No. 18-16696

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLUB ONE CASINO, INC., dba CLUB ONE CASINO; and GLCR, INC., dba THE DEUCE LOUNGE AND CASINO,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; RYAN ZINKE, in his official capacity as Secretary of the Interior; and MIKE BLACK, in his official capacity as Acting Assistant Secretary of the Interior – Indian Affairs,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of California
No. 1:16-CV-1908-AWI-EPG (Hon. Anthony W. Ishii)

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiffs-appellants make the following disclosure pursuant to Federal Rule of Appellate Procedure 26.1:

The plaintiffs/appellants are not a subsidiary or affiliate of any publicly owned corporation, nor does any public-held company have a 10% or greater ownership interest in any of the plaintiffs-appellants.

There is no publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome of this case.

Dated: December 6, 2018

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JURISDICTION STATEMENT

The Department of Interior issued a final agency action. ER 82-218. The district court had subject matter jurisdiction under 5 U.S.C. §§ 701-706. The district court entered a final judgment dismissing the case on July 13, 2018. ER 4-25.[1] Plaintiffs timely appealed on September 7, 2018. ER 1-2. This Court has jurisdiction under 28 U.S.C. § 1291.

[1] Reported as *Club One Casino, Inc. v. U.S. Dep't of Interior*, 328 F.Supp.3d 1033 (E.D. Cal. 2018).

ISSUES PRESENTED

1. Does a private party's gift of off-reservation land to the United States in trust for an Indian tribe shift some portion of California's historic territorial jurisdiction over that property to the tribe, allowing the federal government to impose an Indian casino at odds with the will of nearly 4 million California voters who specifically rejected such gambling on the land in question? [2]

2. When a state revokes the gubernatorial concurrence required by 25 U.S.C. § 2719 before the Secretary of the Interior takes final administrative action is Indian gambling barred on land acquired after 1988?

3. In opposing final federal administrative action authorizing Indian gambling, do plaintiffs have standing to challenge, on Tenth Amendment and statutory grounds, the impact on California's historic territorial jurisdiction of a private party's transfer of land to the United States in trust for an Indian tribe?

CONSTITUTIONAL AND STATUTORY AUTHORITIES

An addendum containing the pertinent statutory and Constitutional provisions is attached.

[2] We use the terms "Indian" and "tribe" because those are the terms used in the relevant statutes. No disrespect is intended.

INTRODUCTION

In 2014, more than 3.7 million California voters, a 61% to 39% majority, voted "no" on Proposition 48 thereby rejecting the subject off-reservation Indian casino project on land over which California has historic territorial jurisdiction. The casino proponents and the Secretary of the Interior ignored the voters' mandate, with the Secretary issuing rules—termed "Secretarial Procedures"—purporting to allow the very Indian casino the voters rejected.

The land in question is almost 40 miles from the North Fork Tribe's reservation, but conveniently located next to a major North-South freeway and a 20-minute drive or less from California's fifth largest city, Fresno. A Nevada casino company "donated" it to the United States to hold in trust for the Tribe in 2013. Under the pertinent statutory scheme, gambling is not allowed on Indian lands acquired after 1988 absent state consent. Whatever consent may have existed was revoked pursuant to Proposition 48 *before* the Secretary took final action to approve this casino project. That should end the issue.

But there's more. A fundamental prerequisite to the Secretary's power to allow Indian gambling is that the Tribe must have not merely ownership of, but also *jurisdiction* over, the land. A State cannot be deprived of its sovereign jurisdiction (in whole or in part) over land within its borders simply by a private entity gifting land to an Indian tribe via the federal government. The district court's reasoning was that when the United States takes land in trust for an

Indian tribe, the transfer of title *automatically* creates tribal jurisdiction over land that has been under California's jurisdiction since statehood.

But no statute or Constitutional provision says that. The enabling legislation that does exist (the Indian Reorganization Act) has to be construed in a manner that does not infringe a State's sovereign jurisdiction over lands within its borders and must be harmonized with other federal legislation and the Tenth Amendment which bar the United States from appropriating territorial jurisdiction, in whole or in part, over lands within a State's borders without that State's consent.

Contrary to the district court's view, plaintiffs have ample standing to raise these issues. This is their first opportunity to challenge a concrete federal administrative determination permitting Indian gambling on the land. They are entitled to assert statutory and Tenth Amendment protections when federal action infringes State prerogatives in a manner that directly affects them.

The Secretary and the district court have asserted a novel and far-reaching jurisdiction-grabbing federal power. If this can happen here, it can happen anywhere—downtown Los Angeles, San Francisco. A State's ability to stop unilateral acquisition of its sovereign territory for Indian gambling? According to the district court, none. The notion that the federal government can interfere with California's historic territorial jurisdiction without the State's consent is

constitutionally suspect. A federal power to usurp all or a part of State sovereignty over lands within its borders cannot be recognized absent unambiguous statutory and constitutional mandate, coupled with clear State consent, which does not exist here.

The district court was wrong in concluding that a State's territorial jurisdiction can be diminished by federal fiat. Constitutional federalism principles dictate that a State's territorial jurisdiction—State sovereignty's foundation—only diminishes when the State in question consents.

The judgment below should be reversed.

STATEMENT OF THE CASE

The present dispute is whether the North Fork Indian Tribe gained sufficient State consent and jurisdiction over off-reservation property as required by the Indian Gaming Regulatory Act (25 U.S.C. §§ 2710(d)(1)(A) & 2719), to allow the Secretary of the Interior to authorize a Nevada-style casino there[3] over the objection of the vast majority of the California electorate.

A. A private Nevada gaming company purchases a proposed casino site 15 miles from Fresno, California but 40 miles (an hour drive) from the North Fork reservation.

The proposed casino site ("the Madera Parcel") consists of 305 acres located in an unincorporated portion of Madera County, California. ER 192-193, 516. It is located approximately 15 miles north of Fresno just off State Route 99, a major North-South freeway. ER 50, 192-193, 618. Fresno is California's fifth most populous city.

The North Fork Tribe's Rancheria lands are 38 miles away, near the town of North Fork. The Tribe owns a second parcel about 36 miles away from the site which is used for housing. *See* ER 364, 585; *see also Stand Up for California! v.*

[3] "Nevada-style" or "Class III" gambling includes slot machines and house-banked games, e.g., games where the casino or the "house" itself can profit (or lose) based on the outcome of the bet. Such gambling is illegal under the California law. Cal. Const. art. IV, § 19(e); Cal. Penal Code §§ 330, *et seq*.

U.S. Dep't of Interior, 204 F. Supp. 3d 212, 231 (D.D.C. 2016), *aff'd*, 877 F.3d 1177 (D.C. Cir. 2018).

The land was purchased by Fresno Land Acquisitions LLC, a subsidiary of Station Casinos, a Nevada gambling entity. *See* ER 39, 584.[4] Prior to the purchase, a related Station Casinos entity entered into an agreement with the North Fork Tribe to operate and manage a casino on "unspecified" land that Station Casinos intended to gift to the federal government to be held in trust for the Tribe for gaming purposes. ER 589. The North Fork Tribe had not previously occupied or governed the Madera Parcel.

The United States did not reserve jurisdiction over the Madera Parcel at the time California was admitted to the Union. *See* 9 Stat. 452 (1850) (California Admission Act); ER 29-30. The State has never ceded or surrendered jurisdiction over the Madera Parcel. ER 8, 29-30, 51.

B. The North Fork Tribe's efforts to obtain federal gambling approval for the Madera Parcel and the eventual gift of that land to the United States in trust for the Tribe.

2005: Land to Trust Application. The North Fork Tribe submitted a request to the Department of the Interior to acquire the Madera Parcel in order to operate a

[4] *See* Station Casinos LLC SEC Form 10-K, Exhibit 21.1 – Subsidiaries of Station Casinos LLC, filed March 30, 2012 (https://www.sec.gov/Archives/edgar/data/1503579/000150357912000002/stn-ex211x10k.htm) (last accessed November 27, 2018).

gambling casino. ER 510. Because the Tribe's casino plans involved "after acquired" land—i.e., land acquired after the 1988 effective date of the Indian Gaming Regulatory Act, 25 U.S.C. § 2719 (the "Gaming Act")—the Tribe requested a separate "section 2719" determination that it be allowed to conduct gaming on the Madera Parcel, a determination that requires state consent. *See* ER 582. The Madera Parcel was at the time owned by the Station Casinos subsidiary. ER 584.

***2011: The Section 2719 Determination*.** The Secretary of the Interior issued a "Record of Decision" on the Tribe's application (the "§ 2719 decision"), deciding that the North Fork Tribe could conduct gaming on the Madera Parcel. ER 515. The § 2719 decision was issued before the Secretary determined whether the land (still owned by the Nevada gambling corporation) would be taken into trust for the Tribe. ER 580-631. The Secretary made no finding that the Tribe had acquired jurisdiction over the Madera Parcel. Nor is there any finding or discussion of the North Fork Tribe actually occupying or governing the Madera Parcel in the past. *See* ER 596.

No federal agency or official ever considered whether the Madera Parcel satisfies the Gaming Act's jurisdiction requirement or whether territorial jurisdiction had transferred to the North Fork Tribe. ER 10 ("The administrative record contains no evidence that any governmental entity had affirmatively

concluded that North Fork had territorial jurisdiction over the Madera Site"); see also ER 50-51 (admission of same). It was impossible for there to be such a determination because the Madera Parcel was still in private hands. The land had yet not been transferred to the United States.

2012: California Governor's Purported Concurrence. California's Governor purported to concur in the Secretary's determination that the North Fork Tribe could conduct gaming on "after-acquired" land. ER 578-579.

