator-selected compact, and may only modify them to comply with IGRA's other provisions or state law. *Id.* As a result, the Secretary lacks discretion to alter the Procedures to address environmental effects that may arise from the contents of the Procedures, and so the Secretary cannot be the cause of any such effects. Therefore, NEPA's requirements are not triggered.

In an effort to impose on the Secretary discretion he does not possess in prescribing the Secretarial Procedures, Stand Up attempts to downplay the significant role that the mediator, appointed and supervised by this Court, plays in the actions that culminate in the issuance of Procedures. While it is true that it is the Secretary, and not the mediator, who authorizes Class III gaming, the discrete roles of the mediator, as selector of the compact, and the Secretary, as the official authorized to issue the Procedures, are defined by IGRA, to which the Secretary must adhere. Without providing supporting authority, Stand Up asserts that the Secretary was free to alter the Secretarial Procedures as he saw fit, but nothing in § 2710(d)(7)(B)(iv) gives the Secretary such broad discretion. It is not for Stand Up or the Secretary to question the mandates of IGRA. Congress made a calculated decision in providing the mediator, a neutral body, the task of selecting the compact that best conforms to IGRA and other federal laws. *Texas v. United States*, 497 F.3d 491, 508 (5th Cir. 2007) ("[I]f mediation is ordered, it is undertaken by a neutral, judicially-appointed mediator who objectively weighs the proposals submitted by the state and tribe. . . . under IGRA's remedial scheme the court-appointed mediator essentially defines the regulations that the Secretary may promulgate."); *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1225 (10th Cir. 2017) ("Congress has narrowly circumscribed the Secretary's authority in prescribing procedures by cross-referencing previous steps in the judicial remedial process.").

Stand Up next asserts that if the Secretary lacks discretion to issue Procedures that deviate from the mediator-selected compact, this would render the "in consultation with the Indian tribe" requirement superfluous. [Dkt. 46 at 24]. Here, the consultation requirement, however, is not tied to agency discretion or intended to dictate a particular result. Rather, it ensures that the tribe whose gaming will be subject to the Procedures has an opportunity discuss any potential changes with the Secretary before he issues the Procedures. Ultimately, however, the Secretary cannot—and did not—make alterations that change material terms of mediator-selected compact. For these reasons, Stand Up's argument that Defendants' interpretation of IGRA's remedial scheme would render the consultation requirement superfluous fails.

While acknowledging that "the provision requiring the Secretary to prescribe procedures does not mention a duty to ensure the procedures comply with any particular federal law beyond IGRA," [Dkt. 46 at 25], Stand Up then attempts to escape this concession by posing a hypothetical scenario—not present here—in which the mediator-selected compact violates other applicable federal laws. To be sure, the Secretary did modify the compact to avoid unilaterally obligating the State to take on regulatory responsibilities, [AR0000-2245], which could raise Tenth Amendment concerns. The comparison that Stand Up seeks to make between the Secretary complying with the U.S. Constitution and "other applicable federal laws" like NEPA and the Clean Air Act is not apt, because the Secretary is *always* bound by constitutional constraints, whereas there are circumstances in which, like here, NEPA simply does not apply. *See* 42 U.S.C. § 4332(C) (an environmental analysis is only required for "major Federal actions significantly affecting the quality of the human environment.").

Finally, Stand Up's attempt to distinguish *Public Citizen* from this case appears to rest on the premise that because IGRA affords the Secretary the "essential discretion" to generally regulate gaming by Indian tribes, then he must have the discretion to modify Secretarial Procedures issued pursuant to IGRA. But this is false. Under IGRA, the Secretary is *required* by § 2710(d)(7)(B)(iv) to issue Procedures consistent with the mediator-selected compact if the compact complies with other provisions of IGRA and state law, in the same fashion that the Federal Motor Carrier Safety Administration (FMCSA) was mandated by 49 U.S.C. §

1 13902(a)(1) to "certify any motor carrier that can show that it is willing and able to comply with
2 the various substantive requirements for safety and financial responsibility contained in DOT
3 regulations," *Public Citizen*, 541 U.S. at 766. *Public Citizen* did not rest on the FMCSA's
4 general authority to regulate the operations of trucks, but on the limited authority Congress
5 vested in the agency to certify motor carriers.

6 Additionally, *Public Citizen* recognized that the "rule of reason" would relieve an agency
7 from the requirement to prepare an EIS "due to the environmental impact of an action it could
8 not refuse to perform." *Id.* at 769. Contrary to Stand Up's contention that the analysis in *Public*
9 *Citizen* rests on a general ability of an agency to regulate a particular field, *see* [Dkt. 46 at 27],
10 the holding of *Public Citizen* is much more specific: "where an agency has no ability to prevent a
11 certain effect due to its limited statutory authority over the relevant actions, the agency cannot be
12 considered a legally relevant 'cause' of the effect." *Public Citizen*, 541 U.S. at 770. Put
13 differently, had the Secretary departed from the mediator-selected compact by stripping the
14 provision allowing the Tribe to build a second gaming facility on the same parcel, such a
15 departure would have to be justified on the basis of an inconsistency with either IGRA or State
16 law or it would have been in violation of IGRA. Plaintiffs do not suggest what provision of
17 IGRA or State law prohibits two facilities (but not one) on the same parcel. Absent such a
18 showing of inconsistency, the Secretary is not the cause of any environmental effects that may
19 someday result if the tribe chooses to build a second gaming facility, and NEPA work
20 concerning such a hypothetical facility would serve no purpose.

21 Accordingly, the Secretary is not the legally relevant cause of any environmental impacts
22 stemming from the contents of the Secretarial Procedures, and thus issuing such Procedures are
23 not a major federal action triggering NEPA's requirements.

24

25 **B. If the Court Determines that a NEPA Analysis is Necessary, the Existing EIS Satisfies Any Such Requirement**

26 Stand Up argues that the Secretarial Procedures cannot rely upon the 2009 final EIS.
27 [Dkt. 46 at 34]. But NEPA's implementing regulations expressly allow an earlier environmental
28 document to relieve the agency from preparing a new EIS, provided that earlier document

sufficiently covers the new action. *See* 43 C.F.R. §§ 46.120(c); § 46.300. The regulations do not require that the Secretary utilize any particular language in relying on the previous EIS, and in any event, the Secretary does reference the 2009 EIS in Section 2.23 of the Procedures. [AR00002201]. Neither do the NEPA regulations restrict an agency's ability to rely on an earlier environmental document prepared for a separate agency action. Stand Up does not dispute that an EIS was prepared for the actual casino contemplated by the Tribe during the two-part determination and fee-to-trust process.[6] That EIS was prepared for the same parcel of land, the Madera Site, for which the Secretary authorized Class III gaming under the Secretarial Procedures, and to the extent that a NEPA analysis is necessary, the 2009 EIS is sufficient to satisfy that requirement.

In fact, doing anything other than relying on the 2009 EIS would lead to an entirely speculative NEPA process that further illustrates that the Secretarial Procedures are simply not the "proximate cause" of anything. *Public Citizen*, 541 U.S. at 767. When Stand Up discusses what should be evaluated, their briefing immediately becomes utterly vague. *See* [Dkt. 46 at 14] (noting Procedures "provided no discussion of the size of either facility"; that a second facility is an "alternative of uncertain scope"). In other words, NEPA work would have to guess at what might be the contours of a second gaming facility that the Tribe may or may not find to be feasible at some later date. No one can predict when or why the Tribe might decide it is worthwhile to build a second facility on the same parcel as the first, and so there is no basis for analyzing the potential environmental impacts of such a hypothetical facility. And that in turn shows that the Secretarial Procedures at most gave the Tribe the discretion to pursue a course of

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[6] To the extent that the Secretarial Procedures differ from the 2009 EIS, these changes are not sufficient to trigger a new NEPA analysis. While the Secretarial Procedures may impose limitations by which the Tribe may engage in Class III gaming, they are not put in place for a particular project, but instead to define a process by which the Tribe may engage in Class III Gaming. The Tribe has expressly stated that it has not planned or developed a second facility. [Dkt. 37 at 43]. Because of these circumstances, Stand Up cannot demonstrate anything beyond a speculative injury, at best. If the Tribe plans at some later date to develop a second facility, the Procedures require that the Tribe prepare a tribal environmental impact report. [AR00002264].

action at some point in the future, but cannot be said to be the cause of any decision to actively pursue that action.

IV. THE SECRETARIAL PROCEDURES DO NOT VIOLATE THE CLEAN AIR ACT BECAUSE THE CONFORMITY REQUIREMENT DOES NOT APPLY

In taking the Madera Site in trust, a CAA conformity determination was done in connection with the Tribe's proposed gaming facility. Stand Up has challenged that determination and lost. *Stand Up for California v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212, 320-23 (D.D.C. 2016). Here Stand Up argues that because the Procedures afford the Tribe the discretion to build a second facility on the same parcel as the first, a new conformity determination must be done. As with any NEPA work evaluating environmental impacts of a hypothetical future facility, any CAA analysis could only be based on sheer speculation about what might be constructed, how it might be constructed, and what kinds of air pollutants might be emitted. But the CAA does not require any such analysis, which would be of little use or value. As noted above, the Secretary does not have broad discretion to alter the mediator-selected compact. Any alteration must be based on fixing an inconsistency with "the provisions of this chapter, and the relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Stand Up has failed to show how the possibility of a second facility being constructed at some future time provides a basis for the Secretary to alter the terms of mediator-selected compact.

