

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STATE OF CONNECTICUT, ET AL.)	
)	
<i>Plaintiffs,</i>)	
)	
v.)	No. 1:17-cv-02564-RC
)	
UNITED STATES DEPARTMENT OF THE)	
INTERIOR, ET AL.,)	
)	
<i>Defendants.</i>)	
)	

**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 compacts² 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*

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.

Dated: August 3, 2018

Respectfully submitted,

KILPATRICK TOWNSEND &
STOCKTON LLP

/s/ Keith M. Harper
Keith M. Harper, Bar No. 451956
KHarper@kilpatricktownsend.com
Catherine F. Munson, Bar No. 985717
cmunson@kilpatricktownsend.com
607 14th Street, N.W., Suite 900
Washington, D.C. 20005
Telephone: 202-508-5800
Facsimile: 202-508-5858

*Attorneys for Plaintiff
Mashantucket Pequot Tribe*

STATE OF CONNECTICUT

/s/ Mark F. Kohler
Mark F. Kohler
Assistant Attorney General
Mark.Kohler@ct.gov
Michael K. Skold

Assistant Attorney General
Michael.Skold@ct.gov
Connecticut Office of the Attorney General
55 Elm Street, P.O. Box 120
Hartford, CT 06141-0120
Telephone: 860-808-5020
Facsimile: 860-808-5347

*Attorneys for Plaintiff
The State of Connecticut*

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

JEFFREY H. WOOD
Acting Assistant Attorney General

JOSEPH NATHANAEL WATSON (Georgia State Bar No. 212038)
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Indian Resources Section
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
Telephone: (303) 844-1348
Facsimile: (303) 844-1350
Joseph.Watson@usdoj.gov

Attorneys for the United States

**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

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BACKGROUND 3

I. THE SECRETARY’S TWO-PART DETERMINATION, THE GOVERNOR’S CONCURRENCE, AND FEDERAL ACQUISITION OF THE MADERA SITE AS TRUST LAND 3

II. THE 2012 COMPACT AND ISSUANCE OF SECRETARIAL PROCEDURES 5

III. LEGAL BACKGROUND..... 7

IV. RELATED ACTIONS 8

A. Stand Up’s Related Action in the District of Columbia..... 8

B. Stand Up’s Related Action in the Courts of California..... 10

C. Other Cases in the Eastern District of California..... 10

D. Cases in California State Courts..... 10

STANDARD OF REVIEW 11

ARGUMENT 12

I. THE ISSUANCE OF SECRETARIAL PROCEDURES DOES NOT VIOLATE THE JOHNSON ACT (CLAIM I)..... 13

A. Stand Up’s Argument Contradicts IGRA’s Plain Meaning and Language..... 14

B. Stand Up’s Argument Is Contrary to IGRA’s Purpose and the Caselaw Interpreting IGRA 17

C. IGRA Is Not Ambiguous, But If It Were, Stand Up’s Argument Is Still Wrong 18

D. Legislative History Supports the Secretary’s Position..... 19

II. ISSUANCE OF THE SECRETARIAL PROCDEDURES DID NOT VIOLATE NEPA (CLAIM II)..... 20

A. Secretarial Procedures Do Not Require the Secretary to Produce a NEPA Analysis 20

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1.	<u>Secretarial Procedures Are Not a Major Federal Action Under NEPA</u>	21
2.	<u>The Rule of Reason Applies Because an EIS Would Serve No Purpose</u>	24
3.	<u>Preparing a NEPA Analysis Would Conflict With IGRA</u>	25
B.	<u>To the Extent NEPA Analysis Is Necessary the Existing EIS Is Sufficient</u>	27
III.	THE CONFORMITY REQUIREMENTS OF THE CAA DO NOT APPLY TO THE SECRETARY’S ACTION IN ISSUING THE PROCEDURES (CLAIM III).....	28
A.	<u>The Clean Air Act and Conformity Regulations</u>	28
IV.	THE SECRETARY DID NOT VIOLATE FOIA (CLAIM IV).....	31
V.	THE SECRETARIAL PROCEDURES ARE LAWFUL (CLAIM V).....	31
A.	<u>Collateral Estoppel Bars Stand Up’s Fifth Claim</u>	32
B.	<u>The Secretary’s Issuance of Secretarial Procedures Was Lawful</u>	34
1.	<u>The Issuance of Secretarial Procedures Was Mandatory and Lawful.</u>	374
2.	<u>The Secretary was entitled to rely on the validity of the Concurrence.</u>	37
3.	<u>Stand Up Cannot Collaterally Attack the Madera Site’s Gaming Eligibility; It Has Already Done So And Lost</u>	42
4.	<u>This Case Must Be Decided On The Record Before the Court.</u>	43
5.	<u>That 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.</u>	44
	CONCLUSION.....	44

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Cases

Alaska Wilderness League v. Jewell, 788 F.3d 1212 (9th Cir. 2015)..... 25

Amador Cty. v. Salazar, 640 F.3d 373 (D.C. Cir. 2011)..... 4

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)..... 11

Anderson v. Yungkau, 329 U.S. 482 (1947) 35

Ariz. State Bd. for Charter Sch. v. U.S. Dep’t of Educ., 464 F.3d 1003 (9th Cir. 2006) 17

Artichoke Joe’s Cal. Grand Casino v. Norton, 353 F.3d 712 (9th Cir. 2003)..... 19

Beauchamp v. Anaheim Union High Sch. Dist., 816 F.3d 1216 (9th Cir. 2016) 33

Big Lagoon Rancheria v. California, 789 F.3d 947 (9th Cir. 2015)..... 17, 42

California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)..... 39

Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190 (D.C. Cir. 1991) 25

Clark v. Bear Stearns & Co.Inc., 966 F.2d 1318 (9th Cir. 1992)..... 33

Corley v. United States, 556 U.S. 303 (2009)..... 15

Davis v. Mich. Dep’t. of Treasury, 489 U.S. 803 (1989)..... 15

Dep’t of Transp. v. Public Citizen, 541 U.S. 752 (2004)..... passim

EarthReports v. FERC, 828 F.3d 949 (2016) 22

Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of, Okla., 426 U.S. 776 (1976) 26

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 17

Hein v. Capitan Grande Band of Diegueno Mission Indians, 201 F.3d 1256 (9th Cir. 2000)..... 43

Hibbs v. Winn, 542 U.S. 88 (2004)..... 15

Jamul Action Comm. v. Chaudhuri, 837 F.3d 958 (9th Cir. 2016)..... 25, 26, 31

Judulang v. Holder, 565 U.S. 42 (2011)..... 12, 13

Lacson v. U.S. Dep’t of Homeland Sec., 726 F.3d 170 (D.C. Cir. 2013) 11, 12

Lexecon v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998)..... 35

Lopez v. Davis, 531 U.S. 230 (2001) 35

Ma v. Ashcroft, 361 F.3d 553 (9th Cir. 2004)..... 17

1 *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983)..... 21

2 *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014) 39, 43

3 *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985)..... 19

4 *Natural Resources Defense Council, Inc. v. Berklund*, 458 F. Supp. 925 (D.D.C. 1978)..... 23

5 *Nat’l Wildlife Fed’n v. Burford*, 871 F.2d 849 (9th Cir. 1989)..... 43

6 *Nat’l Wildlife Fed’n v. U.S. Army Corps of Engineers*, 384 F.3d 1163 (9th Cir. 2004)..... 43

7 *North Fork Rancheria of Mono Indians v. California*, 1:15cv00419-AWI-SAB, 2015 WL

8 11438206 (E.D. Cal. Nov. 13, 2015) passim

9 *North Fork Rancheria of Mono Indians v. California*, 2016 WL 4208452 (E.D. Cal. Aug. 10,

10 2016) 26

11 *Nw Motorcycle Ass’n v. U.S. Dep’t of Agriculture*, 18 F.3d 1468 (9th Cir. 1994)..... 11

12 *Ohio v. Roberts*, 448 U.S. 56 (1980)..... 24

13 *Oliphant v. Schlie*, 544 F.2d 1007 (9th Cir. 1976)..... 38, 39, 40

14 *Omaha Tribe of Nebraska v. Vill. of Walthill*, 334 F. Supp. 823 (D. Neb. 1971) 38

15 *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Blank*, 693 F.3d 1084 (9th Cir. 2012)..... 28

16 *Paulo v. Holder*, 669 F.3d 911 (9th Cir. 2011)..... 33

17 *Picayune Rancheria of Chukchansi Indians v. Brown*, 178 Cal. Rptr. 3d 563 10

18 *Pueblo of Santa Ana. v. Kelly*, 104 F.3d 1546 (10th Cir. 1997)..... 40, 41, 44

19 *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976)..... 30

20 *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d

21 1019 (9th Cir. 2010)..... 18, 26, 41

22 *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581 (9th Cir. 2014)..... 26

23 *San Luis & Delta-Mendota Water Auth. v. U.S. Dep’t of Interior*, 624 F. Supp. 2d 1197 (E.D.

24 Cal. 2009)..... 43

25 *Serv. Emps. Int’l Union. v. United States*, 598 F.3d 1110 (9th Cir. 2010) 35

26 *Sierra Club v. FERC*, 827 F.3d 36 (D.C. Cir. 2016) 22

27 *Sierra Club v. FERC*, 827 F.3d 59 (D.C. Cir. 2016) 22

28 *Sierra Club v. Mainella*, 459 F. Supp. 2d 76 (D.D.C. 2006) 23

Stand Up for California v. State, 390 P.3d 781 (Cal. 2017)..... 10

1	<i>Stand Up for California! v. U.S. Dep’t of the Interior</i> , 919 F. Supp. 2d 51 (D.D.C. 2013)	3, 9
2	<i>Stand Up for California! v. U.S. Dep’t of the Interior</i> , 71 F. Supp. 3d 109 (D.D.C. 2014)	3
3	<i>Stand Up for California! v. Californai</i> , 211 Cal. Rptr. 3d 490 (Ct. App. 2016)	10
4	<i>Stand Up for California! v. U.S. Dep’t of the Interior</i> , 204 F. Supp. 3d	
5	212 (D.D.C. 2016)	passim
6	<i>Sycuan Band of Mission Indians v. Roache</i> , 54 F.3d 535 (9th Cir. 1994).....	18
7	<i>United Auburn Indian Cmty. v. Brown</i> , 208 Cal. Rptr. 3d 487.....	11
8	<i>United States v. Backlund</i> , 689 F.3d 986 (9th Cir. 2012)	42
9	<i>United States v. Lawrence</i> , 595 F.2d 1149 (9th Cir. 1979)	38
10	<i>United States v. Monsanto</i> , 491 U.S. 600 (1989).....	35
11	<i>United States v. Spokane Tribe of Indians</i> , 139 F.3d 1297 (9th Cir. 1998).....	1, 18
12	<i>Westlands Water Dist. v. Dep’t of Interior</i> , 376 F.3d 853 (9th Cir. 2004)	28
13	<i>Wilderness Soc’y v. Dombeck</i> , 168 F.3d 367 (9th Cir. 1999).....	43
14	<i>Wood v. Herman</i> , 104 F. Supp. 2d 43 (D.D.C. 2000).....	35
15	<i>Statutes</i>	
16	15 U.S.C. § 1175(a)	8
17	18 U.S.C. § 1166(c)	14
18	25 U.S.C. § 1323.....	38
19	25 U.S.C. § 2702.....	18
20	25 U.S.C. § 2710.....	passim
21	25 U.S.C. § 2710(d)	passim
22	25 U.S.C. § 2710(e)	26, 31
23	25 U.S.C. § 2719.....	4
24	25 U.S.C. § 2719(b)	7, 32, 39, 40
25	25 U.S.C. §2710(d).....	15, 36
26	25 U.S.C. §§ 2703.....	1
27	42 U.S.C. § 4332(C)	8, 21
28	42 U.S.C. § 7409.....	28

1 42 U.S.C. § 7506(c) 29

2 42 U.S.C. §§ 7401-7671 28

3 5 U.S.C. § 706..... 12, 36

4 Cal Gov. Code § 12012.5..... 6

5 Cal. Const. Art. IV 5

6 Cal. Gov. Code § 98005..... 5

7 *Regulations*

8 25 C.F.R. § 292.23 7

9 25 C.F.R. § 293 6

10 40 C.F.R. § 1500.1 25

11 40 C.F.R. § 1500.6 8

12 40 C.F.R. § 1508.18 21

13 40 C.F.R. § 93.150-165..... 29

14 40 C.F.R. § 93.153 8, 29

15 43 C.F.R. § 46.120 27

16 49 Fed. Reg. 24 4

17 50 Fed. Reg. 6,055 4

18 78 Fed. Reg. 62649-01 (Oct. 22, 2013) 6

19
20
21
22
23
24
25
26
27
28

1
2 This lawsuit is Stand Up For California!’s (Stand Up) second lawsuit, in federal court,
3 related to a parcel of land that the Secretary of the Interior (Federal Defendants) holds in trust for
4 the North Fork Rancheria of Mono Indians. Four of Stand Up’s claims challenge the mandatory
5 issuance of Secretarial Procedures under Indian Gaming Regulatory Act (IGRA), the Johnson
6 Act, the National Environmental Policy Act (NEPA), and the Clean Air Act (CAA). Stand Up
7 also raises a FOIA claim but does not allege that the administrative record is incomplete.
8

9 IGRA authorizes tribes to engage in Class III gaming, which includes most casino games
10 such as blackjack and roulette as well as slot machines, in states where the tribe is located, where
11 the state allows gaming of that nature, and where the state and tribe negotiate a tribal-state
12 compact. 25 U.S.C. §§ 2703(7)(B)(ii), (8), 2710(d)(1). When a state “might choose not to
13 negotiate, or to negotiate in bad faith, Congress included a complex set of procedures designed to
14 protect tribes from recalcitrant states.” *United States v. Spokane Tribe of Indians*, 139 F.3d
15 1297, 1299 (9th Cir. 1998). If, as in this case, the tribe bringing a good-faith suit prevails on its
16 claims and other means for the state to consent to a compact, including one selected by a
17 mediator, are unsuccessful, the Secretary “shall prescribe” Secretarial Procedures “consistent
18 with the proposed compact selected by the mediator, the provisions of [IGRA], and the
19 relevant provisions of the laws of the State.” 25 U.S.C. § 2710(d)(7)(B)(vii). The Secretarial
20 Procedures mandated by IGRA were lawfully issued in July 2016.
21
22
23

24 Stand Up’s first three claims contend that the Secretarial Procedures are inconsistent with
25 the Johnson Act, NEPA, and the CAA. There is no lawful reason for the Secretary to withhold
26 Secretarial Procedures, which IGRA mandates be issued, under any of those statutes. Stand Up’s
27 fifth claim contends that the Secretarial Procedures are invalid because it argues the Governor’s
28

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

3 First, Stand Up's Johnson Act challenge ignores the fact that Secretarial Procedures are a
4 full substitute for a tribal-state compact. Class III gaming does not violate the Johnson Act.
5 Stand Up's argument ignores IGRA's text and purpose (producing an absurd result) and Ninth
6 Circuit case law. Second, the Secretary did not violate NEPA by prescribing the procedures
7 without performing a NEPA analysis. Prescribing Secretarial Procedures is not subject to NEPA
8 because it is not a major federal action subject to NEPA, IGRA does not allow the Secretary to
9 do so, the Secretary is not the legally relevant cause of any environmental effects, and the
10 Secretary has already conducted an Environmental Impact Statement for the trust-acquisition
11 decision. Third, the Secretary did not violate the CAA for related reasons.