2012: Compact Negotiations. Thereafter, the Governor entered into a compact with the North Fork Tribe to allow it to conduct Nevada-style gambling on the Madera Parcel. ER 388-506. The compact was then submitted, as required by California law, to the Legislature for ratification. ER 8, 507-508. The California Legislature ratified the compact, but the ratification statute did not cede jurisdiction to the North Fork Tribe. ER 385-386, 507-508; *see also* Cal. Gov't Code § 12012.25.59(a); A.B. 277 (2013). The California Constitution gives the voters power to override legislative action by way of a statewide referendum. *See* Cal. Const., art. II, §§ 9-10.[5] A referendum was promptly submitted to the California Secretary of State. ER 8. When California forwarded the North Fork compact to the Secretary of the Interior, the transmittal letter made "clear that if the

[5] Upon a timely referendum filing, the statutory enactment is suspended. *Assembly v. Deukmejian*, 639 P.2d 939, 950 (Cal. 1982).

referendum measure [Proposition 48] qualified for the ballot [California's approval] would not take effect until the voters had voted on it." ER 8, 507-508.

2012-2013: The Madera Parcel Is Finally Transferred To The United States. In November 2012, the Secretary of the Interior issued a second decision approving the North Fork Tribe's application to have the Madera Parcel taken into trust (the "fee-to-trust decision"). ER 509-577. The fee-to-trust decision contains no finding regarding jurisdiction. In 2013, Fresno Land Acquisitions deeded the Madera Parcel to the United States to be held in trust for the North Fork Tribe. ER 7, 50, 584, 365.

C. Nearly 4 million California voters reject off-reservation gambling, including the specific casino at issue here.

In 2014, California voters overwhelmingly rejected the North Fork compact by referendum (Proposition 48). *See* Addendum, A-10-12 for full text of Proposition 48. The vote was 61% to 39%. ER 8-9, 55; s*ee also* http://elections.cdn.sos.ca.gov/sov/2014-general/ssov/ballot-measures-summary.pdf at 50-52 (last accessed November 29, 2018).

D. Post-election, the North Fork Tribe and the Secretary of the Interior, in defiance of the California voters, proceed with the Madera Parcel casino plan.

In the wake of the decisive referendum vote, the Governor, following the will of the People, refused to negotiate another compact for casino gaming on the

Madera Parcel. ER 367; *North Fork Rancheria of Mono Indians v. California*, 2015 WL 11438206 at *3 (E.D. Cal. 2015).

The North Fork Tribe sued under 25 U.S.C. § 2710(d)(7)(A)(i), claiming the State was not acting in "good faith" under the Gaming Act when it refused to ignore the popular referendum results. The district court ruled in the Tribe's favor and sent the matter to "mediation" pursuant to 25 U.S.C. § 2710(d)(7)(B)(iv). *See North Fork Rancheria of Mono Indians*, 2015 WL 11438206. Under that process the "mediator" selects and recommends one or the other of the proposals submitted by the Tribe and the State.

In 2016 the mediator recommended the Tribe's proposal (ER 219-221), and defendants, completely ignoring the referendum vote, proceeded to issue so-called Secretarial Procedures rules permitting the North Fork Tribe to conduct Nevada-style gaming without the State's consent. ER 79-218; *see also* ER 10.

The Secretary made no finding about whether the North Fork Tribe had acquired jurisdiction over the site, whether the site qualifies as "Indian lands" under the Gaming Act, or what governmental authority the Tribe had exercised over the Madera Parcel. ER 79-218.

E. Plaintiffs face competition from Indian "Nevada-style" gambling which they are barred by California law from offering.

Plaintiffs are two state-licensed card clubs located within the same market area as the proposed casino. ER 75-78 (Kirkland Declaration). The Madera Parcel is an approximate 20-minute drive from plaintiff Club One's businesses, and an hour from plaintiff GLCR's. *Id.*, at ¶¶s 3, 7.

California's Constitution bars Nevada-style gambling. Cal. Const., art. IV, § 19(e). State regulated card clubs are allowed so long as they do not underwrite winnings or losses. Accordingly, California card clubs, such as plaintiffs, cannot operate slot machines, roulette, or host banking or percentage card games. *Id.*, *see also* Cal. Penal Code §§ 330, *et seq*. Rather, licensed card clubs rent table space to players who compete against each other, not the house. The Nevada-style proposed North Fork Indian casino games are more popular than the plaintiffs' non-banked card games. ER 75-78 at ¶¶s 4, 8.

Plaintiffs submitted evidence that they, as well as the surrounding communities, including the City of Fresno, will suffer economic harm if the North Fork Tribe opens a Nevada-style casino, with the resulting loss of jobs, revenue, and tax contributions. *Id.*, at ¶¶s 2-9. The district court did not find otherwise.

F. The district court's ruling: The Secretary of Interior is entitled to authorize the North Fork Tribe to conduct casino gambling over the objection of California's voters on newly acquired land over which the Tribe had no prior jurisdiction.

Plaintiffs sued the Secretary under the Administrative Procedure Act seeking to set aside the Secretarial Procedures purporting to allow the North Fork Tribe to engage in gambling activities on land that remains within the State of California's territorial jurisdiction. ECF 1.

Both sides moved for summary judgment. ECF 36, 37. Plaintiffs asserted that under the Reorganization Act, the Gaming Act, 40 U.S.C. § 3112, and the Tenth Amendment—and the federalism principles embedded therein—a cession of jurisdiction is necessary to transfer any portion of a State's territorial sovereignty. ECF 36-1, 38. Plaintiffs' core claim is that a private party cannot shift territorial jurisdiction by deeding property to the United States and, correspondingly, that the United States cannot create tribal jurisdiction unilaterally by accepting such a transfer. Plaintiffs argued that the Gaming Act required the acquisition of territorial jurisdiction over the Madera Parcel and that such jurisdiction did not transfer without a formal cession by the State. Imposing this off-reservation casino on California, without a compact and against the will of its People, violates both the Gaming Act and the Tenth Amendment.

The Secretary argued that the mere taking of the Madera Parcel in trust for the North Fork Tribe, even if done without the State's consent, automatically divested California of at least some portion of its sovereign jurisdiction and transferred that jurisdiction to the North Fork Tribe. ER 5.

The district court found:

1) "Prior to the acquisition of the Madera Site in trust for the North Fork Tribe, the land was privately owned";
2) "Jurisdiction over the land was not reserved by the United States when California was admitted to the Union in 1850";
3) "The State of California has never taken express steps to cede territorial jurisdiction over the land to the United States or [to the North Fork Tribe]";
4) "[T]he United States has never issued a written acceptance of cession of jurisdiction in connection with the Madera" Parcel. ER 7-8.

Nonetheless, the district court concluded that jurisdiction shifted upon the land being placed in trust with the federal government. ER 16-18. In the district court's view, the Madera Parcel qualified as "Indian land" subject to the Gaming Act simply by virtue of being held in trust for the Tribe. ER 21. Assuming some manifestation of "governmental authority" was required, the court concluded that a

North Fork tribal grazing ordinance enacted in 2015, well after Proposition 48, sufficed. ER 22-23.

The district court refused to consider plaintiffs' Tenth Amendment argument that the deed transferring title to the federal government affected title only and did not shift jurisdiction. The district court held that private parties, such as plaintiffs, had no standing to assert Tenth Amendment rights. ER 13-14.

Further, in the district court's view, the fee-to-trust transfer was not at issue and, therefore, no question could be raised as to whether the fee-to-trust transfer shifted territorial jurisdiction. *Id.* The district court viewed the unilateral donation of the Madera Parcel to the United States as creating territorial jurisdiction in the North Fork Tribe, thus entitling the Tribe to conduct Nevada-style gambling there, despite the fact that there had been no State cession, not to mention the voters' rejection of this very casino proposal.

SUMMARY OF ARGUMENT

This case concerns whether the Indian Gaming Regulatory Act permits the Secretary of the Interior to authorize off-reservation casino gambling in the teeth of a State's rejection of such gambling. But the statute limits this practice in two critical ways. First, it requires that the Governor of the State consent. 25 U.S.C. § 2719. And second, it requires that the gaming take place only on land over which a tribe has and has actually exercised jurisdiction. 25 U.S.C. § 2710(d)(1). These requirements exist both to prevent a "land rush" in Indian gaming and to vindicate the Constitution's basic guarantees of State sovereignty. Neither requirement is met in this case. That the federal Indian Reorganization Act permits the federal government to acquire land in trust for Indian tribes, including land that, as here, is not historically associated with or contiguous to tribal lands, does not change the jurisdictional landscape.

Appellants challenge rules, labeled Secretarial Procedures, issued by the Secretary of the Interior, that purport to allow the North Fork Tribe to operate a Nevada-style gambling casino on a parcel of land far from its reservation—land purchased by a Nevada gambling company and donated to the United States to hold in trust for the tribe. All of this despite the express and overwhelming rejection by California's voters of this specific off-reservation gambling casino.

The California card club plaintiffs here suffer direct Article III injury from a competing Nevada-style Indian casino on California state land. They have standing to challenge whether the necessary statutory and constitutional prerequisites exist for the Secretary's issuance of Secretarial Procedures, the final step to allowing Indian gambling on the newly acquired land. Recent controlling Supreme Court authority confirms that plaintiffs have standing to raise Tenth Amendment State sovereignty concerns.

The issue here involves the interplay of three disparate federal statutes, not part of a unified legislative scheme but rather enacted at different times for different purposes, as well as the State-sovereignty protecting Tenth Amendment. The statutes are:

- The Indian Gaming Regulatory Act (the Gaming Act), 25 U.S.C. §§ 2701, *et seq.*, under which the Secretary purported to act, which allows Indian gambling in certain instances on lands under tribal jurisdiction;

- The Indian Reorganization Act (the Reorganization Act), 25 U.S.C. § 5108, under which the United States can, and here did, acquire property in trust for a tribe, but without mention of jurisdiction; and

- 40 U.S.C. § 3112, which requires State consent for the federal government's acquisition of jurisdiction over State lands.