IGRA does not afford the Secretary the authority to second-guess the mediator's selection, and the Secretary's only task in prescribing the Procedures is to ensure the mediator's selection does not violate any other provisions of IGRA or state law. The Secretary was not delegated "practical control" over the emissions that may result from the Tribe's project. Moreover, the Secretary lacks authority to dictate if, when, and where on the parcel the Tribe should build any second facility. Thus, the Secretary "cannot practicably control, nor will [he]

maintain control, over [any] emissions" that may result from a future decision by the Tribe to go forward with a second gaming facility on the same site. *Public Citizen*, 541 U.S. at 772.[7]

V. THE SECRETARY DID NOT VIOLATE THE FREEDOM OF INFORMATION ACT

Federal defendants are aware of the Freedom of Information Act ("FOIA") request submitted by Stand Up on August 12, 2016 and are diligently working to fulfill the request. As reflected in the Declaration of Carol Leader Charge, FOIA Coordinator for the Office of the Assistant Secretary – Indian Affairs[8], Interior has committed to responding to the request by no later than December 5, 2017, if the Court is amenable to that date. At that point, Plaintiffs' FOIA claim will become moot. *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002).

CONCLUSION

Federal defendants respectfully request that this Court grant their and North Fork Tribe's motion for summary judgement, deny Stand Up's motion for summary judgment, and enter a judgment upholding the issuance of the Secretarial Procedures.

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[7] At the same time, of course, the Secretarial Procedures do not immunize the Tribe, or anyone else, from enforcement of all applicable laws, including the CAA, in the context of any facilities it chooses to construct and operate on the Madera Site.

[8] The Leader Charge Declaration is Exhibit 2 to the Kintz Declaration.

1 DATED this October 6, 2017.

2 Respectfully submitted,
3 JEFFREY H. WOOD
Acting Assistant Attorney General
4
5 /s/ *JoAnn Kintz*
6 JoAnn Kintz
7 Steven Miskinis
Trial Attorneys
8 United States Department of Justice
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2 CERTIFICATE OF SERVICE
3 I HEREBY CERTIFY that on October 6, 2017, I filed the foregoing electronically
4 through the CM/ECF system, which caused the parties or counsel reflected on the Notice of
5 Electronic Filing to be served by electronic means.
6
7 : October 6, 2017 /s/*JoAnn Kintz*
8 JoAnn Kintz
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9 **UNITED STATES DISTRICT COURT**
10 **EASTERN DISTRICT OF CALIFORNIA**
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STAND UP FOR CALIFORNIA!, ET AL. Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL. Defendants.	**CASE NO. 2:16-CV-02681-AWI-EPG** **ORDER DENYING STAND UP FOR CALIFORNIA!'S MOTION FOR SUMMARY JUDGMENT** (Doc. 29) **ORDER GRANTING NORTH FORK'S MOTION FOR SUMMARY JUDGMENT** (Doc. 36) **ORDER GRANTING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT** (Doc. 40) **ORDER DENYING MOTION TO STAY** (Doc. 28)

12–21

22 **I. Introduction**

23 Plaintiffs Stand Up for California!, Randall Brannon, Madera Ministerial Association,
24 Susan Stjerne, First Assembly of God – Madera, and Dennis Sylvester (collectively "Stand Up")
25 have brought this action against the Department of the Interior, and its Bureau of Indian Affairs
26 and the heads of both (collectively the "Federal Defendants" or "United States"), seeking to
27 prevent class III gaming activity by the North Fork Rancheria of Mono Indians at a 305.49 acre
28 parcel of land in Madera, California ("the Madera Parcel"). *See* Doc. 13. The Court permitted

North Fork Rancheria of Mono Indians ("North Fork") to intervene in this action. Doc. 23.

The parties have filed cross-motions for summary judgment in accordance with the briefing schedule approved by the Court. Docs. 23, 29, 36, 40. Plaintiff Stand Up has also filed a motion to stay the proceedings until the California Supreme Court can resolve whether the Governor of the State of California had the authority under California law to concur in the Secretary of the Interior's two-part after acquired lands determination. Doc. 28; *see* 25 U.S.C. § 2917(b)(1)(A). For the following reasons, Plaintiff's motions will be denied and Defendants' motions will be granted.

II. Background

A. North Fork Tribe and Acquisition of Proposed Gaming Site

The North Fork Rancheria of Mono Indians is a federally recognized Indian tribe, located in Madera County. North Fork's Separate Statement of Undisputed Facts, Doc. 38 ("Doc. 38") at ¶ 1. Presently, "North Fork has no source of revenue other than federal grants and California Revenue Sharing Trust Fund distributions…." Doc. 38 at ¶ 2. North Fork possesses a 61.5 acre parcel in North Fork, California, held in trust by the United States as a reservation. *See* Doc. 38 at ¶ 2; Administrative Record ("AR") at 00000248.[1] That land is "not suitable for commercial development." Doc. 38 at ¶ 2.

In 2005, North Fork submitted a fee-to-trust application to the United States Department of the Interior, seeking to have a roughly 305-acre parcel of land in Madera, California, (the "Madera Site") taken into trust for purposes of developing a hotel and casino. Doc. 38 at ¶ 3; AR00000160. In 2006, North Fork submitted a supplement to its fee-to-trust application, also asking the Secretary of the Interior conduct a two-part determination[2] pursuant to 25 U.S.C. § 2917(b)(1)(A), excepting the Madera Parcel from the prohibition on gaming on lands acquired in trust for an Indian tribe after October 17, 1988. *See* Doc. 38 at ¶ 4; AR00000240.

[1] Due to the size of the administrative record, it was lodged in paper and compact disc formats. *See* Doc. 26. It is not available on the Court's cm/ecf system.

[2] The two-part determination of § 2719(b)(1)(A) provides an exception to the general prohibition on class III gaming on lands acquired after October 17, 1988, by asking if gaming on the newly acquired lands is in the best interest of the Indian tribe and its members, and if such gaming would be non-detrimental to the surrounding community. The two-part determination requires an affirmative finding on both questions by the Secretary of the Interior and concurrence by the Governor of the State in which the gaming activity is to be conducted.

A lengthy review process followed. Significant for this action, the Department of the Interior conducted an environmental impact study ("EIS") to address the environmental impact of operation of a hotel and casino on the Madera Site. *See* Doc. 38 at ¶ 6; *North Fork Rancheria of Mono Indians v. State of California* ("*North Fork v. California*"), 2015 WL 11438206, *1 (E.D. Cal. Nov. 13, 2015). The results of the EIS were published on August 6, 2010. AR00000160; *Picayune Rancheria of Chukchansi Indians v. United States Dept. of the Interior* ("*Picayune v. DOI*"), 2017 WL 3581735, *1 (E.D. Cal. Aug. 18, 2017); *North Fork v. California*, 2015 WL 11438206 at *1; *see* Doc. 38 at ¶ 6.[3] The DOI also conducted a conformity determination pursuant to the Clean Air Act with respect to the fee-to-trust determination. *See* Doc. 29-4 at 104-137.

The Secretary did not conduct any other EIS, environmental assessment, or conformity determination with respect to the Madera Site prior to prescribing of gaming procedures.

B. Related Actions

1. Good Faith Litigation

On March 17, 2015, North Fork initiated an action against the State of California to compel the state to negotiate a new tribal-state compact in good faith. *North Fork Rancheria of Mono Indians of California v. State of California*, E.D.C.A. No. 1:15-cv-419-AWI-SAB, Doc. 1 (E.D. Cal. Mar. 17, 2015). On November 13, 2015, this Court granted North Fork's motion for judgment on the pleadings and ordered North Fork and California to conclude a compact for the Madera Site within sixty (60) days. *North Fork v. California*, 2015 WL 11438206 (E.D. Cal. Nov. 13, 2015)[4]; 25 U.S.C. § 2710(d)(7)(A), (d)(7)(B). North Fork and California were unable to negotiate and conclude a compact within the 60-day period. *North Fork v. California*, Doc. 27 at 1 (E.D. Cal. Jan 15, 2016). This Court appointed a mediator, directed the parties to submit their last best offers for a compact to the mediator, and directed the mediator to "select from the two proposed compacts the one which best comports with the terms of [IGRA], ... any other applicable Federal law[,] and with the findings and order (Doc. 25) of th[is] [C]ourt." *Id*., Doc.

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[3] *See also* northforkeis.com (last accessed on July 18, 2018).

[4] The order on cross-motions for judgment on the pleadings is located at AR00000476-00000498 and AR00001366-00001388. For the sake clarity and accessibility, this Court uses the reporter citation.

30 at 1 (E.D. Cal. Jan. 26, 2016); *see* 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator selected North Fork's compact and submitted the compact to North Fork and California. AR 000000001-142; *see* 25 U.S.C. § 2710(d)(7)(B)(v). California did not consent to the compact within 60-days of the compact having been submitted to it. AR00000001. The mediator informed the Secretary of the Interior that California did not consent to the selected compact. AR00000001; *see* 25 U.S.C. § 2710(d)(7)(B)(vii). "On July 29, 2016, the Secretary of the Interior notified North Fork and California that it had issued Secretarial Procedures for the purpose of authorizing class III gaming at the Madera Site." AR00002186-2325.

2. The District of Columbia Action

On December 10, 2012, Stand Up for California! filed an action against the Secretary of the Interior, bringing APA, IRA, IGRA, National Environmental Policy Act ("NEPA"), and Clean Air Act ("CAA") challenges to the Secretary's two-part, fee-to-trust, and environmental impact determinations regarding proposed gaming at the Madera Site. *Stand Up for California! v. Dept. of the Interior*, No. 1:12-cv-2039-BAH, Doc. 1 (D.D.C. Dec. 10, 2012); *see also Id.*, Stand Up's Third Amended Complaint, Doc. 103 (Dec. 3, 2014). On December 31, 2012, Picayune filed a similar action against the Secretary regarding the Madera Site. *See Picayune Rancheria of the Chukchansi Indians v. United States*, No. 1:12-cv-2071-BAH, Doc. 1 (D.D.C. Dec. 31, 2012). In that action, Picayune alleged, among other things, that the "Assistant Secretary [of the Interior] violated the APA, IGRA, and the IRA by relying on a purported concurrence from the Governor of California that is ultra vires and invalid under California law." *Id.*, Doc. 1 at ¶ 57.

