FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CLUB ONE CASINO, INC., DBA Club One Casino; GLCR, INC., DBA The Deuce Lounge and Casino, *Plaintiffs-Appellants*, v. DAVID BERNHARDT; MIKE BLACK, Acting Assistant Secretary of the Interior - Indian Affairs; U.S. DEPARTMENT OF THE INTERIOR, *Defendants-Appellees*.	No. 18-16696 D.C. No. 1:16-cv-01908-AWI-EPG OPINION

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted February 11, 2020
San Francisco, California

Filed May 27, 2020

Before: R. Guy Cole, Jr.* Ronald M. Gould,
and Mary H. Murguia, Circuit Judges.

Opinion by Judge Murguia

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* The Honorable R. Guy Cole, Jr., Chief Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation.

SUMMARY**

Tribal Gaming

The panel affirmed the district court's summary judgment in favor of the U.S. Department of the Interior and its Secretary in an action brought by plaintiff cardrooms, challenging the Secretary's approval of a Nevada-style casino project on off-reservation land in the County of Madera, California by the North Fork Rancheria of Mono Indians, a federally recognized tribe.

Section 3719 of Indian Gaming Regulatory Act ("IGRA") prohibits gaming on any lands acquired by the Secretary in trust for the benefits of Indian Tribes after October 17, 1988, unless one of several exceptions applies. As relevant here, Class III games include casino-style games, slot machines, and lotteries, and can only be conducted pursuant to tribal-state compacts approved by the Secretary. Section 5108 of the Indian Reorganization Act of 1934 ("IRA") authorized the Secretary to acquire interests or rights for the purpose of providing land for Indians. In July 2016, in accordance with IGRA, the Secretary prescribed certain procedures that permitted gaming on the Madera Parcel (the "Secretarial Procedures").

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel rejected plaintiffs' contention that the Secretarial Procedures were issued in violation of IGRA. The panel held that as a matter of law, the federal government confers tribal jurisdiction over lands it acquires in trust for the benefit of tribes. The panel further held that the Tribe's jurisdiction over the Madera Parcel operated as a matter of law and the Tribe clearly exercised governmental power when it entered into agreements with local governments and enacted ordinances concerning the property. Finally, the panel rejected plaintiffs' claim that the Tribe's acquisition of any jurisdiction over the Madera Parcel required the State's consent or cession. Specifically, the panel held that the Enclave Clause of the U.S. Constitution did not apply because the Secretary's acquisition of land in trust for the benefit of a tribe did not result in the creation of a federal enclave or violate the Clause. The panel also held that 40 U.S.C. § 3112 did not apply where the jurisdiction at issue here—which was created by operation of law—was not granted by the State to the federal government, or taken by the federal government from the State.

The panel rejected plaintiffs' contention that to the extent IRA created tribal jurisdiction upon the Secretary's acquisition of land in trust for the benefit of the Tribe, it violated the Tenth Amendment. The panel held that the IRA did not offend the Tenth Amendment because Congress has plenary authority to regulate Indian affairs.

The panel held that plaintiffs waived two arguments raised for the first time on appeal.

The panel concluded that the Secretary's actions were not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

COUNSEL

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Tamara Rountree (argued), John David Gunter II, Steven Miskinis, and Joann Kintz, Attorneys; Eric Grant, Deputy Assistant Attorney General; Jeffrey Bossert Clark, Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; for Defendants-Appellees.

OPINION

MURGUIA, Circuit Judge.

This action is one in a series of actions[1] concerning the proposed construction and operation of a Nevada-style casino on off-reservation land in the County of Madera, California (the "Madera Parcel") by the North

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[1] *See Picayune Rancheria of Chukchansi Indians v. United States Dep't of Interior*, No. 1:16-CV-0950-AWI-EPG, 2017 WL 3581735, at *3–5 (E.D. Cal. Aug. 18, 2017) (reviewing actions related to the proposed casino).

Fork Rancheria of Mono Indians (the "North Fork" or "Tribe"), a federally recognized tribe. Plaintiffs-Appellants, Club One Casino and the Deuce Lounge, are cardrooms licensed by the State of California (the "State"). Plaintiffs contend that the approval of the casino project by the United States Secretary of the Interior (the "Secretary") and the United States Department of the Interior (collectively, Defendants-Appellees) is unlawful, and they brought a host of procedural, statutory, and constitutional challenges. The district court granted summary judgment against Plaintiffs on all claims. We affirm.

I

The North Fork Rancheria of Mono Indians of California are the modern descendants of the Mono Indians, who have used and occupied lands in and near California's San Joaquin Valley for several centuries. The Tribe has approximately 1,750 citizens, is headquartered in North Fork, Madera County, California, and has been federally recognized since 1915.

In March 2005, the North Fork applied to the Department of the Interior to have a 305-acre plot of land in Madera County taken into trust by the United States pursuant to section 5108 of the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 5101-5144. The Tribe proposes to construct a casino resort on the property.

In September 2011, the Secretary made a determination pursuant to section 2719 of the Indian Gaming Regulatory Act ("IGRA"), *id.* §§ 2701-2721, finding that

gaming on the land would be in the best interest of the North Fork and not detrimental to the surrounding community (the "Secretarial Determination"). In August 2012, the Governor of the State of California (the "Governor") informed the Secretary that he concurred in the Secretarial Determination and negotiated a compact with the North Fork to govern gaming at the Madera Parcel. In February 2013, the Madera Parcel was acquired in trust by the Secretary for the benefit of the North Fork. In June 2013, the California Legislature passed Assembly Bill 277, which ratified the compact, and the Governor signed the legislation into law the following month. Enough signatures, however, were gathered to place a veto referendum ("Proposition 48") on the November 2014 ballot, which proposed voiding the California Legislature's ratification of the compact. Proposition 48 passed with sixty-one percent of the vote—meaning that Assembly Bill 277, which had ratified the compact between the Tribe and the State, was vetoed by the voters.

After this defeat at the polls, the North Fork requested that the State negotiate a new tribal-state compact to govern gaming at the Madera Parcel. The State refused, citing Proposition 48's passage. In March 2015, the Tribe brought an action under IGRA, alleging that the State failed to negotiate in good faith. *N. Fork Rancheria of Mono Indians of Cal. v. California*, No. 1:15-CV-00419-AWI-SAB, 2015 WL 11438206, at *1 (E.D. Cal. Nov. 13, 2015). The district court agreed, finding that the State's refusal to negotiate a compact post-referendum violated IGRA, and ordered

the State and the North Fork to conclude a compact within sixty days. *Id.* at *8, *12. When the parties failed to do so, the court selected a mediator and directed the parties to submit their last best offers. The parties complied with the order and the mediator selected the North Fork's proposed compact as "the compact that best comported with IGRA, Federal law, and the orders of this Court." The mediator thereafter submitted the compact to the State for its consent. The State did not consent to the selected compact within the statutorily required time period and the mediator's proposed compact was submitted to the Secretary pursuant to section 2710(d)(7)(B)(vii) of IGRA.

In July 2016, in accordance with IGRA, the Secretary prescribed certain procedures that permitted gaming on the Madera Parcel (the "Secretarial Procedures"). The Secretarial Procedures do not include express findings as to whether the North Fork had jurisdiction or exercised governmental power over the Madera Parcel or whether the Madera Parcel was Indian land.

Plaintiffs, the cardrooms, sued the Secretary and the Department of the Interior in the district court in December 2016. They challenged the Secretary's issuance of the Secretarial Procedures under the Administrative Procedure Act, claiming: (1) the Secretarial Procedures were issued in violation of IGRA, as the Tribe purportedly never acquired jurisdiction or exercised governmental power over the Madera Parcel; and (2) assuming the Tribe acquired jurisdiction and exercised governmental power, IRA violates the Tenth

Amendment to the Constitution by reducing the State's jurisdiction over land within its territory without its agreement.

On cross-motions for summary judgment, the district court denied Plaintiffs' motion and granted Defendants' motion. In accordance with case law from other circuits, the district court held that: (1) the Tribe had jurisdiction over the Madera Parcel for purposes of IGRA by virtue of the land being acquired in trust for the Tribe and neither consent nor cession by the State was required; (2) Plaintiffs' Tenth Amendment challenge was not properly before the court, as Plaintiffs had only challenged the issuance of the Secretarial Procedures, not the Secretary's acquisition of the Madera Parcel in trust for the benefit of the Tribe; and (3) alternatively, Plaintiffs lacked standing to bring the Tenth Amendment challenge. Plaintiffs timely appealed.

II

We review the district court's grant of summary judgment *de novo* to determine whether the Secretary's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016). We have described the arbitrary and capricious standard as deferential and narrow, establishing a "high threshold" for setting aside agency action. *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1067, 1070 (9th Cir. 2010) (per

curiam). We also review purely legal questions *de novo*. *Wagner v. Nat'l Transp. Safety Bd.*, 86 F.3d 928, 930 (9th Cir. 1996).

III

Before proceeding to our analysis, we pause to set out the applicable statutory landscape. Gaming in Indian country is a multi-billion-dollar industry conducted pursuant to the Indian Gaming Regulatory Act of 1988. IGRA "accommodate[s] the interests of tribes in pursuing gaming but also set[s] forth a federal regulatory regime, and g[ives] a powerful role to states by providing for significant state involvement in the decision to permit casino-style gaming." Cohen's Handbook of Federal Indian Law § 12.01, at 876 (2012) ("Federal Indian Law").

Gaming is permitted only on Indian lands, which are defined as "all lands within the limits of any Indian reservation," 25 U.S.C. § 2703(4)(A), *and* "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," *id.* § 2703(4)(B). Thus, a tribe may engage in gaming activities either: (1) on a reservation; or (2) off a reservation on tribal or individual trust land, or land not held in trust but subject to a restriction on alienation, but only if a tribe exercises governmental power over this trust or restricted land. *Id.* § 2703(4).

Importantly, section 2719 of IGRA prohibits gaming on any lands acquired by the Secretary in trust for the benefit of Indian tribes after October 17, 1988, unless one of several exceptions applies. An exception pertinent to this appeal permits gaming if the Secretary makes a two-part determination: (1) finding that gaming on land acquired in trust after 1988 "would be in the best interest of the Indian tribe and its members"; and (2) that such gaming "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." *Id.* § 2719(b)(1)(A).

Additionally, IGRA divides gaming into three classes. As relevant here, Class III[2] games include casino-style games, slot machines, and lotteries. *See id.* § 2703(8). Generally, Class III games can only be conducted pursuant to tribal-state compacts approved by the Secretary. *Id.* § 2710(d)(1)(C), (3)(B). *If* a state generally permits such gaming, IGRA authorizes a tribe to bring an action in federal court[3] against a state that

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[2] Class I games include social and traditional games for prizes of minimal value. Federal Indian Law § 12.02, at 881–82. Class I gaming is within the sole jurisdiction of tribes. *Id.* Class II games include bingo, bingo-like games, and certain non-banking (meaning, players compete against each other and not the "house") card games. *Id.* Class II gaming is jointly regulated by tribes and the National Indian Gaming Commission, excluding a role for states. *Id.*

[3] As a result of the Supreme Court's ruling in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996), states may assert Eleventh Amendment immunity from tribal lawsuits alleging failure to negotiate in good faith—meaning, tribes are prohibited from

refuses to enter into negotiations at all or has refused to negotiate a Class III tribal-state compact in good faith. *Id.* § 2710(d)(7)(A)(i), (B)(i). If there is a finding by a district court that the state failed to negotiate in good faith, IGRA requires the district court to order the tribe and the state to negotiate a compact within sixty days. *Id.* § 2710(d)(7)(B)(iii). If a compact fails to materialize within sixty days, the district court shall appoint a mediator who will require the tribe and the state to submit their best and final proposal for a compact. *Id.* § 2710(d)(7)(B)(iv). The mediator then selects the compact that best comports with policies embodied in IGRA and other applicable federal laws. *Id.* If the state still refuses to agree to be bound by the chosen compact, IGRA requires the mediator to refer the matter to the Secretary, who must then issue gaming procedures consistent with the compact selected by the mediator, other relevant provisions of IGRA, and the laws of the state. *Id.* § 2710(d)(7)(B)(vii).