The Gaming Act allows the Secretary of the Interior to permit Nevada-style casino gambling (slot machines, house-banked games, etc.) on Indian lands. But the Gaming Act contains a crucial predicate to any such permission. The land in question must be under *tribal* jurisdiction. 25 U.S.C. § 2710(d)(1)(A). The rules are even stricter for lands, such as here, acquired after 1988. 25 U.S.C. § 2719. On such lands, the State has an *absolute veto;* its governor must consent. In this case, any such consent was revoked before final agency action occurred.

But even if the consent requirement can be evaded, tribal *jurisdiction* over the casino land remains the Gaming Act's fundamental prerequisite. Without it, the Secretary cannot authorize casino gambling. Here, the proposed casino site is off-reservation land far from the tribe's reservation. The land has been under been under California's territorial jurisdiction since statehood. California has never ceded nor consented to surrendering any portion of its territorial jurisdiction over the land. ER 8, 29-30; see also, ER 51 (defendants admit no cession by the State). California's voters expressly *rejected* a tribe-State compact for this parcel. In the wake of that vote, the Governor declined to negotiate further, a revocation of any prior consent to Indian gambling at this location.

The district court held that jurisdiction automatically shifts to the tribe by the mere act of transferring land to the United States in trust for a tribe under the Reorganization Act. But the Reorganization Act says nothing about automatically

springing tribal jurisdiction arising from a land transfer to the United States in trust. It says nothing about the federal government commandeering some portion of a State's territorial jurisdiction without State consent. To the contrary, 40 U.S.C. § 3112 *requires* State consent for the federal government to obtain *any* jurisdiction—full, partial, or concurrent—over land within State borders. And, that is what the Tenth Amendment requires.

The Reorganization Act and the Gaming Act must be construed in harmony with 40 U.S.C. § 3112 and the Tenth Amendment. Even if the Constitution's Indian Commerce Clause *could* allow Congress to appropriate jurisdiction over State lands and transfer it to tribes—a decidedly overbroad reading of that clause—Congress cannot be presumed to have so intended absent express language to that effect. Such language does not exist in the statutes that govern this case.

Indeed, the irreducible constitutional minimum is that State consent is required for the transfer of *any* portion of its territorial jurisdiction to another sovereign. The federal government cannot unilaterally supplant State territorial jurisdiction.

The North Fork Tribe never acquired territorial jurisdiction from California, and for that reason the district court should have ruled that the Madera Parcel does not qualify for a tribal casino under the Gaming Act. Alternatively, if the Reorganization Act is construed to empower the federal government to obtain

some portion of California's territorial jurisdiction without State consent, it violates the Tenth Amendment. The federal government does not possess the power to unilaterally appropriate, and by such action reduce, the territorial jurisdiction of a sovereign state. The Secretary of Interior is not empowered to mandate a tribal casino on land within state borders that is under the State's jurisdiction. The Secretary certainly has no such power as regards land acquired after 1988 as to which the State has expressly rejected Indian gambling.

The district court's judgment must be reversed with directions that it invalidate the Secretarial Procedures that permit Indian Nevada-style gambling on the subject off-reservation property.

ARGUMENT

I. The Secretary's Actions Are Invalid If Inconsistent With Governing Law Or The Constitution.

The Administrative Procedure Act directs that an agency's action must be set aside if "*not in accordance with the law, . . . contrary to constitutional right, . . . in excess of statutory jurisdiction,* authority, *or limitations, . . .* [or] without observance of procedure required by law." 5 U.S.C. § 706 (italics added); *see Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971); *Brower v. Evans*, 257 F.3d 1058, 1065 (9th Cir. 2001). The "inquiry, while narrow, must be searching and careful." *Brower*, 257 F.3d at 1065 (citing *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989)); *accord Native Ecosys. Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) ("substantial inquiry" "a thorough, probing, in-depth review").

Here, the relevant administrative directive is that "the Secretary shall prescribe, . . . procedures . . . under which class III gaming may be conducted on the Indian lands *over which the Indian tribe has jurisdiction*." 25 U.S.C. § 2710(d)(7)(B)(vii), (italics added). As to land obtained after 1988, "the Governor of the State in which the gaming activity is to be conducted" must "concur[] in the Secretary's determination." 25 U.S.C. § 2719(b)(1)(A). If the Secretary's action as to post-1998 land is without the Governor's concurrence, it is invalid as a matter of law. Likewise, if the Indian tribe does not have jurisdiction over the lands in

question then the Secretary's "procedures . . . under which class III gaming may be conducted" necessarily are in excess of statutory authority. If the Secretary or a statutory scheme imbues the lands with tribal "jurisdiction" by violating the Tenth Amendment, the Secretary has acted contrary to constitutional right.

II. The Secretary Can Allow Indian Tribes To Conduct Gambling Only On Lands Over Which They Have Jurisdiction.

A. Tribal jurisdiction over the lands is the fundamental prerequisite to allowable Indian gambling.

In 1987, the Supreme Court held that Indian tribes were free to conduct whatever gambling operations they wished on the lands over which they had tribal jurisdiction, i.e., reservation lands. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). In response, Congress enacted the Gaming Act, 25 U.S.C. §§ 2701, *et seq.* The Gaming Act allows unrestricted limited types of games (social or individual games, Bingo, etc.) on Indian lands, but has a more restrictive scheme for the "Class III," Nevada-style gambling activities at issue in this case.[6]

[6] Class III gaming is anything not encompassed within Class I (social or personal games) or Class II (Bingo-type games of chance). "[B]anking card games, including baccarat, chemin de fer, or blackjack (21)" and "electronic or electromechanical facsimiles of any game of chance or slot machines of any kind" are specifically excluded from Class II and, therefore, necessarily are Class III. 25 U.S.C. § 2703(7)(B)&(8).

Under the Gaming Act, a tribe may conduct Class III gaming that is otherwise unlawful in California "*on Indian lands* [but] only if such activities are . . . authorized by an ordinance or resolution that . . . is adopted by the governing body of the Indian tribe *having jurisdiction over such lands* [and] … conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . " 25 U.S.C. § 2710(d)(1) (italics added). If a State refuses to bargain in good faith as to a compact, the Secretary can allow such gaming on recommendation of a "mediator." 25 U.S.C. 2710(d)(7)(B)(iv) (the "mediator" selects one of the proposals submitted by the tribe and the State, acting effectively as an arbitrator).

The key limitations are that the gambling must be conducted (1) "on Indian lands," (2) by the tribe "having jurisdiction over such lands." These two requirements are central to the Gaming Act and are repeated several times within the statutory framework. Without satisfying *both* requirements, the Gaming Act does *not* apply and state law governs. *See Massachusetts v. Wampanoag Tribe of Gay Head*, 853 F.3d 618, 624-25 (1st Cir. 2017) (*Gay Head*); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 700-03 (1st Cir. 1994) (*Narragansett*) (exercise of governmental power and having jurisdiction are "dual limitations" under the Gaming Act). Thus, "any tribe seeking to conduct gaming on land must

have jurisdiction over that land." *Citizens Against Casino Gambling in Erie Cnty. v. Chaudhuri*, 802 F.3d 267, 279 (2d Cir. 2015).

The fact that a tribe *owns* land, either in fee or beneficially, does *not* suffice. See *City of Sherrill N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (that tribe purchased and owned lands within boundary of former reservation did not give tribe jurisdiction). Jurisdiction is more than mere ownership. E.g., *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014). It is the legal power to control and regulate conduct, the basic building block of a sovereign's police power. "[J]urisdiction is a threshold requirement to exercising governmental power." *Miami Tribe of Oklahoma v. United States*, 927 F. Supp. 1419, 1423 (D. Kan. 1996). "Absent jurisdiction, the exercise of governmental power is, at best, ineffective, and at worst, invasion." *Id.*

The federal government does not possess general police power to authorize Indian gambling in a State that does not want it on land that is not under tribal jurisdiction. *See Nat'l Fed. Of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535-36 (2012) (*States*, not the federal government, have general police power). What the Gaming Act authorized is casino gambling on land where tribal jurisdiction exists in some degree. Such jurisdiction only exists as to lands reserved to the tribe at statehood or upon consent from the situs State.

B. Stricter requirements, allowing for absolute State veto, apply to land, such as the Madera Parcel, acquired after 1988. Those requirements have not been met here.

Congress recognized that the Gaming Act might set off a land rush by tribes intent on acquiring new properties and expanding Indian gambling into hitherto unknown areas. To curtail that, the Gaming Act puts specific restrictions on lands acquired (as here) after 1988 (when the Gaming Act was enacted). Specifically, Indian gambling is *prohibited* on "lands acquired by the Secretary in trust for the benefit of an Indian tribe" after 1988 unless (a) contiguous to the tribe's existing reservation or (b) within the tribe's last recognized reservation. 25 U.S.C. § 2719(a). Neither of those exceptions applies.

The only other plausible exception requires two things: (1) a Secretarial determination after "consultation with . . . appropriate State and local officials, including officials of other nearby Indian tribes," and (2) Gubernatorial concurrence. 25 U.S.C. § 2719(b)(1)(A). Here, neither condition is satisfied. The Secretary's section 2719 decision does *not* reflect "consultation with … appropriate State and local officials." To the contrary, it reflects that the local authorities and neighboring tribe that responded to the Secretary's outreach *opposed* the plan. ER 622-623. Ignoring or dismissing others' concerns is not "consultation."

As to concurrence, California's Governor initially expressed conditional support for the casino. ER 622. However, it is not clear whether the Governor had the power to do so without legislative concurrence (which would, like the compact here, be subject to a referendum veto). The legal question regarding gubernatorial concurrence power is pending before the California Supreme Court; to date, the California Court of Appeal has held that the Governor did *not* have that power as regards this specific project. *Stand Up for California! v. State of California*, 6 Cal. App. 5th 686 (2016), review granted No. S239630 (Mar. 22, 2017). [7] If the Governor had no authority under California to act unilaterally, then the Governor's section 2719 concurrence is invalid and section 2719's requirement has not been satisfied.