On January 9, 2013, the District of Columbia district court consolidated the *Stand Up* and *Picayune* actions. *Stand Up for California! v. Dept. of the Interior*, 1:12-cv-2039-BAH, Minute Entry (Jan. 9, 2013). The parties filed cross-motions for summary judgment in early 2015. *Id.*, Docs. 106, 108, 111-117, 121, 122. The District of Columbia district court ordered additional briefing on the question of whether the State of California was required to be joined under Federal Rule of Civil Procedure 19. *Id.*, Doc. 135 (Sept. 30, 2015).

While the cross-motions for summary judgment were under submission, the Secretary "prescribed the secretarial procedures mandated by IGRA," as a result of the Good Faith

1 Negotiation Action before this Court. *Id.*, Docs. 163, 163-1; *Stand Up for California! v. Dept. of*
2 *the Interior*, 204 F.Supp.3d 212, 240 (D.D.C. 2016) ("On July 29, 2016, Lawrence S. Roberts,
3 Acting Assistant Secretary of Indian Affairs, notified the North Fork Tribe and the State of
4 California that, after reviewing the mediator's compact submission, 'procedures under which the
5 [North Fork Tribe] may conduct Class III gaming consistent with IGRA' had been issued and,
6 thus, 'Secretarial Procedures for the conduct of Class III gaming on the Tribe's Indian lands are
7 prescribed and in effect.'") (citation omitted, alteration in original).

8 On September 6, 2016, United States District Court for the District of Columbia
9 dismissed Picayune and Stand Up's claims premised on the invalidity of the Governor's
10 concurrence, concluding that the State of California was an indispensable party. *Stand Up for*
11 *California! v. Dept. of the Interior*, 204 F.Supp.3d at 253-254. The court further dismissed the
12 claims premised upon the invalidity of the 2012 Compact as moot in light of the issuance of
13 Secretarial procedures. *See Id.* at 248. As to all other of Picayune and Stand Up's IGRA, IRA,
14 APA, NEPA, and CAA claims, the court granted summary judgment in favor of the Secretary
15 and North Fork. *Id.* at 323.

16 Stand Up and Picayune appealed a portion of the district court's judgment to the circuit
17 court level. *Stand Up for California! v. Dept. of the Interior*, ---F.3d----, 2018 WL 385220 (D.C.
18 Cir. Jan. 18, 2018).[5] The United States Court of Appeals for the District of Columbia Circuit
19 affirmed all challenged portions of the lower court's decision. *Id.*

20 *3. The Gubernatorial Concurrence Action*

21 In March of 2013, Stand Up filed suit in the Madera County Superior Court, contending
22 that the Governor lacked the authority under California law to concur in the Secretary of the
23 Interior's two-part determination. *Stand Up for California v State of California et al.*, 5th DCA
24 Case No. F069302. The Madera County Superior Court held that the Governor's authority to
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27 [5] Picayune challenged, but Stand Up did not challenge, the district court's determination that California is a
necessary party to an action containing "any challenge to the validity of the Governor's concurrence." *Stand Up for*
28 *California v. Dept. of the Interior*, 204 F.Supp.3d at 251; *Stand Up For California! v. Dept. of the Interior*, 2018
WL 385220, *6.

1 concur with the Secretary's determination is implicit in the Governor's authority to negotiate and
2 conclude Tribal-State compacts on behalf of the state. *Id*. Stand Up appealed.

3 The Fifth District Court of Appeal issued a decision on December 16, 2016, in three
4 separate opinions, reversing the judgment of the trial court and holding that the Governor's
5 concurrence was invalid under state law. *Stand Up for California! v. State of California*, 6
6 Cal.App.5th 686 (Cal. Ct. App. Dec. 16, 2016). Several months earlier, the California Third
7 District Court of Appeal issued a decision on a similar question regarding a different Indian tribe,
8 determining that the Governor's concurrence with a two-part determination by the Secretary is an
9 executive (rather than legislative) power and therefore within the authority of the Governor.
10 *United Auburn Indian Community of Auburn Rancheria v. Brown*, 4 Cal.App.5th 36, 208
11 Cal.Rptr.3d 487 (Cal. Ct. App. Oct 13, 2016).

12 In light of the apparent disagreement, the California Supreme Court has granted review of
13 *Stand Up for California! v. State of California* and *United Auburn*. *See Stand Up for California!*
14 *v. State of California*, 390 P.3d 781 (Mar. 22, 2017) (granting review and deferring consideration
15 pending resolution of *United Auburn*); *United Auburn*, 387 P.3d 741 (Jan. 25, 2017) (granting
16 review). Both actions remain pending.

17 **III. Legal Standard**

18 A. IGRA, Johnson Act, NEPA, and CAA claims brought pursuant to the APA

19 Summary judgment is an appropriate mechanism for reviewing agency decisions under
20 the APA. *Turtle Island Restoration Network v. United States Dept. of Commerce,* 878 F.3d 727,
21 732 (9th Cir. 2017); *City & County of San Francisco v. United States*, 130 F.3d 873, 877 (9th
22 Cir.1997); *Occidental Engineering Co. v. Immigration & Naturalization Service*, 753 F.2d 766,
23 769–70 (9th Cir.1985). However, courts do not utilize the standard analysis for determining
24 whether a genuine issue of material fact exists. *See Occidental*, 753 F.2d at 769–70; *Academy of*
25 *Our Lady of Peace v. City of San Diego*, 835 F.Supp.2d 895, 902 (S.D.Cal.2011); *California*
26 *RSA No. 4 v. Madera Cnty.*, 332 F.Supp.2d 1291, 1301 (E.D.Cal.2003). In reviewing an agency
27 action, the relevant legal question for a court is "whether the agency could reasonably have
28 found the facts as it did." San *Francisco*, 130 F.3d at 877; *Occidental*, 753 F.2d at 769. A court

“is not required to resolve any facts in a review of an administrative proceeding.” *Occidental*, 753 F.2d at 769; *California RSA*, 332 F.Supp.2d at 1301. Instead, in reviewing an agency action, the relevant legal question for a court reviewing a factual determination is “whether the agency could reasonably have found the facts as it did.” *San Francisco*, 130 F.3d at 877; *Occidental*, 753 F.2d at 769; *California RSA*, 332 F.Supp.2d at 1301.

The Court’s review in resolving an APA challenge to an agency action is circumscribed: the court will only set aside agency action if its “‘findings[] and conclusions [are] found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’ ‘in excess of statutory jurisdiction’ or ‘without observance of procedure required by law.” *Turtle Island*, 878 F.3d at 732 (quoting 5 U.S.C. § 706(2)(A), (C)-(D)). Agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law “only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Defs. Of Wildlife v. Zinke*, 856 F.3d 1248, 1256-1257 (9th Cir. 2017) (citation omitted); *see Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (An “agency must examine the relevant data and articulate a satisfactory explanation for its action.”) This standard is “highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.” *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000)). Review under this standard is narrow, and the court may not substitute its judgment for that of the agency. *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 573 (9th Cir. 1988). Nevertheless, the court must “engage in a substantial inquiry ... a thorough, probing, in-depth review.” *Native Ecosys. Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (citation and internal quotations omitted).

B. FOIA Claim

Any party may move for summary judgment, and the Court shall grant summary

1 judgment if the movant shows that there is no genuine dispute as to any material fact and the
2 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks
3 omitted); *Washington Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Each
4 party's position, whether it be that a fact is disputed or undisputed, must be supported by (1)
5 citing to particular parts of materials in the record, including but not limited to depositions,
6 documents, declarations, or discovery; or (2) showing that the materials cited do not establish the
7 presence or absence of a genuine dispute or that the opposing party cannot produce admissible
8 evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may
9 consider other materials in the record not cited to by the parties, but it is not required to do so.
10 Fed. R. Civ. P. 56(c)(3); *Carmen v. San Francisco Unified Sch. Dist*., 237 F.3d 1026, 1031 (9th
11 Cir. 2001); *accord Simmons v. Navajo Cnty., Ariz*., 609 F.3d 1011, 1017 (9th Cir. 2010).
12 In resolving cross-motions for summary judgment, the Court must consider each party's
13 evidence. *Johnson v. Poway Unified Sch. Dist*., 658 F.3d 954, 960 (9th Cir. 2011). A plaintiff
14 bears the burden of proof at trial, and to prevail on summary judgment, it must affirmatively
15 demonstrate that no reasonable trier of fact could find other than for the plaintiff. *Soremekun v.*
16 *Thrifty Payless, Inc*., 509 F.3d 978, 984 (9th Cir. 2007). Defendants do not bear the burden of
17 proof at trial or in moving for summary judgment, they need only prove an absence of evidence
18 to support the plaintiff's case. *In re Oracle Corp. Sec. Litig*., 627 F.3d 376, 387 (9th Cir. 2010).
19 In judging the evidence at the summary judgment stage, the Court does not make credibility
20 determinations or weigh conflicting evidence, *Soremekun*, 509 F.3d at 984 (quotation marks and
21 citation omitted), and it must draw all inferences in the light most favorable to the nonmoving
22 party and determine whether a genuine issue of material fact precludes entry of judgment,
23 *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir.
24 2011) (quotation marks and citation omitted).
25 In the FOIA context, courts review an agency's decision whether or not to disclose de
26 novo. 5 U.S.C. § 552(a)(4)(B); *see also Louis v. United States Dep't of Labor*, 419 F.3d 970, 977
27 (9th Cir. 2005) (De novo review "requir[es] no deference to the agency's determination or
28 rationale regarding disclosures.") However, courts "accord substantial weight to an affidavit of

an agency concerning the agency's determination as to technical feasibility ... and reproducibility." 5 U.S.C. § 552(a)(4)(B). If the FOIA dispute presents a genuine issue of material fact, courts proceed to a bench trial or adversary hearing. *Animal Legal Def. Fund v. United States Food & Drug Admin.*, 836 F.3d 987, 990 (9th Cir. 2016).