In addition to IGRA, this appeal implicates the Indian Reorganization Act of 1934. IRA authorizes the Secretary "in his discretion" to acquire "any interest in lands, water rights, or surface rights to lands, within or without existing reservations," through purchase, gift, or exchange "for the purpose of providing land for Indians." *Id.* § 5108 (formerly § 465). IRA reflected a major shift in federal policy from one favoring diminishment of tribal lands to one protecting tribal lands

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bringing lawsuits in federal court against a state without the consent of the state. California has waived its immunity and has thereby consented to such suits. *See* Cal. Gov't Code § 98005.

and supporting tribal self-government and economic development. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

In sum, in order for a tribe to engage in *any* gaming on off-reservation land acquired after October 17, 1988, the following must take place: (1) land—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, 25 U.S.C. § 2703(4)(B)—must be acquired; (2) the Secretary must make a determination finding that gaming would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, *id.* § 2719(b)(1)(A); and (3) the governor of the state must concur in the determination, *id.*

In order for a tribe to engage in *Class III* gaming, however, the Secretary must *also* either approve a tribal-state compact, *id.* § 2710(d)(1)(C), *or* prescribe secretarial procedures, if the state failed to negotiate in good faith, *id.* § 2710(d)(7)(B)(vii). As explained above, if a state refuses to negotiate a tribal-state compact in good faith or to enter into negotiations at all, IGRA authorizes the Secretary to permit gaming by issuing gaming procedures consistent with a compact selected by a mediator, other relevant provisions of IGRA, and the laws of the state.

IV

On appeal, Plaintiffs re-assert the arguments they presented to the district court. Plaintiffs contend that: (1) the Secretarial Procedures were issued in violation of IGRA, as the Tribe purportedly never acquired jurisdiction or exercised governmental power over the Madera Parcel; and (2) assuming the Tribe acquired jurisdiction and exercised governmental power, IRA violates the Tenth Amendment by reducing the State's jurisdiction over land within its territory without its agreement. Plaintiffs also, however, introduce two additional arguments, which they present for the first time on appeal: (1) that the Secretarial Determination finding that gaming at the Madera Parcel would be in the best interest of the North Fork and not detrimental to the surrounding community did not reflect sufficiently robust consultation, as required by law; and (2) that the Governor lacked authority to concur in the Secretarial Determination. We address the first two arguments below, and we conclude that the latter two have been waived.

A

Plaintiffs contend that the Secretarial Procedures, which permit gaming on the Madera Parcel, were issued in violation of IGRA because the Tribe purportedly lacked jurisdiction and did not exercise governmental power over the Madera Parcel. In support of this argument Plaintiffs appear to claim that: (1) tribal jurisdiction was not automatically obtained by the

Tribe when the United States acquired the Madera Parcel in trust for the benefit of the Tribe; (2) the Secretary was required, but failed, to consider whether the Tribe possessed jurisdiction and whether the Tribe exercised governmental power over the Madera Parcel; and (3) the Tribe's acquisition of any jurisdiction over the Madera Parcel requires the State's consent or cession—neither of which was granted. None of these arguments has merit.

1

As noted above, IRA authorizes the Secretary "in his discretion" to acquire "any interest in lands, water rights, or surface rights to lands, within or without existing Indian reservations," through purchase, gift, or exchange "for the purpose of providing land for Indians." *Id.* § 5108. And while there is no Ninth Circuit precedent precisely on point, other circuits have logically concluded that, as a matter of law, the federal government confers tribal jurisdiction over lands it acquires in trust for the benefit of tribes. We agree.

In *Upstate Citizens for Equality, Inc. v. United States*, for example, the Second Circuit concluded that "[l]and held by the federal government in trust for Indians under [section 5108 of IRA] 'is generally not subject to (1) state or local taxation; (2) local zoning and regulatory requirements; or, (3) state criminal and civil jurisdiction [over Indians], unless the tribe consents to such jurisdiction.' " 841 F.3d 556, 561 (2d Cir. 2016) (alteration in original) (quoting *Conn. ex rel. Blumenthal*

v. United States Dep't of Interior, 228 F.3d 82, 85–86 (2d Cir. 2000)). The court further noted that the federal government may, "by acquiring land for a tribe, divest a state of important aspects of its jurisdiction, even if a state previously exercised wholesale jurisdiction over the land and even if 'federal supervision over [a tribe] has not been continuous.'" *Id.* at 568 (alteration in original) (quoting *United States v. John*, 437 U.S. 634, 653 (1978)). Accordingly, "[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." *Id.* at 569 (emphasis added).[4]

Similarly, in *Yankton Sioux Tribe v. Podhradsky*, the Eighth Circuit concluded that "land held in trust under [IRA] is effectively removed from state jurisdiction," for "when Congress enacted [IRA] 'it doubtless intended and understood that the Indians for whom the land was acquired would be able to use the land free from state or local regulation or interference as well as free from taxation.'" 606 F.3d 994, 1011 (8th Cir. 2010) (quoting *Chase v. McMasters*, 573 F.2d 1011, 1018 (8th Cir. 1978)).

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[4] Notably and importantly, federal and Indian authority do not entirely displace state authority over land taken into trust. *Upstate Citizens for Equality*, 841 F.3d at 572. For example, under Public Law 280, 18 U.S.C. § 1162(a), California retains "broad criminal jurisdiction over offenses committed by or against Indians within all Indian country within the State." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987), *superseded on other grounds by statute.*

As a general matter, too, off-reservation trust land like the Madera Parcel is "Indian country" with all the jurisdictional consequences that attach to that status.[5] Federal law defines "Indian country," in part, as "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state." 18 U.S.C. § 1151(b). Off-reservation trust land set aside for Indian use is Indian country under subsection (b) of the Indian country statute. Off-reservation trust land is, by definition, land set aside for Indian use and subject to federal control. Federal control over trust land is evident and made clear in regulations such as 25 C.F.R. § 1.4(a), which precludes state or local regulation of property "belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States[.]" "Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States." *Native Vill. of Venetie*, 522 U.S. at 527 n.1.

As such, the federal government confers tribal jurisdiction over lands it acquires in trust for the benefit of tribes as a matter of law.

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[5] "Although this definition by its terms relates only to federal criminal jurisdiction, we have recognized that it also generally applies to questions of civil jurisdiction. . . ." *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998).

2

Plaintiffs' next contention, that the Secretary was somehow legally required to consider whether the Tribe possessed jurisdiction and exercised governmental power over the Madera Parcel, is equally unpersuasive. Plaintiffs do not point to any provision of IGRA—or any other relevant authority, for that matter—requiring the Secretary to make either determination. We decline to read into IGRA unnecessary requirements demanded neither by law nor logic. As to jurisdiction specifically, requiring the Secretary to evaluate whether the Tribe possesses jurisdiction over the land would be illogical. As noted above, the Tribe's jurisdiction over the Madera Parcel operates as a matter of law; it is not a question of fact. *Upstate Citizens for Equality*, 841 F.3d at 569 ("When 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.").

As to governance, the Tribe most certainly exercises governmental power over the Madera Parcel. IGRA authorizes gaming on "any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe . . . *and over which an Indian tribe exercises governmental power.*" 25 U.S.C. § 2703(4)(B) (emphasis added). Although federal courts have not often had occasion to consider whether a tribe "exercises governmental power" within the meaning of IGRA, those that have considered the question have held that exercising governmental power requires a showing of

both theoretical power to exercise jurisdiction over the property and proof of actual exercise of that authority. For example, the First Circuit in *Rhode Island v. Narragansett Indian Tribe* held that "[m]eeting this requirement does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority." 19 F.3d 685, 703 (1st Cir. 1994).

In *Massachusetts v. Wampanoag Tribe of Gay Head*, the First Circuit similarly concluded that a tribe which had passed ordinances and entered into agreements with state and local governments for the provision of law enforcement and firefighting services exercised governmental power sufficiently within the meaning of IGRA. 853 F.3d 618, 625–26 (1st Cir. 2017). The court underscored that "the achievement of full-fledged self-governance" was not necessary—only "merely movement in that direction." *Id.* at 626.

Here, the record clearly indicates that in late 2006 the Tribe entered into "enforceable and binding" agreements with the County of Madera and the City of Madera for the provision of law enforcement and fire protection services at the Madera Parcel. The Tribe also enacted a gaming ordinance in 2009 "governing the conduct of gaming" at the Madera Parcel. The district court also took judicial notice of the fact that the Tribe enacted an ordinance in October 2015 approving a conservation plan for the Madera Parcel.

For these reasons, both conditions were met here. The Tribe's jurisdiction over the Madera Parcel

operates as a matter of law and the Tribe clearly exercised governmental power when it entered into agreements with local governments and enacted ordinances concerning the property.

3

Plaintiffs' final claim in support of their argument that the Secretarial Procedures were issued in violation of IGRA—that the Tribe's acquisition of any jurisdiction over the Madera Parcel requires the State's consent or cession—is also unavailing. Plaintiffs point to the Constitution's Enclave Clause and a federal statute, 40 U.S.C. § 3112, as the sources of those requirements.[6]

The Enclave Clause does not apply here. The Secretary's acquisition of land in trust for the benefit of a tribe does not result in the creation of a federal enclave or violate the Enclave Clause. *See, e.g., Upstate Citizens*

[6] In general, Congress may acquire jurisdiction *from* a state through two methods: consent and cession. The first method, consent, arises from the Constitution's Enclave Clause. Case law construing the clause instructs that state consent is needed only when the federal government takes "exclusive" jurisdiction over land within a state. *See, e.g., Paul v. United States*, 371 U.S. 245, 263 (1963). "Exclusive" jurisdiction for Enclave Clause purposes is equivalent to the sweeping power that Congress exerts over the District of Columbia, the first subject of the clause. *Id.* The second method, cession, relates to 40 U.S.C. § 3112. Under this federal statute, the federal government can acquire jurisdiction from a state by filing a notice accepting the state's jurisdiction with the state's governor or in such manner as may be prescribed by the laws of the state where the lands are situated. 40 U.S.C. § 3112(b).

for Equality, 841 F.3d at 571 ("When land is taken into trust by the federal government for Indian tribes, the federal government does not obtain such categorically exclusive jurisdiction over the entrusted lands."); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 151 (D.D.C. 2002) ("[I]t is clear that land taken into trust for Indians does not create an exclusive federal enclave. Consequently, the Enclaves [sic] Clause is not implicated[.]"). "State jurisdiction is . . . only reduced, and not eliminated, when the federal government takes land into trust for a tribe. Because federal and Indian authority do not wholly displace state authority over land taken into trust pursuant to § 5 of the IRA, the Enclave Clause poses no barrier to the entrustment that occurred here." *Upstate Citizens for Equality*, 841 F.3d at 572.

Section 3112 also does not apply. By its own terms, the statute sets forth requirements for the federal government's *acceptance* of jurisdiction over land. *See, e.g.*, 40 U.S.C. § 3112(b) ("[The federal government] shall indicate acceptance of jurisdiction . . . by filing a notice of acceptance with the Governor of the State[.]") Here, the federal government is not accepting jurisdiction "from the State." In other words, the jurisdiction at issue here—which was created by operation of law, as noted above—was not granted by the State to the federal government, or taken by the federal government from the State. *See, e.g., Kleppe v. New Mexico*, 426 U.S. 529, 541–43 (1976) (noting the distinction between Congress' constitutional powers and its derivative legislative powers acquired from a state, and noting that

where Congress acts pursuant to a non-derivative constitutional power, federal legislation preempts conflicting state law). The federal government's power under IRA to acquire the Madera Parcel in trust for the benefit of the Tribe is derived from Congress' broad general power, pursuant to the Indian Commerce Clause, to legislate with respect to Indian tribes—power which has been consistently described as "plenary and exclusive" power over Indian affairs. *United States v. Lara*, 541 U.S. 193, 200 (2004); *see also Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs[.]"). Therefore, when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. *See Kleppe*, 426 U.S. at 543.

Thus, Plaintiffs' claim that the Tribe's acquisition of any jurisdiction over the Madera Parcel requires the State's consent or cession fails.

B

Plaintiffs also contend that to the extent IRA creates tribal jurisdiction upon the Secretary's acquisition of land in trust for the benefit of the Tribe, it violates the Tenth Amendment.[7] Plaintiffs assert that "tak[ing] sovereignty from a State without that State's consent or permission" violates the Tenth Amendment, as

[7] Plaintiffs have standing to bring this claim pursuant to *Bond v. United States*, 564 U.S. 211, 220–21 (2011).

"[t]erritorial jurisdiction is a fundamental component of State sovereignty."