In any event, the Governor's concurrence was revoked before defendants issued the challenged Secretarial Procedures. Those Secretarial Procedures were the final federal administrative determination to allow casino gambling on the Madera Parcel. The administrative activity that preceded issuance was

[7] See *United Auburn Indian Community of the Auburn Rancheria v. Brown*, 4 Cal. App. 5th 36 (2016), review granted No. S238544 (Jan. 25, 2017); *United Auburn* involves a casino project near Sacramento. *Stand Up for California!* involves the North Fork casino at issue here. *Stand Up for California!* holds that the Governor has no authority to concur without the consent of the Legislature (and therefore subject to popular referendum veto). *United Auburn Indian Community* holds the opposite. Both cases remain citable as persuasive authority. Cal. Ct. R. 8.115(e)(1).

intermediate in nature. It was not until issuance of formal Secretarial Procedures that the federal government took the final, consummating step to authorize gambling on the Madera parcel. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (no final agency action until "consummation" of agency's process); *AT & T Corp. v. Coeur d'Alene Tribe*, 295 F.3d 899, 911-12 (9th Cir. 2002) (same).

The statutory prohibition regarding after-acquired lands is categorical. Casino gambling on such property is prohibited unless the Governor of the State "concurs in the Secretary's determination." 25 U.S.C. § 2719(a) & (b)(1)(A). The Governor must "concur" in the Secretary's actual *determination*, not in some speculative, preliminary determination that depends on future events. In short: The Governor cannot "concur" in a determination that is not yet final.

Stated another way, the Governor's consent must be in place concurrent with the Secretary's *final* gambling determination. It undoubtedly was not here. If, by the time that the Secretary makes a final determination, the State's Governor has indicated that he or she does not, or will not, concur—or no longer concurs—the basic concurrence prerequisite of the Gaming Act has not been met. That is precisely the situation here. The prohibition on gambling on post-1998 acquired lands without a State's concurrence was meant to preclude just the sort of "reservation shopping" that occurred with respect to the proposed North Fork

casino. This is exactly the sort of case where Congress refused to permit commercial and tribal interests to trump the interests of a State.

California's Governor made clear that, once Proposition 48 passed, he did *not*, would *not*, and could *not* agree to casino gambling on the Madera Parcel. He unequivocally stated that he could not "negotiate" terms for (i.e., concur in) what the voters had overwhelmingly rejected. 2015 WL 11438206 at *3. The Governor's hewing to the voters' directive effectively withdrew any concurrence that might have been given, and it occurred before final agency action.

As section 2719's concurrence requirement was not satisfied, the Secretary's decision must be reversed regardless of the North Fork Tribe's jurisdiction.

C. The Secretary's action was procedurally improper to the extent that the Secretary made a gambling decision without determining whether tribal jurisdiction or governance existed.

There are other procedural problems with the Secretary's process. The Secretary never considered whether the tribe, in fact, possessed jurisdiction or exercised governmental power over the Madera Parcel. It is undisputed that the Secretary's determination never considered whether the Madera Parcel satisfies the Gaming Act's jurisdiction requirement. ER 10 ("The administrative record contains no evidence that any governmental entity had affirmatively concluded that North Fork had territorial jurisdiction over the Madera Site"); see also ER 50-51

(admission of same). There can be no presumption of correctness as to an issue the Secretary never considered.

Likewise, the only evidence considered by the district court regarding the required exercise of "governmental power" over the Madera Parcel was a grazing ordinance enacted after Proposition 48, that the Secretary did not consider. ER 23 (n.15) (grazing ordinance, not part of the administrative record, enacted in 2015). A grazing ordinance for vacant and unused land is hardly the *extensive* tribal institutional control, management and governance required in other cases. *E.g.*, *Gay Head*, 853 F.3d 618, 625-26; *Narragansett*, 19 F.3d 685, 703.

Both jurisdiction and governance are express Gaming Act prerequisites. The Secretary and the district court put the cart before the horse. The Secretary cannot properly make a determination regarding Class III gambling without first determining tribal jurisdiction and actual governance on the subject property. Stated another way, the Secretary could not have made a proper determination before first determining whether the predicate facts existed. These procedural defects too, require reversal.

III. Neither Individuals, Tribes, Nor the Federal Government Can Unilaterally Create Territorial Jurisdiction Over Land Within State Borders Without The Situs State's Consent.

Setting aside for the sake of argument the dispositive revoked consent to gambling on land acquired after 1988, the key question in this appeal is whether the North Fork Tribe had ever acquired *jurisdiction* over the Madera Parcel.

There is no question that the Madera Parcel has been under California's jurisdiction since statehood. There is no suggestion that the Madera Parcel had *ever* been part of the North Fork Tribe's reserved lands. The parcel thus was indisputably under California's jurisdiction. *See City of Sherrill,* 544 U.S. 197 (State had jurisdiction over land tribe purchased and owned within boundary of former reservation where State had exercised control and governance over the subject land for decades). Indian tribes do not have jurisdiction over "off-reservation" land. *Organized Village of Kake v. Egan,* 369 U.S. 60, 62-63, 70, 75 (1962) ("Off-reservation" fishing rights are subject to State regulation); *cf. Metlakatla Indian Community v. Egan*, 369 U.S. 45, 57-58 (1962) (State fishing laws unenforceable on an Indian reservation where federal government reserved jurisdiction upon State's admission).

Neither tribal occupancy nor tribal ownership of land within state borders alters territorial jurisdiction. *Michigan v. Bay Mills Indian Community,* 572 U.S. 782, makes the point. There a tribe had purchased land and opened a casino on it.

Michigan sued to shut down the casino because it violated state law. Although the *tribe* enjoyed sovereign immunity, *the land was still subject to state law*: "Unless federal law provides differently, 'Indians going beyond reservation boundaries' are subject to any generally applicable state law." *Id.*, at 795. Michigan could therefore apply its criminal statues against tribal officials and persons engaged in illegal gambling.

The district court effectively evaded the jurisdiction issue with the following propositions: (a) the plaintiffs have no standing to challenge the fee-to-trust transfer or its jurisdictional effect, (b) the plaintiffs have no standing to assert the Tenth Amendment bar on the unilateral usurpation of State jurisdiction, and (c) a fee-to-trust transfer of title to the United States under the Indian Reorganization Act, 25 U.S.C. § 5108, *automatically* creates tribal jurisdiction over lands that previously had been State-jurisdiction lands.

All three propositions are wrong.

A. Plaintiff card clubs have standing to challenge whether the transfer of the Madera Parcel created tribal jurisdiction absent State cession of jurisdiction or, if so, whether such a unilateral jurisdictional transfer violates the Tenth Amendment.

1. Plaintiff card clubs have timely challenged whether the transfer of the Madera Parcel to the United States created tribal jurisdiction.

As discussed above, tribal jurisdiction over the land in question is the fundamental prerequisite for federally-authorized Indian gambling. The district

court held that plaintiffs were too late to challenge the tribe's jurisdiction because they did not sue to challenge the "fee-to-trust" transfer of the Madera parcel from Station Casinos to the United States. But that simply assumes the answer. The issue isn't whether a private person or entity can donate land to the United States to hold in trust for an Indian tribe—it undoubtedly can. The issue is: What is the *jurisdictional effect* of such a transfer?

If, as plaintiffs assert, the district court's assumption is wrong and the title transfer did not self-create federal or tribal jurisdiction, then the core Gaming Act prerequisite is not be satisfied, and defendants' Secretarial Procedures are fatally defective. The plaintiff card clubs have standing to challenge the jurisdictional *effect* of a transfer of private property in trust for a tribe to the United States. Plaintiffs have standing under the Gaming Act to challenge whether its fundamental prerequisites have been satisfied. *See Artichoke Joe's v. Norton*, 216 F.Supp.2d 1084, 1100-09 (E.D. Cal. 2002), *aff'd* 353 F.2d 712, 719 n.9 (9th Cir. 2003), *cert. denied*, 543 U.S. 815 (2004).

This proceeding is the first opportunity plaintiffs have had to argue the jurisdictional effect or non-effect of a fee-to-trust title transfer (or, for that matter, the section 2719 decision). Plaintiffs could not have challenged the mere transfer of title because it was of no moment to them. At the fee-to-trust transfer juncture, plaintiffs had not suffered constitutional injury. Had plaintiffs sued in 2013 to

challenge the fee-to-trust transfer, the case would have been dismissed because future use of the land as a casino would have been hypothetical and speculative. *See, e.g.*, *Stop the Casino 101 Coalition v. Salazar*, 2009 WL 1066299 at *3 (N.D. Cal. 2009) ("the Secretary's acceptance of the land into trust did not authorize this project. . . . [T]he . . . Tribe has no authorization to operate a gaming facility on the parcel . . . The alleged injury . . . is therefore 'too speculative' to invoke this Court's jurisdiction."), *aff'd*, 384 Fed. Appx. 546, 548 (9th Cir. (2010) ("Injuries related to the possible building of a casino are hypothetical and not fairly traceable to an agency action that affirmatively declined to determine whether or not a casino could be built on the Property . . . Here, the resultant injuries are all hypothetical, related to the possible building of a casino in the future.").

Plaintiffs cannot be put in a too early/too late, no-win Catch-22 that deprives them of standing to address a real and concrete injury visited on them by unlawful governmental action. Plaintiffs cannot be criticized for waiting to file suit until their constitutional injury crystalized into concrete harm. Once defendants took final action—issuing the Secretarial Procedures authorizing the North Fork casino—plaintiffs' injury became concrete, generating Article III standing. Any other rule would mean that plaintiffs would not have standing to challenge the jurisdictional effect of the fee-to-trust transfer when it takes place, and would face

a fait accompli in challenging that jurisdictional effect after it takes place. The law does not impose such impossibilities.

The district court also sought to bind the plaintiff card clubs to what it viewed as California's concession in another case—the North Fork Tribe's suit against the State for "failing to negotiate in good faith" following Proposition 48—that the tribe had some degree of "jurisdiction" over the Madera Parcel. ER 10. But the plaintiff card clubs were not parties to that litigation. They cannot be bound by any "concession" made by other parties in it. *Taylor v. Sturgell*, 553 U.S. 880 (2008) (absent six exceptions, none of which applies here, nonparties are not bound by issues determined in other litigation); *Sandpiper Vill. Condo. Ass'n., Inc. v. Louisiana-Pac. Corp.*, 428 F.3d 831, 848-49 (9th Cir. 2005).