IV. Discussion

A. Administrative Procedures Act ("APA") Review

Stand Up seeks APA review of the Secretary's decision to issue Secretarial Procedures regulating gaming on the Madera Site. Stand Up contends that the Secretary's issuance of gaming procedures violated the Johnson Act, 15 U.S.C. § 1171, et seq., the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321, et seq., the Clean Air Act ("CAA"), 42 U.S.C. § 7401 et seq., and the Indian Gaming Regulatory Act ("IGRA").

1. The Johnson Act

The Johnson Act, enacted in 1951, prohibits the possession or use of "any gambling device[6] … within Indian country." 15 U.S.C. § 1175(a). Stand Up argues that IGRA provides an exception to the general prohibition on use of slot machines in Indian country *only when* a valid Tribal-State compact has been entered into to govern gaming on the Indian land. Doc. 29 at 16 (citing 25 U.S.C. § 2710(d)(6) ("The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that (A) is entered into … by a state in which gambling devices are legal, and (B) is in effect.") It is agreed that no effective Tribal-State compact has ever been entered into by North Fork and the State of California. Indeed, that fact was the predicate for North Fork's good faith negotiation action, which ultimately resulted in the issuance of Secretarial Procedures and not a Tribal-State compact. *See North Fork v. California*, 2015 WL 11438206 at *2-3. Accordingly, Plaintiff argues that "[b]ecause North Fork … has not entered into a compact with the state that is effective under IGRA," the Johnson Act prohibits gaming "at the Madera Site." Doc. 29 at 16-17. In sum, Stand Up contends that any prescribing of Secretarial Procedures pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii)—which can only take place

[6] "Gaming device," for purposes of the Johnson Act, includes "slot machine[s]." 15 U.S.C. § 1171(a).

in the absence of an effective Tribal-State compact—violates the Johnson Act if those procedures permit use of slot machines.

Defendants contend that gaming under Secretarial Procedures should be considered the functional equivalent of gaming under a Tribal-State compact. Reading IGRA as a whole, they contend, makes clear that Secretarial Procedures are designed to operate as a complete substitute to existence of an effective Tribal-State compact. North Fork and the Secretary both rely on the purpose of IGRA (generally) and the purpose of the remedial process. If Stand Up's reading of the Johnson Act is accepted, they argue, the purpose of the remedial process will be thwarted and the value of Secretarial Procedures diminished.

The Court begins, as it must, by examining the text of the statutes at issue. *Friends of Animals v. United States Fish and Wildlife Service*, ---F.3d----, 2018 WL 343754, *3 (9th Cir. Jan. 10, 2018) (quoting *Limtacio v. Camacho*, 549 U.S. 483, 488 (2007)); *see Grayned v. City of Rockford*, 408 U.S. 104, 110 (1972). The Johnson Act is clear in its broad prohibition of sale, "transport[ation], possess[ion], or use [of] any [slot machine] … within Indian country." 15 U.S.C. § 1175(a). The Johnson Act provides no exceptions relevant here. Congress was not blind to the limitations imposed by the Johnson Act in enacting IGRA. It specifically carved out an exception to the prohibition imposed by the Johnson Act for "any gaming conducted under a Tribal-State compact that (a) is entered into under paragraph (3)[7] by a State in which gaming devices are legal, and (b) is in effect." 25 U.S.C. § 2710(d)(6). IGRA does not carve out the same express exception for gaming conducted pursuant to Secretarial Procedures. And, as Stand Up correctly points out, elsewhere in section 2710, Congress makes clear in an earlier step of the remedial process, a compact selected by the appointed mediator and consented to by the State "shall be treated as a Tribal-State compact entered into under paragraph (3)." 25 U.S.C. § 2710(d)(7)(B)(vi). No such language is used to describe the situation wherein the State refuses to

[7] 25 U.S.C. § 2710(d)(3) provides, in full, as follows:

> Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

consent to the compact selected by the mediator and the Secretary prescribes gaming procedures. 25 U.S.C. § 2710(d)(7)(B)(vi).

Section 2710(d)(6) exempts gaming conducted pursuant to a Tribal-State compact from the reach of the Johnson Act. Section 2710(d)(6) does not expressly exempt gaming conducted pursuant to Secretarial Procedures from the reach of the Johnson Act. At first blush, Secretarial Procedures issued pursuant to section 2710(d)(7)(b)(vii) do not appear to be "a Tribal-State compact" for purposes of section 2710(d)(3). The statutory language is clear and unambiguous. In such situations "the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce [the statute] according to its terms." *Dodd v. United States*, 545 U.S. 353, 359 (2005) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). A closer look at Stand Up's proposed reading makes clear that the outcome that it proposes is absurd—it would result in internal inconsistencies within IGRA, it would render the issuance of Secretarial Procedures inoperative in every case, and it would undermine the carefully crafted statutory scheme and goals of IGRA and its remedial process.

In the situation at bar, the Secretary is compelled by IGRA to "prescribe … procedures … which are consistent with the proposed compact selected by the mediator, the provisions of IGRA, and the relevant provisions of [California law]" and "under which class III gaming may be conducted…." 25 U.S.C. § 2710(d)(7)(B)(vii). Conspicuously absent from that subsection is any requirement that the Secretary, in considering the gaming procedures to be prescribed, consider whether those procedures would violate the Johnson act or "any other applicable federal law." *See* 25 U.S.C. § 2710(d)(7)(B)(iv) (directing the mediator to determine which proposed compact "best comports with [IGRA], and any other applicable Federal law and with the findings and order of the court"). If gaming conducted pursuant to Secretarial Procedures is not treated as synonymous to gaming pursuant to a Tribal-State compact, section 2710(d)(7)(B)(vii) would compel the Secretary to both (1) authorize gaming at least partially inconsistent with the Johnson Act (and completely inconsistent with section 23 of IGRA, codified at 18 U.S.C. §

1166),[8] and (2) not consider whether the gaming is in violation of the Johnson Act (or section 1166).[9]

Next, such a reading would also result in section 2710 also being internally inconsistent in a manner that would render the remedial process inoperative. It is a fundamental cannon of statutory interpretation that "statute[s] should be construed so that effect is given to all [of their] provisions, so that no part will be inoperative or superfluous, void or insignificant...." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181–86 (rev. 6th ed. 2000)). Section 2710(d)(1) makes clear that "[c]lass III gaming activities shall be lawful on Indian lands only if such activities are," among other things, "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." 18 U.S.C. § 1166 mirrors that requirement. If Secretarial Procedures prescribed pursuant to section 2710(d)(7)(A)(vii) are not treated as equivalent to a Tribal-State compact for purposes of IGRA, then the remedial process would be meaningless. Secretarial Procedures could *never* be issued because Secretarial Procedures—necessarily issued in the absence of a compact that is in effect—would *always* be "[in]consistent with … the provisions of [IGRA]…." 25 U.S.C. § 2710(d)(7)(B)(vii)(I). The Court will not read IGRA to have created an empty remedial process. Such an outcome must be rejected.

Even setting aside the internal inconsistencies, a reading of IGRA that treats Secretarial Procedures as a limited remedy, offering fewer class III gaming options than a Tribal-State compact, would wholly undermine the purpose of the remedial process. *See* 25 U.S.C. § 2710(d)(7)(b); S. Rep. 100-446, at *14, reprinted in 1988 U.S.C.C.A.N. 3071, 3085 ("[T]he issue before the Committee was how best to encourage States to deal fairly with tribes as sovereign governments…. The Committee elected, as the least offensive option, to grant tribes the right to

[8] Section 23 of IGRA was codified at 18 U.S.C. § 1166(a). It prohibits "gambling" in Indian country to the same extent prohibited elsewhere in a state under that state's law. 18 U.S.C. § 1166(a). 18 U.S.C. § 1166(c) excludes from the definition of "gambling" any "class III gaming conducted under a Tribal-State compact … that is in effect."

[9] If inconsistency with the Johnson Act was the only problem with Plaintiff's proposed reading of the impact of Secretarial Procedures the Court would consider whether IGRA impliedly repealed a portion of the Johnson Act. Because other problems with Plaintiff's proposed reading exist, the Court need not address that question.

1 sue a State if a compact is not negotiated" in good faith.")[10]; *see Armstrong v. Exceptional Child*
2 *Center, Inc.*, 135 S.Ct. 1378, 1393 (2015) ("Congress must have intended [section
3 2710(d)(7)(B)(vii)] to be the exclusive means of enforcing [section] 2710(d)(3)."); *United States*
4 *v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299-1300 (9th Cir. 1998) (recognizing that the
5 remedial process provides the leverage necessary for Indian tribes to encourage states to
6 negotiate in good faith); *id*. at 1301 ("IGRA … struck a finely-tuned balance between the
7 interests of the states and the tribes. Most likely it would not have been enacted if that balance
8 had tipped conclusively in favor of the states, and without IGRA the states would have no say
9 whatever over Indian gaming.") Without the possibility of Secretarial Procedures authorizing a
10 tribe to conduct class III gaming in the event of a state's failure to negotiate in good faith, no
11 incentive would exist for states to negotiate in good faith. States could do exactly what IGRA
12 sought to prevent—"use the compact requirement … as a justification by a State for excluding
13 Indian tribes from [conducting class III] gaming" in states where such gaming is otherwise
14 legal.[11] S. Rep. 100-446 at *14.