The authority to regulate Indian affairs is among the enumerated powers of the federal government. U.S. Const. art. I, § 8, cl. 3; *Cotton Petroleum Corp.*, 490 U.S. at 192; *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (noting that Congress has plenary power "to deal with the special problems of Indians," including the power to legislate on their behalf). "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *Cty. of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 234 (1985); *see also United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876) ("Congress now has the exclusive and absolute power to regulate commerce with the Indian tribes[.]").

The Tenth Amendment to the Constitution reserves to the states those powers not expressly delegated to the federal government. The powers delegated to the federal government and those reserved to the states by the Tenth Amendment are mutually exclusive. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States[.]" *New York v. United States*, 505 U.S. 144, 156 (1992).

Because Congress has plenary authority to regulate Indian affairs, contrary to Plaintiffs' argument, IRA does not offend the Tenth Amendment. *See, e.g., Carcieri v. Kempthorne*, 497 F.3d 15, 39–40 (1st Cir. 2007) (en banc) (emphasizing that powers expressly

delegated to Congress do not implicate the Tenth Amendment), *rev'd on other grounds sub nom. Carcieri v. Salazar*, 555 U.S. 379 (2009); *see also Gila River Indian Cmty. v. United States*, 729 F.3d 1139, 1154 (9th Cir. 2013), *as amended* (July 9, 2013) (holding that a federal statute "was well within congressional power under the Indian Commerce Clause and is not trumped by the Tenth Amendment").

C

Plaintiffs also raise two arguments for the first time on appeal. First, Plaintiffs claim the Secretarial Determination that gaming would be in the best interest of the Tribe and would not be detrimental to the surrounding community did not reflect sufficiently robust consultation with "appropriate State and local officials" pursuant to section 2719(b)(1)(A) of IGRA because some local authorities opposed the Tribe's request for gaming on off-reservation lands. Second, Plaintiffs claim that the Governor's 2012 concurrence in the Secretarial Determination was unauthorized as a matter of state law[8] and, alternatively, was revoked

[8] The California Supreme Court has granted review of two related cases involving the following legal question: "May the Governor concur in a decision by the Secretary of the Interior to take off-reservation land in trust for purposes of tribal gaming without legislative authorization or ratification, or does such an action violate the separation of powers provisions of the state Constitution?" *United Auburn Indian Cmty. of the Auburn Rancheria v. Brown*, No. S238544 (review granted Jan. 25, 2017); *Stand Up for California! v. State*, No. S239630 (review granted

before the issuance of the Secretarial Procedures. Neither of these arguments were presented to the district court.

"Absent exceptional circumstances, we generally will not consider arguments raised for the first time on appeal, although we have discretion to do so." *El Paso City v. Am. W. Airlines, Inc. (In re Am. W. Airlines, Inc.)*, 217 F.3d 1161, 1165 (9th Cir. 2000). Plaintiffs have failed to address any of the exceptions to the general rule that an argument raised for the first time on appeal is waived. *See United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990) (discussing the limited circumstances where the Court may consider an issue raised for the first time on appeal, which include when there are "exceptional circumstances" why the issue was not raised in the trial court, when the new issue arose while the appeal was pending because of a change in the law, and when the issue presented is purely one of law and the opposing party will not suffer prejudice as a result of the failure to raise the issue in the trial court).

Accordingly, Plaintiffs have waived these arguments.

Mar. 22, 2017) (briefing deferred pending decision in *United Auburn*).

V

In summary, the Tribe's jurisdiction over the Madera Parcel operates as a matter of law and the Tribe clearly exercised governmental power when it entered into agreements with local governments and enacted ordinances concerning the property. Because neither the Enclave Clause nor 40 U.S.C. § 3112 are implicated here, neither the State's consent nor cession is required for the Tribe to acquire any jurisdiction over the Madera Parcel. Finally, IRA does not offend the Tenth Amendment because Congress has plenary authority to regulate Indian affairs. As such, we conclude that the Secretary's actions were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Alaska Oil & Gas*, 815 F.3d at 554.

AFFIRMED.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

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.

CASE NO. 1:16-cv-01908-AWI-EPG

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT (Doc. 36)

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Doc. 37)

ORDER CLOSING THE CASE

(Filed Jul. 13, 2018)

I. Introduction

Plaintiffs Club One Casino and The Deuce Lounge (collectively "Plaintiffs" or "Club One") bring the instant Administrative Procedures Act ("APA") challenge to the issuance of Secretarial Procedures by the United States Department of the Interior, the Secretary of the Interior, and the Assistant Secretary for Indian Affairs (collectively "DOI" or "Federal Defendants") permitting the North Fork Rancheria of Mono Indians ("North Fork") to conduct tribal gaming on a 305.49 acre parcel

of land in Madera County, California (the "Madera Site"). Complaint, Doc. 1 ("Compl.") at ¶ 1. The substance of the APA challenge is directed at whether the Federal Defendants adequately considered whether North Fork had jurisdiction over the Madera Site for purposes of the Indian Gaming Regulatory Act ("IGRA"), 29 U.S.C. § 2701, et seq.

The parties have filed cross motions for summary judgment. Plaintiffs' argument is twofold. First they contend that "the Secretarial Procedures [offend the APA] because defendants . . . never considered . . . whether the North Fork Tribe actually possesses territorial jurisdiction over the proposed casino site." Doc. 36-1 at 12. The Federal Defendants respond that North Fork necessarily has jurisdiction over the proposed gaming site as a result of the fee-to-trust determination conducted pursuant to the Indian Reorganization Act ("IRA"), taking that land into trust for the Tribe. Second, Plaintiffs argue, assuming that the fee-to-trust determination does shift some jurisdiction from the state to the Tribe, the IRA violates of the Tenth Amendment.

For the following reasons, Plaintiffs' motion will be denied and the Federal Defendants' motion will be granted.

II. Background

Although the background surrounding the proposed gaming facility at the Madera Site is extensive, the Court limits this section to the information

relevant to, or addressed in, Plaintiffs' challenge to the Secretary's issuance of Secretarial Procedures.

A. Plaintiffs – Club One Casino and The Deuce Lounge

Club One Casino and The Deuce Lounge are both cardrooms licensed by the State of California. Declaration of Kyle Kirkland, Doc. 36-3 ("Kirkland Decl.") at ¶¶ 2, 6. Club One operates in Fresno, California and is licensed by the City of Fresno. *Id* at ¶ 2. The Deuce Lounge is located in Goshen, California and licensed by the County of Tulare. *Id.* at ¶ 6. Both Club One and The Deuce Lounge are limited in the kinds of games that they may offer. For instance, both operate poker, baccarat, and blackjack games but neither is permitted to operate slot machines or banking card games where the player bets against the house. *Id.* at ¶¶ 2, 6.

The Madera Site is roughly 25 miles from Club One and 65 miles from The Deuce Lounge. Kirkland Decl. at ¶¶ 3, 7. The Secretarial Procedures permit North Fork to operate slot machines and banking card games that Plaintiffs cannot operate. *See* Administrative Record ("AR") at AR00002202 (North Fork is permitted under the Secretarial Procedures to operate "Gaming Devices," i.e., slot machines, and "banking or percentage card games," among other things.) Both Club One and The Deuce Lounge contend that their businesses will suffer if North Fork is permitted to conduct Class III gaming at the Madera Site. Kirkland Decl. at ¶¶ 5, 9.

B. The North Fork Rancheria of Mono Indians

The North Fork is a federally recognized Indian tribe. AR00000241; *see generally Stand Up for California! v. United States Department of the Interior*, 204 F.Supp.3d 212, 228-231 (D.D.C. Sept. 6, 2016) *aff'd* 879 F.3d 1177 (D.C. Cir. Jan. 12, 2018) *rehrg. en bank denied* (Apr. 10, 2018).[1] "In 1916, pursuant to appropriations acts authorizing the Secretary to purchase land in California for Indians, *see* Act of May 18, 1916, ch. 125, § 3, 39 Stat. 62, . . . the DOI purchased what became the North Fork Rancheria, comprised of 80 acres of land near the town of North Fork, for the use and benefit of approximately 200 landless Indians belonging to the North Fork band." *Stand Up for California!*, 204 F.Supp.3d at 229. That 80-acre plot of land is approximately 4 miles east of the town of North Fork in Madera County. AR 00000245. "The land, which was 'poorly located[,] . . . absolutely worthless as a place to build homes on' and 'lack[ed] . . . water for [both]

[1] The administrative record contains many of the orders issued in actions related to the proposed Class III gaming at the Madera Site. *See*, *e.g.*, AR00000456-00000498, 00001348-00001363, 00001366-00001388, 00001542-00001552. To name a few, the record contains court orders from *Stand Up For California! v. State of California*, Madera Superior Court Case No. MCV062850 (June 26, 2014), *North Fork Rancheria of Mono Indians v. California*, Case No. 15-cv-419-AWI-SAB, 2015 WL 11438206 (E.D. Cal. Nov. 13, 2015), and *Stand Up For California! v. United States Department of the Interior*, Case No. 12-cv-2039-BAH, 204 F.Supp.3d 212 (D. D.C. 2016). For the sake of clarity and accessibility, the Court uses the reporter citations for those cases rather than citing to their location in the administrative record in this Court's CM/ECF system.

domestic purposes and . . . irrigation,' was essentially uninhabitable." *Stand Up for California!*, 204 F.Supp.3d at 229 (citing a 1920 survey of landless non-reservation Indians in California). Additionally, that reservation was "'on environmentally sensitive lands within the Sierra National Forest, . . . near Yosemite National Park. . . .'" *Id.* at 231 (citing the Bureau of Indian Affairs, Record of Decision, finding that the Madera Site should be gaming-eligible pursuant to 25 U.S.C. § 2719(b)(1) (Sept. 1, 2011)).

The United States also holds in trust for the Tribe a 61.5-acre tract of land "'located on a steep hillside . . . in . . . North Fork.'" *Stand Up for California!*, 204 F.Supp.3d at 231. (citation omitted). "The tract contains a community center, basic infrastructure (i.e., roads, water, sewer), pads for nine single-family homes, and the North Fork Tribe's 'current government headquarters.'" *Id.* (citation omitted).

C. The Madera Site Acquisition

The Madera Site is a 305.49-acre plot of land in Madera County, California, approximately 15 miles north of the city limits of the City of Fresno on Avenue 17, just west of the intersection with State Route 99. AR00002299-00002300; Doc. 37-2 at 3. The Madera Site is about 38 miles from North Fork's Rancheria lands and about 36 miles from its 61.5 acre tract which is used for housing. AR00000245; *Stand Up for California*, 204 F.Supp.3d at 231; Doc. 37-2 at 3.

In March of 2005, North Fork submitted an application to the Bureau of Indian Affairs ("BIA") to have the Madera Site taken into trust for the purpose of operating a Class III gaming facility ("fee-to-trust application"). Doc. 37-2 at 5; AR00000240. In the same month, North Fork also requested that the Secretary make the two-part after-acquired lands determination[2] pursuant to 25 U.S.C. § 2719(b)(1)(A) ("2719 application"). Doc. 37-2 at 5; AR00000240; AR 00000160. On September 1, 2011, the Secretary issued a Record of Decision on the 2719 application ("the 2719 ROD"), finding that gaming on the Madera Site would be in the best interest of North Fork and not detrimental to the surrounding community. Doc. 37-2 at 6; AR00000240. The Governor of the State of California ("the Governor") concurred with that determination on August 31, 2012. Doc. 32-7 at 7; AR 00000317-00000318.

On November 26, 2012, the Assistant Secretary—Indian Affairs issued a Record of Decision approving the fee-to-trust application ("the IRA ROD"). Doc. 37-2 at 7; AR00000159-00000227. The Madera Site was acquired in trust by the United States for the benefit of North Fork in 2013. *North Fork Rancheria of Mono Indians of California v. State of California*, 2015 WL 11438206, *2 (E.D. Cal. Nov. 13, 2015) ("*North Fork v. California*"); Doc. 37-2 at 3. Prior to the acquisition of

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[2] That determination sought is regularly referred to as the "two-part" determination. *E.g.*, *Cachil Dehe Band of Wintun Indians of Colusa Indian Community v. Zinke*, ___ F.3d ___, 2018 WL 2033762, *3 (9th Cir. May 2, 2018).

the Madera Site in trust for North Fork, the land was privately owned. Doc. 37-2 at 4; Doc. 30 at 3. Jurisdiction over the land was not reserved by the United States when California was admitted to the Union in 1850. Doc. 37-2 at 4. The State of California has never taken express steps to cede territorial jurisdiction over the land to the United States or North Fork and the United States has never issued a written acceptance of cession of jurisdiction in connection with the Madera Site. Doc. 37-2 at 4.