This is especially so as there was no formal concession. The State just did not raise or dispute jurisdiction as a predicate issue in a case that focused on a completely different point—whether the State could lack "good faith" in failing to negotiate a compact regarding post-1988 land as to which the Gaming Act gave the State an absolute veto (a veto that was emphatically exercised by the People via Proposition 48). Issue preclusion requires the *actual litigation* of an issue and does not apply to questions of law or jurisdiction that were not contested in the prior case. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980) (Issue preclusion "cannot apply when the party against whom the earlier decision is asserted did not have a

'full and fair opportunity' to litigate that issue in the earlier case"); *Segal v. Am. Tel. & Tel. Co.*, 606 F.2d 842, 845 (9th Cir. 1979) (jurisdiction issue of law).

2. The plaintiff card clubs have standing to raise the Tenth Amendment.

The district court also ruled that the plaintiff card clubs have no standing to assert Tenth Amendment rights. It reasoned that only States, and not private parties, can assert such claims. To begin with, plaintiff card clubs *can* assert, no matter what, that the applicable statutes, the Reorganization Act and the Gaming Act, have to be construed *consistent with* the Constitution, including the Tenth Amendment. There is no principle that says that an individual litigant cannot urge that a statute be construed in a constitutional manner even if that litigant does not have standing to make a direct constitutional challenge.

Beyond that, the district court was plain wrong in holding that only States have standing to assert Tenth Amendment issues. *Bond v. United States*, 564 U.S. 211 (2011), holds otherwise: Non-State-government litigants may challenge a Tenth Amendment violation which inflicts injury on them. In *Bond*, a criminal defendant asserted that Congress violated the Tenth Amendment when it enacted 18 U.S.C. § 229 as part of the Chemical Weapons Convention Implementation Act of 1998. "Article III poses no barrier" to individual citizens asserting Tenth Amendment claims. *Bond*, 564 U.S. at 217 (citation omitted). "The limitations that federalism entails are not therefore a matter of rights belonging only to the

States. States are not the sole intended beneficiaries of federalism . . . An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. Fidelity to principles of federalism is not for the States alone to vindicate." 564 U.S. at 222. So it is here. Plaintiffs suffer concrete, particular, and redressable injury to the extent that the Reorganization Act and the Gaming Act violate the Tenth Amendment by allowing the federal government to appropriate State jurisdiction.

The district court erroneously relied on *Tennessee Elec. Power Co v. TVA*, 306 U.S. 118 (1939), see ER 13, which the Supreme "Court long ago disapproved of . . . as authoritative respecting Article III limitations." *Bond*, 564 U.S. at 216-17. The other cases cited by the district court pre-date *Bond*. *See* ER 13 (citing *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009); *Stop the Casino 101 Coalition v. Salazar*, 384 F. App'x 546, 548 (9th Cir. 2010); and *City of Roseville v. Norton*, 219 F.Supp.2d 130, 146-148 (D.D.C. 2002)). By contrast, the Second Circuit, relying on *Bond*, has squarely held (in the on-point Indian gambling context) that local communities, citizen groups, and private residents all have standing to contest an intrusion on state sovereignty, even when the State is not a party. *Upstate Citizens for Equality v. United States*, 841 F.3d 556, 569 n.15 (2d Cir. 2016), *cert. denied*, 2017 W5660979 (2017).

B. The transfer to the United States in trust did not, per se, create tribal jurisdiction.

The fundamental premise of the district court's decision is that when title to the Madera Parcel transferred to the United States in trust for the North Fork Tribe, the tribe *automatically* obtained newly created tribal jurisdiction over the land. ER 16-17. That premise is false. The district court relied on the Reorganization Act, which empowers the federal government to acquire land for Indians. 25 U.S.C. § 5108.[8] Title is taken in the name of the United States "in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.* There is no mention of jurisdiction in the statute. Nor can the Reorganization Act be read in isolation. As we now discuss, it has to be read together with other federal statutes and the Tenth Amendment.

1. The United States does not gain jurisdiction (and therefore has no jurisdiction to grant to a tribe) simply by obtaining ownership of property.

Land ownership is not sovereignty. "[B]efore a sovereign may exercise governmental power over land, the sovereign, in its sovereign capacity, must have

[8] Enacted in 1934, the Reorganization Act reflected a fundamental change in federal policy. Previously, the federal government sought to break up Indian lands, allocating them to individuals who could then sell them on the open market without restriction. The Reorganization Act provided a federal government conduit for Indians to regain lands. *See generally*, *American Indian Law Deskbook* (Conf. of Western Attorneys General) at §1.10 (2018 ed.).

jurisdiction over that land." *Kansas v. United States*, 249 F.3d 1213, 1229 (10th Cir. 2001). "[J]urisdiction cannot be acquired tortiously or by disseizin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state . . . ." *Ft. Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 538-39 (1885). The sovereign states possess "primary jurisdiction" over all land within their borders. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333 (1998). As the Supreme Court observed long ago, "Upon the admission of a state into the Union, the state doubtless acquires general jurisdiction, civil and criminal . . . throughout its limits, except where it has ceded exclusive authority to the United States." *Van Brocklin v. Tennessee*, 117 U.S. 151, 167-68 (1886).

"Absent the state's consent . . . the United States does not obtain exclusive *or concurrent jurisdiction*. Instead it is simply an ordinary proprietor. . . . [T]he United States may secure jurisdiction over the purchased or condemned land through 'a cession of legislative authority and political jurisdiction' from the state . . . .'" *United States v. Gliatta*, 580 F.2d 156, 158 n.6 (5th Cir. 1978) (citations omitted, italics added). "It is not unusual for the United States to own within a state lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the state. On the contrary, the lands remain part of her territory and within the operation of her laws, save that the latter cannot affect the title of the United States or embarrass it

in using the lands or interfere with its right of disposal. [¶] A typical illustration is found in the usual Indian reservation set apart within a state ….” *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650–51 (1930).

Even where the United States has express constitutional power to exercise jurisdiction over land in the several States, *State* consent is required. Thus, the Enclaves Clause authorizes the federal government to exercise jurisdiction “over all Places purchased *by the Consent of the Legislature of the State* in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.” U.S. Const. art. I, § 8, cl. 17 (italics added).

Territorial jurisdiction—the power to legislate as to lands within its borders—is a State’s most prized possession. “[T]he well-established principle [is] that States do not easily cede their sovereign powers.” *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013); *see also Silas Mason Co. v. Tax Comm’n*, 302 U.S. 186, 199 (1937); *Parish of Plaquemines v. Total Petrochemical & Refining USA, Inc.*, 64 F.Supp.3d 872 (E.D. La. 2014). State cession of jurisdiction is of necessity a voluntary act: the “free act of the states.” *See United States v. Bevans*, 16 U.S. 336, 388 (1818).

Under California law, a cession of territorial jurisdiction requires a vote of the legislature. *See* Cal. Gov’t Code §§ 110, *et seq.*; *Coso Energy Developers v. County of Inyo*, 122 Cal. App. 4th 1512, 1521 (2004). “It is incontestable that the

Constitution established a system of 'dual sovereignty.' Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3 . . . Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'" *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (internal citations omitted). This is "a fundamental structural decision incorporated into the Constitution." *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018). "'[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.'" *Id.* at 1477 (federal government may not "commandeer" States to do its bidding).

No constitutional authority—express or implied—allows Congress to strip a State of its territorial jurisdiction by unilateral federal action in any context. *See*

sections B.3. & 4., below. A State's consent, expressed through its legislature or its People, is required.

The United States itself has repeatedly recognized that its ownership of property does not translate into unilateral assumption of any degree of jurisdiction. "[W]hether the United States has acquired real property voluntarily (purchase, donation) or involuntarily (condemnation), *the mere fact of federal ownership does not withdraw the land from the jurisdiction of the state in which it is located.... Acquisition of land and acquisition of federal jurisdiction over that land are two different things*." *Principles of Federal Appropriations Law*, Ofc. the General Counsel, U.S. Gov't Acct'g Ofc., ch. 13, 13-101 (3d ed. 2008) (citations omitted) (the "GAO Report") (available at http://www.gao.gov/special.pubs/d08978sp.pdf (last accessed Nov. 28, 2018) (italics added); *see id*. at 13-116-117 ("For the land over which the United States has not obtained exclusive, partial, or concurrent jurisdiction *by consent or cession*, federal jurisdiction is said to be 'proprietorial.' This term originated in some of the cases to the effect that, absent consent or cession, the United States has 'only the rights of an ordinary proprietor"); *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States* (June 1957) at Part II, 45-46, italics added; available at http://constitution.org/juris/fjur/fed_jur.htm (last accessed Nov. 28, 2018).

"The United States may hold or acquire property within the borders of a State without acquiring jurisdiction. It may acquire title to land necessary for the performance of its functions by purchase or eminent domain without the state's consent. *See Kohl v. United States*, 91 U.S. 367, 371, 372 (1875) . But it does not thereby acquire legislative jurisdiction by virtue of its proprietorship. The acquisition of jurisdiction is *dependent on the consent of or cession of jurisdiction by the state*." U.S. Dep't of Justice, *Criminal Resource Manual*, § 664 Territorial Jurisdiction (italics added) available at https://www.justice.gov/jm/criminal-resource-manual-664-territorial-jurisdiction (last accessed Nov. 30, 2018).

Bottom line: Just because the United States obtains title to property within a State, whether it be in fee or in trust for another, does not create jurisdiction over that property by the United States or any other entity.

2. The Reorganization Act and the Gaming Act have to be construed in concert with 40 U.S.C. § 3112, which precludes federal commandeering of jurisdiction over state lands without state consent.