15 Finally, no court has ever found that class III gaming cannot be conducted pursuant to
16 Secretarial Procedures for want of a Tribal-State compact. In fact, many courts recognize that
17 Secretarial Procedures issued at the final stage of IGRA's remedial process operates as an
18 "alternative mechanism permitted under IGRA" for conducting class III gaming. *Pueblo of*
19 *Pojoaque v. New Mexico*, 863 F.3d 1226, 1236 (10th Cir. 2017); *accord New Mexico v. Dept. of*
20 *the Interior*, 854 F.3d 1207, 1224-1225 (10th Cir. 2017); *Big Lagoon Rancheria v. California*,
21 789 F.3d 947, 955-956 (9th Cir. 2015) ("[O]nce the secretary of the Interior prescribes
22 procedures to govern gaming that are consistent with [the proposed compact selected by the
23 mediator], Big Lagoon Rancheria will be authorized to … engage in the gaming that it seeks.")
24 (citing 25 U.S.C. § 2710(d)(7)(B)(vii)); *Estom Yumeka Maidu Tribe of the Enterprise Rancheria*
25

26 [10] The Supreme Court made clear in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996), that Congress could not constitutionally permit a tribe to force "a recalcitrant state" to the bargaining table through initiation of
27 suit pursuant to IGRA's remedial framework if the state did not consent to suit. *Spokane Tribe*, 139 F.3d at 1299 (citing *Seminole Tribe*, 517 U.S. at 72). That limitation presents no issue here because the State of California did consent to suit. *See North Fork v. California*, 2015 WL 1143826 at *5-6.

28 [11] Class III gaming pursuant to IGRA can only be authorized in states that permit "such gaming for any purpose by any person, organization or entity." 25 U.S.C. § 2710(d)(1)(B).

of California v. California, 163 F.Supp.3d 769, 777-778 (E.D. Cal. 2016) (recognizing both that the Secretary of the Interior can prescribe gaming conditions in the final step of the remedial process and that IGRA does not contemplate and does not provide for the conduct of class III gaming in absence of a Tribal-State compact); see *also Texas v. United States*, 497 F.3d 491, 500 (5th Cir. 2007) (characterizing imposition of Secretarial Procedures under section 2710(d)(7)(B)(vii) as "imposition of a compact on an unwilling or uncooperative state").

Stand Up's challenge to issuance of Secretarial Procedures on the ground that such procedures are inconsistent with the Johnson Act is without merit. As to this question, the Secretary's action was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; it was not in excess of statutory jurisdiction or without observance of procedure required by law. Summary judgment on this question will be granted in favor of North Fork and the Federal Defendants.

2. National Environmental Protection Act ("NEPA")

NEPA, codified at 42 U.S.C. § 4321, et seq., "provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *San Diego Navy Broadway Complex Coalition v. United States Dept. of Def.*, 817 F.3d 653, 659 (9th Cir. 2016) (citation omitted). It requires federal agencies to prepare a detailed environmental impact statement ("EIS") for all "major Federal actions affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).[12] "Major Federal action[s]" that trigger NEPA requirements "include[] actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. As a preliminary step, federal agencies prepare an environmental assessment ("EA")—a "concise public document ... [that] [b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or a finding of no significant impact [("FONSI")]." 40 C.F.R. 1508.9; *In Defense of Animals v. Dept. of the Interior,* 751 F.3d 1054, 1068 (9th Cir. 2014) (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir.1998)). When an EA is conducted and a

[12] NEPA also requires an EIS to accompany "every recommendation or report on proposals for legislation." 42 U.S.C. § 4332(2)(C). No proposed legislation was at issue here.

FONSI made and explained, an action is not a major Federal action affecting the quality of the human environment and no detailed EIS is required. 40 C.F.R. § 1508.13; *see Concerned Citizens and Retired Miners Coalition v. United States Forest Service*, --- F.Supp.3d ----, 2017 WL 3896290, *32 (D. Ariz. Sept. 6, 2017); *cf. In Defense of Animals*, 751 F.3d at 1068 ("When substantial questions are raised as to whether a proposed project 'may cause significant degradation of some human environmental factor,' an EIS is required.") (citations omitted). It is undisputed that no EA was conducted with respect to issuance of Secretarial Procedures. *See* AR00002186-88. Instead, at this Court's direction, the Secretary issued procedures governing the conduct of class III on the Madera Site, considering only the proposed compact selected by the mediator, the provisions of IGRA, and the relevant provisions of state law. *See* 25 U.S.C. § 2710(d)(7)(B)(vii).

Stand Up argues that (1) the issuance of Secretarial Procedures is a major Federal action for purposes of NEPA, requiring preparation of an EA; and (2) the EIS prepared in connection with taking the Madera Site into trust for North Fork for the purpose of conducting Tribal gaming does not satisfy NEPA's requirement in connection with issuance of Secretarial Procedures. The Secretary and North Fork respond, *inter alia,* that (1) issuance of Secretarial Procedures is not a major Federal action for purposes of NEPA, or (2) even insofar as Secretarial Procedures are major Federal action, the Secretary's authority in issuing gaming procedures is cabined such that the "rule of reason" would excuse preparation of a pointless EIS.[13] The Court agrees with North Fork and the Secretary that the "rule of reason" excludes issuance of Secretarial Procedures from the reach of NEPA's environmental assessment requirement. Accordingly, it only conclusively resolves the second question.

a. Major Federal action

As noted, NEPA obligations are triggered when a federal agency engages in a "major Federal action[] affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

[13] The Court reads the "rule of reason" outlined in *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004) obviate the need for a determination as to whether an agency action was a major Federal action when the agency is not permitted to prevent the action even with the benefit of an EIS. As such, the Court considers whether the issuance of Secretarial Procedures was the cause of the alleged environmental effect and does not decide whether the Secretarial Procedures constitute a major Federal action.

1 "Major Federal action[s]" that trigger NEPA requirements "include[] actions with effects that
2 may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R.
3 § 1508.18. Federal actions include approval by a federal agency of projects by non-governmental
4 entities. *Id*. at § 1508.18(b)(4). The Court declines to determine whether prescribing gaming
5 procedures is a major Federal action. *Cf. Jamul Action Committee v. Chaudhuri*, 837 F.3d 958,
6 963 (9th Cir. 2016) (declining to determine whether the NIGC's approval of a gaming ordinance
7 was a major Federal action where the NIGC was not otherwise not required to comply with
8 NEPA due to an irreconcilable conflict between IGRA and NEPA); *Alaska Wilderness League v.*
9 *Jewell*, 788 F.3d 1212, 1225 (9th Cir. 2015) (declining to determine whether an agency action
10 constituted a major Federal action where a statutory mandate limited the agency's authority to
11 act, excusing NEPA compliance).

12 b. Rule of Reason

13 The Supreme Court and NEPA's enabling regulations both make clear that an agency
14 action, regardless of whether it is a major Federal action, is only subject to NEPA environmental
15 assessment obligations if the agency has the authority to prevent the potential environmental
16 effect at issue. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004); *see* 15 C.F.R.
17 § 1508.8. "[W]here an agency has no ability to prevent a certain effect due to its limited statutory
18 authority over the relevant action, the agency cannot be considered a legally relevant 'cause' of
19 the effect." *Public Citizen*, 541 U.S. at 770; *id.* at 767 ("NEPA requires a 'reasonably close
20 causal relationship' between the environmental effect and the alleged cause.") (citation omitted).
21 This rule has been characterized as a "rule of reason," excusing a federal agency from preparing
22 an EIS "[w]here [its] preparation would serve 'no purpose' in light of NEPA's regulatory
23 scheme…." *Public Citizen*, 541 U.S. at 768.

24 NEPA was designed with two purposes: First, "'it ensures that the agency, in reaching its
25 decision will have available, and will carefully consider, detailed information regarding
26 significant environmental impacts.'" *Public Citizen*, 541 U.S. at 768 (quoting *Robertson v.*
27 *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)); *Jamul Action Committee v.*
28 *Chaudhuri*, 837 F.3d 958, 961 (9th Cir. 2016). "Second, it 'guarantees that the relevant

1 information will be made available to the larger audience that may also play a role in both the
2 decisionmaking process and the implementation of that decision." *Public Citizen*, 541 U.S. at
3 768 (quoting *Robertson*, 490 U.S. at 349.) If preparation of an EIS could serve neither purpose,
4 then an EIS need not be prepared. *Public Citizen*, 541 U.S. at 768. That said, "to the fullest
5 extent possible … public laws of the United States [must] be interpreted and administered in
6 accordance with [NEPA]." *Jamul Action Committee*, 837 F.3d 958, 961 (quoting, *inter alia*, 42
7 U.S.C. § 4332). If preparation of an EIS might have some impact on the Secretary's prescribing
8 of Secretarial Procedures, the rule of reason would not excuse compliance with NEPA.

9 The Defendants argue that, even assuming that a full, detailed EIS was prepared, it would
10 not (and indeed it *could not*) have impacted his prescribing of Secretarial Procedures. The
11 remedial process of IGRA does not write the Secretary a blank check to issue any conditions for
12 gaming that he sees fit. Instead, the Secretary and North Fork argue, his view is restricted to
13 consultation with the Indian tribe and review of the compact selected by the mediator, the
14 provisions of IGRA, and the relevant portions of California law. 25 U.S.C. § 2710(d)(7)(B)(vii).
15 The Secretary contends that he is not authorized to modify the procedures from those set in the
16 selected compact except for inconsistency with IGRA or relevant state law. In other words, the
17 Secretary contends that he cannot modify the procedures for environmental reasons.