12 In this case, four of Stand Up's claims challenge the Secretarial Procedures which IGRA
13 mandated that the Secretary prescribe as a result of North Fork's successful good-faith lawsuit
14 against the state of California. The Secretary was not required to make a CAA conformity
15 determination before prescribing the procedures because the prescription of Secretarial
16 Procedures is exempt from the conformity requirements. Fourth, Stand Up's argument
17 concerning its FOIA claim does not allege that the Administrative Record is incomplete. It does
18 not effect the other claims. Fifth, Stand Up once again challenges the validity of the Governor's
19 concurrence in federal Courts. It has previously asserted this before, lost, and failed to appeal
20 this issue. Stand Up is collaterally estopped from litigating this issue again. Even if they were
21 not, their claim would fail under federal law. The Secretary was not required to consider the
22 validity of the Governor's concurrence when prescribing Secretarial Procedures.
23
24
25
26
27
28

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

3 BACKGROUND

4 Stand Up seeks to relitigate many of same claims and issues in order to challenge the
5 Secretarial Procedures prescribed as a result of a judgment issued by this Court and the
6 subsequent operation of IGRA. *See North Fork Rancheria of Mono Indians v. California*,
7 1:15cv00419-AWI-SAB, 2015 WL 11438206, at *12 (E.D. Cal. Nov. 13, 2015) (North Fork's
8 good-faith lawsuit under 25 U.S.C. § 2710 against California).

9
10 This Court set forth much of the relevant background for this case in its order granting
11 North Fork's motion to intervene in this lawsuit. *See* Doc. 23 (Order entered March 8, 2017);
12 *see also North Fork*, 2015 WL 11438206, at *1-4. Another court has also extensively examined
13 and set forth facts relevant to Stand Up's original challenge to the Secretary's two-part
14 determination and the Governor's concurrence. *Stand Up for California! v. U.S. Dep't of the*
15 *Interior (Stand Up I)*, 919 F. Supp. 2d 51, 54-61 (D.D.C. 2013) (denying Stand Up's request for
16 preliminary injunction); *Stand Up for California! v. U.S. Dep't of the Interior (Stand Up II)*, 71
17 F. Supp. 3d 109, 112-15 (D.D.C. 2014) (dealing with administrative record issues); and *Stand Up*
18 *for California! v. U.S. Dep't of the Interior (Stand Up III)*, 204 F. Supp. 3d 212 (D.D.C. 2016)
19 (granting summary judgment on most claims for Federal Defendants and North Fork, and
20 dismissing the other claims). The following additional background supplements what this Court
21 has already explained in its prior rulings.

22 **I. THE SECRETARY'S TWO-PART DETERMINATION, THE** 23 **GOVERNOR'S CONCURRENCE, AND FEDERAL ACQUISITION OF THE** 24 **MADERA SITE AS TRUST LAND**

1 California voters authorized, via constitutional amendment, casino-style or Las Vegas
2 style Indian gaming under IGRA in March 2000.¹ 2000 Cal. Legis. Serv. Prop. 1A- Gambling
3 on Tribal Lands (Ca. 2000); *amending* Cal. Const. art. IV, § 19(f). Since the enactment of
4 Proposition 1A, the Secretary has considered a number of land-into-trust applications for gaming
5 purposes in California. North Fork is a federally recognized Indian tribe located in Madera
6 County. *See* Restoration of Federal Status to 17 California Rancherias, 49 Fed. Reg. 24,084
7 (June 11, 1984); Indian Tribal Entities Recognized and Eligible to Receive Services, 50 Fed.
8 Reg. 6,055, 6057 (Feb. 13, 1985). In 2005, North Fork submitted a fee-to-trust application for
9 the Madera site to Interior for the purpose of developing a resort hotel and casino. AR00000160.
10 North Fork did so in order to meet its need for economic development, self-sufficiency, and self-
11 governance, and to provide its Tribal citizen population with employment, educational
12 opportunities, and critically needed social services. This application was supplemented by North
13 Fork’s 2006 request for a Secretarial determination of the Madera site’s eligibility for gaming
14 pursuant to IGRA.

15
16
17
18 One way that land taken into trust after IGRA’s enactment is eligible for gaming, is if the
19 Secretary issues a favorable two-part determination finding that gaming on the newly acquired
20 lands is in the best interest of the Indian tribe and its members and that such gaming would be
21 non-detrimental to the surrounding community, and if “the Governor of the State in which the
22 gaming activity is to be conducted concurs in the Secretary’s determination.” 25 U.S.C. § 2719
23

24
25 ¹ IGRA divides gaming into three classifications, only one of which—Class III—is at issue in
26 this case. *See Amador Cty. v. Salazar*, 640 F.3d 373, 376 (D.C. Cir. 2011) (“The Act divides
27 gaming into three classes . . . Class III, which includes most casino games such as blackjack and
28 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 AR00000317.
8

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 **II. THE 2012 COMPACT AND ISSUANCE OF SECRETRIAL PROCEDURES**

12 Where state law allows class III gaming pursuant to IGRA, as California does pursuant to
13 its Constitution, Cal. Const. Art. IV, § 19(f), IGRA anticipates that a tribe seeking to engage in
14 class III gaming will first attempt to obtain a compact with the state. 25 U.S.C. § 2710(d)(1)(C).
15 After receiving a tribal request to negotiate over a class III gaming compact, IGRA mandates that
16 “the State shall negotiate with the Indian tribe in good faith to enter into such a compact.” 25
17 U.S.C. § 2710 (d)(3)(C). California has waived its sovereign immunity, Cal. Gov. Code §
18 98005, to lawsuits by tribes alleging that the State has failed to conduct “negotiations with the
19 Indian tribe for the purpose of entering into a Tribal-State compact . . . in good faith.” 25 U.S.C.
20 § 2710(d)(7)(A). IGRA provides a remedial process for tribes that prevail on their claim that a
21 state has failed to negotiate in good faith. *Id.* § 2710(d)(7)(B)(iv-vii). The remedial process is
22 designed to produce a compact through mediation between a tribe and state. *Id.* §
23 2710(7)(B)(iv). If the state and tribe do not reach agreement during mediation they must each
24 submit a proposed compact to the mediator, who shall select from the two proposed compacts the
25
26
27
28

1 one that best comports with IGRA, applicable federal law, and the findings and order of the
2 court. *Id.* Thereafter the state has 60 days to consent to the selected compact. *Id.* §
3 2710(d)(7)(B)(vi)-(vii). If the state does not consent, the mediator shall forward the selected
4 compact to the Secretary, who “shall prescribe, in consultation with the Indian tribe,
5 procedures,” *id.* § 2710(d)(7)(vii), under which class III gaming may be conducted by the tribe.
6

7 Although North Fork and the Governor executed a compact in 2012 (2012 Compact)
8 governing class III gaming, the 2012 Compact is no longer in effect. AR00002187. The 2012
9 Compact was ratified by the California legislature on May 2, 2013, via Assembly Bill No. 277
10 (AB 277). AB 277 (Hall), (2013-2014 Reg. Sess.) (Cal. July 3, 2013) *chaptered at* 2013 Stat.
11 Ch. 51; Cal Gov. Code § 12012.5. On July 3, 2013, the Governor approved AB 277. In
12 compliance with 25 C.F.R. § 293, the California Secretary of State submitted the 2012 Compact
13 to the Secretary for review and approval. AR00002187. The Assistant Secretary—Indian
14 Affairs, took no action within 45-days and subsequently published notice that the 2012 Compact
15 was “considered to have been approved” by operation of IGRA. Notice of Tribal-State Class III
16 Gaming Compact Taking Effect, 78 Fed. Reg. 62649-01 (Oct. 22, 2013). In a November 4, 2014
17 referendum, California voters opted to overturn AB 277² and following the 2014 referendum,
18 California refused to recognize the validity of the 2012 Compact or enter into further
19 negotiations with North Fork for a new compact. AR00002187.
20
21

22 As a consequence North Fork filed suit against California pursuant to IGRA’s remedial
23 provision, 25 U.S.C. § 2710(d)(7). On November 13, 2015, this Court ruled that California had
24

25
26 ² Legal disputes regarding the 2012 Compact are “effectively moot” in light of the “Secretarial
27 Procedures prescribed by the Secretary,” because the 2012 Compact is no longer in effect. *Stand*
28 *Up III*, 204 F. Supp. 3d at 247.

1 failed to “enter into negotiations with North Fork for the purpose of entering into a Tribal-State
2 compact within the meaning of § 2710” and ordered the parties to conclude a compact within 60
3 days. *North Fork*, 2015 WL 11438206, at *12. The parties did not conclude a compact within
4 60 days and the Court appointed a Mediator. The Mediator selected a compact to which the
5 State did not consent and, as required by IGRA, the Mediator notified the Secretary of the State’s
6 failure to consent and submitted the selected Compact to the Secretary for conversion to
7 Secretarial Procedures. AR0000001-03, 2187.

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

13 **III. LEGAL BACKGROUND**

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

16 **IGRA.** As described above, IGRA allows gaming on land that is taken into trust after
17 IGRA’s enactment if, among other alternatives, the Secretary finds that the gaming on the land
18 “would be in the best interest of the Indian tribe and its members,” and “would not be
19 detrimental to the surrounding community,” and “if the Governor of the State in which the
20 gaming activity is to be conducted concurs in the Secretary’s determination.” 25 U.S.C. §
21 2719(b)(1)(A). If the Secretary makes a favorable determination, the land will be gaming-
22 eligible if the governor concurs within one year (with a possible 180-day extension). 25 C.F.R. §
23 292.23(b).

26 **NEPA.** For “major Federal actions significantly affecting the quality of the human
27 environment, a detailed statement” must be produced by the relevant federal agency, concerning
28

1 the environmental impact, unavoidable adverse environmental effects, and alternatives to the
2 proposed action. 42 U.S.C. § 4332(C). NEPA does not apply where “existing law applicable to
3 the agency’s operations expressly prohibits or makes compliance impossible.” 40 C.F.R. §
4 1500.6. Moreover, if an agency’s action is not a major federal action, then no environmental
5 review is necessary.

6
7 **CAA.** The Clean Air Act’s implementing regulations exempt agencies from the
8 requirement to conduct a conformity determination where the agency’s action does not cause
9 new emissions that exceed specified emissions rates. 40 C.F.R. § 93.153(b), (c)(1).

10 **Johnson Act.** The Johnson Act makes it “unlawful to manufacture, recondition, repair,
11 sell, transport, possess, or use any gaming device . . . within Indian country as defined in section
12 1151 of title 18 . . .” 15 U.S.C. § 1175(a). Gambling devices include slot machines. *Id.* §
13 1171(a). IGRA, which was enacted after the Johnson Act, specifies that the Johnson Act does
14 not apply “to any gaming conducted under a Tribal-State compact” which is “in effect” and
15 entered into by a State in which “gambling devices are legal.” 25 U.S.C. § 2710(d)(6). IGRA
16 requires the Secretary to authorize class III gaming activities pursuant to Secretarial Procedures
17 that are “consistent with the proposed compact selected by the mediator,” “the provisions of this
18 chapter,” and “the relevant provisions of the laws of the State.” *Id.* § 2710(d)(7)(B)(vii).

19
20
21 **IV. RELATED ACTIONS**

22 Stand Up has brought two other actions related to this matter, one of which was its
23 lawsuit raising nearly identical claims in the U.S. District Court for the District of Columbia in
24 2012, the other in California State Court in 2013.

25
26 A. Stand Up’s Related Action in the District of Columbia

1 Stand Up and several other plaintiffs (collectively, “Stand Up”) challenged the
2 Secretary’s two-part determination and trust decision in the United States District Court for the
3 District of Columbia. *See Stand Up I*, 919 F. Supp. 2d at 54. The *Stand Up III* Court denied
4 Stand Up’s and Picayune Rancheria of Chukchansi Indians’ motions for summary judgment,
5 granted the defendants’ motions for summary judgment on all of Picayune’s claims, granted the
6 defendants’ motions for summary judgment on most of Stand Up’s claims, and dismissed Stand
7 Up’s remaining claims as moot and/or for failure to join an indispensable party. *Stand Up III*,
8 204 F. Supp. 3d at 247. Picayune also challenged the same action in the same court; that case
9 was consolidated with Stand Up’s. *Stand Up I*, 919 F. Supp. 2d at 55 n.5. Stand Up later
10 amended its complaint to challenge the Secretarial determination and trust decision on new
11 grounds: that the Governor’s concurrence was invalid, the 2014 referendum rendered the 2012
12 Compact and the decision invalid, and the CAA. 1st Am. Compl., *Stand Up for California! v.*
13 *U.S. Dep’t of the Interior*, No. 12-cv-2039 Doc. 56 (D.D.C. June 27, 2013); 3d Am. Compl. *id.*
14 Doc. 103 (D.D.C. Dec. 3, 2014).

15
16
17
18 After the administrative record for the challenged decisions were filed, the Federal
19 Defendants sought and were granted a partial remand without vacatur to cure a procedural defect
20 regarding a notice requirement for the CAA conformity determination. *See id.*, Doc. 63 (Aug. 1,
21 2013); *id.* Doc. 77 (Dec. 16, 2013). The conformity determination was reissued by Federal
22 Defendants in April of 2014.

23
24 After the parties filed cross-motions for summary judgment, on September 6, 2016, the
25 court issued a decision rejecting Stand Up and Picayune’s claims. *Stand Up III*, 204 F. Supp. 3d
26 at 212, *appeal docketed Nos.* 16-5327, 16-5328 (D.C. Cir. Nov. 15, 2016). Stand Up appealed
27 the summary judgment decision but not the ruling that California was an indispensable party.
28

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

2 Stand Up has also brought a lawsuit in California state court which challenges the
3 Governor’s authority, under California law, to concur in the Secretary’s two-part determination.
4 *Stand Up for California! v. Brown*, No. MCV062850 (Cal. Super. Ct. Madera Cty. Compl. filed
5 Mar. 27, 2013). Although the Superior Court ruled against Stand Up, the Fifth Appellate District
6 reversed. *Stand Up for California! v. California*, 211 Cal. Rptr. 3d 490 (Ct. App. 2016), review
7 granted (Mar. 22, 2017). On March 22, 2017, the California Supreme Court granted review of
8 the case and ordered that further action was deferred pending disposition of the *United Auburn*
9 case. See *Stand Up for California v. State*, 390 P.3d 781 (Cal. 2017). Because the California
10 Supreme Court has granted review, the Fifth District’s decision “has no binding or precedential
11 effect, and may be cited for potentially persuasive value only.” Cal. Rules of Court 8.1115(e)(1).
12
13

14 C. Other Cases in the Eastern District of California

15 Two other cases have been filed in the Eastern District of California purporting to
16 challenge the Secretary’s issuance of procedures. Those include *Picayune Rancheria of*
17 *Chukchansi Indians v. U.S. Dep’t of the Interior*, No. CV 16-0950-AWI-EPG (E.D. Cal. filed
18 July 1, 2016) and *Club One Casino, Inc. v. U.S. Dep’t of the Interior*, No. CV 16-01908-AWI-
19 EPG (E.D. Cal. filed Dec. 21, 2016). Additionally, *Cal-Pac Rancho Cordova, LLC v. United*
20 *States Dep’t of the Interior*, No. CV 16-02982-KJM-KJN (E.D. Cal. Filed Dec. 21, 2016),
21 involves an APA challenge to a separate prescription of Secretarial Procedures.
22
23

24 D. Cases in California State Courts

25 1. *Picayune Rancheria of Chukchansi Indians v. Brown*, 178 Cal. Rptr. 3d 563, 229,
26 Cal. App. 4th 1416 (Ct. App. 2014). Picayune’s California Environmental Quality Act challenge
27 to the Governor’s concurrence in the Secretary’s decision to take the Madera site into trust for
28

1 To the extent a plaintiff states a claim under the APA, the reviewing Court should uphold
2 an agency action unless the plaintiff demonstrates that the agency action is “arbitrary, capricious,
3 an abuse of discretion, or otherwise not in accordance in law,” 5 U.S.C. § 706(2)(A), “in excess
4 of statutory jurisdiction, authority, or limitations, or short of statutory right,” *id.* § 706(2)(C), or
5 “without observance of procedure required by law.” *Id.* § 706(2)(D). The scope of review
6 under the arbitrary and capricious standard is “narrow” and “a court is not to substitute its
7 judgment for that of the agency.” *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011). (Citations
8 omitted).
9

10 ARGUMENT

11 Stand Up’s Complaint raises five claims. The first alleges violations of the Johnson Act.
12 This claim fails because it contradicts a plain reading of IGRA’s text, purpose, legislative
13 history, Ninth Circuit case law, and common sense. Stand Up’s second claim alleges the
14 Secretary failed to comply with NEPA, but this claim fails on the merits because the Secretary
15 was not required to prepare a NEPA analysis before issuing the Secretarial Procedures. Stand
16 Up’s third claim alleges that the Secretary violated the CAA, but the Secretary was not required
17 to make a CAA conformity determination before prescribing the procedures because the
18 prescription of Secretarial Procedures is exempt from the conformity requirements. Stand Up’s
19 fourth claim concerns FOIA, and Stand Up has not indicated that its FOIA claims effect any of
20 its other claims. Stand Up’s Fifth Claim challenges the lawfulness of the Secretarial Procedures.
21 That claim fails for three independent reasons. First, Stand Up is collaterally estopped from
22 bringing a claim based on the Governor’s concurrence. The District Court for the District of
23 Columbia has already ruled against Stand Up on this issue and Stand Up did not appeal. Second,
24 the Secretarial Procedures are lawful. Third, the Secretary was not required to consider the
25
26
27
28

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

6
7 Federal Defendants respectfully request summary judgment be entered against Stand Up
8 on all of their claims.