Consistent with the foregoing principle, the acquisition of federal jurisdiction (and therefore derivatively tribal jurisdiction) over lands within a sovereign State is constrained by State consent. Thus, 40 U.S.C. § 3112(b) directs that the United States "may accept or secure, *from the State* in which land or an

interest in land . . . is situated, *any jurisdiction* over the land or interest not previously obtained." (Italics added).

The federal government may not commandeer a State's jurisdiction over its own land. Section 3112 means that "the state must consent to the cession of jurisdiction, and the federal government must give notice that it is accepting jurisdiction. If these steps are not followed, the federal government does not obtain jurisdiction over these lands—its interest is that of a proprietor." *United States v. Grant*, 318 F.Supp.2d 1042, 1046 (D. Mont. 2004).

Federal statutes have to be read together. "When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive "'to give effect to both."'" *Epic Systems v. Lewis*, 138 S. Ct. 1612, 1624 (2018). That means that the Reorganization Act (and the Gaming Act) must be read in conjunction with 40 U.S.C. § 3112.

In particular, newer statutes have to be read in the context of existing statutory provisions. Congress is "aware of existing law when it passes legislation." *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). Here, section 3112 or its predecessor, Pub. Law 71-467, 46 Stat. 828 (1930), existed when Congress enacted the Reorganization Act and the Gaming Act. Congress presumably knew that the rule was that the United States' acquisition of ownership

did *not* create federal jurisdiction absent State consent. To overcome such a clear existing statutory mandate, Congress had to utilize unequivocal, express language.

The Reorganization Act does not mention jurisdiction. Section 3112 does. There is a straightforward way to read the Reorganization Act and section 3112 in concert. The Reorganization Act permits the United States to acquire lands on behalf of Indian tribes, just as it might purchase lands for forts, armories, federal buildings, or the like. If *jurisdiction*—that is, the right to govern—is to be transferred, in whole or in part, however, State consent is required.

The district court did not discuss section 3112. That omission is fatal. Section 3112(c) mandates a conclusive presumption against a jurisdictional transfer; it dooms any argument that somehow the North Fork Tribe acquired territorial jurisdiction over the Madera Parcel with a mere change in ownership.

3. Neither the Indian Commerce Clause nor principles of residual tribal sovereignty allow the Reorganization Act to unilaterally transfer jurisdiction over state land to the United States or a tribe.

It has been argued that the Indian Commerce Clause (U.S. Const. art. I, § 8, cl. 3) affords Congress the power to seize jurisdiction over lands in the States so long as it does so on behalf of Indian tribes. *See Upstate Citizens*, 841 F.3d at 566-68. The Indian Commerce Clause is part of Congress's general power to regulate all but purely intra-State commerce: "The Congress shall have Power . . . To

regulate Commerce with foreign Nations, and among the several States, *and with the Indian Tribes* . . . .” (Italics added.) Under the “well-worn Latin phrase” *noscitur a sociis*, *see Lagos v. United States*, 138 S. Ct. 1684, 1688 (2018), the power to regulate commerce with Indian tribes should be comparable to that Congress possesses to regulate interstate or foreign commerce. *But see Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 62 (1996) (dicta: “If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes”).

At a minimum, though, the Indian Commerce Clause does not afford Congress the power to unilaterally abrogate States’ constitutionally protected territorial jurisdiction and integrity. *See id.* at 53 (Congress had no power under the Indian Commerce clause to use Gaming Act to abrogate States’ 11th Amendment rights). Congress may have broad Constitutional power to regulate relations with Indian tribes, but that power does *not* include usurpation of constitutionally enumerated and protected State prerogatives. *See generally*, *Upstate Citizens*, 2017 WL 5660979 at *1–2 (2017) (Thomas J., dissenting from denial of cert.) (“But ‘neither the text nor the original understanding of the [Indian

Commerce] Clause supports Congress' claim to such 'plenary' power.' . . . [T]he Clause extends only to 'regulat[ing] trade with Indian tribes—that is, Indians who had not been incorporated into the body-politic of any State.' [¶] Understood this way, the Indian Commerce Clause does not appear to give Congress the power to authorize the taking of land into trust under the [Reorganization Act]") (citations omitted); *see also* Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denv. U. L. Rev. 201 (2007); Joseph D. Matal, *A Revisionist History of Indian Country*, 14 Alaska L. Rev. 283, 336-38 (1997)").

Congress cannot by federal fiat divest a State of jurisdiction over lands which it was afforded at statehood. "'Congress cannot, after statehood, reserve or convey . . . lands that have already been bestowed upon a State.' *Idaho v. United States*, 533 U.S. 262, 280, n. 9 . . . (2001) . . .; *see also id.*, at 284 . . . (Rehnquist, C.J., dissenting) ('[T]he consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event ... to suggest that subsequent events somehow can diminish what has already been bestowed')." *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009); *see Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984).

But assuming that the breadth of congressional power under the Indian Commerce Clause is immeasurable,[9] principles of federalism dictate that Congress be presumed to *not* have silently intended to exercise a power to displace, in whole or in part, State sovereignty without explicitly saying so. Federalism considerations preclude federal laws from being interpreted in a way that burdens substantial state interests unless Congress *clearly* intends such a result. As the Supreme Court has explained, "the protection of the States against intrusive exercises of Congress' Commerce Clause powers" requires that "we must be absolutely certain that Congress intended such an exercise." *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991); *see also* 1 Laurence Tribe, *American Constitutional Law* 1176 (3d ed. 2000) ("[T]o give the state-displacing weight of federal law to mere constitutional ambiguity would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.").

"This is especially true where such an interpretation may also press the outer limits of Congress's authority under the Indian Commerce Clause. *See United States v. Lara*, 541 U.S. 193, 205 (2004) (indicating that Congress could run up against 'constitutional limits' if its Indian legislation 'interfere[d] with the power or authority of any State')." *Gila River Indian Cmty. v. United States*, 729 F.3d

[9] Appellants reserve the right to challenge such a conclusion at the en banc or writ of certiorari stage if any Ninth Circuit case is viewed as dispositive on the scope of Congress's Indian Commerce Clause powers.

1139, 1170 (9th Cir. 2013) (N.R. Smith, J., dissenting); *see also Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (construing congressional "apology" resolution as not transferring jurisdiction over State lands to Native Hawaiians).

This effectuates the canon of constitutional avoidance, the principle that statutes are to be construed to avoid constitutional problems. "[W]hen deciding which of two plausible statutory constructions to adopt, . . . [i]f one of them would raise a multitude of constitutional problems, the other should prevail . . . ." *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). The canon "rest[s] on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts"; it is "a means of giving effect to congressional intent, not of subverting it." *Id*. (citations omitted); *see generally Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J, concurring).

The relevant Reorganization Act provision, 25 U.S.C. § 5108, is silent as to whether taking title to private lands historically within State jurisdiction somehow creates new federal or tribal jurisdiction. The word "jurisdiction" does not appear in the statute. Nothing in the Act's legislative history suggests that such was Congress's final intent. To the contrary, prior versions of the proposed statute *did* include reference to "jurisdiction," references that did not appear in the final statute. *Compare* 25 U.S.C. § 5108 *with* 73rd Cong. 2nd Sess., House Report, H.R. 7902, May 28, 1934 at 3, §7 *and* 73rd Cong. 2nd Sess., H.R. 7092, Feb. 12,

1934, at 36-37, § 16. "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23–24 (1983); *accord Plata v. Schwarzenegger*, 603 F.3d 1088, 1096 (9th Cir. 2010). The converse should be true as well. Where Congress includes broad, constitutionally questionable language in an earlier version of a bill but deletes it prior to enactment, it must be presumed that Congress did not intend to go as far as originally proposed.

Thus, absent more express language than appears in the Reorganization Act, that Act must be construed as *not* including the power by the United States to unilaterally create out of thin air competing jurisdiction, partial or whole, federal or tribal, over lands lying within State borders that have always beeen under the State's territorial jurisdiction. Cases that appear to recognize Congressional power to create tribal sovereignty over lands that previously were under State jurisdiction all involve either lands that previously had been part of the tribe's express reservation, *Upstate Citizens* (lands on former reservation), or that were purchased by the United States to replace reservation lands lost due to federal action, *Gila River*

(land acquired under Gila Bend Indian Reservation Lands Replacement Act, *not* the Reorganization Act; replacing reservation lands lost due to federal dam project). By contrast here, the issue is whether the Reorganization Act implicitly

creates previously absent federal or tribal jurisdiction over land that has always been within a State's territorial jurisdiction. The answer is "no," as there is no clear direction to do so.

There is another reason to believe that Congress neither understood nor intended that the United States has the power to unilaterally supervene State jurisdiction at any time. In admitting new States, Congress has typically reserved Congressional or tribal jurisdiction over existing Indian lands, including in the case of Alaska after the Reorganization Act was enacted.[10] If the United States could create federal or tribal jurisdiction over Indian lands any time it wished by the simple expedient of taking the lands in trust, then such reservations would have been entirely unnecessary.

Nor can concepts of tribal inherent sovereignty fill the jurisdictional gap. Although Indian tribes have unique attributes of inherent sovereignty "over both their members and their territory," *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983), a tribe's "inherent sovereignty" refers to the right to govern internal affairs, such as who may become a member, adoption rules, and so forth. *See, e.g.*, *United States v. Wheeler*, 435 U.S. 313, 322 n.18 (1978). But the

[10] *See, e.g.*, Kansas and Nebraska, Kansas-Nebraska Act, 10 Stat. 277 (1854); Montana, North Dakota, South Dakota and Washington Enabling Act, 25 Stat. 676 (1889); Idaho Const. art. XXI, § 19 (1890); Utah, 28 Stat. 107 (1894); Oklahoma, 34 Stat. 267 (1906); Arizona and New Mexico, 36 Stat. 557 (1910); Alaska, Alaska Statehood Act, 72 Stat. 339 (1958).

"exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana v. United States*, 450 U.S. 544, 564 (1981). Tribes do not have "inherent sovereignty" over non-members. *See Montana,* 450 U.S.at 564; *Philip Morris USA, Inc. v. King Mountain Tobacco Co.*, 569 F.3d 932, 938-939 (9th Cir. 2009) ("As a general rule, tribes do not have jurisdiction, either legislative or adjudicative, over nonmembers"). Nor does such authority extend beyond the reservation. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *King Mountain Tobacco Co., Inc. v. McKenna*, 768 F.3d 989, 993 (9th Cir. 2014) (quoting *Mescalero Indian Tribe v. Jones*, 411 U.S. 145, 148-49 (1973)). Certainly, inherent tribal sovereignty does not give tribes a free hand to participate in otherwise barred conduct (gambling) with nontribal members (the public at large) on land outside tribal jurisdiction. *E.g.*, *Michigan v. Bay Mills Indian Community*, 572 U.S. 782.

The lands over which tribes have inherent sovereignty are those held for and occupied by the tribes at the time the State was created. In a nutshell, the lands never became a part of the State in which they were situated.[11]

4. To the extent that the Reorganization Act and the Gaming Act allow the unilateral creation of tribal jurisdiction over land under State jurisdiction, the Tenth Amendment invalidates them.

To the extent that the Reorganization Act goes beyond what the Indian Commerce Clause constitutionally allows, it runs afoul of the Tenth Amendment. The Tenth Amendment mandates that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the

[11] See note 10, *supra*. *E.g.*, *Worcester v. Georgia*, 31 U.S. 515 (1832) (land set aside for the Cherokee tribe by treaty before Georgia became one of the original states); *In re Kansas Indians*, 72 U.S. 737 (1866) (Kansas accepted admission into the union with a stipulation that Indian rights to their lands would remain unimpaired); *Williams v. Lee*, 358 U.S. 217 (1959) (Navajo Indian Reservation established by an 1868 treaty in the territory that became Arizona 44 years later); *Montana v. United States*, 450 U.S. 544, 548 (1981) and *Big Horn Cnty Electric Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000) (Crow reservation in Montana established by the 1868 Second Treaty of Fort Laramie and "reserved out" when Montana became a state twenty-one years later, Enabling Act, 25 Stat. 676 (1889)); *Nevada v. Hicks*, 533 U.S. 353 (2001) (Fallon Paiute-Shoshone reservation, which was on Indian land set aside in 1861, prior to Nevada's statehood in 1864 (see 12 Stat. 209-214 [Nevada Territory Act], 13 Stat. 30 [Statehood Act])); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 204 & n.1 (1987) (lands were formally set apart for the Cabazon North Fork Tribe 1876 and 1891, that the tribes had occupied prior to 1850).

States respectively, or to the people." U.S. Const. amend. X. At its core, it reaffirms State sovereignty. Everything not *expressly permitted* to Congress and the United States is precluded. Thus, absent express constitutional directive, the federal government cannot take sovereignty from a State without that State's consent or permission.

Such express permission is not found in the language of the Indian Commerce Clause, and it is not found anywhere else in the Constitution. There is no express grant of federal power to seize jurisdiction over States' lands without the consent of the situs State. The lack of an express grant of power, coupled with the Tenth Amendment's protective shield, combine to bar the Secretary's action and the district court's ruling.

Territorial jurisdiction is a fundamental component of State sovereignty. Here, the right to control casino gambling on land within State borders was expressly and directly exercised by the people of the State of California through the referendum process. Absent a clear mandate elsewhere in the Constitution, the Tenth Amendment bars the United States—be it Congress or the Secretary—from interfering with that right.

5. The cession requirements embedded in the Tenth Amendment and 40 U.S.C. §3112 apply as much to creation of "partial" or "concurrent" jurisdiction as to any other type of jurisdiction.

The district court attempted to sidestep the cession requirement by finding that it only applies to the acquisition of "exclusive" jurisdiction, as opposed to "partial" or "concurrent" jurisdiction that might be shared with the situs State. ER 33 n.5 (State consent only required for transfer of exclusive jurisdiction). That analysis is flawed.

Section 3112 applies to the transfer of *any* jurisdiction, in whole or in part. Section 3112 "created a definite method of acceptance of jurisdiction so that all persons could know whether the government had obtained 'no jurisdiction at all, or partial jurisdiction, or exclusive jurisdiction.'" *Adams v. United States*, 319 U.S. 312, 314 (1943); *see Kleppe v. New Mexico*, 426 U.S. 529, 542 (1976); *United States v. Parker*, 36 F. Supp. 3d 550, 566-67 (W.D.N.C. 2014) ("While the Framers designed the Enclave Clause to provide Congress 'exclusive' jurisdiction over enclaves, any jurisdiction was predicated upon the consent of a State that was authorizing acquisition by the federal government"). And, it makes no difference constitutionally if a State's jurisdiction over property is interfered with completely or only partially. If there's no federal right to obtain complete jurisdiction from a State unwillingly, then there's no federal right to obtain partial jurisdiction from a State unwillingly.

6. The authority relied upon by the district court does not lead to a different result.

None of the authorities relied on by the district court alters the above. A number of the cases deal with land where there is a substantial history of tribal occupation and governance. For example *Rice v. Olson*, 324 U.S. 786, 789 (1945), which the district court cited for the proposition that the "policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history," see ER 17, involved a reservation on land with a long history of tribal occupation that was established by treaty in two years before the State, Nebraska, joined the Union. 324 U.S. at 790. Likewise, *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975), involved land long been occupied by Indians, the Santa Rose Rancheria established in 1934, some 41 years prior to the decision. If anything, *Santa Rosa Band of Indians* supports the plaintiffs' position in that it holds that jurisdictional disputes must be determined on a case-by-case basis. *See* 532 F.2d at 669. The very different jurisdictional facts here—private property purchased by an out of state gambling company seeking to capitalize on the tribe's status, property that had never been part of any North Fork tribal reservation or previously owned or governed by the tribe—dictate a different result.

Nor do *United States v. John*, 437 U.S. 634 (1978), and *United States v. McGowan*, 302 U.S. 535 (1938), alter the calculus. Both involved land with a long history of Indian occupation and governance. In *John*, it was the Choctaw

Reservation in Mississippi, established for at least a generation prior to the case reaching the Supreme Court, *see* 437 U.S. at 649, while in *McGowan*, the Reno Indian colony in Nevada was created in 1916, *see* 302 U.S. at 537, and occupied well prior to the dispute that gave rise to the Court's decision. Moreover, these cases involved land set aside for Indian housing and general welfare, not for a casino to conduct gambling—a business that would be patronized primarily by non-members and that would be illegal if conducted by an ordinary Californian.

City of Sherrill, 544 U.S. 197, gets closer to the mark but does not mandate a different conclusion. There, the Tribe claimed that it was exempt from state taxation on property it had purchased in the open market but that had been part of the Tribe's original reservation, last owned by the tribe in 1805. "For two centuries, governance of the area . . . has been provided by the State of New York and its county and municipal units." *Id.* at 202. The Supreme Court concluded that mere ownership did not dislodge State jurisdiction. "[T]he tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders." *Id.* at 203. In dicta, the Court commented that the Tribe could *reacquire* lost sovereignty over the land through the Reorganization Act's land-to-trust process, *see id.* at 220-21. But the Court did not consider whether sovereignty could be reacquired without State

consent. *See Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"); *United States v. Pepe*, 895 F.3d 679, 688 (9th Cir. 2018) ("cases are not precedential for propositions not considered").

That leaves *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556. Like *City of Sherrill*, *Upstate Citizens* involved land that had previously been occupied and governed by the Oneida Indian Tribe, *see* 841 F.3d at 562-64, and not the naked "reservation shopping" that occurred here. Nonetheless, *Upstate Citizens* sweepingly stated that "[w]hen the federal government takes land into trust for an Indian tribe, the state that previously exercised jurisdiction over the land cedes some of its authority to the federal and tribal governments." 841 F.3d at 569. But *Upstate Citizens* did not consider (and neither did any other case) the impact of 40 U.S.C. § 3112 or of the requirement that the Reorganization Act be construed to avoid an inference of congressional interference with State jurisdiction.

Nor did the Second Circuit ever explain how the purely *federal* act of taking land into trust constituted an act by the *State* in *ceding* jurisdiction. At a minimum, the substantial factual distinction between *Upstate Citizens* and this case calls for a different result as to whether any jurisdiction is created or transferred under the

Reorganization Act by the mere transfer of a private person's fee title to the United States to hold in trust for a tribe. *See Upstate Citizens*, 2017 WL 5660979 at *1-2 (Thomas, J., dissenting from denial of certiorari). To the extent that *Upstate Citizens* stands for a universal proposition that the mere transfer of fee title to the United States creates some degree of tribal jurisdiction supplanting what previously had been State jurisdiction without state consent, it is wrong and should not be followed. [12]

Nor did this Circuit consider any of these issues in *Gila River*, 729 F.3d 1139 (9th Cir. 2013). *Gila River* did not consider whether the *effect* of a fee-to-trust transfer under the Reorganization Act was to create tribal jurisdiction. The sole question there was whether the particular statute at issue, the Gila Bend Indian Reservation Lands Replacement Act, authorized the United States to *purchase* the particular parcel of property. *Gila River* certainly did *not* consider whether doing so created jurisdiction sufficient for the Gaming Act, noting instead that the right

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

to conduct Indian gambling on the site was being litigated elsewhere and *not* decided in *Gila River*.

The district court also relied on the concept that the Madera Property had somehow magically become "Indian country," a term not used in the Reorganization Act or the Gaming Act. ER 18-20. The district court reasoned that in order to determine whether tribal jurisdiction exists under the Gaming Act, "we must look to whether the land in question is Indian country." ER 18 (quoting *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996)). The court's logic was that any land over which a tribe has jurisdiction is "Indian country"; that lands held in trust "are Indian Country"; and therefore, there is tribal jurisdiction over any lands held in trust for an Indian tribe. *Id*. (citing *Chaudhuri*, 802 F.3d at 280, *United States v. Sohappy*, 770 F.2d 816 (9th Cir. 1985) and 18 U.S.C. § 1151).