D. Tribal-State Compact Negotiation History

On August 31, 2012, the Governor concluded a compact with North Fork to conduct Class III gaming at the Madera Site. Doc. 37-2 at 7; AR00000320-00000438. That compact was concluded on the same date as the Governor's concurrence with the Secretary's two-part determination and before the IRA ROD issued or the land was taken into trust for North Fork. The Governor's office then forwarded the compact to the California Legislature for ratification. Doc. 37-2 at 7; *North Fork v. California*, 2015 WL 11438206 at *2. On June 27, 2013, the California Legislature ratified the compact by means of Assembly Bill 277 ("AB 277"), and the Governor signed the bill on July 3, 2013. Doc. 37-2 at 8. The California Secretary of State forwarded the compact to the Secretary of the Interior on July 16, 2013, with the notation that the effective date of the compact would be January 1, 2014, unless a referendum

measure qualified for the ballot. AR00000439-00000440.[3] The Secretary of State made clear that if the referendum measure qualified for the ballot, AR 277 would not take effect until the voters had voted on it.

Notice of the completed compact was published in the Federal Register on October 22, 2013, stating that the compact was "approved" and was taking effect to "the extent it was consistent with IGRA." 78 Fed.Reg. 62649-01 (Oct. 22, 2013). On November 20, 2013, the Secretary of State informed the Secretary of the Interior that a veto referendum on AR 277 qualified for the ballot ("Proposition 48") and that the measure would go before voters at the November 3, 2014 general election. AR00000455. Sixty one percent of California voters voted against the legislative ratification of the compact. Doc. 37-2 at 8.[4]

On January 2, 2015, North Fork requested that the State of California enter into negotiations for a new compact for Class III gaming on the Madera Site. Doc. 37-2 at 8-9; *North Fork v. California*, 2015 WL 11438206 at *7. The State refused, indicating that negotiations for a compact regarding gaming at the

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[3] The Governor's office sent a separate letter on July 9, 2013, indicating that the State of California had entered into a compact with North Fork. AR00000441.

[4] *See* Index of California Referenda located at http://www.sos.ca.gov/elections/ballot-measures/referendum/ (last accessed on July 11, 2018).

Madera Site would be "futile" given the result of the referendum. *Id.*

E. The Good Faith Litigation, the Remedial Process, and Issuance of Secretarial Procedures

On March 17, 2015, North Fork filed suit against California pursuant to 25 U.S.C. § 2710(d)(7), seeking a determination that the State of California did not negotiate in good faith toward an enforceable compact. Doc. 37-2 at 9; *see generally North Fork v. California*, 2015 WL 11438206. On November 13, 2015, the Court held that by refusing to negotiate, California failed to negotiate in good faith to conclude a Tribal-State compact within the meaning of 25 U.S.C. § 2710(d)(7)(B)(ii-iii). *Id.* at *8. On that basis, the Court ordered North Fork and California to conclude a compact within 60 days of the date of that order. *Id.* at *8, 12 (citing 25 U.S.C. § 2710(d)(7)(B)(iii)).

North Fork and California did not conclude a compact within the 60-day period allowed. Doc. 37-2 at 9. On January 25, 2016, the Court appointed a mediator and directed North Fork and California to submit their last best offers. Doc. 37-2 at 9; *see* 25 U.S.C. § 2710(d)(7)(B)(iv). The mediator was directed to select from the two proposed compacts the one which best comported with IGRA, other Federal law, and the findings and order of the Court. Doc. 37-2 at 9; *see* 25 U.S.C. § 2710(d)(7)(B)(vii). On February 11, 2016, the mediator determined that the proposed compact submitted by North Fork best met the Court's direction. Doc.37-2

at 9; AR00000002-AR00000003. From the date that the mediator returned the selected compact to the California, California was permitted to sixty days to consent to the selected compact or decline to do so. 25 U.S.C. § 2710(d)(7)(B)(vi). California did not consent to the compact within the time permitted. Doc. 37-2 at 10; AR00000001. In conformity with the requirements of IGRA and the order of the Court, the mediator forwarded the selected compact to the Secretary of the Interior to prescribe procedures under which North Fork could conduct Class III gaming at the Madera Site. Doc. 37-2 at 10; AR00000001; *see* 25 U.S.C. 2710(d)(7)(B)(vii).

On July 29, 2016, the Secretary issued Secretarial Procedures permitting the Tribe to conduct Class III gaming without a Tribal-State compact. AR00002186-00002325. In issuing those procedures, the Secretary did not make any express finding regarding whether North Fork had jurisdiction over the Madera Site or whether it was Indian land. Doc. 37-2 at 10; AR00002186-00002325.

The administrative record contains no evidence that any governmental entity had affirmatively concluded that North Fork had territorial jurisdiction over the Madera Site. Doc. 37-2 at 10-11. However, in resolving the cross-motions for judgment on the pleadings in *North Fork v. California*, 2015 WL 11438206 at *8, the Court explained that it was "undisputed" between North Fork and California that "the Madera [Site] [is] gaming-eligible Indian land[] within the meaning of 25 U.S.C. §§ 2703(4) and 2719(b)(1)(A)." *See also North*

Fork v. California, 2016 WL 4208452, *5 (E.D. Cal. Aug. 16, 2016) (subsequent determination) (The Court emphasized that the State of California admitted that North Fork "exercises jurisdiction over the Madera Parcel, which constitutes 'Indian lands' under IGRA.")[5]

F. North Fork Tribal Council Action With Respect to the Madera Site[6]

On October 16, 2015, the North Fork Tribal Council passed Resolution No. 15-58 approving a general policy for permitting of Indian agricultural lands and a conservation plan for the Madera Site. Declaration of Steven Miskinis, Doc. 37-3 ("Miskinis Decl.") at 1-6.

G. This Court's Decision Denying Supplementation of the Administrative Record

Club One filed a motion, seeking to supplement the administrative record compiled by the Secretary. Doc. 22. Club One argued that consideration of the ownership history of the Madera Site is relevant to whether North Fork had jurisdiction over that land. *Id.* at 5-6, 8-10. Therefore, Club One argued, supplementation of the record was necessary to determine whether the Secretary had considered all factors

[5] No order in that action expressly considered whether there could be Indian lands over which a tribe did not have jurisdiction.

[6] Plaintiffs object to consideration of this evidence on the bases that it is irrelevant and falls outside of the administrative record.

relevant to the prescribing of Secretarial Procedures for Class III gaming. *Id.* at 5.

In order to determine whether to permit supplementation of the administrative record, it was "necessary [for the Court] to determine" what it means for "an Indian tribe [to] exercise jurisdiction over land" for purposes of IGRA. Doc. 33 at 6.[7] To that end, the Court permitted the parties to submit supplemental briefing on that issue. Doc. 30 at 8. Mirroring their present positions, Club One argued that a State must cede jurisdiction over land to a tribe or the United States in order for a tribe to have jurisdiction over that land for purposes of IGRA; whereas, the Secretary argued that jurisdiction over land, for purposes of IGRA, is conferred to a tribe when the land is taken into trust by the United States for the benefit of that tribe.

The Court made the following limited determination:

> When the Secretary takes land into trust for an Indian tribe, some but not all jurisdiction is transferred from the State to the Indian tribe and the Federal Government. The fee-to-trust determination does not result in the Federal Government or an Indian tribe holding exclusive jurisdiction over the land.[fn] However, IGRA does not require a tribe to

[7] In prior orders the Court has interchangeably referred to "having" and "exercising" jurisdiction over land. Because it now addresses "having jurisdiction" for purposes of § 2710(d)(3)(A), (d)(7)(B)(vii) and "exercising governmental power" for purposes of 2703(4), the Court ceases the former imprecision.

> exercise exclusive jurisdiction over land.[fn]. . . . [W]hen the Secretary . . . takes land into trust for an Indian tribe, that Indian tribe certainly has jurisdiction over that land for purposes of IGRA.

Doc. 33 at 9-10. Because the parties were (and are) in agreement that the Madera Site was held in trust by the United States for North Fork at the time the Secretary prescribed gaming procedures (and Club One is not challenging the fee-to-trust determination), the Court found that the material relating to the ownership history of the Madera Site was irrelevant to the Secretarial determination in question here—the prescribing of gaming procedures.

III. Legal Standard

Summary judgment is an appropriate mechanism for reviewing agency decisions under the APA. *Turtle Island Restoration Network v. United States Dept. of Commerce*, 878 F.3d 727, 732 (9th Cir. 2017); *City & County of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir.1997); *Occidental Engineering Co. v. Immigration & Naturalization Service*, 753 F.2d 766, 769–70 (9th Cir.1985). However, courts do not utilize the standard analysis for determining whether a genuine issue of material fact exists. *See Occidental*, 753 F.2d at 769–70; *Academy of Our Lady of Peace v. City of San Diego*, 835 F.Supp.2d 895, 902 (S.D. Cal. 2011); *California RSA No. 4 v. Madera Cnty.*, 332 F.Supp.2d 1291, 1301 (E.D. Cal. 2003). A court "is not required to resolve any facts in a review of an administrative

proceeding." *Occidental*, 753 F.2d at 769; *California RSA*, 332 F.Supp.2d at 1301. Instead, in reviewing an agency action, the relevant legal question for a court reviewing a factual determination is "whether the agency could reasonably have found the facts as it did." *San Francisco*, 130 F.3d at 877; *Occidental*, 753 F.2d at 769.

The Court's review in resolving an APA challenge to an agency action is circumscribed: the court will only set aside agency action if its "'findings[] and conclusions [are] found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' 'in excess of statutory jurisdiction' or 'without observance of procedure required by law." *Turtle Island*, 878 F.3d at 732 (quoting 5 U.S.C. § 706(2)(A), (C)-(D)). Agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law "only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Defs. Of Wildlife v. Zinke*, 856 F.3d 1248, 1256-1257 (9th Cir. 2017) (citation omitted); *see Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (An "agency must examine the relevant data and articulate a satisfactory explanation for its action.") This standard is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists

for its decision." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000)). Review under this standard is narrow, and the court may not substitute its judgment for that of the agency. *Morongo Band of Mission Indians v. Fed. Aviation Admin.*, 161 F.3d 569, 573 (9th Cir. 1988). Nevertheless, the court must "engage in a substantial inquiry . . . a thorough, probing, in-depth review." *Native Ecosys. Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (citation and internal quotations omitted).

Assuming an error was made, the Court considers whether it was harmless. 5 U.S.C. § 706. In the context of agency review, the role of harmless error is constrained. The doctrine may be employed only "when a mistake of the administrative body is one that clearly had no bearing on the procedure used or the substance of decision reached." *Buschmann v. Schweiker*, 676 F.2d 352, 358 (9th Cir.1982).

IV. Discussion

Plaintiffs' motion indicates that it presents two issues: (1) whether the Secretary violated IGRA when he issued Secretarial Procedures "authorizing North Fork . . . to operate a casino on off-reservation land that is still under state jurisdiction?";[8] and (2) "[d]oes

[8] Plaintiffs also dispute whether North Fork exercised governmental power over the Madera Site such that it is

it violate the Tenth Amendment if the Federal Government unilaterally diminishes a state's territorial jurisdiction and shifts it to an Indian tribe?" Doc. 36-1 at 10. Plaintiffs present a third argument: (3) the Secretarial Procedures "are not consistent with state law" because no compact is in effect and they therefore violate IGRA. Doc. 36-1 at 47.

The Court will resolve the first issue: No, because the land was taken into trust by the United States for North Fork, North Fork had jurisdiction over that land for purposes of IGRA and therefore IGRA was not violated by Secretary prescribing Secretarial Procedures.

Next, the Court will not resolve the second issue because the agency action that purportedly violates the Tenth Amendment—the fee-to-trust determination made pursuant to the IRA—is not challenged in this action therefore the question is not properly before the Court. Insofar as Plaintiffs seek to vindicate the State of California's partial divestment of jurisdiction by operation of the IRA, it is well settled in this Circuit that they lack standing to do so. *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 972 (9th Cir. 2009) (citing *Tenn. Elec. Power Co. v. Tenn Valley Auth*, 306 U.S. 118, 144 (1939); *Stop The Casino 101 Coalition v. Salazar*, 384 Fed.Appx. 546, 548 (9th Cir. 2010); *see City of Roseville v. Norton*, 219 F.Supp.2d 130, 146-148 (D.D.C. 2002).