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

11 Stand Up contends that IGRA and the Johnson Act prohibit the Secretary from issuing
12 Secretarial Procedures that authorize slot machines. Pls.' Mem. at 8, Doc. 29. This is a
13 misreading of IGRA, which contains a waiver of the Johnson Act. 25 U.S.C. § 2710(d)(6).
14 IGRA authorizes class III gaming, including slot machines, that are 1) authorized by tribal
15 "ordinance or resolution;" 2) "located in a State that permits such gaming for any purpose by any
16 person, organization, or entity;" and 3) "conducted in conformance with a Tribal-State compact
17 entered into by the Indian [T]ribe and the State." 25 U.S.C. § 2710(d)(1)(A)-(C). When a State
18 fails to negotiate in good faith a Tribal-State compact, a tribe may sue the state and, as happened
19 here, when a Court finds the State did not negotiate in good faith and the State did not consent to
20 the compact selected by the mediator, the Secretary "shall prescribe . . . procedures." *Id.* §
21 2710(d)(7)(B)(vii). Critically, IGRA states that "under [Secretarial Procedures] class III gaming
22 may be conducted on the Indian lands over which the Indian tribe has jurisdiction." *Id.* §
23 2710(d)(7)(B)(vii). The plain language of IGRA authorizes class III gaming, including slot
24 machines, pursuant to Secretarial Procedures. The Secretarial Procedures authorized class III
25 gaming activities that are also authorized under California law—this includes slot machines.

1 AR00002202-03. The inquiry need not go any further. Stand Up’s convoluted argument that
2 IGRA and the Johnson Act conspire to deny the Secretary any authority to issue Secretarial
3 Procedures that include slot machines is contrary to IGRA when it is read in whole, contradicts
4 IGRA’s purpose and the relevant caselaw, is not supported by legislative history, and would fail
5 even if IGRA were ambiguous. The administrative record demonstrates that “Secretarial
6 Procedures are properly viewed as a full substitute for a Class III gaming compact.”
7

8 AR00002295. There is no basis in statute or authority to suggest that Secretarial Procedures—a
9 remedy for a state’s failure to comply with this Court’s orders to negotiate in good faith and
10 conclude a gaming compact—cannot authorize the same activities that a tribal-state compact can
11 authorize. *See* 25 U.S.C. § 2710 (d)(7)(B)(iii-iv).
12

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

14 IGRA is clear that Secretarial Procedures are a full and complete substitute for a tribal-
15 state compact. Just as compacts are exempt from the criminal prohibitions in IGRA and the
16 Johnson Act, 25 U.S.C § 2710(d)(6), 18 U.S.C. § 1166(c)(2), so too are Secretarial Procedures.
17

18 The plain reading of IGRA refutes Stand Up’s argument that the Johnson Act prohibits
19 slot machines when the Secretary has issued procedures as a result of IGRA’s remedial process.
20 The Johnson Act, “shall not apply to any gaming conducted under a Tribal-State compact that —
21 is entered into under paragraph (3) by a State in which gambling devices are legal, and is in
22 effect.” 25 U.S.C. § 2710(d)(6). IGRA describes Tribal-State compacts and provides a remedial
23 provision that allows tribes to obtain a compact when a State does not negotiate in good faith.
24 Ultimately, such cases may result in the prescription by the Secretary of “procedures which are
25 consistent with the proposed compact selected by the mediator . . . and under which class III
26
27
28

1 gaming may be conducted on the Indian lands over which the tribe has jurisdiction.” 25 U.S.C.
2 §2710(d)(7)(vii).

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

19
20
21
22 Stand Up’s argument is essentially that because the text of IGRA does not say “Compact
23 and Secretarial procedures” in 25 U.S.C. § 2710(d)(6), Secretarial Procedures are a “second
24 best.” However, the fact that only slot machines are singled out demonstrates its absurdist
25 reading. If Stand Up’s argument were applied to the rest of IGRA, Secretarial Procedures would
26 accomplish nothing and would allow no class III gaming at all. For example, IGRA authorizes
27
28

1 class III gaming “only if such activities are . . . conducted in conformance with a Tribal-State
2 compact.” 25 U.S.C. § 2710(d)(1)(C). That provision doesn’t mention Secretarial Procedures
3 either. Stand Up does not argue that provision should be interpreted the same way it thinks 25
4 U.S.C. § 2710(d)(6) should be interpreted, thus its interpretation would render Secretarial
5 Procedures completely meaningless, allowing no class III gaming. Stand Up seeks to foist upon
6 the statute a contrived interpretation that, if applied to the entire statute, would render IGRA’s
7 entire remedial scheme a nullity.
8

9 Stand Up’s argument also plainly contradicts an additional portion of IGRA’s statutory
10 language. IGRA provides that “the Secretary shall prescribe . . . procedures — which are
11 consistent with the proposed compact selected by the mediator . . . — [and] the provisions of this
12 chapter” 25 U.S.C. § 2710(d)(7)(B)(vii)(I). First, the compact selected by the mediator
13 allowed slot machines. Stand Up’s suggestion would nullify Congress’s command for
14 Secretarial Procedures consistent with the one selected by the mediator by precluding slot
15 machines. Yet it admits that the mediator can select a compact that allows slot machines. Pls.’
16 Mem. at 11. Congress demanded that the Procedures be consistent with the compact selected by
17 the mediator and said nothing about slot machines. Moreover, Congress also wrote that the
18 compact should be consistent with “the provisions of this chapter,” which includes the Johnson
19 Act waiver. IGRA does not require the Secretary to modify the Procedures to be consistent with
20 other federal laws, including the Johnson Act.
21

22 IGRA’s plain language and meaning make clear that class III gaming under Secretarial
23 Procedures is equivalent to class III gaming under a compact. Stand Up’s reading would make
24 the whole remedial process a pointless exercise. If an interpretation of a statute “would produce
25 absurd results” then that interpretation should “be avoided if alternative interpretations consistent
26
27
28

1 with the legislative purpose are available.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564,
2 575 (1982). “When a natural reading of the statutes leads to a rational, common-sense result, an
3 altercation of the meaning is not only unnecessary, but also extrajudicial.” *Ariz. State Bd. for*
4 *Charter Sch. v. U.S. Dep’t of Educ.*, 464 F.3d 1003, 1008 (9th Cir. 2006) (“[W]ell-accepted rules
5 of statutory construction caution us that ‘statutory interpretations which would produce absurd
6 results are to be avoided’” (quoting *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004))). It would
7 be very odd for Congress to take pains to identify and exempt from the Johnson Act activities
8 undertaken consistent with a tribal-state compact, and then to not apply that exemption to the
9 product of the judicial remedy for a state’s failure to negotiate a tribal-state compact in good
10 faith. A common-sense and natural reading of IGRA makes clear that Secretarial Procedures are
11 to be treated the same as a tribal-state compact.
12
13

14 B. Stand Up’s Argument Is Contrary to IGRA’s Purpose and the Caselaw
15 Interpreting IGRA

16 Stand Up’s argument that Secretarial Procedures are “second best” to compacts is not
17 only inconsistent with IGRA’s plain language and meaning, but also its purpose. Pls.’ Mem. at
18 19. When a tribe prevails in a good-faith lawsuit pursuant to IGRA’s remedial provision the
19 result is that “once the Secretary of the Interior prescribes procedures to govern gaming that are
20 consistent with [the mediator’s] selection, [the tribe] will be authorized to build the casino and
21 engage in the gaming that it seeks.” *Big Lagoon Rancheria v. California*, 789 F.3d 947, 956 (9th
22 Cir. 2015). IGRA’s remedial provision protects the interests of tribes by providing a judicial
23 remedy for a state’s failure to negotiate a compact in good faith. It is intended to provide a full
24 substitute for a compact, and nothing in IGRA’s language provides for a “second class” compact.
25
26 “The purpose of [IGRA] is to provide a statutory basis for the operation of gaming by Indian
27 tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal
28

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
24
25
26
27 C. IGRA Is Not Ambiguous, But If It Were, Stand Up’s Argument Is Still Wrong
28

1 IGRA is not ambiguous, and the result here is clear. But even if it were ambiguous,
2 “statutes are to be construed liberally in favor of the Indians, with ambiguous provisions
3 interpreted for their benefit.” *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).
4 (Citations omitted). The Ninth Circuit has applied this canon to IGRA and, specifically, 25
5 U.S.C. § 2710, the portion of the act at issue here. *Artichoke Joe’s Cal. Grand Casino v. Norton*,
6 353 F.3d 712, 731 (9th Cir. 2003). The *Blackfeet* canon applies to “federal statutes that are
7 ‘passed for the benefit of dependent Indian tribes,’” and where there is ambiguity in the statute.
8 *Id.* “IGRA is undoubtedly a statute passed for the benefit of Indian tribes.” *Id.* at 729. *See also*
9 S. Rep. No. 100-446 at 15 *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3083 (1988) (noting
10 Congress's expectation that this canon would apply to IGRA); to the extent there is ambiguity
11 about whether Secretarial Procedures are a full substitute for a tribal-state compact, the *Blackfeet*
12 canon applies here, and requires that any ambiguity be interpreted in favor of Indian tribes.
13
14

15 D. Legislative History Supports the Secretary’s Position

16 Stand Up’s discussion of legislative history remarkably avoids discussing Secretarial
17 Procedures and instead offers up its own views about the history of Indian gaming since the
18 passage of IGRA. To the extent that legislative history is relevant, it should address the
19 provisions at issue, not any party’s irrelevant views regarding the propriety of Indian gaming and
20 slot machines. Fortunately, Congress did describe a “carefully crafted” remedial process which
21 was designed “to meet tribal concerns that States may refuse to allow them to initiate class III
22 gaming.” 134 Cong. Rec. 25,377-25,378 (1988) (statement of Rep. Vucanovitch). The “need to
23 provide some incentive for States to negotiate with tribes in good faith” is satisfied by the
24 remedial process. S. Rep. 100-446 at 13. Stand Up’s quotations of Senators Reid and Inouye
25 make no mention of Secretarial Procedures and Stand Up’s interpretation of them largely implies
26
27
28

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

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

6
7 **II. ISSUANCE OF THE SECRETARIAL PROCEDURES DID NOT VIOLATE**
8 **NEPA (CLAIM II)**

9 The operation of IGRA required the Secretary to prescribe procedures “consistent with
10 the proposed compact selected by the mediator . . . , the provisions of this chapter, and the
11 relevant provisions of the laws of the State.” 25 U.S.C. § 2710(d)(7)B)(vii)(I). There is no
12 statutory prong requiring the Secretary to conduct a NEPA analysis. Stand Up, however, asserts
13 that the Secretary was required to prepare a NEPA analysis, claiming that the Secretarial
14 Procedures are a “major federal action,” Pls.’ Mem. at 23, and that the Secretary had discretion
15 requiring him to comply with NEPA. Neither argument is consistent with controlling law. First,
16 Secretarial Procedures, like the tribal-state compacts for which they are a complete substitute, are
17 not major federal actions under NEPA. Second, even if a NEPA analysis was required, the
18 Secretary already prepared an EIS for the acquisition of the Madera Site which would satisfy any
19 NEPA obligations.
20
21

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

23 There are three independent reasons to enter summary judgment for Federal Defendants
24 on Stand Up’s NEPA claim. First, issuance of Secretarial Procedures is not a “major federal
25 action.” The Secretary is not the relevant cause of any environmental effects that trigger NEPA.
26 Second, NEPA’s rule of reason applies here; Secretarial Procedures should not constitute a major
27 federal action because, given the Secretary’s lack of discretion, preparing a NEPA analysis
28

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

5
6 1. Secretarial Procedures Are Not a Major Federal Action Under NEPA.

7 NEPA requires an environmental analysis for “major [f]ederal actions significantly
8 affecting the quality of the human environment.” 42 U.S.C. § 4332(C). Secretarial Procedures
9 are not a major federal action, which is an “action[] with effects that may be major and which are
10 potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18. The relevant
11 “effects” of a major federal action are those that “are caused by the action.” *Id.* § 1508.8. No
12 NEPA analysis is necessary here because the Secretary is not the relevant cause of any alleged
13 environmental effects. The Secretary lacks discretion over the Secretarial Procedures’ alleged
14 environmental effects and therefore cannot be the cause of those effects. IGRA mandates the
15 issuance of procedures, including the content of those procedures, and the Secretary cannot alter
16 them in response to any analysis prepared pursuant to NEPA. NEPA does not require the
17 Secretary to prepare an environmental analysis before prescribing procedures.
18
19

20 NEPA requires more than a “but for” relationship to make an agency prepare a NEPA
21 analysis. *Dep’t of Transp. v. Public Citizen*, 541 U.S. 752, 767 (2004). Instead, there must be a
22 “reasonably close causal relationship” between any environmental effect and the alleged cause.
23 *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983); *Public Citizen*,
24 541 U.S. at 767. In *Public Citizen* the Supreme Court held that when an agency is subject to a
25 statutory mandate that requires it to take a particular action, the agency has “no authority to
26 prevent the effect.” *Id.* It analogized NEPA’s close causal relationship between the
27
28

1 environmental effect and the alleged cause to the “familiar doctrine of proximate cause from tort
2 law.” *Id.* An agency that “has no ability to prevent a certain effect due to its limited statutory
3 authority over the relevant actions . . . cannot be considered a legally relevant ‘cause’ of the
4 effect.” *Id.* at 770. Therefore, it need not analyze the effect. In *Public Citizen*, the Supreme
5 Court analyzed causation under NEPA, regarding rules promulgated by the Department of
6 Transportation to regulate cross-border Mexican trucking operations. *Id.* at 759. The Court
7 found that the agency lacked “statutory authority to impose or enforce emissions controls or to
8 establish environmental requirements unrelated to motor carrier safety,” and therefore had “no
9 discretion to prevent the entry of Mexican trucks.” *Id.* at 759-60, 770. In that case, only the
10 President, not the agency, “could authorize (or not authorize) cross-border operations from
11 Mexican motor carriers, and because” the agency had “no discretion to prevent the entry of
12 Mexican trucks, its [environmental assessment] did not need to consider the environmental
13 effects arising from the entry.” *Id.* at 770. *See also EarthReports v. FERC*, 828 F.3d 949, 955
14 (2016) (following *Public Citizen*); *Sierra Club v. FERC*, 827 F.3d 59, 68 (D.C. Cir. 2016)
15 (same); *Sierra Club v. FERC*, 827 F.3d 36, 46 (D.C. Cir. 2016) (same).