But Supreme Court precedent makes clear that the district court's logic is mistaken. "Indian country" is defined by 18 U.S.C. § 1151(b), in pertinent part, as "all dependent Indian communities . . . ." In *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 530 (1998), the Court explained that the two key components to the term "dependent Indian communities" are whether there has been "both a federal set-aside and federal superintendence" over the land in question. *Venetie*, 522 U.S. at 530.

Cases underpinning *Venetie*'s analysis require tribal occupancy and settlement in addition to mere possession of beneficial title. *See Venetie*, 522 U.S. at 532-34 (discussing examples). Plus, the required "federal superintendence" is missing unless the Federal Government actively manages the property. *Venetie* cited examples where "the Federal Government actively controlled the lands in question, effectively acting as a guardian for the Indians." 522 U.S. at 533.

Here, in sharp contrast, North Fork Tribe and Station Casinos are to develop a commercial gambling operation on a parcel of California farmland with essentially *no* federal superintendence. The federal government has not "actively controlled" the land, the project, or the business, and has no plans to do so. The business will be managed by a subsidiary of Station Casinos. That the Gaming Act is aimed at tribal self-sufficiency and economic development does not suffice: "Our Indian country precedents . . . do not suggest that the mere provision of 'desperately needed' social programs can support a finding of Indian country. Such health, education, and welfare benefits are merely forms of general federal aid; considered either alone or in tandem . . . they are not indicia of active federal control over the Tribe's land sufficient to support a finding of federal superintendence." *Venetie*, 522 U.S. at 534. A gambling casino to be managed by a private company and patronized primarily by nonmembers of the tribe hardly qualifies.

For there to be the necessary superintendence, "the Federal Government must take some action setting apart the land for the use of the Indians 'as such,' and that it is *the land in question*, and not merely the Indian tribe inhabiting it, that must be under the superintendence of the Federal Government." 522 U.S. at 530 n.5 (italics in original).

In any event, the "Indian country" label presupposes land over which the federal government has jurisdiction. Without jurisdiction, there can be no Indian country. If "Indian country" is the Gaming Act measure, then the answer is simple. The Gaming Act does not apply. The district court's application of the Indian country label was error and it was improper to use that nomenclature.

CONCLUSION

This case is unprecedented. The federal government insists that the State must allow a casino project to proceed, on land title to which was acquired after 1988—land as to which Congress decreed a State has an absolute right to veto Indian gambling. Despite a veto by nearly 4 million California voters, the federal government has proceeded anyway. It claims that transfer of ownership from a private party to the United States to be held in trust, by itself, created new tribal jurisdiction. But territorial jurisdiction does not transfer by federal fiat, and it does not transfer by osmosis. Under the Constitution, State consent is required. Forcing this casino on California under these circumstances exceeds the Secretary's power

under the Gaming Act, the Reorganization Act, and 40 U.S.C. § 3112—and would exceed Congress's power under the Indian Commerce Clause and the Tenth Amendment if the Gaming Act and Reorganization Act are construed as broadly as the district court held. This is particularly so as Congress gave States the absolute right to withhold consent to Indian gambling on property acquired after 1988 and California, through its referendum process, revoked any such consent well before the Secretary's final action.

On the undisputed facts of this case, the district court should have concluded that the North Fork Tribe does not have jurisdiction over the proposed casino site. Without such jurisdiction, the Gaming Act does not apply and the property is not eligible for Class III, Nevada-style casino gambling. Accordingly, the Secretary's purported determination under the Gaming Act is invalid.

For these reasons, the judgment should be REVERSED.

Dated: December 6, 2018

GREINES, MARTIN, STEIN & RICHLAND, LLP

By: _____s/Robert A. Olson_____
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STATEMENT OF RELATED CASES

I certify, pursuant to Federal Rule of Appellate Procedure 28-2.6 that the following case is the only known related cases pending in this Court:

Stand Up for California v. U.S. Dep't of the Interior, Appeal No. 18-16830, No. 16-CV-02681-WBS (E.D. Cal., filed November 11, 2016). This case raises the issue of whether the Secretarial Procedures are invalid because they violate IGRA and the Johnson Act, which only permits the use of slot machines in Indian Territory pursuant to a compact.

Dated: December 6, 2018

SLOTE LINKS & BOREMAN, LLP

By: s/Robert D. Links
Robert D. Links
Co-Counsel for Plaintiffs

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the attached BRIEF FOR CLUB ONE CASINO, INC., dba CLUB ONE CASINO; and GLCR, INC., dba THE DEUCE LOUNGE AND CASINO AS APPELLANTS:

(1) complies with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 13,948 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2013, in 14-point Times New Roman font.

Dated: December 6, 2018

SLOTE LINKS *&* BOREMAN, LLP

By: ___s/Robert D. Links_____
Robert D. Links
Co-Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 6, 2018

SLOTE LINKS *&* BOREMAN, LLP

By: __s/Robert D. Links_____
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ADDENDUM OF PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

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FEDERAL STATUTORY PROVISIONS

Indian Gaming Regulatory Act

25 U.S.C. § 2710(d)(1) (jurisdiction requirement):

Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect."

25 U.S.C. § 2701(d)(3)(A) (compact requirement):

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

Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

25 U.S.C. § 2719 (Gaming on Lands Acquired after October 17, 1988):

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless--

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and--

(A) such lands are located in Oklahoma and--

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when--

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; …."

25 U.S.C. § 2703(4) (definition of "Indian lands"):

The term "Indian lands" means--

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2710(d)(7) (mediation procedure):

(A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of

entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

* * *

(B)

(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith, the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming

activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under

clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

Indian Reorganization Act

25 U.S.C. § 5108 (formerly 25 U.S.C. § 465):

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

Federal Jurisdiction Statute

40 U.S.C. § 3112

(a) Exclusive jurisdiction not required.—It is not required that the Federal Government obtain exclusive jurisdiction in the United States over land or an interest in land it acquires.

(b) Acquisition and acceptance of jurisdiction.—When the head of a department, agency, or independent establishment of the Government, or other authorized officer of the department, agency, or independent establishment, considers it desirable, that individual may accept or secure, from the State in which land or an interest in land that is under the immediate jurisdiction, custody, or control of the individual is situated, consent to, or cession of, any jurisdiction over the land or interest not previously obtained. The individual shall indicate acceptance of jurisdiction on behalf of the Government by filing a notice of acceptance with the Governor of the State or in another manner prescribed by the laws of the State where the land is situated.

(c) Presumption.—It is conclusively presumed that jurisdiction has not been accepted until the Government accepts jurisdiction over land as provided in this section.

STATE STATUTORY PROVISIONS

Proposition 48

This law proposed by Assembly Bill 277 of the 2013–2014 Regular Session (Chapter 51, Statutes of 2013) is submitted to the people of California as a referendum in accordance with the provisions of Section 9 of Article II of the California Constitution.

This proposed law adds a section to the Government Code; therefore, new provisions proposed to be added are printed in *italic type* to indicate that they are new.

Proposed Law

SECTION 1. Section 12012.59 is added to the Government Code, to read:

12012.59.

(a) (1) *The tribal-state gaming compact entered into in accordance with the federal Indian Gaming Regulatory Act of 1988 (18 U.S.C. Secs. 1166 to 1168, inclusive, and 25 U.S.C. Sec. 2701 et seq.) between the State of California and the North Fork Rancheria Band of Mono Indians, executed on August 31, 2012, is hereby ratified.*

(2) *The tribal-state gaming compact entered into in accordance with the federal Indian Gaming Regulatory Act of 1988 (18 U.S.C. Secs. 1166 to*

1168, inclusive, and 25 U.S.C. Sec. 2701 et seq.) between the State of California and the Wiyot Tribe, executed on March 20, 2013, is hereby ratified.

(b) (1) *In deference to tribal sovereignty, none of the following shall be deemed a project for purposes of the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code):*

(A) *The execution of an amendment to the tribal-state gaming compacts ratified by this section.*

(B) *The execution of the tribal-state gaming compacts ratified by this section.*

(C) *The execution of an intergovernmental agreement between a tribe and a county or city government negotiated pursuant to the express authority of, or as expressly referenced in, the tribal-state gaming compacts ratified by this section.*

(D) *The execution of an intergovernmental agreement between a tribe and the Department of Transportation negotiated pursuant to the express authority of, or as expressly referenced in, the tribal-state gaming compacts ratified by this section.*

(E) *The on-reservation impacts of compliance with the terms of the tribal-state gaming compacts ratified by this section.*

(F) *The sale of compact assets, as defined in subdivision (a) of Section 63048.6, or the creation of the special purpose trust established pursuant to Section 63048.65.*

(2) *Except as expressly provided herein, this subdi subdivision does not exempt a city, county, or city and county, or the Department of Transportation, from the requirements of the California Environmental Quality Act.*

From The Official Title & Summary
(Prepared by the California Attorney General):

Proposition 48. Indian Gaming Compacts. Referendum.

A "Yes" vote approves, and a "No" vote rejects, a statute that:

- Ratifies tribal gaming compacts between the state and the North Fork Rancheria of Mono Indians and the Wiyot Tribe.
- Omits certain projects related to executing the compacts or amendments to the compacts from scope of the California Environmental Quality Act.

CONSTITUTIONAL PROVISIONS

Federal Constitution

Indian Commerce Clause

U.S. Const. Art. I, §8, cl. 3:

"Congress shall have the power … To regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes;…."

Tenth Amendment

U.S. Const., Amend. X:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

State Constitution

California Constitution, Art. IV, Section 19 (e) & (f):

(e) The Legislature has no power to authorize, and shall prohibit casinos of the type currently operating in Nevada and New Jersey.

(f) Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian

lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

CERTIFICATE OF SERVICE

I hereby certify that on December 6, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 6, 2018

__s/Robert D. Links_____ _
Robert D. Links
Co-Counsel for Plaintiffs