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appropriately considered "Indian land." *See* 25 U.S.C. § 2703(4)(B); 25 C.F.R. § 502.12(b). The Court will address that argument as well.

Finally, the court will resolve the third issue: Secretarial Procedures are not inconsistent with California law merely because a compact does not exist.

A. IGRA—Jurisdiction Over Land and Governmental Power Requirements

In the final stage of the IGRA remedial process, the Secretary must prescribe gaming 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)(II); *see also* 25 U.S.C. 2710(d)(3)(A). Courts, including this Court, have read that section as imposing two requirements.[9] *See Massachusetts v. Wampanoag Tribe of Gay Head*, 853 F.3d 618, 624 (1st Cir. 2017) *cert. denied*, 138 S.Ct. 639.

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[9] The Court would note that the language of § 2710(d)(7)(B)(vii)(II) could be just as easily read to require *three* showings as two: (1) Indian lands, over which (2) the Indian tribe (3) exercises jurisdiction. Indeed, in the context of § 2710(d)(3)(A), courts have found those three prerequisites. *See Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, 2004 WL 1103021, *5 (E.D. Cal. Mar. 12, 2004) (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler*, 304 F.3d 616 (6th Cir. 2002) However, the Ninth Circuit made clear that challenges to a tribe's status as an Indian tribe is a collateral attack, not appropriately raised in the IGRA context. *See Big Lagoon Rancheria v. California*, 789 F.3d 947, 953-954 (9th Cir. 2015) (en banc) (Asserting that a tribe lacks "standing to invoke . . . IGRA,"—in that situation, whether or not the tribe is an Indian tribe, *see* § 2710(d)(3)(A)—"necessarily argues that the [Bureau of Indian Affairs] exceeded its authority when it took" land into trust for the tribe pursuant to the IRA. "The proper vehicle to make such a challenge is a petition to review [the IRA entrustment decision] pursuant to the APA.")

The first requirement is that an Indian tribe "have jurisdiction" over the gaming site. *Wampanoag Tribe*, 853 F.3d at 624; *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 566 (2nd Cir. 2016) *cert. denied*, 2017 WL 5660979 (Nov. 27, 2017) (quoting *Citizens Against Casino Gambling in Erie County v. Chaudhuri*, 802 F.3d 267, 279 (2nd Cir. 2015)); *Miami Tribe of Oklahoma v. United States*, 656 F.3d 1129, 1144 (10th Cir. 2011); *Club One Casino, Inc. v. United States Dept. of Interior*, 2017 WL 5877033, *4 (E.D. Cal. Nov. 29, 2017). In its last order, the Court expressly declined to set out the precise contours of what it means for an Indian tribe to "have jurisdiction" over a particular piece of land. *Club One*, 2017 WL 5877033 at *6.

The second requirement, arising from the definition of "Indian land," is that the tribe "exercise governmental power" over the land. 25 U.S.C. § 2703(4)(B); *see Wampanoag Tribe*, 853 F.3d at 624-626 (citing, *inter alia, State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994)); *Chaudhuri*, 802 F.3d at 286.

In short, an Indian tribe must exercise governmental power over land held in trust by the United States for the tribe for the land to be Indian land. 25 U.S.C. § 2703(4)(B). In order to conduct gaming on that Indian land (or demand that a state negotiate toward an enforceable compact), the Indian tribe conducting that gaming must be the tribe that has jurisdiction over that land.[10]

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[10] The Secretary challenges whether he must independently verify that those requirements are met prior to issuing secretarial

B. Having Jurisdiction Over Indian Land

Plaintiffs begin their argument by quoting the portion of this Court's November 29, 2017 order that framed the issue then before the Court: "Legally, the parties are in agreement that, at least in the ordinary case, acquisition of an ownership interest in land by the United States only impacts title to that land; it does not divest the State of jurisdiction over that land. [citation omitted] . . . The parties disagree regarding the jurisdictional impact of the Secretary taking the Madera Site into trust for North Fork through the authority delegated to the Secretary by the IRA." Doc. 36-1 at 10 (quoting Doc. 33 at 5). It is not until much later in Plaintiffs' argument that they recognize that the Court resolved that question in its November 29, 2017 order. *See* Doc. 36-1 at 44. In the interim, Plaintiffs' argument reiterates (albeit in more depth) the argument submitted in response to this Court's authorization for supplemental briefing in resolving Plaintiffs' motion to supplement the administrative record. *Compare* Doc. 32 *with* Doc. 36-1.

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procedures in light of the fact that those same requirements were necessary in order for North Fork to initiate its good faith negotiation litigation against the State to begin with. *Compare* 25 U.S.C. § 2710(d)(3)(A) *with* 25 U.S.C. § 2710(d)(7)(B)(vii)(II). This Court shares the Secretary's doubts regarding whether the Secretary is required by § 2710(d)(7)(B)(vii)(II) to verify that the same requirements for a tribe to institute a good faith negotiation action have been met. Although the Secretary's position offers the appeal of eliminating the risk of inconsistent findings that IGRA does not appear to anticipate, because the Court finds that both the "having jurisdiction" and "exercising governmental power" requirements are met, the court does not resolve that question.

In both iterations of Plaintiffs' argument, the reasoning is as follows: IGRA requires "territorial jurisdiction" over any land where Class III gaming is to be conducted; California has territorial jurisdiction over all land within its borders, including the Madera Site; transfer of title to real property does not impact territorial jurisdiction over that real property; in order for an Indian tribe to acquire jurisdiction over land sufficient for purposes of IGRA, the State in which the land lies must expressly cede jurisdiction to the tribe or the United States; no express cession of jurisdiction by California has taken place with respect to the Madera Site and the United States has not expressly accepted jurisdiction of the Madera Site; therefore North Fork does not have jurisdiction over the Madera Site and the Secretary erred in issuing Secretarial Procedures.

To Plaintiffs' motion to supplement and motion for summary judgment, the Secretary has responded that North Fork's jurisdiction over the Madera Site, for purposes of IGRA, arose through the act of placing the land in trust for the tribe. The Court agreed with the Secretary's position in denying Plaintiffs' motion to supplement the administrative record and the Court remains in agreement now.

i. The fee-to-trust determination shifts some jurisdiction from a State to an Indian tribe.

As a starting point, Congress has the power to regulate commerce with the Indian tribes. U.S. Const. art. I, § 8, cl. 3 (conferring upon Congress the power

"[t]o regulate commerce . . . with the Indian tribes.") The Supreme Court has described Congressional authority under the Indian Commerce Clause as "plenary." *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (noting that Congress has plenary power "to deal with the special problems of Indians," including the power to legislate); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). The IRA was enacted, at least in part, pursuant to that authority. *See Upstate Citizens*, 841 F.3d at 568; *South Dakota v. United States Department of the Interior*, 787 F.Supp.2d 981, 992 (D. S.D. 2011).

The United States Supreme Court has been clear that § 5 of the IRA "provides the proper avenue for" an Indian tribe "to reestablish sovereign authority over territory. . . ." *City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 221 (2005) (citing 25 U.S.C. § 465, now codified at 25 U.S.C. § 5108); *see Carcieri v. Kempthore*, 497 F.3d 15, 36 (1st Cir. 2007) *rev'd on other grounds* 555 U.S. 379 (Regardless of how an Indian tribe lost "aboriginal title or ancient sovereignty" over land—even if it is fully extinguished—§ 5 is appropriate to "establish[] tribal sovereignty over land."); *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 531 n.6 (1998) (suggesting that action by Congress or an executive agency acting under delegated authority can create or recognize Indian rights with respect to property). However, the Supreme Court did not detail the precise ways that taking land into trust for an Indian tribe impact the

share of jurisdiction between an Indian tribe, a State, and the Federal Government. *See Sherrill*, 544 U.S. at 220-221 (The implementing regulations for § 5 of the IRA are "sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory.") The Ninth Circuit has indicated that § 5 of the IRA is designed to allow the Secretary hold such lands "in the legal manner and condition in which trust lands were held under the . . . court decisions [existing before enactment of the IRA, i.e.,] free of state regulation."[11] *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 666 (9th Cir. 1975); *see Chaudhuri*, 802 F.3d at 285-286; *Cf. Guidville Band of Pomo Indians v. NGV Gaming, Ltd.*, 531 F.3d 767, 777 (9th Cir. 2008) (The DOI gives state governments an opportunity to object to the fee-to-trust determination by demonstrating "why taking the land into trust would 'impact [ ] their jurisdiction. . . .") (citing, *inter alia*, 25 C.F.R. § 151.11(d)). Under Ninth Circuit authority, this Court should treat land placed in trust for a tribe pursuant to § 5 of the IRA in the same manner as land held in trust for tribes prior to enactment of the IRA in 1934. *Santa Rosa*, 532 F.2d at 666; *see also Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history.") "Rather than reading the omission of a provision exempting the lands [taken into trust pursuant to § 5 of

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[11] This Court does not read *Santa Rosa* for the proposition that Indian jurisdiction over land is entirely exclusive of state jurisdiction. *See* 18 U.S.C. § 1151.

the IRA] from state regulation as evidencing a congressional intent to allow state regulation, [the Ninth Circuit] read the omission as indicating that Congress simply took it for granted that the states were without such power, and that an express provision was unnecessary; i.e., that the exemption was implicit in the grant of trust lands under existing legal principals." *Santa Rosa*, 532 F.2d at 666 n. 17.

Other circuits share a similar understanding. The Second Circuit held in *Upstate Citizens*, 841 F.3d at 569, 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." *Accord Chaudhuri*, 802 F.3d at 284 (finding in dicta that lands taken into trust pursuant to § 5 of the IRA are subject to tribal jurisdiction). *See also*, *Upstate Citizens for Equality, Inc. v. United States*, ___ S.Ct. ___, 2017 WL 5660979, *1, 3 (Nov. 27, 2017) (Thomas, J., dissenting from denial of cert.) (The Supreme Court's reading of the IRA in *Sherrill* and the Second Circuit's reading of the IRA in *Upstate Citizens* permit the Secretary "to take any state land and strip the State of almost all sovereign power over it 'for the purpose of providing land for the Indians.'") The Court agrees with the Second Circuit that use of the fee-to-trust provision of § 5 of the IRA shifts at least some jurisdiction from the State to a tribe and the federal government.

The cases cited by Plaintiffs do not undermine that conclusion.

ii. The shift of jurisdiction to an Indian tribe resulting from a fee-to-trust determination is enough to satisfy the "having jurisdiction over" Indian lands requirement of § 2710(d)(1)(A)(i).

IGRA does not define what it means to have jurisdiction over Indian land. The answers that Courts have given to this question are varied. The Second Circuit has indicated that "'[j]urisdiction,' in this context, means 'tribal jurisdiction'—'a combination of tribal and federal jurisdiction over land,' to the exclusion (with some exceptions) of state jurisdiction." *Upstate Citizens*, 841 F.3d at 566 (quoting *Chaudhuri*, 802 F.3d at 279-280)); *see Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, 2014 WL 1103021, *7 (E.D. Cal. 2004). The Second Circuit also explained that lands over which tribal jurisdiction exist "have historically been referred to as 'Indian country.'" *Chaudhuri*, 802 F.3d at 280; *see* 18 U.S.C. § 1151; *accord HRI, Inc. v. EPA*, 198 F.3d 1224, 1250 (10th Cir. 2000) (quoting *Mustang Prod. Co. v. Harrison*, 94 F.3d 1382, 1384 (10th Cir. 1996) ("In order to determine whether the Tribes have [tribal] jurisdiction [over a specific plot of land] we must . . . look to whether the land in question is Indian country.")[12]

"'[L]ands held in trust by the United States for the Tribes are Indian Country within the meaning of § 1151(a).'" *U.S. v. Sohappy*, 770 F.2d 816, 822 (9th Cir.

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[12] *See also Waterwheel Camp Recreational Area, Inc. v. LaRance*, 642 F.3d 802, 809 n.5 (indicating that Indian land can exist outside of a reservation and citing to a statute involving Indian country).