19 This case is analogous to *Public Citizen*. “IGRA, indeed, requires the Secretary to [issue
20 procedures] if the state does not agree to the mediator-selected compact.” Pls.’ Mem. at 26
21 (citing 25 U.S.C. § 2710(d)(7)(B)(vi)). However, IGRA does not grant the Secretary the
22 “discretion that brings the Secretarial Procedures within NEPA’s purview.” *Id.* IGRA
23 specifically describes the procedures’ content. The procedures must be “consistent with the
24 proposed compact selected by the mediator,” “the provisions of this chapter,” and “the relevant
25 provisions of the laws of the State.” 25 U.S.C. § 2710(d)(7)(B)(vii)(I). Like *Public Citizen*,
26 where the relevant statute obligated the agency to allow entry of Mexican trucks if they satisfied
27
28

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

3 Stand Up does not articulate, nor could they, how those requirements make the Secretary
4 the proximate cause of any environmental effect. Stand Up instead discusses all the ways that
5 the Secretarial Procedures are consistent with the proposed compact selected by the mediator.
6 Pls.' Mem. at 26-27 ("in prescribing the procedures, the Secretary maintained the provisions
7 from the proposed compact . . ."). For example, the compact selected by the mediator
8 authorized 2,500 slot machines and two facilities and so did the secretarial Procedures. *Compare*
9 AR000022 with AR00002203-2204. The Secretary did not and was not authorized to evaluate
10 the environmental impacts of this, but instead was required to prescribe procedures "consistent
11 with a mediator's selected compact, IGRA, and the relevant provisions of state law."
12 AR00002188. Stand Up asks this Court to assume that NEPA grants the Secretary some
13 authority to alter IGRA's requirement to prescribe procedures "consistent with the proposed
14 compact selected by the mediator," but there is no basis for that assertion. Stand Up's analogy to
15 *Natural Resources Defense Council, Inc. v. Berklund*, 458 F. Supp. 925 (D.D.C. 1978), fails
16 because there the Secretary had some discretion over the content of a coal lease.³ That case also
17 predates *Public Citizen*, which is controlling in this case. Here, Congress required that the
18 Secretarial Procedures be consistent with the very terms that Stand Up complains should have
19 spawned a NEPA analysis.
20
21
22
23

24 The Secretary did, however, modify Section 8.2 of the compact selected by the mediator,
25 in order to allow the State to opt into the regulatory responsibilities in the compact and providing
26

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

1 that, in the State’s absence, that the National Indian Gaming Commission would step in.
2 AR000062, 2245. The Secretary explained that he did this in order to issue procedures
3 “consistent with . . . the provisions of this chapter,” stating that “[t]he mediator’s selected
4 compact provides the State Gaming Agency with authority to regulate the Tribe’s class III
5 gaming activities. The Secretary, however, cannot unilaterally obligate the State to carry out
6 those regulatory responsibilities under these Secretarial Procedures.” AR00002245. The
7 Secretary had good reason to make this change: IGRA required it and imposing those duties on
8 the State of California could raise Tenth Amendment issues. Once again, the Secretary was not
9 the proximate cause of an effect under NEPA, because he had no discretion to avoid making the
10 change to the Procedures. Fundamentally, however, it is very hard to see how such a change
11 could have any environmental effects whatsoever.
12

13
14 In short, the Secretary is constrained by IGRA from considering the environmental
15 effects of the Secretarial Procedures. As a result, Federal Defendants are entitled to summary
16 judgment on this issue.
17

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

19 If the Court determines that the Secretarial Procedures are a major federal action, then
20 NEPA’s rule of reason applies and the Secretary was still not required to conduct an
21 environmental analysis. *Public Citizen* recognized the “rule of reason.” *Public Citizen*, 541 U.S.
22 at 767. “Where the preparation of an EIS would serve ‘no purpose’ in light of NEPA’s
23 regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to
24 prepare an EIS.” *Id.* (Citations omitted). Because of IGRA’s mandate the Secretary had no
25 discretion in this case, and as a result, NEPA analysis would have had no impact, no use, and
26 provided no useful information. “The law does not require the doing of a futile act.” *Ohio v.*
27
28

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

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

21
22
23
24
25 3. Preparing a NEPA Analysis Would Conflict With IGRA.

26 Preparing a NEPA analysis for the Secretarial Procedures would create “an irreconcilable
27 and fundamental conflict with the substantive statute at issue.” *Jamul Action Comm. v.*
28

1 *Chaudhuri*, 837 F.3d 958, 963 (9th Cir. 2016) (quoting *San Luis & Delta-Mendota Water Auth.*
2 *v. Jewell*, 747 F.3d 581, 648 (9th Cir. 2014)); *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of*
3 *Okla.*, 426 U.S. 776, 788 (1976). The Ninth Circuit has held that performing a NEPA analysis
4 for NIGC's approval of a gaming ordinance creates an irreconcilable conflict between NEPA and
5 IGRA. *Jamul Action Comm.*, 837 F.3d at 964. NIGC must approve a gaming ordinance within
6 "90 days after the date . . . any tribal gaming ordinance or resolution is submitted" to the
7 Chairman of NIGC." *Id.* (citing 25 U.S.C. § 2710(e)). Preparing a NEPA analysis takes far
8 longer than that. *Id.* Therefore, the Ninth Circuit held that even if NIGC's approval of a gaming
9 ordinance was a major federal action, NIGC was not required to prepare an EIS because there is
10 an irreconcilable statutory conflict between NEPA and IGRA. *Id.* at 962. Although there is not
11 a hard deadline imposed on the Secretary to prescribe Procedures, the Ninth Circuit has
12 recognized that the remedial process is intended to "permit the tribe to process gaming
13 arrangements on an expedited basis." *Rincon Band of Luiseno Mission Indians of Rincon*
14 *Reservation*, 602 F.3d at 1041. This Court has also recognized this expedited process. *See*
15 *North Fork Rancheria of Mono Indians v. California*, 2016 WL 4208452, at *8 (E.D. Cal. Aug.
16 10, 2016) (Ishii, J.) (discussing 25 U.S.C. § 2710(d)(7)(B)(iv)-(vii)). A NEPA process is
17 inherently at odds with the timeframe anticipated by IGRA's remedial process. When a tribal-
18 state compact is submitted to the Secretary, IGRA provides only 45 days to approve or
19 disapprove the compact. 25 U.S.C. § 2710(d)(8)(C). Applying NEPA to Secretarial Procedures,
20 but not a tribal-state gaming compact which must be approved or disapproved in 45 days, would
21 be a perverse result.

22
23
24
25
26 Critically, IGRA specifies that the Secretary shall prescribe class III gaming procedures
27 that are consistent with the proposed compact selected by the mediator," "the provisions of this
28

1 chapter,” and “the relevant provisions of the laws of the state.” 25 U.S.C. §
2 2710(d)(7)(B)(vii)(I). There is no authority granted to the Secretary to consider a NEPA
3 analysis. Requiring the Secretary to add an environmental assessment to the existing
4 requirements for procedures would create an irreconcilable conflict between NEPA and IGRA.

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

6 The Secretary has already prepared (and Stand Up has already challenged and lost its
7 challenge) an EIS for the Secretary’s trust acquisition of the Madera site. The fee-to-trust
8 decision was not “based upon any particular Tribal-State Compact” or whether class III gaming
9 occurred under a tribal-state compact or Secretarial procedures. *Stand Up III*, 204 F. Supp. 3d at
10 256. The record relating to that decision is not before this Court; if the Court needs that record
11 Federal Defendants will provide it. The Secretarial Procedures already incorporate the existing
12 EIS by reference, AR00002264, and its mitigation measures. AR00002270-71. No
13 environmental analysis pursuant to NEPA was necessary to issue the Secretarial Procedures, but
14 even if it were, the existing NEPA analysis prepared for the Secretary’s trust acquisition is
15 sufficient. NEPA allows an agency to fulfill its requirements using an existing NEPA document
16 if “it adequately assesses the environmental effects of the proposed action and reasonable
17 alternatives.” 43 C.F.R. § 46.120(c). An agency does not need to prepare a new NEPA analysis
18 if the action and its effects have already been “covered sufficiently by an earlier environmental
19 document.” *id.* § 46.300. Because the Secretary was required by IGRA to prescribe procedures
20 consistent with the compact selected by the mediator, there are some differences between the
21 Secretarial Procedures and the proposed alternative analyzed in the EIS: like the mediator’s
22 selected compact the Secretarial Procedures provide for two facilities instead of one and 2,500
23 slot machines instead of 2,000. Nevertheless, there is no requirement to evaluate these changes
24
25
26
27
28

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

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

12 A. The Clean Air Act and Conformity Regulations

13 The Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), establishes a joint state and
14 federal program to control the Nation's air pollution by prescribing national primary and
15 secondary ambient air quality standards. *See* 42 U.S.C. § 7409. The United States
16 Environmental Protection Agency ("EPA") establishes national ambient air quality standards
17 ("NAAQS") for certain pollutants, *id.*, and each air quality control region in each state is later
18 designated as "attainment," "nonattainment," or "unclassifiable" with respect to each NAAQS.
19 *Id.* § 7407(d)(1)(A). Each State must adopt and submit to EPA for approval a state
20 implementation plan ("SIP") that provides for the implementation, maintenance, and
21 enforcement of the NAAQS in a designated air quality region. *Id.* § 7410(a)(1). Federal agency
22 actions must conform to these plans:
23
24

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

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

4 EPA has promulgated regulations to assist federal agencies in determining the conformity
5 of their actions with SIPs. *See* 40 C.F.R. § 93.150-165 (“General Conformity Regulations”). In
6 relevant part, these regulations implement the statutory requirement for a conformity
7 determination for proposed federal actions in nonattainment areas. *Id.* § 93.153(b). A
8 determination must be prepared for each pollutant (and its specified precursors) where the total
9 emissions caused by the proposed federal action would equal or exceed specified emissions
10 levels. *Id.* The Agency, however, exempted certain actions from the provisions of the rule,
11 including “[r]ulemaking and policy development and issuance.” *Id.* § 93.153(c)(2)(iii).
12

13
14 Stand-Up argues that the Secretary was required to make a CAA conformity
15 determination under 42 U.S.C. § 7506(c)(1) before prescribing the procedures. EPA, however,
16 has exempted rulemaking, including administrative adjudications, and policy development and
17 issuance from the scope of the conformity requirements. 40 C.F.R. § 93.153(c)(2)(iii). The
18 Secretary’s action in prescribing the procedures at issue is a rulemaking or administrative action
19 that establishes the requirements and limits for the operation of class III activities at the facility.
20 Accordingly, this action is exempt from the conformity requirements.
21

22 Furthermore, the argument that the Secretary was required to conduct a conformity
23 analysis is inconsistent with the plain language of IGRA. IGRA specifies that the procedures are
24 to be “consistent with the proposed compact selected by the mediator under clause (iv), the
25 provisions of [IGRA], and the relevant provisions of the laws of the State.” 25 U.S.C. §
26 2710(d)(7)(vii)(I). This language does not give the Secretary the discretion to alter provisions of
27
28

1 the mediator-selected compact based on conformity with the relevant SIP. Congress limited the
2 Secretary's consideration to IGRA, thereby excluding consideration of other federal statutes.
3 There is no basis for the suggestion that, in later enacting CAA Section 7506(c)(1), Congress
4 intended to broaden the federal laws to be considered in prescribing the procedures to include the
5 CAA. "It is a basic principle of statutory construction that a statute dealing with a narrow,
6 precise, and specific subject is not submerged by a later enacted statute covering a more
7 generalized spectrum." *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).
8 Therefore, the suggestion that the Secretary cannot prescribe procedures under IGRA without
9 ensuring that the procedures will conform to the applicable SIP must be rejected.
10

11 In addition, applying the conformity requirements of CAA Section 7506(c)(1) when the
12 Secretary prescribes Procedures would subject those Procedures to requirements that do not
13 apply to a compact negotiated by the Tribe and the State. First, IGRA section 2710(d)(8)(B)
14 provides that the Secretary can disapprove a negotiated compact only if it violates IGRA; "any
15 other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands;"
16 or "the Trust obligations of the United States to Indians." A compact negotiated by a State and a
17 Tribe cannot violate the requirements of CAA Section 7506(c)(1). The obligations under that
18 section apply only to federal agencies; the Tribe and State, of course, are nonfederal actors. For
19 this reason, the Secretary could not disapprove a negotiated compact on the ground that the
20 compact violated CAA Section 7506(c)(1). An argument that the Secretary's decision to
21 approve or disapprove a negotiated compact is itself subject to the requirement to make a
22 conformity determination under this section of the CAA would create a direct conflict between
23 the CAA and IGRA. In IGRA, Congress provided that a negotiated compact will be considered
24 approved if the Secretary does not either approve or disapprove the compact within 45 days. 25
26
27
28

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

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

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

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

21 **V. THE SECRETARIAL PROCEDURES ARE LAWFUL (CLAIM V)**

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

25 **Collateral Estoppel:** Stand Up unambiguously challenged the Governor’s concurrence
26 in *Stand Up III*. No. 12-cv-2039, 3d Am. Compl., *Stand Up III*., Doc. 103, ¶¶ 63, 68. In that
27 Complaint, Stand Up alleged that the concurrence constituted a “legislative act for which” the
28

1 Governor “lacked authority under California law, thereby rendering the Governor’s concurrence
2 and the Secretary’s” two-part determination “null and void.” *Id.* ¶ 63. Stand Up alleged that if
3 the Governor’s concurrence was invalid, “the Secretary’s decision to take the [Madera Site] into
4 trust . . . is arbitrary, capricious, and an abuse of discretion” *Id.* at ¶ 68. Now, in this case,
5 Stand Up’s fifth claim alleges that the “prescription of Secretarial procedures” was unlawful
6 because the Madera Site is not eligible for gaming because the Governor of California lacked
7 authority to concur in the determination under 25 U.S.C. § 2719(b)(1)(A). First. Am. Compl.,
8 Doc. 13, ¶ 73. In *Stand Up III*, the district court dismissed Stand Up’s claims, holding that the
9 state of California was a necessary and indispensable party. Stand Up is collaterally estopped
10 from reasserting this claim.
11

12
13 **Stand Up’s Claim fails under federal law:** Stand Up’s claim fails on the merits for a
14 variety of reasons. 1) The issuance of Secretarial Procedures was lawful. 2) The Secretary was
15 entitled to rely on the facial validity of the concurrence. 3) Stand Up seeks to collaterally attack
16 the Madera Site’s gaming eligibility, and this is not permissible. 4) This case must be decided on
17 the record before the Court. 5) The validity of the Governor’s concurrence under state law has
18 no bearing on this case and, to the extent it does, the concurrence is valid.
19

20 A. Collateral Estoppel Bars Stand Up’s Fifth Claim

21 Stand Up has already challenged, and lost, its claim that the Governor’s concurrence was
22 invalid. Stand Up alleged that “the Governor’s concurrence is invalid” and therefore the
23 Secretary’s “decision to take the [Madera Site] into trust is . . . arbitrary, capricious, and an abuse
24 of discretion, not in accordance with the law. . . .” 3d Am. Compl., *Stand Up III.*, No. 12-cv-
25 2039, Doc. 103, ¶ 68; see also ¶ 63, 111. After briefing on whether California was an
26 indispensable party, the court ruled that Stand Up’s claims “in any way involving the Governor’s
27
28

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

9 That court also confirmed the reasonableness of the Secretary’s actions. “Indeed, neither
10 the IGRA nor the IRA require the Secretary to determine the validity of the Governor’s
11 concurrence under California law.” *Id.* at 255. *Stand Up* also seeks to relitigate that issue in this
12 case. The issue of whether California was a necessary and indispensable party was fully
13 litigated and briefed by all parties to this case. The determination of this issue was necessary to
14 *Stand Up III’s* judgment to dismiss certain claims filed by *Stand Up*. *Id.* *Stand Up III’s* holding
15 that California is an indispensable party should not be relitigated here. “Collateral estoppel, or
16 issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between
17 the same parties.” *Beauchamp v. Anaheim Union High Sch. Dist.*, 816 F.3d 1216, 1225 (9th Cir.
18 2016) (citation omitted). For claim preclusion to apply: “(1) the issue must be identical to one
19 alleged in prior litigation; (2) the issue must have been “actually litigated” in the prior litigation;
20 and (3) the determination of the issue in the prior litigation must have been “critical and
21 necessary” to the judgment.” *Id.* at 1225 (quoting *Clark v. Bear Stearns & Co. Inc.*, 966 F.2d
22 1318, 1320 (9th Cir. 1992)); *Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011).