18 In response, Stand Up focuses upon the mediator's obligation to select from the two
19 proposed last best offer compacts from the tribe and state, the compact "which best comports
20 with the terms of [IGRA] and any other applicable Federal law and with the findings of the
21 court." 25 U.S.C. § 2710(d)(7)(B)(iv). Although the mediator *selects* the compact, Stand Up
22 argues, it is the Secretary who *gives effect* to it by issuing gaming procedures. Stand Up contends
23 that the Secretary is required to correct any error by the mediator in resolving "any other
24 applicable Federal law," *see* 25 U.S.C. § 2710(d)(7)(B)(iv), rather than "perpetuat[ing] the
25 violation by adopting the mediator-selected compact," Doc. 46 at 25. Stand Up highlights that
26 the Secretary in fact did make changes to the mediatory-selected compact, permitting the State to
27 opt-in to the regulatory role that it takes in relation to tribes with whom it has entered a Tribal-
28 State compact. Doc. 46 at 25; AR00002187-88. "If the State does not opt-in, the National Indian

1 Gaming Commission [("NIGC"]) [will] perform such responsibilities pursuant to a
2 Memorandum of Understanding [("MOU")] with the Tribe." AR00002188; *accord*
3 AR00002245. Plaintiff contends that the modification was not made to comply with IGRA or
4 relevant state law but to comply with "other applicable federal law"—namely the United States
5 Constitution.

6 Stand Up's proposed reading is again inconsistent with IGRA. First, the Secretary's
7 modification of the mediator-selected compact in a manner designed to avoid offending the
8 Tenth Amendment[14] is not an indication that he is equally bound by NEPA.[15] The text and
9 legislative history of IGRA, as well as subsequent judicial decisions regarding IGRA make clear:
10 a State cannot be compelled to negotiate with an Indian tribe toward entering into a compact or
11 take *any* action gaming-related action with respect to an Indian tribe. 25 U.S.C. §§ 2710(d)(3)(A)
12 (authorizing a Tribe to request negotiations with a State), 2710(d)(7)(B) (establishing a
13 mechanism for authorizing gaming notwithstanding a State's non-participation and framing the
14 State's involvement as a matter of state consent); S. Rep. 100-446 at *13-14 (IGRA is designed
15 to "mak[e] use of existing State regulatory systems" but only "through negotiated compacts"
16 between an Indian tribe and a State.) *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d
17 1422, 1435 (10th Cir.1994) ("Had Congress intended to mandate that the states enter into
18 compacts with Indian tribes, it would not have included these latter sections in § 2710(d)(7).");
19 *Cheyenne River Sioux Tribe v. South Dakota*., 3 F.3d 273, 281 (8th Cir. 1993) (IGRA gives
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21 [14] "'Federal laws conscripting state officers … violate state sovereignty and are thus not in accord with the Constitution.'" *National Federation of Independent Business v. Sebelius,* 567 U.S. 519, 620 (2012); (quoting *Printz*
22 *v. United States*, 521 U.S. 898, 925, 935 (1997); *New York v. United States*, 505 U.S. 144, 176 (1992)). However, Congress "may direct a state to consider implementing a federal program so long as states retain the prerogative to
23 decline Congress' invitation." *Ponca Tribe of Oklahoma v. State of Oklahoma,* 37 F.3d 1422, 1433-1434 (10th Cir.1994); *accord Estom Yumeka Maidu Tribe*, 163 F.Supp.3d at 779.
24 [15] The Court would note that the Secretary made the same modification when prescribing Secretarial Procedures regarding the Estom Yumeka Maidu Tribe of the Enterprise Rancheria of California in relation to *Estom Yumeka*
25 *Maidu Tribe of the Enterprise Rancheria of California v. State of California*, 2:14-cv-1939-TLN-CKD (E.D. Cal. 2016). *See* Letter to Glenda Nelson at p. 2, accompanying Secretarial Procedures for the Estom Yumeka Maidu
26 Tribe of the Enterprise Rancheria, located at https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc2-056229.pdf (BIA, Aug. 12, 2016) (last accessed on July 18, 2018). The same modification was also made when
27 prescribing Secretarial Procedures regarding the Rincon Band of Luiseno Indians. *See* Letter to Bo Mazzetti at p.3, accompanying Secretarial Procedures for Rincon Band of Luiseno Indians, located at
28 https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-026439.pdf (BIA, Feb. 8, 2013) (last accessed on July 18 2018). Both documents are judicially noticeable.

States the "right to get involved in … gaming casino operations within the state…, but does not compel it."); *Estom Yumeka Madiu Tribe*, 163 F.Supp.3d at 779 (IGRA does not require a State "to negotiate with a tribe to conclude a compact, in the sense that there is no ultimate mandate that a [T]ribal-[S]tate [compact] be agreed upon."); *but see New Mexico v. Dept. of the Interior*, 854 F.3d at 1213 ("[S]tates still retain the obligation to negotiate in good faith under § 25 U.S.C. § 2710(d)(3)(A)."). The Secretary made a necessary change to the mediator-selected compact to ensure that Secretarial Procedures complied with the limitations of IGRA, which also had the effect of avoiding violation of the Constitution. The Secretary's modification, in compliance with section 2710(d)(7)(B)(vii), assured that the Secretarial Procedures were "consistent with" IGRA; it was not an attempt to comply with "other applicable federal law." *See* 25 U.S.C. §§ 2710(d)(7)(B)(iv), (vii).[16, 17]

The Court reads section 2710(d)(7)(B)(vii) to contain an exhaustive list of authorities to be considered by the Secretary in prescribing Secretarial Procedures. *See also*, *Texas v. United States*, 497 F.3d at 524 (The Secretarial Provisions issued pursuant to Part 291[18] "differ[] only slightly from the statutory requirement" of section 2710(d)(7)(B)(vii). [I]t is unclear which of the two is more restrictive" but "the regulations certainly do not grant 'unbridled power to prescribe Class III regulations.") This understanding is consistent with the detailed and comprehensive statutory scheme of IGRA created by Congress. The Secretary, although clearly having the most relevant experience in overseeing Tribal-State compacts, is purposefully removed from the thick

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[16] The Court does not now comment on whether the Secretary could (or must) make other changes to a Tribal-State compact that were compelled by the Constitution but not necessary to assure consistency with IGRA or relevant state law. That question is not before the Court.

[17] Even in situations where the Secretary is vested with broader authority by IGRA—to disapprove an agreed upon compact that is inconsistent with IGRA, other provisions of Federal law not related to jurisdiction over gaming on Indian lands, or trust obligations to the Indian tribes, *see* 25 U.S.C. § 2710(d)(8)(B)(i)-(iii)—there is no obligation to comply with NEPA "because there is an irreconcilable statutory conflict between NEPA and IGRA." *Jamul Action Committee*, 837 F.3d at 962 (discussing approval of gaming ordinances by the NIGC pursuant to IGRA). Indeed, preparing an EIS would be impossible in the 45-day period set by IGRA. *See* 25 U.S.C. § 2710(d)(8)(C); *Jamul Action Committee*, 837 F.3d at 965 (noting that it is impossible for an agency to prepare an EIS in ninety days). From the Court's review, the Secretary has never attempted to complete an EA in response to submission of a Tribal-State compact for approval.

[18] Part 291 of Title 25 of the Code of Federal Regulations was implemented post-*Seminole* to address the situation wherein a state refuses to negotiate or does not negotiate in good faith and then defends a good faith litigation by asserting sovereign immunity. The Tenth Circuit recently held that Part 291 was not a valid exercise of the Secretary of the Interior's authority under IGRA. *New Mexico v. Dept. of the Interior,* 854 F.3d at 1221. This case does not address that situation and that holding has no direct impact here. *See* note 10, *infra*.

of the remedial process. *See Texas v. United States*, 497 F.3d at 500. In this context, the Secretary is required to prescribe procedures consistent with the selected compact, the provision of IGRA, and relevant portions of state law. Elsewhere in IGRA, the Secretary and others with parts in the Congressional scheme are delineated different roles and limitations. *See, e.g.*, 25 U.S.C. §§ 2710(d)(7)(B)(iii) (detailing what a court may consider and must consider in deciding whether a State has negotiated in good faith), 2710(d)(7)(B)(iv) (detailing what the mediator considers in selecting a compact), 2710(d)(8)(B) (detailing the grounds upon which the Secretary may disapprove a compact). In order to give the distinctions in roles meaningful effect, this Court must read section 2710(d)(7)(B)(vii) to list the only considerations that the Secretary is authorized to make. *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'") *Briseno v. ConAgra Foods, Inc.*, 844 F.3d 1121, 1125 (9th Cir. 2017) ("[T]he enumeration of certain criteria to the exclusion of others should be interpreted as an intentional omission.") (citation omitted). Otherwise, the Court would effectively elude the purposeful distinctions made by Congress regarding the roles of the mediator—to select a compact considering, *inter alia*, "other applicable Federal law"—and the Secretary—to give effect to the chosen compact considering, *inter alia*, "provisions of [IGRA]." *See* 25 U.S.C. §§ 2710(d)(7)(B)(iv), (vii); *New Mexico v. Dept. of the Interior*, 854 F.3d at 1225 ("[T]he Secretary's role is limited.… Congress has narrowly circumscribed the Secretary's authority in prescribing procedures by cross-referencing previous steps in the judicial remedial process."); *see also Republic of Ecuador v. Mackay*, 742 F.3d 860, 864 (9th Cir. 2013) ("An interpretation that gives effect to every clause is generally preferable to one that does not.")[19] It is not the Court's province to second guess Congressional judgements. Requiring the Secretary to consider matters outside of those expressly articulated by Congress would do exactly that.