1985) (quoting *Hydro Resources, Inc v. EPA*, 608 F.3d 1131); *accord State of Ariz. V. EPA*, 151 F.3d 1205, 1214 (9th Cir. 1998); *HRI, Inc.* 198 F.3d at 1254; *Citizens Against Casino Gambling in Erie County v. Hogen*, 2008 WL 2746566 at *34 (collecting cases). For purposes of determining whether land is Indian country, the Supreme Court does not differentiate between lands taken into trust prior to statehood of the State in which the lands lie and those lands taken into trust after. *See U.S. v. John*, 437 U.S. 634, 649 (1978) (explaining that all doubt was removed that land was subject to federal criminal jurisdiction when it was declared to be held in trust for a tribe); *U.S. v. McGowan*, 302 U.S. 535, 537-538 (1938) (finding that land taken in trust by the United States for an Indian tribe after Nevada's induction into the union was Indian country because it was validly set apart for use of the Indians).

The First Circuit appears to require a lesser showing that the Second Circuit to prove that a tribe has jurisdiction over land for purposes of IGRA—that a tribe possesses "that portion of jurisdiction they possess by nature of their sovereign existence as a people." *Wampanoag Tribe*, 853 F.3d at 624. The First Circuit went on to suggest that a tribe's possession of any jurisdiction (and a state's possession of anything short of exclusive jurisdiction) meets the threshold showing. *Id.* at 625 n.5; *accord Narragansett*, 19 F.3d at 701.

In this Court's estimation, a logical reading of the "having jurisdiction over" language is simply that it is a linkage requirement between the Indian tribe and the Indian land at issue. In other words, that language

is included to ensure that an Indian tribe in California, for instance, does not seek authorization to conduct Class III gaming on Indian land under the jurisdiction of some other tribe in New York. When a tribe possesses Indian lands, that tribe necessarily has jurisdiction over those lands. Such a reading is consistent with the language of § 2710(d)(3)(A):

> 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. § 2710(d)(3)(A). Congress uses linking language to explain that negotiation by a tribe must be with "the State in which [its Indian] lands are located," not some other State. In the same way, Congress explains that the tribe "having jurisdiction over the Indian lands upon which a class III activity . . . is to be conducted" shall seek to negotiate with a State. That language is not to suggest some additional jurisdictional requirement but to link the specific tribe to specific Indian lands.[13]

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[13] Other portions of IGRA suggest that any time Indian lands exist, *some* tribe has jurisdiction over those lands. *See* 25 U.S.C. § 2710(d)(1)(A)(i) (In order to conduct Class III gaming activities, those activities must be "authorized by an ordinance . . . that is

Regardless of which standard is correct, North Fork has jurisdiction over the Madera Site. Applying the Second Circuit's test from *Upstate Citizens*, the land acquired in trust by the United States for the benefit of North Fork is Indian country, set apart for the use of the tribe and under federal superintendence. It is therefore under North Fork's tribal jurisdiction. *Sohappy*, 770 F.2d at 822; *Oklahoma Tax Comm'n*, 498 U.S. at 511. Applying the First Circuit's test from *Wampanoag Tribe*, the Madera Site is under North Fork's tribal jurisdiction because the fee-to-trust process shifted at least some jurisdiction to the tribe. *Santa Rosa*, 532 F.2d at 666 n. 17; *Chaudhuri*, 802 F.3d at 285. Finally, North Fork easily meets the linkage requirement that this Court would impose; North Fork is the Indian tribe for whom the United States holds the Madera Site.

C. Exercising Governmental Power

The term "exercising governmental power" is "undefined by IGRA and 'the case law considering the phrase is sparse." *Commonwealth v. Wampanoag Tribe of Gay Head*, 144 F.Supp.3d 152, 166 (D. Mass. 2015) (quoting *Miami Tribe of Okla. v. United States*, 5 F.Supp.2d 1213, 1217 (D. Kan. 1998)). Indeed, many circuit courts simply conclude that land is Indian land when it is held in trust by the United States for the benefit of a tribe without asking if a tribe exercises

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adopted by the governing body of the Indian tribe having jurisdiction over such lands.")

governmental power over that land. *Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1032 n.3 (10th Cir. 2017) *cert. denied* 138 S.Ct. 571 ("There is no question that the Kansas land constitutes 'Indian land' because the land was taken into trust for the Quapaw Tribe in 2012."); *Alabama v. PCI Gaming Authority*, 801 F.3d 1278, 1290-1293 (11th Cir. 2015) (concluding that lands are Indian lands after only finding that they were taken into trust for the tribe by the Secretary of the Interior); *see Big Lagoon Rancheria*, 789 F.3d at 953.[14] *See also Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1006, 1010-11 (8th Cir.2010) (recognizing lands taken into trust by the BIA under § 5 of the IRA are Indian country, and "as a general rule Indian country falls under the primary civil, criminal, and regulatory jurisdiction of the federal government and the resident Tribe rather than the states") That understanding seems to match best with the Ninth Circuit and Supreme Court's most recent explanations of "Indian land" as defined by § 2703(4)(B). *Patchak v. Zinke*,

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[14] In an unpublished decision, the Ninth Circuit has suggested that *Big Lagoon Rancheria* stands for the proposition that a challenge to whether or not land is in fact Indian land can only be challenged by way of a challenge to the IRA fee-to-trust decision. *Jamul Action Committee v. Chaudhuri*, 651 Fed.Appx. 689, 690 (9th Cir. 2016) (citing *Big Lagoon Rancheria*, 789 F.3d at 953); *accord Jamul Action Committee v. Chaudhuri*, 200 F.Supp.3d 1042, 1051-1052 (E.D. Cal. 2016). That understanding comports with the Court's conclusion that taking land into trust for an Indian tribe renders the land Indian land for purposes of IGRA. If some showing additional to the fee-to-trust determination was required for land to be Indian land, a challenge to whether land is Indian land could appropriately take place outside of a challenge to the fee-to-trust determination.

___ U.S. ___, 138 S.Ct. 879, 903 n.1 (2018) ("Federal law allows Indian tribes to operate casinos on 'Indian lands,' 25 U.S.C. § 2710, which includes lands 'held in trust by the United States for the benefit of any Indian tribe,' " § 2703(4)(B)."); *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 554 n.2 (9th Cir. 2016) (Albeit in a slightly different context, the Ninth Circuit explained that "Section 2703(4) defines 'Indian lands' as 'all lands within the limits of any Indian reservation; and any lands title to which is . . . held in trust by the United States for the benefit of any Indian tribe.' ") Neither the Supreme Court nor the Ninth Circuit found the "exercise of governmental power" clause analytically significant enough to merit mention. On that basis, the Court holds that the Madera Site is Indian land because it is in trust for North Fork.

That said, the other circuit courts suggests a need for actual *use* of the jurisdictional authority over the land; some showing of "concrete manifestations of that authority." *Wampanoag Tribe*, 853 F.3d at 625 (quoting *State of Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994)). In *Wampanoag Tribe*, the First Circuit explained that the tribe need not have achieved "full-fledged self-governance, but merely movement in that direction . . . to evince that the Tribe exercises . . . enough governmental power to satisfy" that requirement. 853 F.3d at 625-626. Any doubt in resolving whether a tribe exercises sufficient governmental power is "to be resolved in favor of Indians." *Id.* at 826 (quoting, *inter alia, Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-587 (1977)).

The Second Circuit in *Wampanoag Tribe* and in *Narragansett* had no problem determining that the Tribes exercised governmental power. The Wampanoag Tribe "established a housing program," "entered into an intergovernmental agreement with the EPA," "operat[ed] a health care clinic," offered social services and public safety services, passed ordinances, and employed a judge. *Wampanoag Tribe*, 853 F.3d at 626. The Narragansett Tribe had "established a housing authority," had government-to-government relations with the EPA, and took "advantage of the Indian Self-Determination and Education Assistance Act." *Narragansett*, 19 F.3d at 703. *See also Chaudhuri*, 802 F.3d at 286 (noting in dicta that a tribe exercised governmental power over land where it policed, fenced, posted signs on, and enacted ordinances relating to that land).

Even assuming the First and Second Circuits are correct, there is sufficient evidence in the administrative record such that it was not arbitrary or capricious for the Secretary to conclude that North Fork exercised governmental power over the Madera Site.

In this case, the Secretary was procedurally in a different position than in *Wampanoag Tribe* and *Narragansett*. Here, a determination had already been made that the Madera Site is Indian land. In *North Fork v. California*, 2015 WL 11438206 at *8, where this Court resolved cross motions for judgment on the pleadings between North Fork and California, the Court made clear that "it [was] undisputed [between California and North Fork] that . . . the Madera [Site is] gaming-eligible Indian land[ ] within the meaning

of 25 U.S.C. § 2703(4) and 2719(b)(1)(A)." *Accord North Fork v. California*, 2016 WL 4208452 (E.D. Cal. Aug. 10, 2016). Indeed, that order was considered by the court-appointed mediator in selecting a proposed compact which, in turn, was considered by the Secretary in prescribing the gaming procedures at issue in this action. That decision is part of the administrative record upon which the Secretary was permitted to rely.

Next, even assuming the Secretary was required to delve beyond the Court's determination, the evidence available to the Secretary in the time before the Secretarial Procedures were issued indicated that North Fork had enacted an ordinance with respect the Madera Site. Miskinis Decl., Doc. 37-2 at 4-6.[15] If the Court remanded the action to the Secretary for consideration of whether North Fork exercised governmental power over the Madera Site, the Secretary could only conclude that North Fork exercised governmental power over that site by legislating with respect to it.

D. Consistency with California Law

At the final stage of the remedial process, the Secretary must prescribe gaming procedures "which are consistent with the proposed compact selected by the mediator . . . , the provisions of [IGRA], and the

[15] The Court takes judicial notice of North Fork's Tribal Ordinance, designated Resolution No. 15-58, enacted on October 16, 2015. *North County Community Alliance, Inc. v. Salazar*, 573 F.3d 738, 746 (9th Cir. 2009) (taking judicial notice of a tribal ordinance.)

relevant provisions of the laws of the State." 25 U.S.C. § 2710(d)(7)(B)(vii)(II). Plaintiffs argue in their motion (and abandon the argument in their reply) that the Secretarial Procedures are inconsistent with California law because no Compact exists governing Class III gaming. Plaintiffs are mistaken.

As a preliminary matter, Secretarial Procedures cannot be issued if a valid compact governing Class III gaming on an Indian tribe's Indian lands exists. *See* 25 U.S.C. §§ 2710(d)(3)(A), 2710(d)(7)(B)(vi-vii). To be clear, it is Plaintiffs' position that Secretarial Procedures, if issued to permit an Indian tribe in California to conduct Class III gaming, will always violate IGRA. For that proposition, Plaintiffs direct the Court to Article IV, sections 19(e) and 19(f) of the California Constitution which, collectively, preclude Nevada style gaming except by Indian tribes conducting such gaming pursuant to tribal-state compacts. Cal. Const., art. IV, § 19(e-f). Plaintiffs reason that Secretarial Procedures are not a compact and therefore gaming at the Madera Site under such procedures is inconsistent with the California Constitution. Plaintiffs cite no case authority for this proposition and it is undercut by the California Supreme Court's decision in *Hotel Employees and Restaurant Employees Intern. Union v. Davis*, 21 Cal.4th 585 (1999). In *Hotel Employees* the California Supreme Court addressed, *inter alia*, California's statutory wavier of immunity enacted in response to *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).[16]

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[16] In *Seminole Tribe*, the Supreme Court held that that in authorizing Indian tribes to sue the state pursuant to IGRA,

Hotel Employees, 21 Cal.4th at 1010-1011. That waiver of immunity reads, in relevant part, as follows:

> [T]he State of California . . . submits to the jurisdiction of the courts of the United States in any action brought against the state by any federally recognized California Indian tribe asserting any cause of action arising from the state's refusal to enter into negotiations with that tribe for the purpose of entering into a different Tribal-State compact pursuant to IGRA or to conduct those negotiations in good faith, the state's refusal to enter into negotiations concerning the amendment of a Tribal-State compact to which the state is a party, or to negotiate in good faith concerning that amendment, or the state's violation of the terms of any Tribal-State compact to which the state is or may become a party.

Cal. Gov't Code § 98005. The *Hotel Employees* court explained that the waiver of immunity was designed to give effect to IGRA's remedial framework, 25 U.S.C. § 2710(d)(7). *Hotel Employees*, 21 Cal.4th at 615 ("The [above-quoted portion] of section 98005, in providing the state's consent to such a suit, is obviously intended to restore to California tribes the remedy provided in IGRA.") The issuance of Secretarial Procedures is the part of the remedial process that gives it teeth. If gaming pursuant to Secretarial Procedures was not

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Congress impermissibly sought to abrogate Eleventh Amendment immunity. 517 U.S. at 47. In order to avoid offending the Eleventh Amendment, a State must explicitly consent to suit. *Id.*

contemplated, the purpose of the remedial process—restoring leverage to tribes to sue recalcitrant states and thereby force them into a compact—would be wholly eroded. *U.S. v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299-1300 (9th Cir. 1998). The State of California did not waive jurisdiction so a tribe could bring a claim without a remedy.