26 Each element for issue preclusion is satisfied here. *Stand Up* was a plaintiff in *Stand Up*
27 *III* and had sued Federal Defendants; North Fork was a defendant-intervenor. That is identical to
28

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

8 B. The Secretary’s Issuance of Secretarial Procedures Was Lawful

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

10 Simply put, IGRA required the Secretary to issue Secretarial Procedures as a result of
11 IGRA’s remedial process. IGRA explicitly provides a cause of action “initiated by an Indian
12 tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the
13 purpose of entering into a Tribal-State compact . . . or to conduct such negotiations in good
14 faith.” 25 U.S.C. § 2710(d)(7)(A)(i). If “the court finds that the State has failed to negotiate in
15 good faith with the Indian tribe” then “the court shall order the State and the Indian Tribe to
16 conclude such a compact” within 60 days. *Id.* § 2710(d)(7)(B)(iii). “If a State and an Indian tribe
17 fail to conclude a Tribal-State compact” then “the Indian tribe and the State shall each submit to
18 a mediator . . . a proposed compact that represents their last best offer for a compact.” *Id.* §
19 2710(d)(7)(B)(iv). The mediator then selects the compact that “best comports with the terms of
20 this chapter and any other applicable Federal law and with the findings and order of the court.”
21 *Id.* The selected compact is then submitted to the tribe and State, *id.* § 2710(d)(7)(B)(v), and if
22 “a State consents to a proposed compact” then “the proposed compact shall be treated as a
23 Tribal-State compact.” *Id.* § 2710(d)(7)(B)(vi). But, if the “State does not consent . . . to a
24 proposed compact submitted by the mediator . . . the mediator shall notify the Secretary and the
25
26
27
28

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
7 proposed compact selected by the mediator under clause (iv), the provisions of this chapter,
8 and the relevant provisions of the laws of the State, and (II) under which class III gaming
9 may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

10 25 U.S.C. § 2710(d)(7)(B)(vii). This is what the Secretary did.

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.
26
27
28

1 The Secretary’s issuance of Secretarial Procedures was not “arbitrary, capricious, [or] an
2 abuse of discretion,” 5 U.S.C. § 706(2)(A), because the Secretary had no discretion on the
3 question of whether to issue Secretarial Procedures. North Fork brought a good-faith suit against
4 California. It prevailed. IGRA stated that the Secretary “shall prescribe” procedures if the State
5 failed to consent to the compact selected by the mediator. That is what the Secretary did. In the
6 letter accompanying the procedures, the Secretary recognized his mandatory “duty under IGRA
7 to prescribe Class III gaming procedures.” AR00002186; 2188 (“IGRA requires the Secretary to
8 prescribe procedures”). When a statute mandates an agency action, it cannot be found to be
9 arbitrary, capricious, or an abuse of discretion. *Public Citizen*, 541 U.S. at 770 (decision was not
10 arbitrary, capricious, or abuse of discretion when the agency “has no discretion”). There is
11 simply no basis, under the APA’s deferential standard of review, to find that the Secretarial
12 Procedures violate IGRA and the APA.
13
14

15 Stand Up correctly admits that “the Secretary cannot refuse to prescribe procedures.”
16 Pls.’ Mem. at 14. Mandatory actions cannot be determined to be arbitrary, capricious, or an
17 abuse of discretion. *Id.* The Secretary properly fulfilled his mandate under IGRA by prescribing
18 Secretarial Procedures that are consistent with the compact submitted to him by the Court
19 appointed mediator in *North Fork*. 2015 WL 11438206, at * 2; AR00002187. Stand Up has not
20 demonstrated that the Secretary’s action was arbitrary, capricious, or an abuse of discretion.
21
22

23 Stand Up’s argument that validity of the Governor’s concurrence is relevant to IGRA’s
24 requirement that Secretarial Procedures “are consistent with . . . the relevant laws of the State . .
25 .,” 25 U.S.C. § 2710(d)(7)(vii), is wrong. This provision says that the Secretarial Procedures,
26 which govern class III gaming in lieu of a tribal-state compact, must be consistent with the
27
28

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

3 The Secretary did, however, consider the *relevant* provisions of state laws, i.e., those
4 laws having significant and demonstrable bearing on whether the Secretarial Procedures were
5 “consistent with the State’s regulatory role in class III gaming under numerous existing compacts
6 with tribes in the State.” AR00002187. The Secretary considered the relevant state law and
7 found that the Secretarial Procedures are “consistent with the State’s regulatory role in Class III
8 gaming under numerous existing compacts with tribes in the State.” *Id.* “Under IGRA, these
9 Secretarial Procedures are properly viewed as a full substitute for a Class III gaming compact[.]”
10 *Id.* at AR00002295. The state laws that are relevant to Secretarial Procedures are those which set
11 forth the conditions of gaming. Those are the laws that Secretarial Procedures must be consistent
12 with.
13
14

15 Stand Up has failed to allege that the Secretarial Procedures are unlawfully prescribed
16 because they are inconsistent with any provision of state law actually relevant to the conditions
17 of gaming. The Governor’s concurrence has nothing to do with this remedial provision of
18 IGRA—it involves the Secretary’s two-part determination. Stand Up’s argument that the
19 Secretary should have considered the Governor’s concurrence before issuing the Secretarial
20 Procedures is simply contrary to the plain text of IGRA.
21

22 2. The Secretary was entitled to rely on the validity of the Concurrence.
23

24 Federal Defendants are entitled to summary judgment because the Secretary was not
25 required by IGRA, or any other federal statute, to make a determination of whether the
26 Governor’s facially valid concurrence was valid as a matter of California law.
27
28

1 Federal law does not require federal officials to look behind the actions of state officials to
2 determine whether those officials complied with state law. In *United States v. Lawrence*, the
3 Ninth Circuit held that the Secretary was entitled to rely upon actions by the Governor of
4 Washington “whether or not the Governor’s proclamation was valid under Washington law.”
5 595 F.2d 1149, 1151 (9th Cir. 1979) (citation omitted). *Lawrence* involved state retrocession of
6 jurisdiction over Indian lands under 25 U.S.C. § 1323, which allowed states to retrocede
7 jurisdiction over Indian lands in certain matters to the United States. An executive order allowed
8 the Secretary to accept any retrocession by publishing it in the federal register. Exec. Order No.
9 11435, 33 Fed. Reg. 17,339 (Nov. 23, 1968). In 1971, the Governor of Washington proclaimed
10 retrocession of jurisdiction over the Suquamish Port Madison Indian Reservation. The Ninth
11 Circuit concluded that the Governor’s authority to retrocede jurisdiction was irrelevant, citing
12 “the plenary power of the federal government over Indian affairs” and “the inescapable difficulty
13 of requiring the Secretary to delve into the internal workings of the state government, and the
14 reliance of the federal government upon what appeared to have been a valid state action.
15 *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev’d on other grounds*, 435 U.S. 191
16 (1978).
17

18
19
20 Other retrocession cases support the Secretary’s reliance on the validity of the Governor’s
21 concurrence. In *Omaha Tribe of Nebraska v. Vill. of Walthill*, 334 F. Supp. 823 (D. Neb. 1971),
22 the court determined that the relevant question was “not whether the state resolution was valid
23 under state law, but whether it was valid under federal law.” *Id.* at 831. “If the elected
24 representatives . . . acted beyond their power in sending the Secretary of the Interior a notice
25 offering a retrocession of jurisdiction over certain Indian country, then they must answer to the
26 people of the state for their negligence.” *Id.* at 832.
27
28

1 It is critical to distinguish between (1) whether the Governor’s concurrence is valid as a
2 matter of state law and (2) whether a federal cause of action lies against the Secretary for relying
3 on a facially valid Governor’s concurrence that plaintiffs allege violates state law. IGRA does
4 not mandate that the states follow a particular procedure to issue a Governor’s concurrence. *See*
5 25 U.S.C. § 2719(b)(1)(A) (“but only if the Governor of the State in which the gaming activity is
6 to be conducted concurs in the Secretary’s determination”). There is no other standard in IGRA
7 by which the Secretary may determine whether he has received a Governor’s concurrence. In
8 other portions of IGRA Congress specifically mentions the State, and not merely the Governor.
9 Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,367 (May 20,
10 2008) (“section 2719 of IGRA only requires the Governor’s concurrence” and does not require
11 “the consent of the State . . .”). To the extent that any party attacks the Secretary’s reliance on a
12 Governor’s concurrence in a two-part determination, it must do so based on IGRA, not some
13 arbitrary standard that suits their case. The standard to be applied is simple —“the Governor of
14 the State in which the gaming activity is to be conducted concurs . . .” 25 U.S.C. §
15 2719(b)(1)(A). This does not mean that a state court cannot find that the Governor violated her
16 own authority. That, however, is not a standard that applies to the Secretary when he must
17 evaluate whether the “Governor of the State” concurred in his two-part determination. In this
18 case, the Governor of California concurred.

19
20
21
22 Stand Up’s attempts to distinguish the retrocession cases are misplaced. Like the
23 retrocession cases, the federal government has plenary power over Indian affairs, *see Oliphant*,
24 544 F.2d at 1012, including authority to acquire land in trust for Indian tribes and authorize
25 gaming on Indian lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204
26 n.1, 207 (1987), *superseded by statute*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024
27
28

1 (2014). Further, as in the retrocession cases, the Secretary has an interest in being able to rely on
2 the validity of the Governor's concurrence. In this case, the need for finality is accentuated by
3 the investments made by Tribes who build casino operations on trust land relying on the
4 concurrence. Additionally, like the retrocession cases, the Secretary was not given authority to
5 second guess the Governor's determination. IGRA specifically states that the Governor, and
6 only the Governor, need concur. 25 U.S.C. § 2719(b)(1)(A). The retrocession cases did not
7 involve a statute that allowed the Secretary to second guess the governors of different states,
8 either.
9

10 This matter, and the retrocession cases, are also distinguishable from *Pueblo of Santa*
11 *Ana v. Kelly*, 104 F.3d 1546, 1556 (10th Cir. 1997). In that case, the Tenth Circuit examined
12 whether, under New Mexico law, the Governor of New Mexico had unilateral authority to bind
13 that state to a tribal-state compact absent legislative ratification. *Id.* Stand Up's argument
14 challenges whether a Governor's concurrence in the Secretary's two-part determination is valid.
15 There are important differences. A Governor's concurrence occurs only once and its effect is to
16 remove the restrictions imposed by IGRA on tribal land use, and does not require the State to
17 take further regulatory action. Retrocession was, similarly, a one-time event which altered
18 jurisdiction over land. Binding a state to a gaming compact can impose ongoing regulatory
19 obligations on the state. This case, like *Oliphant*, fundamentally involves "the inescapable
20 difficulty of requiring the Secretary to delve into the internal workings of the state government,
21 and the reliance of the federal government upon what appeared to have been a valid state action."
22 *Oliphant*, 544 F.2d at 1012.
23
24
25

26 *Pueblo of Santa Ana* did not involve the Governor's concurrence in a two-part
27 determination. *Pueblo of Santa Ana*, 104 F.3d at 1548. Instead, it involved a tribal-state gaming
28

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

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

20 Here, regardless of whether the retrocession cases or *Santa Ana Pueblo* are applicable,
21 the Secretary’s two-part determination, which is not challenged here, relied on the facially valid
22 Governor’s concurrence. Stand Up advances many reasons why it believes the Secretary should
23 not have relied upon it, but it fails to advance a workable framework for how the Secretary might
24 delve into each State’s law and determine whether each State’s governor acted lawfully. It
25 cannot do so, because the plain language of IGRA refers to the “Governor’s” concurrence, not
26
27
28

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

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

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

12
13 The Ninth Circuit has held that "parties cannot 'use a collateral proceeding to end-run
14 procedural requirements governing appeals of administrative decisions.'" *Big Lagoon Rancheria*
15 789 F.3d at 953 (quoting *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012)). The
16 practical application of that holding is that parties cannot "attack collaterally the [Secretary's]
17 decision to take" land "into trust outside the APA" because doing so "would cast a cloud of
18 doubt over countless acres of land that have been taken into trust for tribes recognized by the
19 federal government." *Id.* at 954. To challenge a land-into-trust decision a party must "file the
20 appropriate APA action." *Id.* In this case, Stand Up has not challenged the agency action that
21 took the Madera site into trust but has challenged the Secretarial Procedures. Claim V is an
22 attempt to collaterally attack an agency action that is not challenged in this case. Accordingly,
23 summary judgment is appropriate on this claim.

24
25 Moreover, IGRA does not grant Stand Up a private right of action to challenge the
26 eligibility of Indian land for gaming or to enjoin gaming conducted under Secretarial Procedures.
27

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. This Case Must Be Decided On The Record Before the Court.

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
22

23 Stand Up argues that its Fifth claim is based upon what the California Supreme Court
24 holding will be when it eventually issues a decision on Stand Up’s state court litigation. Yet,
25 there is an administrative record before the Court and the decision that has yet to be issued by the
26 California Supreme Court is not a part of that record. Like *San Luis & Delta-Mendota Water*
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

/s/ Joseph Nathanael Watson
JOSEPH NATHANAEL WATSON
Trial Attorney
United States Department of Justice
Environment & Natural Resources Division
Indian Resources Section

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

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.