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[19] Indeed, the Secretary holds trust obligations to the Tribe that are wholly inconsistent with the Secretary being objective in setting aside portions of the mediator-selected compact. *See Texas*, 497 F.3d at 508 (finding that the secretary's trust obligation to an Indian tribe is inconsistent with the Secretary being a neutral party to select a mediator where a state invokes Eleventh Amendment immunity in response to a good faith suit).

Accordingly, in prescribing gaming procedures, the Secretary may only consult with the Tribe, and ensure compliance with the mediator-selected compact, IGRA, and relevant state law. The Secretary could not depart from the mediator-selected compact unless it was necessary to comply with IGRA or relevant state law.

Stand Up's attempt to distinguish this action from *Public Citizen* is unavailing. In *Public Citizen*, the Supreme Court held that the Federal Motor Carrier Safety Administration ("FMCSA") did not need to consider the environmental effects of increased cross-border operations of Mexican motor carriers in the EA because the FMCSA had no ability to prevent those operations. *Public Citizen*, 541 U.S. at 770. A "critical feature" of that case was that the "FMCSA [had] no ability to countermand the President's lifting of the moratorium or otherwise categorically exclude Mexican motor carriers from operating within the United States." The agency had "only limited discretion regarding motor vehicle carrier registration: It must grant registration to all domestic or foreign motor carriers that are willing and able to comply with the applicable safety, fitness, and financial-responsibility requirements.... FMCSA [had] no statutory authority to impose or enforce emissions controls or to establish environmental requirements unrelated to motor carrier safety." *Id*. at 758–59 (internal quotation marks and citation omitted). Because the agency could not prevent the environmental effects, it could not be considered a legally relevant cause of them. *Id*. at 770. In the same way, this Court ordered the Secretary to prescribe gaming procedures—the Secretary could not decline to do so. The Secretary was permitted only limited discretion regarding the content of those procedures. That discretion did not extend to consideration of environmental consequences—certainly not if that consideration meant prescribing procedures inconsistent with the mediator-selected compact. The Secretary could not have considered the results of an EIS in prescribing gaming conditions and cannot be considered a legally relevant cause of any environmental effects. *Public Citizen*, 541 U.S. at 770. The Secretary merely complied with the role and limitations assigned to him by Congress. For that reason, the "rule of reason" excludes compliance with NEPA requirements. *Id*.

The Secretary's action in not conducting an EA or EIS was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; it was not in excess of statutory

jurisdiction or without observance of procedure required by law. The Court will not compel the Secretary to conduct any review pursuant to NEPA because such review is not required here. Summary judgment on this question will be granted in favor of North Fork and the Federal Defendants.[20]

3. Clean Air Act ("CAA")

Distinct from NEPA, the Clean Air Act is concerned with more than process; it creates substantive requirements and directs the EPA to establish emission limits on air pollutants. 42 U.S.C. § 7409(a); *see* 42 U.S.C. § 7401-7671q. The CAA requires each State to develop a State Implementation Plan ("SIP"), designed to implement, maintain, and enforce the EPA's national ambient air quality standards ("NAAQS"). 42 U.S.C. § 7410(a)(1). Each State is divided into air quality control regions, each of which is designated as a nonattainment area, an attainment area, or an unclassifiable area depending on the ambient air quality of the area. 42 U.S.C. § 7407(b), (d). The CAA is concerned primarily with State regulation of "stationary sources"—buildings or structures which emit or may emit any air pollutant. 42 U.S.C. § 7411(a)(3); *see In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 264 F.Supp.3d 1040, 1045 (N.D. Cal. 2017) (citations omitted). Section 176(c)(1) of the CAA, which applies in nonattainment areas, prohibits federal agencies from "licens[ing]…, permit[ting], or approv[ing] any activity which does not conform to" a SIP. 42 U.S.C. § 7506(c)(1); *accord* 40 C.F.R. § 93.150(a)-(b). "The assurance of conformity to [a SIP] [is] an affirmative responsibility of the head of … [an] agency…." *Id.* It is undisputed that the Madera Site is located within the San Joaquin Valley Air Basin, which is a nonattainment area, triggering the conformity determination requirement of section 176 of the CAA. Doc. 29-4 at 104. Prior to taking the Madera Site into trust, the Secretary conducted a conformity determination. Doc. 29-4 at 104-114; *see Stand Up for California! v. Dept. of Interior*, 2018 WL 385220, *1-2, 9-10. However, it

[20] The Court does not reach the question of whether the Secretary was permitted to rely on the EIS prepared in conducting the fee-to-trust determination. The Court would note that, although the gaming procedures prescribed differ from those anticipated in the 2009 EIS, the procedures require North Fork to conduct an environmental assessment prior to construction of a second gaming facility (or a facility different from the facility envisioned in the fee-to-trust process) on the Madera Site. *See* AR00002264. The procedures further require North Fork to enter into an agreement with the County of Madera regarding mitigation of significant environmental impacts. *See* AR00002269-71. In that way, the procedures are wholly consistent with the selected compact. *See* AR00000081-88.

1 is undisputed that the Secretary did not conduct a conformity determination with respect to the
2 impact of prescribing gaming procedures. Nor did the Secretary did indicate reliance on the
3 previously conducted conformity determination in prescribing gaming procedures.
4 Stand Up contends the Secretary was required to conduct a conformity determination
5 prior to prescribing gaming procedures and, by failing to do so, the Secretary violated the CAA.
6 The Secretary and North Fork both contend that, in the same way that the Secretary was
7 unable to consider environmental impacts shown by any EIS, the Secretary could not make
8 changes to the mediator-selected compact in response to the CAA emissions conformity
9 requirements. The Secretary was not delegated "practical control" over the terms of the gaming
10 procedures such that he could impact emissions. Doc. 37 at 44; Doc. 52 at 21; Doc. 51 at 26.
11 Thus, they argue, the Secretary is exempt from conducting a compliance determination because
12 he did not "cause new emissions to exceed" the relevant threshold amounts. *See Public Citizen*,
13 541 U.S. at 771. The Secretary also argues that his action in prescribing gaming procedures is "a
14 rulemaking or administrative action" that is exempt from the scope of the conformity
15 requirements. Doc. 41 at 36 (citing 40 C.F.R. § 93.153(c)(2)(iii)).
16 The Court agrees that the Secretary lacks sufficient control over the prescribing of
17 gaming procedures to be able to make modifications based on the requirements of the CAA. As a
18 result, the prescribing of Secretarial Procedures does not require a CAA conformity
19 determination. The Supreme Court explained in *Public Citizen* that "agenc[ies] [are] exempt
20 from general conformity determination[s] under the CAA if [their] action would not cause new
21 emissions to exceed certain threshold emission rates set forth in [section] 93.153(b)." *Public*
22 *Citizen*, 541 U.S. at 771. Section 93.153 requires agencies to conduct a conformity determination
23 "for each … pollutant … where the total of direct and indirect emissions … in a nonattainment
24 … area caused by a Federal action" would equal or exceed a certain level. 40 C.F.R. 93.153(b).
25 Indirect emissions are those emissions that are "caused or initiated … and originate" in the same
26 nonattainment area as the Federal action but occur at a different time or place as the action, are
27 reasonably foreseeable, that the agency can practically control, and for which the agency has a
28

continuing program responsibility. 40 C.F.R. § 93.152.[21] Unlike NEPA, the implementing regulations of the CAA define what it means for a Federal action to "cause" emissions: "[c]aused by, as used in the term[] … 'indirect emissions,' means emissions that would not otherwise occur in the absence of the Federal action." 40 C.F.R. § 93.152. "Some sort of 'but for' causation is sufficient for evaluating causation in the conformity review process." *Public Citizen*, 541 U.S. at 755.

The prescribing of gaming procedures will result in vehicle emissions of ROG and NOx greater than *de minimus* thresholds and exceeding applicable conformity thresholds during both construction and operation of the gaming facility. *See* Doc. 29-4 at 111 (finding in the fee-to-trust CAA conformity determination that vehicle emissions caused by the construction and operation of the single gaming facility initially envisioned will exceed applicable conformity thresholds). If the Secretary had not prescribed gaming procedures—as he was required to do—North Fork could not conduct gaming. The Secretary's prescribing of gaming procedures is certainly a "but for" cause of class III gaming at the Madera Site. The Supreme Court came to a similar conclusion in *Public Citizen*. 541 U.S. at 772. It explained that the FMCSA motor carrier safety and registration regulation regulations—without which no Mexican trucks could enter the United States (hence they could not emit pollutants in the United States)—was a "but for" cause of Mexican trucks entering the United States, hence pollution. *Public Citizen*, 541 U.S. at 758, 760, 772.

However, despite being a "but for" cause of pollution, the FMCSA "could not refuse to register Mexican motor carriers simply on the ground that their trucks would pollute excessively…, cannot determine whether registered carriers actually will bring trucks into the United States, cannot control the routes the carriers take, and cannot determine what the trucks will emit." *Public Citizen*, 541 U.S. at 772-773. The High Court reasoned that the FMCSA did not "practicably control[]" and would not "maintain control" over vehicle emissions from the Mexican trucks as would be required to consider the emissions "indirect emissions" which must

[21] Direct emissions are those emissions caused by the Federal action that occur at the same time and place as the Federal action. 40 C.F.R. § 93.152. This case does not involve such emissions. There is no contention that the prescribing of Secretarial Procedures resulted in a concurrent release of pollutants.