Moreover, there is good reason to treat Secretarial Procedures issued pursuant to § 2710(d)(7)(A)(vii) as equivalent to a Tribal-State compact for purposes of IGRA and therefore also for purposes of the relevant portions of California law designed to mirror IGRA. Section 2710(d)(1) makes clear that "[c]lass III gaming activities shall be lawful on Indian lands only if such activities are," among other things, "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect." If Secretarial Procedures prescribed pursuant to section 2710(d)(7)(A)(vii) are not treated as equivalent to a Tribal-State compact for purposes of IGRA, then the remedial process would be meaningless. Secretarial Procedures could *never* be issued because Secretarial Procedures—necessarily issued in the absence of a compact that is in effect—would *always* be "[in]consistent with . . . the provisions of [IGRA]. . . ." 25 U.S.C. § 2710(d)(7)(B)(vii)(I). The Court will not read IGRA to have created (or the State of California to have waived immunity as to) an empty remedial process. Such an outcome must be rejected.

E. Conclusion

The Secretary's issuance of Secretarial Procedures was not arbitrary, capricious, or otherwise not in accordance with law for any of the reasons identified by Plaintiffs. Again, the Court does not address the alleged unconstitutionality of the jurisdictional shift caused by the fee-to-trust determination as that determination is not properly before this Court, as described above.

III. Order

Based on the foregoing, IT IS HEREBY ORDERED that the Plaintiffs' motion for summary judgment is DENIED and the Federal Defendants' motion for summary judgment is GRANTED.

The Clerk of the Court is respectfully directed to enter judgment and close this case.

IT IS SO ORDERED.

Dated: July 13, 2018 /s/ Anthony W. Ishii
SENIOR DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CLUB ONE CASINO, INC., ET AL.,	**JUDGMENT IN A CIVIL CASE**
v.	CASE NO:
SALLY M. JEWELL, ET AL.,	**1:16–CV–01908–AWI–EPG**

XX –– Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER FILED ON 7/13/18

Marianne Matherly
Clerk of Court

ENTERED: **July 13, 2018**

by: /s/ S. Martin–Gill
Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLUB ONE CASINO, INC., DBA Club One Casino; GLCR, INC., DBA The Deuce Lounge and Casino, Plaintiffs-Appellants, v. DAVID BERNHARDT; MIKE BLACK, Acting Assistant Secretary of the Interior - Indian Affairs; U.S. DEPARTMENT OF THE INTERIOR, Defendants-Appellees.	No. 18-16696 D.C. No. 1:16-cv-01908 -AWI-EPG Eastern District of California, Fresno ORDER (Filed Aug. 3, 2020)

Before: COLE,* GOULD, and MURGUIA, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Gould and Murguia voted to deny the petition for rehearing en banc, and Judge Cole recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing and rehearing en banc and no judge has

* The Honorable R. Guy Cole, Jr., United States Chief Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are DENIED (Doc. 50).

[LOGO] **United States Department of the Interior**
OFFICE OF THE SECRETARY
Washington, DC 20240

JUL 29 2016

The Honorable Maryann McGovran
Chairwoman, North Fork Rancheria
of Mono Indians of California
P.O. Box 929
North Fork, California 93643

Dear Chairwoman McGovran:

On April 28, 2016, the Department of the Interior (Department) received a letter, order, and proposed compact from the court-appointed mediator (Mediator) in *North Fork Rancheria of Mono Indians of California v. California* 1:15-cv-00419-AWJ-SAB (E.D. Cal. 2015) that initiated the process for the Department's issuance of Class III gaming procedures consistent with 25 U.S.C. § 2710(d)(7)(B)(vii). The Mediator took this action because the State of California (State) failed to consent to a mediator-selected compact under the process set forth in the Indian. Gaming Regulatory Act (IGRA).[1] After more than 90 days of review by the Department of the Mediator's submission, I am issuing the enclosed procedures under which the North Fork

[1] 25 U.S.C. §2710(d)(7)(B). This is not the first time that a court-appointed mediator has taken such action because the State failed to negotiate a compact in good faith. In 2013, the Department issued procedures governing Class III gaming by the Rincon Band of Luiseno Indians.

Rancheria of Mono Indians (Tribe) may conduct Class III gaming consistent with IGRA.

It is important to note that the issuance of these procedures is the result of the State's actions after a State referendum overturned the legislative ratification of the Tribe's 2012 Compact. First, the State failed to negotiate a Class III compact in good faith. A Federal court expressly found that the State violated IGRA requirement for states to negotiate a compact in good faith. Second, the State further refused to consent to a compact selected by the Mediator. The State's consistent failure to comply with the law triggered the Secretary of the Interior's (Secretary) duty under IGRA to prescribe Class III gaming procedures.[3]

The Secretary's duty to issue procedures is one of IGRA's fundamental safeguards of tribal sovereignty. In IGRA, Congress expressly reaffirmed that tribes maintain their pre-existing sovereign reserved right to conduct gaming. This reserved tribal right, confirmed by the Supreme Court in *Cabazon*,[4] endures throughout IGRA's framework. While Congress provided states a limited role to negotiate a tribal-state compact governing Class III gaming activities, Congress did not eviscerate tribal sovereignty. Recognizing the underlying tribal reserved right, Congress expressly provided that, when a state does not negotiate a tribal-state compact in good faith and does not agree with a

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[3] 25 U.S.C. § 2710(d)(7)(B)(vii).

[4] *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Federal court-appointed mediator's compact, tribes retain the sovereign right to conduct Class III gaming pursuant to Federal procedures issued by the Secretary.[5] The Department's action here upholds that tribal sovereign right.

Under IGRA, states are required to negotiate gaming compacts "in good faith" with tribes and address issues that are specific to each individual tribe. Tribes may enforce this good faith obligation by filing suit in Federal court[6].

In 2012, the Governor and the Tribe executed a compact (2012 Compact) governing Class III gaming. On May 2, 2013, the California Legislature passed AB 277, which ratified the 2012 Compact.[7] In compliance with the requirements of 25 C.F.R. Part 293, the California Secretary of State submitted the 2012 Compact to the Secretary for review and approval. On October 22, 2013, the Assistant Secretary – Indian Affairs published notice in the *Federal Register* that the 2012 Compact between the State and the Tribe was approved and in effect to the extent that it was consistent with IGRA.[8]

In a November 4, 2014 referendum, California voters opted to overturn AB277, the legislative ratification of the 2012 Compact. Following the 2014 referendum, the

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[5] 25 U.S.C. § 2710 (d); *see also* 25 C.F.R. Part 291.

[6] 25 U.S.C. § 2710(d)(7)(A).

[7] Cal. Govt. Code § 12012.59.

[8] Notice of Tribal-State Class III Gaming Compact taking effect, 78 Fed. Reg. 62649 (Oct. 22, 2013).

State refused to recognize the validity of the 2012 Compact or to enter into further negotiations with the Tribe for a new Tribal-State compact.

The Tribe filed suit in Federal district court challenging the State's refusal to negotiate. The State raised several defenses, including sovereign immunity. On November 13, 2015, the Federal District Court for the Eastern District of California held that the State failed to negotiate in good faith with the Tribe after the 2014 referendum. The Court ordered the State and Tribe to reach an agreement within 60 days.[9]

The parties failed to reach an agreement within 60 days, and the Court appointed a mediator, as required by IGRA. The Tribe and State subsequently each submitted a respective "last best offer" proposed compact to the Mediator. The Mediator determined that the Tribe's proposed compact best comported with the terms of IGRA, any other applicable Federal law, and the findings and order of the Court.[10] The Mediator notified the Tribe and State of her selection and gave the State 60 days to consent to the compact. The State failed to consent to the Mediator's selected compact and, as noted above, the Mediator submitted her selection to us on April 28, 2016.

We note the Mediator's selected compact contemplated that, in addition to the North Fork Tribal Gaming Commission's role as a regulator of the Tribe's gaming

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[9] 25 U.S.C. § 2710(d)(7)(B)(iii).

[10] 25 U.S.C. § 2710 (d)(7)(B)(iv).

activities, the State would also have regulatory responsibilities largely consistent with the State's regulatory role in Class III gaming under numerous existing compacts with tribes in the State. Since the State did not consent to the selected compact within the 60 day period set forth in IGRA, the State may not be willing to fulfill such regulatory responsibilities. Accordingly, Section 8.2 provides a 60 day "opt-in" period for the State to provide written notice that it agrees to perform the State Gaming Agency's regulatory responsibilities set forth in the procedures. If the State does not opt-in, the National Indian Gaming Commission has agreed to perform such responsibilities pursuant to a Memorandum of Understanding with the Tribe.

The IGRA requires the Secretary to prescribe procedures after receiving notice that a state has not consented to a mediator's selected compact. After government-to-government consultations with the Tribe, the procedures are to be consistent with a mediator's selected compact, IGRA, and the relevant provisions of state law.[11] We find that the procedures meet those requirements. We note, however, that the procedures we issue today do not draw bright lines for future compacts. Through this process, we have purposely refrained from changing regulatory provisions in deference to the Mediator's submission to the Department and the Tribe's specific request that we change that submission as little as possible. In many respects, we understand that the Mediator's submission to the

[11] 25 U.S.C. § 2710 (d)(7)(B)(vii).

Department reflects compromises the Tribe agreed to make rather than compromises that the Tribe was required to make under IGRA.

Finally, we note that this action to issue procedures is separate from the Departmental decision made years ago requesting the Governor's concurrence to allow gaming on the subject parcel as well as the subsequent decision made in 2012 to accept that parcel into trust.

By this letter we hereby notify the Tribe and the State that the attached Secretarial Procedures for the conduct of Class III gaming on the Tribe's Indian lands are prescribed and in effect.

Sincerely,

/s/ Lawrence S. Roberts
Lawrence S. Roberts
Acting Assistant Secretary –
Indian Affairs

cc: Governor of California
National Indian Gaming Commission

Enclosure

SECRETARIAL PROCEDURES
FOR THE
NORTH FORK RANCHERIA
OF
MONO INDIANS

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[1] CLASS III GAMING PROCEDURES FOR THE NORTH FORK RANCHERIA OF MONO INDIANS

PREAMBLE

In 1988, Congress enacted the Indian Gaming Regulatory Act of 1988 (P. L. 100-497, codified at 25 U.S.C. Sec. 2701-2721,) (hereafter "IGRA") as the federal statute governing Indian gaming in the United

States. The purposes of IGRA are to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments; to provide a statutory basis for regulation of Indian gaming adequate to shield it from organized crime and other corrupting influences; to ensure that the Indian tribe is the primary beneficiary of the gaming operation; to ensure that gaming is conducted fairly and honestly by both the operator and players; and to declare that the establishment of an independent federal regulatory authority for gaming on Indian lands, federal standards for gaming on Indian lands, and a National Indian Gaming Commission are necessary to meet congressional concerns.

The system of regulation of Indian gaming fashioned by Congress in IGRA rests on an allocation of regulatory jurisdiction among the three sovereigns involved: the federal government, the state in which a tribe has land, and the tribe itself IGRA makes Class III gaming activities lawful on the lands of federally-recognized Indian tribes only if such activities are: (1) authorized by a tribal ordinance, (2) located in a state that permits such gaming for any purpose by any person, organization or entity, and (3) conducted in conformity with a gaming compact entered into between the Indian tribe and the state and approved by the Secretary of the Interior or, alternatively, in conformity with Class III gaming procedures issued by the Secretary pursuant to the remedial provisions of IGRA, 25 U.S.C. Sec. 2710 (d)(7).

The Secretary, as requested by the mediator appointed by the United States District Court for the Eastern District of California in *North Fork Rancheria of Mono Indians v. California*, Case No. 1:15-cv-00419-AWI-SAB, and as mandated by IGRA, 25 U.S.C. § 2710 (d)(7)(B)(vii), and in consultation with the North Fork Rancheria of Mono Indians of California ("Tribe"), a federally recognized Indian tribe, hereby promulgates these Class III gaming Secretarial Procedures ("Secretarial Procedures").