1 JEFFREY H. WOOD
Acting Assistant Attorney General

2 JOANN KINTZ
3 STEVEN MISKINIS
4 Trial Attorneys
5 United States Department of Justice
6 Environment & Natural Resources Division
7 Indian Resources Section
8 Ben Franklin Station, P.O. Box 7611
9 Washington, D.C. 20044-7611
10 TEL: (202) 305-0424
11 FAX: (202) 305-0275
12 e-mail: joann.kintz@usdoj.gov

13 Attorneys for the United States

14 **UNITED STATES DISTRICT COURT**
15 **EASTERN DISTRICT OF CALIFORNIA**

16 _____)
17 STAND UP FOR CALIFORNIA!, et al.,)
18 Plaintiffs,)
19 v.)
20 UNITED STATES DEPARTMENT OF)
21 THE INTERIOR, et al.,)
22 Defendants,)
23 and)
24 North Fork Rancheria of Mono Indians,)
25 Intervenor Defendant.)
26 _____)

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

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

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. THIS COURT SHOULD REJECT STAND UP’S WHOLLY UNSUPPORTED THEORY THAT SECRETARIAL PROCEDURES ARE INFERIOR AND CANNOT AUTHORIZE THE USE OF SLOT MACHINES 2

II. THE SECRETARIAL PROCEDURES ARE VALID 7

 A. Stand Up’s Fifth Claim is Barred Based on Issue Preclusion 7

 B. Stand Up’s Challenge to the Secretarial Procedures is An Impermissible Attack on Prior Agency Action 8

 C. The Secretary was Entitled to Rely on the Governor’s Facially Valid Concurrence 9

III. THE ISSUANCE OF SECRETARIAL PROCEDURES DOES NOT VIOLATE THE NATIONAL ENVIRONMENTAL POLICY ACT 12

 A. The Secretarial Procedures are not a major federal action triggering NEPA 12

 B. If the Court Determines that a NEPA Analysis is Necessary, the Existing EIS Satisfies Any Such Requirement 15

IV. THE SECRETARIAL PROCEDURES DO NOT VIOLATE THE CLEAN AIR ACT BECAUSE THE CONFORMITY REQUIREMENT DOES NOT APPLY 17

V. THE SECRETARY DID NOT VIOLATE THE FREEDOM OF INFORMATION ACT 18

CONCLUSION 18

REPLY IN SUPPORT OF FEDERAL DEFENDANTS’ MOTION FOR SUMMARY JUDGMENT

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Federal Cases

Americopters, LLC v. Federal Aviation Admin., 441 F.3d 726 (9th Cir. 2006)8

Butte County v. Hogen, 613 F.3d 190 (D.C. Cir. 2010)10

Ctr. for Biological Diversity v. Env't'l. Protection Agency,
847 F.3d 1075 (9th Cir. 2017)8

County of Amador v. Dep't of Interior, Case No. 15-17253, D.C. No. 2:12-cv-01710-
TLN-CKD (9th Cir. Oct. 6, 2017)4, 5

Davis v. Michigan Dep't of Treasury, 489 U.S. 803 (1989)3

Dep't of Transp. v. Public Citizen, 541 U.S. 752 (2004)12, 15, 16, 18

Duncan v. Walker, 533 U.S. 167, 174 (2001)4

Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000)3

Montana v. Blackfeet Tribe of Indians, 471 U.S. 759 (1985)6

New Mexico v. Dep't of Interior, 854 F.3d 1207 (10th Cir. 2017)13

Oliphant v. Schlie, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191
(1978)11

Overseas Educ. Ass'n, Inc. v. Federal Labor Relations Auth., 876 F.2d 960 (D.C. Cir. 1989)3

Papa v. United States, 281 F.3d 1004, 1013 (9th Cir. 2002)18

Picayune Rancheria of Chukchansi Indians v. U.S. Dep't of the Interior,
Case No. 1:16-CV-0950-AWI-EPG, 2017 WL 3581735 (E.D. Cal. Aug. 17, 2017)7, 8, 13

Pueblo of Santa Ana v. Kelly, 932 F. Supp. 1284 (D.N.M. 1996)12

Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997)11, 12

Red Top Mercury Mines, Inc. v. United States, 887 F.2d 198 (9th Cir. 1989)11

Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger, 602 F.3d
1019 (9th Cir. 2010)6

Sorenson v. Sec'y of the Treasury, 475 U.S. 851 (1986)3

Texas v. United States, 497 F.3d 491, 508 (5th Cir. 2007)13

United States v. Lawrence, 595 F.2d 1149 (9th Cir. 1979)11

United States v. Spokane Tribe of Indians, 139 F.3d 1297 (9th Cir. 1998)4

Zachary v. Cal. Bank & Tr., 811 F.3d 11915

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Federal Statutes

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Administrative Procedure Act, 5 U.S.C. § 555(e)10
Commerce and Trade (Johnson Act), 15 U.S.C. § 11752
Indians, 25 U.S.C. § 2702(1)4
25 U.S.C. § 2703 (7)(A)(i)4
25 U.S.C. § 2710(d)2
25 U.S.C. § 2710(d)(1)6
25 U.S.C. § 2710(d)(1)(A,C)9
25 U.S.C. § 2710(d)(1)(B)5
25 U.S.C. § 2710(d)(6)2, 3, 4, 5
25 U.S.C. 2710(d)(7)(B)(iii)5
25 U.S.C. § 2710(d)(7)(B)(iv)13, 14
25 U.S.C. § 2710(d)(7)(B)(vii)(I)10, 13, 17
25 U.S.C. § 2710(d)(7)(B)(vii)(II)5, 6
25 U.S.C. 2719(b)(1)(A)9, 11
The Public Health and Welfare, 42 U.S.C. § 4332(C)14
Transportation, 49 U.S.C. § 13902(a)(1)15

Federal Administrative Rules and Regulations

Protection of the Environment, 40 C.F.R. § 1508.812
40 C.F.R. § 1508.1812
Public Lands: Interior, 43 C.F.R. § 46.120(c)16
43 C.F.R. § 46.30016

INTRODUCTION

1
2 In the end, this case presents the Court with a single issue: when the Indian Gaming
3 Regulatory Act (“IGRA”) requires the Secretary of the Interior (“Secretary”) to prescribe
4 Secretarial Procedures for a tribe because a state has failed to act in good faith, whether the tribe
5 is penalized because the Secretary lacks the authority to prescribe Procedures that include
6 gaming devices that are otherwise permissible in the state. IGRA contemplates casino-type or
7 “Class III” gaming occurring pursuant to a Tribal-State compact and provides the details
8 regarding what compacts must encompass, how they are approved, and what remedies a tribe has
9 where a state fails to negotiate in good faith. By contrast, Secretarial Procedures are given brief
10 treatment, as the last stop in a remedial process for a tribe confronted by a state that refuses to
11 negotiate a compact in good faith or to negotiate at all. Based on this lack of detail, Plaintiffs
12 (“Stand Up”) in their first claim urge this Court to draw implicit distinctions, with far-reaching
13 consequences, between the Secretary’s authority pursuant to compacts and Procedures based on
14 a lack of specificity in IGRA. Specifically, they claim that the Johnson Act prohibits certain
15 forms of gaming under Procedures but not pursuant to compacts. This approach in effect
16 penalizes a tribe when a state engages in bad faith and forces the Secretary to promulgate
17 Procedures.

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

1 within the same statute should be given the same meaning. *See, e.g., Sorenson v. Sec’y of the*
2 *Treasury*, 475 U.S. 851, 860 (1986) (“identical words used in different parts of the same act are
3 intended to have the same meaning”). Congress used the same term, “class III gaming,” with
4 regard to both Tribal-State compacts and Procedures. 25 U.S.C. § 2710(d)(7)((B)(vii)(II)
5 expressly says Secretarial Procedures apply to all “class III gaming [to be] conducted on Indian
6 lands.” The term “class III gaming” is not limited here, and nowhere else does the statute
7 provide a separate definition for the purposes of Secretarial Procedures. Stand Up’s “plain
8 language” reading of IGRA means the statute requires Secretarial Procedures to allow “class III
9 gaming [to be] conducted” on Indian lands, 25 U.S.C. § 2710(d)(7)((B)(vii)(II), while
10 *simultaneously* making unlawful Secretarial Procedures that authorize Class III gaming utilizing
11 devices banned by the Johnson Act. It would apply exclusively the language at 25 U.S.C. §
12 2710(d)(6) to effectively override 25 U.S.C. § 2710(d)(7)((B)(vii)(II)’s plain meaning and
13 unconditioned authorization of Class III gaming pursuant to Secretarial Procedures, making
14 “class III gaming” mean different things in the same statute. That interpretation flouts the
15 statutory interpretation principle and must be rejected.

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

20 *Stand Up’s theory is inconsistent with the statutory scheme.* It is a “fundamental canon of
21 statutory construction that the words of a statute must be read in their context and with a view to
22 their place in the overall statutory scheme.” *Food and Drug Administration v. Brown &*
23 *Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dep’t of*
24 *Treasury*, 489 U.S. 803, 809 (1989)). That means that “[i]n determining whether Congress has
25 specifically addressed the question at issue, a reviewing court should not confine itself to
26 examining a particular statutory provision in isolation.” *Brown & Williamson*, 529 U.S. at 132;
27 *see also Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014). In addition, courts “must
28 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

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

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

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

24 *Any ambiguities found within IGRA must be construed in favor of Tribes.* In earlier
25 briefing, Federal Defendants noted that if an ambiguity were to be found with respect to the
26 scope of IGRA's authorization of Class III gaming under the Secretarial Procedures, the
27 *Blackfeet* canon would apply, requiring that any ambiguity be interpreted in favor of Indian
28 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 **II. THE SECRETARIAL PROCEDURES ARE VALID**

12 **A. Stand Up’s Fifth Claim is Barred Based on Issue Preclusion**

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

27
28 ² Page references to documents in ECF refer to the ECF pagination, not the original pagination.

1 Court in *Picayune* determined that Picayune was “precluded from re-litigating whether
2 California is an indispensable party to claims challenging the validity of the Governor of
3 California’s concurrence with the Secretary’s two-part determination,” *Picayune*, 2017 WL
4 3581735, at *14. For the same reasons, Stand Up is precluded from raising the issue here and
5 Stand Up’s fifth cause of action must be dismissed on the grounds that the State of California is a
6 necessary and indispensable party to those claims.³

7
8 **B. Stand Up’s Challenge to the Secretarial Procedures is An Impermissible Attack on
9 Prior Agency Action**

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

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

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

11 Moreover, Stand Up’s theory – that the potential invalidation of the Governor’s
12 concurrence with the Secretary’s determination that gaming on the Madera Site will be in the
13 Tribe’s best interest and not detrimental to the surrounding community, 25 U.S.C.
14 2719(b)(1)(A), also invalidates the Secretarial Procedures – is simply wrong. In order to engage
15 in Class III gaming, several conditions must be met. The gaming (1) must be on “Indian lands,”
16 (2) must be conducted pursuant to an ordinance approved by the Chairman of the National Indian
17 Gaming Commission, and (3) must be conducted pursuant to a Tribal-State compact (or
18 Secretarial Procedures). 25 U.S.C. § 2710(d)(1)(A,C). Here the Governor’s two-part
19 concurrence makes the Madera Site Indian lands eligible for gaming while the Secretarial
20 Procedures meet the requirement that gaming be conducted in “conformance with a Tribal-State
21 compact.” If the two-part concurrence is overturned and that in turn makes the Madera Site
22 ineligible for gaming, that does not mean the Secretarial Procedures must be vacated. At most it
23 means the Tribe must take steps to make the Madera Site gaming eligible before gaming
24 pursuant to the Secretarial Procedures may commence. In short, the two-part concurrence
25 provides no basis for overturning the Secretarial Procedures.

26
27 **C. The Secretary was Entitled to Rely on the Governor’s Facially Valid Concurrence**
28

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

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

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

28 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

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

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

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

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

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

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

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

11 In an effort to impose on the Secretary discretion he does not possess in prescribing the
12 Secretarial Procedures, Stand Up attempts to downplay the significant role that the mediator,
13 appointed and supervised by this Court, plays in the actions that culminate in the issuance of
14 Procedures. While it is true that it is the Secretary, and not the mediator, who authorizes Class
15 III gaming, the discrete roles of the mediator, as selector of the compact, and the Secretary, as
16 the official authorized to issue the Procedures, are defined by IGRA, to which the Secretary must
17 adhere. Without providing supporting authority, Stand Up asserts that the Secretary was free to
18 alter the Secretarial Procedures as he saw fit, but nothing in § 2710(d)(7)(B)(iv) gives the
19 Secretary such broad discretion. It is not for Stand Up or the Secretary to question the mandates
20 of IGRA. Congress made a calculated decision in providing the mediator, a neutral body, the
21 task of selecting the compact that best conforms to IGRA and other federal laws. *Texas v.*
22 *United States*, 497 F.3d 491, 508 (5th Cir. 2007) (“[I]f mediation is ordered, it is undertaken by a
23 neutral, judicially-appointed mediator who objectively weighs the proposals submitted by the
24 state and tribe. . . . under IGRA’s remedial scheme the court-appointed mediator essentially
25 defines the regulations that the Secretary may promulgate.”); *New Mexico v. Dep’t of Interior*,
26 854 F.3d 1207, 1225 (10th Cir. 2017) (“Congress has narrowly circumscribed the Secretary’s
27 authority in prescribing procedures by cross-referencing previous steps in the judicial remedial
28 process.”).

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

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

22 Finally, Stand Up’s attempt to distinguish *Public Citizen* from this case appears to rest on
23 the premise that because IGRA affords the Secretary the “essential discretion” to generally
24 regulate gaming by Indian tribes, then he must have the discretion to modify Secretarial
25 Procedures issued pursuant to IGRA. But this is false. Under IGRA, the Secretary is *required*
26 by § 2710(d)(7)(B)(iv) to issue Procedures consistent with the mediator-selected compact if the
27 compact complies with other provisions of IGRA and state law, in the same fashion that the
28 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 **B. If the Court Determines that a NEPA Analysis is Necessary, the Existing EIS**
25 **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

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

11 In fact, doing anything other than relying on the 2009 EIS would lead to an entirely
12 speculative NEPA process that further illustrates that the Secretarial Procedures are simply not
13 the “proximate cause” of anything. *Public Citizen*, 541 U.S. at 767. When Stand Up discusses
14 what should be evaluated, their briefing immediately becomes utterly vague. *See* [Dkt. 46 at 14]
15 (noting Procedures “provided no discussion of the size of either facility”; that a second facility is
16 an “alternative of uncertain scope”). In other words, NEPA work would have to guess at what
17 might be the contours of a second gaming facility that the Tribe may or may not find to be
18 feasible at some later date. No one can predict when or why the Tribe might decide it is
19 worthwhile to build a second facility on the same parcel as the first, and so there is no basis for
20 analyzing the potential environmental impacts of such a hypothetical facility. And that in turn
21 shows that the Secretarial Procedures at most gave the Tribe the discretion to pursue a course of
22
23

24 ⁶ To the extent that the Secretarial Procedures differ from the 2009 EIS, these changes are not
25 sufficient to trigger a new NEPA analysis. While the Secretarial Procedures may impose
26 limitations by which the Tribe may engage in Class III gaming, they are not put in place for a
27 particular project, but instead to define a process by which the Tribe may engage in Class III
28 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].

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

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

5 In taking the Madera Site in trust, a CAA conformity determination was done in
6 connection with the Tribe's proposed gaming facility. Stand Up has challenged that
7 determination and lost. *Stand Up for California v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212,
8 320-23 (D.D.C. 2016). Here Stand Up argues that because the Procedures afford the Tribe the
9 discretion to build a second facility on the same parcel as the first, a new conformity
10 determination must be done. As with any NEPA work evaluating environmental impacts of a
11 hypothetical future facility, any CAA analysis could only be based on sheer speculation about
12 what might be constructed, how it might be constructed, and what kinds of air pollutants might
13 be emitted. But the CAA does not require any such analysis, which would be of little use or
14 value. As noted above, the Secretary does not have broad discretion to alter the mediator-
15 selected compact. Any alteration must be based on fixing an inconsistency with "the provisions
16 of this chapter, and the relevant provisions of the laws of the State." 25 U.S.C. §
17 2710(d)(7)(B)(vii)(I). Stand Up has failed to show how the possibility of a second facility being
18 constructed at some future time provides a basis for the Secretary to alter the terms of mediator-
19 selected compact.

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

1 maintain control, over [any] emissions” that may result from a future decision by the Tribe to go
2 forward with a second gaming facility on the same site. *Public Citizen*, 541 U.S. at 772.⁷

3 **V. THE SECRETARY DID NOT VIOLATE THE FREEDOM OF INFORMATION**
4 **ACT**

5 Federal defendants are aware of the Freedom of Information Act (“FOIA”) request
6 submitted by Stand Up on August 12, 2016 and are diligently working to fulfill the request. As
7 reflected in the Declaration of Carol Leader Charge, FOIA Coordinator for the Office of the
8 Assistant Secretary – Indian Affairs⁸, Interior has committed to responding to the request by no
9 later than December 5, 2017, if the Court is amenable to that date. At that point, Plaintiffs’
10 FOIA claim will become moot. *Papa v. United States*, 281 F.3d 1004, 1013 (9th Cir. 2002).