1 be considered in conformity determinations made pursuant to the CAA. As a result, the FMCSA
2 correctly did not consider any of the "emissions attributable to the increased presence of
3 Mexican trucks within the United States." *Public Citizen*, 541 U.S. at 771, 773. Here, as
4 discussed above, the Secretary's authority to modify the gaming procedures from those selected
5 by the mediator was limited. The Secretary's role was only to ensure that the gaming procedures
6 prescribed were consistent with the mediator-selected compact, IGRA, and relevant California
7 law. 25 U.S.C. § 2710(d)(7)(B)(vii). The Secretary no more practicably controlled or maintained
8 control over emissions at the Madera Site than did the FMCSA in *Public Citizen*.
9 The Court cannot conclude that the Secretary's decision to not conduct a conformity
10 determination into whether emissions at the proposed gaming site exceed threshold amounts was
11 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; it was not
12 in excess of statutory jurisdiction or without observance of procedure required by law. Summary
13 adjudication will be denied to Stand Up and granted to North Fork and the Secretary.
14 4. Indian Gaming Regulatory Act ("IGRA")
15 Stand Up's IGRA challenge is straight-forward: "the Secretarial Procedures are invalid
16 because the Governor of California lacked authority to concur in the Secretary's two-part
17 determination under 25 U.S.C. § 2719(b)(1)(A), and therefore the Madera Site is not eligible for
18 tribal gaming under IGRA." Doc. 29 at 30. The premise that the Governor lacked the authority to
19 concur is not established. That question is now pending before the California Supreme Court.
20 a. Rule 19
21 With respect to the same question, this Court and the District of Columbia District Court
22 both found that the State of California is an indispensable party for any claims that "in any way
23 involv[e] the Governor's concurrence." *Stand Up for California*, 204 F.Supp.3d at 254; *Picayune*
24 *Rancheria of Chukchansi Indians v. United States Department of the Interior*, 2017 WL
25 3581735, *9-10 (E.D. Cal. Aug. 18, 2017). The same holds true here. Stand Up's cause of action
26 relies upon the invalidity of the Governor's concurrence. At least until the California Supreme
27 Court resolves the question before it, the State of California is an indispensable party.
28

b. Stay

Stand Up moves to stay this action pending the California Supreme Court's resolution of the gubernatorial concurrence authority question. The parties disagree on the rule to be applied in resolving the question of whether to issue a stay. Stand Up relies on *Landis v. North American Co*., 299 U.S. 248 (1936) while North Fork and the Federal Defendants argue that *Colorado River Water Conversation District v. United States*, 424 U.S. 800 (1976), controls. This Court has questioned the applicability of *Landis* in governing whether a district court should stay a federal action pending the resolution of a concurrent state court proceeding. *Abrahamson v. Berkley*, 2016 WL 8673060, *19 n. 14 (E.D. Cal. Sept. 2, 2016); *accord Picayune*, 2017 WL 3581735 at *6. Although this Court did not resolve the question and the Ninth Circuit has not spoken directly to the question, the Eleventh Circuit and other district courts in this district have held that the standard articulated in *Colorado River*, governs whether a federal court should stay in favor of a state court proceeding. *See Ambrosia Coal and Const. Co. v. Pages Morales*, 368 F.3d 1320, 1328 (11th Cir. 2004); *Martin v. Minuteman Press Int., Inc*., 2016 WL 4524885, *2 (E.D. Cal. Aug. 30, 2016) (citing, *inter alia*, *R.R. Street & Co. Inc. v. Transport Ins. Co*, 656 F.3d 996, 975 (9th Cir. 2011)); *see also Colorado River*, 424 U.S. at 817-818 (contrasting the policy of judicial conservation and avoidance of duplicating litigation existing between federal district courts presiding over overlapping actions and the "virtually unflagging obligation of federal courts to exercise jurisdiction" over actions where concurrent state court proceedings exist). For the same reasons articulated by the *Martin v. Minuteman Press* court, this Court concludes that *Colorado River* provides the appropriate standard and that *Landis* is inappropriate to forestall a federal action pending resolution of a parallel state action.

In "exceedingly rare" circumstances, *Colorado River* recognizes a "narrow exception" to the federal courts' "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) ("*Colorado River*"); *Smith*, 418 F.3d at 1033. If "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," *Colorado River*, 424 U.S. at 817, show that the federal case should defer to the state case, then the federal

court may dismiss or stay the federal action. *See R.R. St. & Co. v. Transp. Ins. Co*., 656 F.3d 966, 978 (9th Cir. 2011). In deciding whether to dismiss or stay a federal case in favor of a state case concerning the same subject matter, courts in the Ninth Circuit are to examine eight factors: (1) which court first assumed jurisdiction over any property at stake; (2) the inconvenience of the federal forum; (3) the desire to avoid piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether federal law or state law provides the rule of decision on the merits; (6) whether the state court proceedings can adequately protect the rights of the federal litigants; (7) the desire to avoid forum shopping; and (8) whether the state court proceedings will resolve all issues before the federal court. *Id*. at 978–79. With respect to the last factor, although "exact parallelism" is not required between the state and federal cases, "the existence of a substantial doubt as to whether the state proceedings will resolve the federal action precludes *Colorado River* stay or dismissal." *Id*. at 982; *Smith*, 418 F.3d at 1033.

"These factors are to be applied in a pragmatic and flexible way, as part of a balancing process rather than as a mechanical checklist." *Am. Int'l Underwriters (Philippines), Inc. v. Cont'l Ins. Co*., 843 F.2d 1253, 1257 (9th Cir. 1988). Yet, "[a]ny doubt as to whether a factor exists should be resolved against a stay." *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369 (9th Cir. 1990).

The Court addresses only the fifth and eighth factors. As to the fifth factor, the "presence of federal-law issues must always be a major consideration weighing against surrender" of jurisdiction, but "the presence of state-law issues may weigh in favor of that surrender" only "in some rare circumstances." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 (1983). This Court resolves Stand Up's IGRA claim on federal procedural grounds; the underlying state law questions do not impact this Court's decision. More importantly, the APA and FOIA claims before this Court will not be completely resolved by the California Supreme Court's decision. *Seneca Ins. Co. v. Strange Land, Inc.*, 862 F.3d 835, 845 (9th Cir. 2017) (The parallelism factor is "more relevant when it counsels against arbitration, because … insufficient parallelism may preclude abstention.") The Court's "virtually unflagging obligation" to resolve those claims compels the Court to move forward with this action.

c. Conclusion

Because a stay is inappropriate pursuant to *Colorado River*, and because the State of California is an indispensable party to this action, Stand Up's IGRA claim will be dismissed for failure to join an indispensable party.

C. Freedom of Information Act ("FOIA")

The Freedom of Information Act seeks 'to ensure an informed citizenry, vital to the functioning of a democratic society.'" *Tuffly v. U.S. Dep't of Homeland Sec.*, 870 F.3d 1086, 1092 (9th Cir. 2017) (quoting *NLRB v. Robbins Tire & Rubber Co*., 437 U.S. 214, 242 (1978)). Accordingly, "the Act requires that federal agencies make records within their possession promptly available to citizens upon request." *Id*. However, not all records are subject to disclosure; nine exemptions exist. 5 U.S.C. § 552(b).

On August 12, 2016, Stand Up sent a FOIA requests to the Department of the Interior ("DOI") and the Bureau of Indian Affairs ("BIA") requesting "[c]opies of all communications to or from North Fork Rancheria of Mono Indians" and "to or from the State of California" "relating to the development of the Secretarial Procedures." Doc. 29-3 at 5, 8. On August 15, 2016, the BIA informed Stand Up that the FOIA request had been received and "assigned for processing and direct response." Doc. 29-3 at 12. The following day, the DOI responded to Stand Up, indicating that BIA had the information sought and that the BIA would respond directly to Stand Up. Doc. 29-3 at 18. On October 10, 2016, Stand Up sought a status update regarding its FOIA request. Doc. 29-3 at 20. The BIA responded that the FOIA request had been assigned to the Office of the Assistant Secretary – Indian Affairs (ASIA). Doc. 29-3 at 30. On October 6, 2017, the FOIA Coordinator for the Office of the ASIA indicated that the response to Stand Up's FOIA request would be finalized by December 5, 2017. Doc. 52-3 at 1-2.

On December 5, 2017, this Court received notice from the Federal Defendants that on December 4, 2017, the DOI "responded to Stand Up's request, providing all documents answering to the request that are not otherwise subject to withholding under FOIA." Doc. 53 at

2.[22] The documents produced amounted to "about 1,331 pages of documents." Doc. 54 at 2. Two days later, Stand Up responded that the documents provided were apparently incomplete and seeking additional time to review the disclosed documents. Doc. 54. No party has updated the Court on the status of the FOIA dispute since that time. In light of the Federal Defendants' production of documents, and Stand Up's failure to indicate to the Court that the documents provided were in fact an incomplete response, the Court must conclude that the Federal Defendants' response was adequate and all FOIA relief available has been obtained.

V. Order

Accordingly, IT IS HEREBY ORDERED that:

1. Stand Up for California!'s motion for summary judgment (Doc. 29) is DENIED and Defendants' motions for summary judgment (Docs. 36, 40) are GRANTED, as set out herein;
2. Stand Up for California's motion to stay (Doc. 28) is DENIED; and
3. The Clerk of the Court shall enter judgment and close this case.

IT IS SO ORDERED.

Dated: July 18, 2018

SENIOR DISTRICT JUDGE

[22] The BIA withheld one page under FOIA Exemption 4. Doc. 53-1 at 1 (citing 5 U.S.C. § 552(b)(4) (protecting trade secrets and other privileged or confidential financial information). The BIA withheld a second page under FOIA Exemption 6. Doc. 53-1 at 2 (citing 5 U.S.C. § 552(b)(6) (protecting personnel and medical files). The letter explaining the withheld information also explained that a right exists to appeal the withholding within 90 workdays. Doc. 53-1 at 3.