11 **CONCLUSION**

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

15
16
17
18
19
20
21
22
23
24
25
26

⁷ At the same time, of course, the Secretarial Procedures do not immunize the Tribe, or anyone
27 else, from enforcement of all applicable laws, including the CAA, in the context of any facilities
28 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
4 Acting Assistant Attorney General

5 /s/ JoAnn Kintz
6 JoAnn Kintz
7 Steven Miskinis
8 Trial Attorneys
9 United States Department of Justice
10 Environment & Natural Resources Division
11 Indian Resources Section

12 OF COUNSEL
13 Andrew S. Caulum
14 U.S. Department of the Interior
15 Office of the Solicitor – Division of Indian Affairs
16
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 6, 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.

: October 6, 2017

/s/JoAnn Kintz
JoAnn Kintz

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21

**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.

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)

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

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

2 The parties have filed cross-motions for summary judgment in accordance with the
3 briefing schedule approved by the Court. Docs. 23, 29, 36, 40. Plaintiff Stand Up has also filed a
4 motion to stay the proceedings until the California Supreme Court can resolve whether the
5 Governor of the State of California had the authority under California law to concur in the
6 Secretary of the Interior’s two-part after acquired lands determination. Doc. 28; *see* 25 U.S.C. §
7 2917(b)(1)(A). For the following reasons, Plaintiff’s motions will be denied and Defendants’
8 motions will be granted.

9 II. Background

10 A. North Fork Tribe and Acquisition of Proposed Gaming Site

11 The North Fork Rancheria of Mono Indians is a federally recognized Indian tribe, located
12 in Madera County. North Fork’s Separate Statement of Undisputed Facts, Doc. 38 (“Doc. 38”) at
13 ¶ 1. Presently, “North Fork has no source of revenue other than federal grants and California
14 Revenue Sharing Trust Fund distributions....” Doc. 38 at ¶ 2. North Fork possesses a 61.5 acre
15 parcel in North Fork, California, held in trust by the United States as a reservation. *See* Doc. 38
16 at ¶ 2; Administrative Record (“AR”) at 00000248.¹ That land is “not suitable for commercial
17 development.” Doc. 38 at ¶ 2.

18 In 2005, North Fork submitted a fee-to-trust application to the United States Department
19 of the Interior, seeking to have a roughly 305-acre parcel of land in Madera, California, (the
20 “Madera Site”) taken into trust for purposes of developing a hotel and casino. Doc. 38 at ¶ 3;
21 AR00000160. In 2006, North Fork submitted a supplement to its fee-to-trust application, also
22 asking the Secretary of the Interior conduct a two-part determination² pursuant to 25 U.S.C. §
23 2917(b)(1)(A), excepting the Madera Parcel from the prohibition on gaming on lands acquired in
24 trust for an Indian tribe after October 17, 1988. *See* Doc. 38 at ¶ 4; AR00000240.

25 _____
26 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.

27 ² The two-part determination of § 2719(b)(1)(A) provides an exception to the general prohibition on class III gaming
28 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.

1 A lengthy review process followed. Significant for this action, the Department of the
2 Interior conducted an environmental impact study (“EIS”) to address the environmental impact
3 of operation of a hotel and casino on the Madera Site. *See* Doc. 38 at ¶ 6; *North Fork Rancheria*
4 *of Mono Indians v. State of California* (“*North Fork v. California*”), 2015 WL 11438206, *1
5 (E.D. Cal. Nov. 13, 2015). The results of the EIS were published on August 6, 2010.
6 AR00000160; *Picayune Rancheria of Chukchansi Indians v. United States Dept. of the Interior*
7 (“*Picayune v. DOI*”), 2017 WL 3581735, *1 (E.D. Cal. Aug. 18, 2017); *North Fork v.*
8 *California*, 2015 WL 11438206 at *1; *see* Doc. 38 at ¶ 6.³ The DOI also conducted a conformity
9 determination pursuant to the Clean Air Act with respect to the fee-to-trust determination. *See*
10 Doc. 29-4 at 104-137.

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

13 **B. Related Actions**

14 *1. Good Faith Litigation*

15 On March 17, 2015, North Fork initiated an action against the State of California to compel
16 the state to negotiate a new tribal-state compact in good faith. *North Fork Rancheria of Mono*
17 *Indians of California v. State of California*, E.D.C.A. No. 1:15-cv-419-AWI-SAB, Doc. 1 (E.D.
18 Cal. Mar. 17, 2015). On November 13, 2015, this Court granted North Fork's motion for
19 judgment on the pleadings and ordered North Fork and California to conclude a compact for the
20 Madera Site within sixty (60) days. *North Fork v. California*, 2015 WL 11438206 (E.D. Cal.
21 Nov. 13, 2015)⁴; 25 U.S.C. § 2710(d)(7)(A), (d)(7)(B). North Fork and California were unable to
22 negotiate and conclude a compact within the 60-day period. *North Fork v. California*, Doc. 27 at
23 1 (E.D. Cal. Jan 15, 2016). This Court appointed a mediator, directed the parties to submit their
24 last best offers for a compact to the mediator, and directed the mediator to “select from the two
25 proposed compacts the one which best comports with the terms of [IGRA], ... any other
26 applicable Federal law[,] and with the findings and order (Doc. 25) of th[is] [C]ourt.” *Id.*, Doc.

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

28 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.

1 30 at 1 (E.D. Cal. Jan. 26, 2016); *see* 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator selected North
2 Fork's compact and submitted the compact to North Fork and California. AR 000000001-142;
3 *see* 25 U.S.C. § 2710(d)(7)(B)(v). California did not consent to the compact within 60-days of
4 the compact having been submitted to it. AR000000001. The mediator informed the Secretary of
5 the Interior that California did not consent to the selected compact. AR000000001; *see* 25 U.S.C.
6 § 2710(d)(7)(B)(vii). “On July 29, 2016, the Secretary of the Interior notified North Fork and
7 California that it had issued Secretarial Procedures for the purpose of authorizing class III
8 gaming at the Madera Site.” AR00002186-2325.

9 *2. The District of Columbia Action*

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

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

27 While the cross-motions for summary judgment were under submission, the Secretary
28 “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

25
26
27 ⁵ Picayune challenged, but Stand Up did not challenge, the district court’s determination that California is a
28 necessary party to an action containing “any challenge to the validity of the Governor's concurrence.” *Stand Up for*
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

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

6 The Court’s review in resolving an APA challenge to an agency action is circumscribed:
7 the court will only set aside agency action if its “‘findings[] and conclusions [are] found to be ...
8 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,’ ‘in excess
9 of statutory jurisdiction’ or ‘without observance of procedure required by law.’” *Turtle Island*,
10 878 F.3d at 732 (quoting 5 U.S.C. § 706(2)(A), (C)-(D)). Agency action is arbitrary, capricious,
11 an abuse of discretion, or otherwise not in accordance with law “only if the agency relied on
12 factors Congress did not intend it to consider, entirely failed to consider an important aspect of
13 the problem, or offered an explanation that runs counter to the evidence before the agency or is
14 so implausible that it could not be ascribed to a difference in view or the product of agency
15 expertise.” *Def. Of Wildlife v. Zinke*, 856 F.3d 1248, 1256-1257 (9th Cir. 2017) (citation
16 omitted); see *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S.
17 29, 43 (1983) (An “agency must examine the relevant data and articulate a satisfactory
18 explanation for its action.”) This standard is “highly deferential, presuming the agency action to
19 be valid and affirming the agency action if a reasonable basis exists for its decision.” *Ranchers*
20 *Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 499 F.3d
21 1108, 1115 (9th Cir. 2007) (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251
22 (9th Cir. 2000)). Review under this standard is narrow, and the court may not substitute its
23 judgment for that of the agency. *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161
24 F.3d 569, 573 (9th Cir. 1988). Nevertheless, the court must “engage in a substantial inquiry ... a
25 thorough, probing, in-depth review.” *Native Ecosys. Council v. U.S. Forest Serv.*, 418 F.3d 953,
26 960 (9th Cir. 2005) (citation and internal quotations omitted).

27 B. FOIA Claim

28 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

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

5 **IV. Discussion**

6 **A. Administrative Procedures Act (“APA”) Review**

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

12 1. The Johnson Act

13 The Johnson Act, enacted in 1951, prohibits the possession or use of “any gambling
14 device⁶ ... within Indian country.” 15 U.S.C. § 1175(a). Stand Up argues that IGRA provides an
15 exception to the general prohibition on use of slot machines in Indian country *only when* a valid
16 Tribal-State compact has been entered into to govern gaming on the Indian land. Doc. 29 at 16
17 (citing 25 U.S.C. § 2710(d)(6) (“The provisions of section 1175 of Title 15 shall not apply to any
18 gaming conducted under a Tribal-State compact that (A) is entered into ... by a state in which
19 gambling devices are legal, and (B) is in effect.”) It is agreed that no effective Tribal-State
20 compact has ever been entered into by North Fork and the State of California. Indeed, that fact
21 was the predicate for North Fork’s good faith negotiation action, which ultimately resulted in the
22 issuance of Secretarial Procedures and not a Tribal-State compact. *See North Fork v. California*,
23 2015 WL 11438206 at *2-3. Accordingly, Plaintiff argues that “[b]ecause North Fork ... has not
24 entered into a compact with the state that is effective under IGRA,” the Johnson Act prohibits
25 gaming “at the Madera Site.” Doc. 29 at 16-17. In sum, Stand Up contends that any prescribing
26 of Secretarial Procedures pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii)—which can only take place
27

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

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

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

10 The Court begins, as it must, by examining the text of the statutes at issue. *Friends of*
11 *Animals v. United States Fish and Wildlife Service*, ---F.3d---, 2018 WL 343754, *3 (9th Cir.
12 Jan. 10, 2018) (quoting *Limtacio v. Camacho*, 549 U.S. 483, 488 (2007)); see *Grayned v. City of*
13 *Rockford*, 408 U.S. 104, 110 (1972). The Johnson Act is clear in its broad prohibition of sale,
14 “transport[ation], possess[ion], or use [of] any [slot machine] ... within Indian country.” 15
15 U.S.C. § 1175(a). The Johnson Act provides no exceptions relevant here. Congress was not blind
16 to the limitations imposed by the Johnson Act in enacting IGRA. It specifically carved out an
17 exception to the prohibition imposed by the Johnson Act for “any gaming conducted under a
18 Tribal-State compact that (a) is entered into under paragraph (3)⁷ by a State in which gaming
19 devices are legal, and (b) is in effect.” 25 U.S.C. § 2710(d)(6). IGRA does not carve out the same
20 express exception for gaming conducted pursuant to Secretarial Procedures. And, as Stand Up
21 correctly points out, elsewhere in section 2710, Congress makes clear in an earlier step of the
22 remedial process, a compact selected by the appointed mediator and consented to by the State
23 “shall be treated as a Tribal-State compact entered into under paragraph (3).” 25 U.S.C. §
24 2710(d)(7)(B)(vi). No such language is used to describe the situation wherein the State refuses to

25
26 ⁷ 25 U.S.C. § 2710(d)(3) provides, in full, as follows:

27 Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being
28 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.

1 consent to the compact selected by the mediator and the Secretary prescribes gaming procedures.
2 25 U.S.C. § 2710(d)(7)(B)(vi).

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

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

1 1166),⁸ and (2) not consider whether the gaming is in violation of the Johnson Act (or section
2 1166).⁹

3 Next, such a reading would also result in section 2710 also being internally inconsistent
4 in a manner that would render the remedial process inoperative. It is a fundamental canon of
5 statutory interpretation that “statute[s] should be construed so that effect is given to all [of their]
6 provisions, so that no part will be inoperative or superfluous, void or insignificant...” *Hibbs v.*
7 *Winn*, 542 U.S. 88, 101 (2004) (quoting 2A N. Singer, *Statutes and Statutory Construction* §
8 46.06, pp. 181–86 (rev. 6th ed. 2000)). Section 2710(d)(1) makes clear that “[c]lass III gaming
9 activities shall be lawful on Indian lands only if such activities are,” among other things,
10 “conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the
11 State under paragraph (3) that is in effect.” 18 U.S.C. § 1166 mirrors that requirement. If
12 Secretarial Procedures prescribed pursuant to section 2710(d)(7)(A)(vii) are not treated as
13 equivalent to a Tribal-State compact for purposes of IGRA, then the remedial process would be
14 meaningless. Secretarial Procedures could *never* be issued because Secretarial Procedures—
15 necessarily issued in the absence of a compact that is in effect—would *always* be “[in]consistent
16 with ... the provisions of [IGRA]....” 25 U.S.C. § 2710(d)(7)(B)(vii)(I). The Court will not read
17 IGRA to have created an empty remedial process. Such an outcome must be rejected.

18 Even setting aside the internal inconsistencies, a reading of IGRA that treats Secretarial
19 Procedures as a limited remedy, offering fewer class III gaming options than a Tribal-State
20 compact, would wholly undermine the purpose of the remedial process. *See* 25 U.S.C. §
21 2710(d)(7)(b); S. Rep. 100-446, at *14, reprinted in 1988 U.S.C.C.A.N. 3071, 3085 (“[T]he issue
22 before the Committee was how best to encourage States to deal fairly with tribes as sovereign
23 governments.... The Committee elected, as the least offensive option, to grant tribes the right to

24
25
26 ⁸ Section 23 of IGRA was codified at 18 U.S.C. § 1166(a). It prohibits “gambling” in Indian country to the same
27 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
28 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
27 could not constitutionally permit a tribe to force “a recalcitrant state” to the bargaining table through initiation of
28 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.

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).

1 of *California v. California*, 163 F.Supp.3d 769, 777-778 (E.D. Cal. 2016) (recognizing both that
2 the Secretary of the Interior can prescribe gaming conditions in the final step of the remedial
3 process and that IGRA does not contemplate and does not provide for the conduct of class III
4 gaming in absence of a Tribal-State compact); see also *Texas v. United States*, 497 F.3d 491, 500
5 (5th Cir. 2007) (characterizing imposition of Secretarial Procedures under section
6 2710(d)(7)(B)(vii) as “imposition of a compact on an unwilling or uncooperative state”).

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

13 2. National Environmental Protection Act (“NEPA”)

14 NEPA, codified at 42 U.S.C. § 4321, et seq., “provides the necessary process to ensure
15 that federal agencies take a hard look at the environmental consequences of their actions.” *San*
16 *Diego Navy Broadway Complex Coalition v. United States Dept. of Def.*, 817 F.3d 653, 659 (9th
17 Cir. 2016) (citation omitted). It requires federal agencies to prepare a detailed environmental
18 impact statement (“EIS”) for all “major Federal actions affecting the quality of the human
19 environment.” 42 U.S.C. § 4332(2)(C).¹² “Major Federal action[s]” that trigger NEPA
20 requirements “include[] actions with effects that may be major and which are potentially subject
21 to Federal control and responsibility.” 40 C.F.R. § 1508.18. As a preliminary step, federal
22 agencies prepare an environmental assessment (“EA”)—a “concise public document ... [that]
23 [b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]
24 or a finding of no significant impact [(“FONSI”).” 40 C.F.R. 1508.9; *In Defense of Animals v.*
25 *Dept. of the Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014) (citing *Blue Mountains Biodiversity*
26 *Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir.1998)). When an EA is conducted and a
27

28 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.

1 FONSI made and explained, an action is not a major Federal action affecting the quality of the
2 human environment and no detailed EIS is required. 40 C.F.R. § 1508.13; *see Concerned*
3 *Citizens and Retired Miners Coalition v. United States Forest Service*, --- F.Supp.3d ----, 2017
4 WL 3896290, *32 (D. Ariz. Sept. 6, 2017); *cf. In Defense of Animals*, 751 F.3d at 1068 (“When
5 substantial questions are raised as to whether a proposed project ‘may cause significant
6 degradation of some human environmental factor,’ an EIS is required.”) (citations omitted). It is
7 undisputed that no EA was conducted with respect to issuance of Secretarial Procedures. *See*
8 AR00002186-88. Instead, at this Court’s direction, the Secretary issued procedures governing the
9 conduct of class III on the Madera Site, considering only the proposed compact selected by the
10 mediator, the provisions of IGRA, and the relevant provisions of state law. *See* 25 U.S.C. §
11 2710(d)(7)(B)(vii).

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

23 a. Major Federal action

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

26 _____
27 ¹³ The Court reads the “rule of reason” outlined in *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770
28 (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 Amendment¹⁴ 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

21 ¹⁴ “Federal laws conscripting state officers ... violate state sovereignty and are thus not in accord with the
22 Constitution.” *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 620 (2012); (quoting *Printz*
23 *v. United States*, 521 U.S. 898, 925, 935 (1997); *New York v. United States*, 505 U.S. 144, 176 (1992)). However,
24 Congress “may direct a state to consider implementing a federal program so long as states retain the prerogative to
25 decline Congress’ invitation.” *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d 1422, 1433-1434 (10th
26 Cir.1994); *accord Estom Yumeka Maidu Tribe*, 163 F.Supp.3d at 779.

27 ¹⁵ The Court would note that the Secretary made the same modification when prescribing Secretarial Procedures
28 regarding the Estom Yumeka Maidu Tribe of the Enterprise Rancheria of California in relation to *Estom Yumeka*
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
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
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
<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.

1 States the “right to get involved in ... gaming casino operations within the state..., but does not
2 compel it.”); *Estom Yumeka Madiu Tribe*, 163 F.Supp.3d at 779 (IGRA does not require a State
3 “to negotiate with a tribe to conclude a compact, in the sense that there is no ultimate mandate
4 that a [T]ribal-[S]tate [compact] be agreed upon.”); *but see New Mexico v. Dept. of the Interior*,
5 854 F.3d at 1213 (“[S]tates still retain the obligation to negotiate in good faith under § 25 U.S.C.
6 § 2710(d)(3)(A).”). The Secretary made a necessary change to the mediator-selected compact to
7 ensure that Secretarial Procedures complied with the limitations of IGRA, which also had the
8 effect of avoiding violation of the Constitution. The Secretary’s modification, in compliance with
9 section 2710(d)(7)(B)(vii), assured that the Secretarial Procedures were “consistent with” IGRA;
10 it was not an attempt to comply with “other applicable federal law.” *See* 25 U.S.C. §§
11 2710(d)(7)(B)(iv), (vii).^{16, 17}

12 The Court reads section 2710(d)(7)(B)(vii) to contain an exhaustive list of authorities to
13 be considered by the Secretary in prescribing Secretarial Procedures. *See also, Texas v. United*
14 *States*, 497 F.3d at 524 (The Secretarial Provisions issued pursuant to Part 291¹⁸ “differ[] only
15 slightly from the statutory requirement” of section 2710(d)(7)(B)(vii). [I]t is unclear which of the
16 two is more restrictive” but “the regulations certainly do not grant ‘unbridled power to prescribe
17 Class III regulations.’”) This understanding is consistent with the detailed and comprehensive
18 statutory scheme of IGRA created by Congress. The Secretary, although clearly having the most
19 relevant experience in overseeing Tribal-State compacts, is purposefully removed from the thick

20 _____
21 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.

22 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
23 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*
24 *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*
25 *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
26 Tribal-State compact for approval.

27 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
28 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*.

1 of the remedial process. *See Texas v. United States*, 497 F.3d at 500. In this context, the
2 Secretary is required to prescribe procedures consistent with the selected compact, the provision
3 of IGRA, and relevant portions of state law. Elsewhere in IGRA, the Secretary and others with
4 parts in the Congressional scheme are delineated different roles and limitations. *See, e.g.*, 25
5 U.S.C. §§ 2710(d)(7)(B)(iii) (detailing what a court may consider and must consider in deciding
6 whether a State has negotiated in good faith), 2710(d)(7)(B)(iv) (detailing what the mediator
7 considers in selecting a compact), 2710(d)(8)(B) (detailing the grounds upon which the Secretary
8 may disapprove a compact). In order to give the distinctions in roles meaningful effect, this
9 Court must read section 2710(d)(7)(B)(vii) to list the only considerations that the Secretary is
10 authorized to make. *See Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17
11 (1983) (“[W]here Congress includes particular language in one section of a statute but omits it
12 in another section of the same Act, it is generally presumed that Congress acts intentionally and
13 purposely in the disparate inclusion or exclusion.”) *Briseno v. ConAgra Foods, Inc.*, 844 F.3d
14 1121, 1125 (9th Cir. 2017) (“[T]he enumeration of certain criteria to the exclusion of others
15 should be interpreted as an intentional omission.”) (citation omitted). Otherwise, the Court would
16 effectively elude the purposeful distinctions made by Congress regarding the roles of the
17 mediator—to select a compact considering, *inter alia*, “other applicable Federal law”—and the
18 Secretary—to give effect to the chosen compact considering, *inter alia*, “provisions of [IGRA].”
19 *See* 25 U.S.C. §§ 2710(d)(7)(B)(iv), (vii); *New Mexico v. Dept. of the Interior*, 854 F.3d at 1225
20 (“[T]he Secretary’s role is limited.... Congress has narrowly circumscribed the Secretary’s
21 authority in prescribing procedures by cross-referencing previous steps in the judicial remedial
22 process.”); *see also Republic of Ecuador v. Mackay*, 742 F.3d 860, 864 (9th Cir. 2013) (“An
23 interpretation that gives effect to every clause is generally preferable to one that does not.”)¹⁹ It
24 is not the Court’s province to second guess Congressional judgements. Requiring the Secretary
25 to consider matters outside of those expressly articulated by Congress would do exactly that.

26
27 ¹⁹ Indeed, the Secretary holds trust obligations to the Tribe that are wholly inconsistent with the Secretary being
28 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).

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

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

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

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

5 3. Clean Air Act (“CAA”)

6 Distinct from NEPA, the Clean Air Act is concerned with more than process; it creates
7 substantive requirements and directs the EPA to establish emission limits on air pollutants. 42
8 U.S.C. § 7409(a); *see* 42 U.S.C. § 7401-7671q. The CAA requires each State to develop a State
9 Implementation Plan (“SIP”), designed to implement, maintain, and enforce the EPA’s national
10 ambient air quality standards (“NAAQS”). 42 U.S.C. § 7410(a)(1). Each State is divided into air
11 quality control regions, each of which is designated as a nonattainment area, an attainment area,
12 or an unclassifiable area depending on the ambient air quality of the area. 42 U.S.C. § 7407(b),
13 (d). The CAA is concerned primarily with State regulation of “stationary sources”—buildings or
14 structures which emit or may emit any air pollutant. 42 U.S.C. § 7411(a)(3); *see In re*
15 *Volkswagen “Clean Diesel” Marketing, Sales Practices, and Products Liability Litigation*, 264
16 F.Supp.3d 1040, 1045 (N.D. Cal. 2017) (citations omitted). Section 176(c)(1) of the CAA, which
17 applies in nonattainment areas, prohibits federal agencies from “licens[ing]..., permit[ing], or
18 approv[ing] any activity which does not conform to” a SIP. 42 U.S.C. § 7506(c)(1); *accord* 40
19 C.F.R. § 93.150(a)-(b). “The assurance of conformity to [a SIP] [is] an affirmative responsibility
20 of the head of ... [an] agency....” *Id.* It is undisputed that the Madera Site is located within the
21 San Joaquin Valley Air Basin, which is a nonattainment area, triggering the conformity
22 determination requirement of section 176 of the CAA. Doc. 29-4 at 104. Prior to taking the
23 Madera Site into trust, the Secretary conducted a conformity determination. Doc. 29-4 at 104-
24 114; *see Stand Up for California! v. Dept. of Interior*, 2018 WL 385220, *1-2, 9-10. However, it

25 ²⁰ The Court does not reach the question of whether the Secretary was permitted to rely on the EIS prepared in
26 conducting the fee-to-trust determination. The Court would note that, although the gaming procedures prescribed
27 differ from those anticipated in the 2009 EIS, the procedures require North Fork to conduct an environmental
28 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

1 continuing program responsibility. 40 C.F.R. § 93.152.²¹ Unlike NEPA, the implementing
2 regulations of the CAA define what it means for a Federal action to “cause” emissions: “[c]aused
3 by, as used in the term[] ... ‘indirect emissions,’ means emissions that would not otherwise occur
4 in the absence of the Federal action.” 40 C.F.R. § 93.152. “Some sort of ‘but for’ causation is
5 sufficient for evaluating causation in the conformity review process.” *Public Citizen*, 541 U.S. at
6 755.

7 The prescribing of gaming procedures will result in vehicle emissions of ROG and NOx
8 greater than *de minimus* thresholds and exceeding applicable conformity thresholds during both
9 construction and operation of the gaming facility. *See* Doc. 29-4 at 111 (finding in the fee-to-
10 trust CAA conformity determination that vehicle emissions caused by the construction and
11 operation of the single gaming facility initially envisioned will exceed applicable conformity
12 thresholds). If the Secretary had not prescribed gaming procedures—as he was required to do—
13 North Fork could not conduct gaming. The Secretary’s prescribing of gaming procedures is
14 certainly a “but for” cause of class III gaming at the Madera Site. The Supreme Court came to a
15 similar conclusion in *Public Citizen*. 541 U.S. at 772. It explained that the FMCSA motor carrier
16 safety and registration regulation regulations—without which no Mexican trucks could enter the
17 United States (hence they could not emit pollutants in the United States)—was a “but for” cause
18 of Mexican trucks entering the United States, hence pollution. *Public Citizen*, 541 U.S. at 758,
19 760, 772.

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

27 ²¹Direct emissions are those emissions caused by the Federal action that occur at the same time and place as the
28 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

1 b. Stay

2 Stand Up moves to stay this action pending the California Supreme Court’s resolution of
3 the gubernatorial concurrence authority question. The parties disagree on the rule to be applied in
4 resolving the question of whether to issue a stay. Stand Up relies on *Landis v. North American*
5 *Co.*, 299 U.S. 248 (1936) while North Fork and the Federal Defendants argue that *Colorado*
6 *River Water Conservation District v. United States*, 424 U.S. 800 (1976), controls. This Court
7 has questioned the applicability of *Landis* in governing whether a district court should stay a
8 federal action pending the resolution of a concurrent state court proceeding. *Abrahamson v.*
9 *Berkley*, 2016 WL 8673060, *19 n. 14 (E.D. Cal. Sept. 2, 2016); *accord Picayune*, 2017 WL
10 3581735 at *6. Although this Court did not resolve the question and the Ninth Circuit has not
11 spoken directly to the question, the Eleventh Circuit and other district courts in this district have
12 held that the standard articulated in *Colorado River*, governs whether a federal court should stay
13 in favor of a state court proceeding. *See Ambrosia Coal and Const. Co. v. Pages Morales*, 368
14 F.3d 1320, 1328 (11th Cir. 2004); *Martin v. Minuteman Press Int., Inc.*, 2016 WL 4524885, *2
15 (E.D. Cal. Aug. 30, 2016) (citing, *inter alia*, *R.R. Street & Co. Inc. v. Transport Ins. Co.*, 656
16 F.3d 996, 975 (9th Cir. 2011)); *see also Colorado River*, 424 U.S. at 817-818 (contrasting the
17 policy of judicial conservation and avoidance of duplicating litigation existing between federal
18 district courts presiding over overlapping actions and the “virtually unflagging obligation of
19 federal courts to exercise jurisdiction” over actions where concurrent state court proceedings
20 exist). For the same reasons articulated by the *Martin v. Minuteman Press* court, this Court
21 concludes that *Colorado River* provides the appropriate standard and that *Landis* is inappropriate
22 to forestall a federal action pending resolution of a parallel state action.

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

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

13 “These factors are to be applied in a pragmatic and flexible way, as part of a balancing
14 process rather than as a mechanical checklist.” *Am. Int’l Underwriters (Philippines), Inc. v.*
15 *Cont’l Ins. Co.*, 843 F.2d 1253, 1257 (9th Cir. 1988). Yet, “[a]ny doubt as to whether a factor
16 exists should be resolved against a stay.” *Travelers Indem. Co. v. Madonna*, 914 F.2d 1364, 1369
17 (9th Cir. 1990).

18 The Court addresses only the fifth and eighth factors. As to the fifth factor, the “presence
19 of federal-law issues must always be a major consideration weighing against surrender” of
20 jurisdiction, but “the presence of state-law issues may weigh in favor of that surrender” only “in
21 some rare circumstances.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1,
22 26 (1983). This Court resolves Stand Up’s IGRA claim on federal procedural grounds; the
23 underlying state law questions do not impact this Court’s decision. More importantly, the APA
24 and FOIA claims before this Court will not be completely resolved by the California Supreme
25 Court’s decision. *Seneca Ins. Co. v. Strange Land, Inc.*, 862 F.3d 835, 845 (9th Cir. 2017) (The
26 parallelism factor is “more relevant when it counsels against arbitration, because . . . insufficient
27 parallelism may preclude abstention.”) The Court’s “virtually unflagging obligation” to resolve
28 those claims compels the Court to move forward with this action.

1 c. Conclusion

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

5 **C. Freedom of Information Act (“FOIA”)**

6 The Freedom of Information Act seeks ‘to ensure an informed citizenry, vital to the
7 functioning of a democratic society.’” *Tuffly v. U.S. Dep’t of Homeland Sec.*, 870 F.3d 1086,
8 1092 (9th Cir. 2017) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)).
9 Accordingly, “the Act requires that federal agencies make records within their possession
10 promptly available to citizens upon request.” *Id.* However, not all records are subject to
11 disclosure; nine exemptions exist. 5 U.S.C. § 552(b).

12 On August 12, 2016, Stand Up sent a FOIA requests to the Department of the Interior
13 (“DOI”) and the Bureau of Indian Affairs (“BIA”) requesting “[c]opies of all communications to
14 or from North Fork Rancheria of Mono Indians” and “to or from the State of California”
15 “relating to the development of the Secretarial Procedures.” Doc. 29-3 at 5, 8. On August 15,
16 2016, the BIA informed Stand Up that the FOIA request had been received and “assigned for
17 processing and direct response.” Doc. 29-3 at 12. The following day, the DOI responded to Stand
18 Up, indicating that BIA had the information sought and that the BIA would respond directly to
19 Stand Up. Doc. 29-3 at 18. On October 10, 2016, Stand Up sought a status update regarding its
20 FOIA request. Doc. 29-3 at 20. The BIA responded that the FOIA request had been assigned to
21 the Office of the Assistant Secretary – Indian Affairs (ASIA). Doc. 29-3 at 30. On October 6,
22 2017, the FOIA Coordinator for the Office of the ASIA indicated that the response to Stand Up’s
23 FOIA request would be finalized by December 5, 2017. Doc. 52-3 at 1-2.

24 On December 5, 2017, this Court received notice from the Federal Defendants that on
25 December 4, 2017, the DOI “responded to Stand Up’s request, providing all documents
26 answering to the request that are not otherwise subject to withholding under FOIA.” Doc. 53 at
27
28

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

8
9 **V. Order**

10 Accordingly, IT IS HEREBY ORDERED that:

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

16
17 IT IS SO ORDERED.

18 Dated: July 18, 2018



19 SENIOR DISTRICT JUDGE

20
21
22
23
24
25
26 _____
27 ²² The BIA withheld one page under FOIA Exemption 4. Doc. 53-1 at 1 (citing 5 U.S.C. § 552(b)(4) (protecting
28 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.