[2] **SECTION 1.0. PURPOSES AND OBJECTIVES.**

The terms of these Secretarial Procedures are designed and intended to:

(a) Enhance and implement a means of regulating Class III Gaming to ensure its fair and honest operation in a way that protects the interests of the Tribe, the State, its citizens, and local communities in accordance with IGRA, and through that regulated Class III Gaming, enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and its governmental services and programs.

(b) Promote ethical practices in conjunction with Class III Gaming, through the licensing and control of persons and entities employed in, or providing goods and services to, the Gaming Operation, protect against the presence or participation of persons whose criminal

backgrounds, reputations, character, or associations make them unsuitable for participation in gaming, thereby maintaining a high level of integrity in tribal government gaming, and protect the patrons and employees of the Gaming Operation and the local communities.

(c) Achieve the objectives set forth in the preamble.

SECTION 2.0. DEFINITIONS.

Sec. 2.1. "Applicable Codes" means the California Building Code and the California Public Safety Code applicable to the County, as set forth in titles 19 and 24 of the California Code of Regulations, as those regulations may be amended during the term of these Secretarial Procedures, including, but not limited to, codes for building, electrical, energy, mechanical, plumbing, fire and safety. Nothing in this Section 2.1 shall be interpreted to grant the State of California (State) or any of its political subdivisions, their agents, employees, or assigns, any authority to enforce the California Code of Regulations on the Indian lands of the Tribe. Additionally, nothing in this section shall be interpreted as waiver of the Tribe's sovereign immunity as to the State or any other person, organization, or entity, for purposes of any claims whatsoever against the Tribe.

[3] **Sec. 2.2.** "Applicant" means an individual or entity that applies for a tribal gaming license or for a State Gaming Agency determination of suitability.

Sec. 2.3. "Association" means an association of California tribal and state gaming regulators, the membership of which comprises up to two (2) representatives from each tribal gaming agency of those tribes with whom the State has a gaming compact under IGRA, and up to two (2) delegates each from the state Department of Justice, Bureau of Gambling Control and the California Gambling Control Commission.

Sec. 2.4. "Class III Gaming" means the forms of class III gaming defined as such in 25 U.S.C. § 2703(8) and by regulations of the National Indian Gaming Commission.

Sec. 2.5. "Commission" means the California Gambling Control Commission, or any successor agency of the State.

Sec. 2.6. "County" means the County of Madera, California, a political subdivision of the State.

Sec. 2.7. "County MOU" means the Memorandum of Understanding entered into between the Tribe and the County on August 16, 2004.

Sec. 2.8. "Financial Source" means any person or entity who, directly or indirectly, extends financing to the Gaming Facility or Gaming Operation.

Sec. 2.9. "Gaming Activity" or "Gaming Activities" means the Class III Gaming activities authorized under these procedures.

Sec. 2.10. "Gaming Device" means any slot machine within the meaning of article IV, section 19,

subdivision (f) of the California Constitution. For purposes of calculating the number of Gaming Devices, each player station or terminal on which a game is played constitutes a separate Gaming Device, irrespective of whether it is part of an interconnected system to such terminals or stations. "Gaming Device" includes, but is not limited to, video poker, but does not include electronic, computer, or other technological aids that qualify as class II gaming (as defined under IGRA).

[4] **Sec. 2.11.** "Gaming Employee" means any natural person who (a) conducts, operates, maintains, repairs, accounts for, or assists in any Gaming Activities, or is in any way responsible for supervising such Gaming Activities or persons who conduct, operate, maintain, repair, account for, assist, or supervise any such Gaming Activities, (b) is in a category under federal or tribal gaming law requiring licensing, (c) is an employee of the Tribal Gaming Agency with access to confidential information, or (d) is a person whose employment duties require or authorize access to areas of the Gaming Facility in which any activities related to Gaming Activities are conducted but that are not open to the public.

Sec. 2.12. "Gaming Facility" or "Facility" means any building in which Gaming Activities or any Gaming Operations occur, or in which the equipment, Gaming Devices, business records, receipts, or funds of the Gaming Operation are maintained (excluding offsite facilities primarily dedicated to storage of those records and financial institutions),.Nothing herein shall

be construed in a manner that (a) does not directly relate to the operation of Gaming Activities or (b) prevents the conduct of class II gaming (as defined under IGRA) therein.

Sec. 2.13. "Gaming Operation" means the business enterprise that offers and operates Gaming Activities, whether exclusively or otherwise.

Sec. 2.14. "Gaming Ordinance" means a tribal ordinance or resolution duly authorizing the conduct of Gaming Activities on the Tribe's Indian lands in California and approved under IGRA.

Sec. 2.15. "Gaming Resources" means any goods or services provided or used in connection with Gaming Activities, whether exclusively or otherwise, including, but not limited to, equipment, furniture, Gaming Devices and ancillary equipment, implements of Gaming Activities such as playing cards, furniture designed primarily for Gaming Activities, maintenance or security equipment and services, and Class III Gaming consulting services. "Gaming Resources" does not include professional accounting and legal services.

Sec. 2.16. "Gaming Resource Supplier" means any person or entity who, directly or indirectly, does, or is deemed likely to, manufacture, distribute, supply, vend, lease, purvey, or otherwise provide, to the Gaming Operation or Gaming Facility at least twenty-five thousand dollars ($25,000) in Gaming Resources in any twelve (12)-month period, or who, directly or indirectly, receives, or is deemed likely to receive, in

connection with the Gaming Operation or Gaming Facility, at least twenty-five thousand dollars ($25,000) in any consecutive twelve (12)-month [5] period, provided that the Tribal Gaming Agency may exclude a purveyor of equipment or furniture that is not specifically designed for, and is distributed generally for use other than in connection with, Gaming Activities, if, but for the purveyance, the purveyor is not otherwise a Gaming Resource Supplier as described herein, the compensation received by the purveyor is not grossly disproportionate to the value of the goods or services provided, and the purveyor is not otherwise a person who exercises a significant influence over the Gaming Operation.

Sec. 2.17. "Gross Gaming Revenue" means the win from Gaming Activities, which is the difference between gaming wins and losses before deducting costs and expenses or deducting incentives or adjusting for changes in progressive jackpot liability accruals. Generally, the difference between patron wagers and the payouts made on winning wagers.

Sec. 2.18. "IGRA" means the Indian Gaming Regulatory Act of 1988 (P. L. 100-497, codified at 25 U.S.C. Sec. 2701-2721), and any amendments thereto, as interpreted by all regulations promulgated thereunder.

Sec. 2.19. "Interested Persons" means (a) all local, state, and federal agencies, which, if a Project were not taking place on Indian lands, would have responsibility for approving the Project or would exercise authority over the natural resources that may be affected by

the Project, (b) any incorporated city in Madera County, and (c) persons, groups, or agencies that request in writing a notice of preparation of a draft tribal environmental impact report described in section 11.0, or have commented on the Project in writing to the Tribe or the County.

Sec. 2.20. "Madera Parcel" means the approximately three hundred five (305) acres of Indian lands held in trust by the United States government for the Tribe in Madera County, California, as legally described in the Federal Register notice (77 Fed. Reg. 71611-12 (Dec. 3, 2012)) and represented on the map at Appendix A hereto.

Sec. 2.21. "Management Contractor" means any Gaming Resource Supplier with whom the Tribe has contracted for the management of any Gaming Activity or Gaming Facility, including, but not limited to, any person who would be regarded as a management contractor under IGRA.

Sec. 2.22. "NIGC" means the National Indian Gaming Commission.

[6] **Sec. 2.23.** "Preferred Alternative" means the construction of the Tribe's initial Gaming Facility, whether constructed singularly or in phases, identified as Alternative A in the final environmental impact statement prepared by the Bureau of Indian Affairs of the United States Department of the Interior pursuant to the National Environmental Policy Act of 1969 for the acquisition of 305.49 acres of land located in Madera County, California, in trust for the Tribe for a

casino and hotel project, noticed on August 6, 2010 (75 Fed. Reg. 47621-22), together with Attachment II to the Record of Decision approving the proposed action on November 26, 2012, and noticed on December 3, 2012 (77 Fed. Reg. 71611-12).

Sec. 2.24. "Procedures" means these Secretarial Class III Gaming Procedures.

Sec. 2.25. "Project" means any activity on the reservation directly related to the operation of Gaming Activities or the Gaming Operation that may cause a Significant Effect on the Off-Reservation Environment, including (a) the construction of a new Gaming Facility, or (b) the renovation, expansion or modification of an existing Gaming Facility. For purposes of this definition, section 11.0, and Appendix B, "reservation" refers to the Madera Parcel.

Sec. 2.26. "Significant Effect(s) on the Off-Reservation Environment" is the same as "Significant Effect(s) on the Environment" and occur(s) if any of the following conditions exist:

(a) A proposed Project has the potential to degrade the quality of the off-reservation environment, curtail the range of the environment, or achieve short-term, to the disadvantage of long-term, environmental goals.

(b) The possible effects of a Project on the off-reservation environment are individually limited but cumulatively considerable. As used herein, "cumulatively considerable" means that the incremental effects of an individual

Project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

(c) The off-reservation environmental effects of a Project will cause substantial adverse effects on human beings, either directly or indirectly.

[7] For purposes of this definition, "reservation" refers to the Madera Parcel.

Sec. 2.27. "State" means the State of California or an authorized official or agency thereof designated by these Secretarial Procedures or by the Governor.

Sec. 2.28. "State Gaming Agency" means the entities authorized to investigate, approve, regulate and license gaming pursuant to the Gambling Control Act (California Business and Professions Code, division 8, chapter 5 (section 19800 et seq.), or any successor statutory scheme, and any entity or entities in which that authority may hereafter be vested.

Sec. 2.29. "State Designated Agency" means the entity or entities designated or to be designated by the Governor to exercise rights and fulfill responsibilities established by these Secretarial Procedures, but only if the State agrees to do so under the provisions of Section 8.2, below.

Sec. 2.30. "Tribe" means the North Fork Rancheria of Mono Indians, a federally recognized Indian tribe listed in the Federal Register as the Northfork

Rancheria of Mono Indians of California, or an authorized official or agency thereof.

Sec. 2.31. "Tribal Chair" or "Tribal Chairperson" means the person duly elected or selected under the Tribe's constitution or governing documents to perform the duties specified therein, including serving as the Tribe's official representative.

Sec. 2.32. "Tribal Gaming Agency" means the person, agency, board, committee, commission, or council designated under tribal law, including, but not limited to, an intertribal gaming regulatory agency approved to fulfill those functions by the NIGC, primarily responsible for carrying out the Tribe's regulatory responsibilities under IGRA and the Tribe's Gaming Ordinance. No person employed in, or in connection with, the management, supervision, or conduct of any Gaming Activity may be a member or employee of the Tribal Gaming Agency.

SECTION 3.0. SCOPE OF CLASS III GAMING AUTHORIZED.

Sec. 3.1. Authorized Class III Gaming.

[8] (a) The Tribe is hereby authorized and permitted to operate only the following Gaming Activities under the terms and conditions set forth in these Secretarial Procedures:

(1) Gaming Devices.

(2) Any banking or percentage card games.

(3) Any devices or games that are authorized under state law to the California State Lottery, provided that the Tribe will not offer such games through use of the Internet unless others in the state not affiliated with or licensed by the California State Lottery are permitted to do so under state and federal law.

(b) Nothing herein shall be construed to preclude the Tribe from offering class II gaming or preclude the negotiation of a separate compact governing the conduct of off-track wagering at the Tribe's Gaming Facility.

(c) Nothing herein shall be construed to authorize or permit the operation of any Class III Gaming that the State lacks the power to authorize or permit under article IV, section 19, subdivision (f), of the California State Constitution.

(d) The Tribe shall not engage in Class III Gaming that is not expressly authorized in these Secretarial Procedures.

SECTION 4.0. AUTHORIZED LOCATION OF GAMING FACILITY, NUMBER OF GAMING DEVICES, COST REIMBURSEMENT, AND MITIGATION.

Sec. 4.1. Authorized Number of Gaming Devices.

(a) Pursuant to the conditions set forth in section 3.1 and sections 4.2 through and including section 5.2, the Tribe is entitled to operate up to a total of two thousand (2,000) Gaming

Devices during the first two (2) years in which Gaming Activities occur, and thereafter the Tribe is entitled to operate up to a total of two thousand five hundred (2,500) Gaming Devices.

[9] (b) The Tribe may request that the Secretary consider increasing the authorized number of Gaming Devices that the Tribe is entitled to operate under these Secretarial Procedures, provided that such request is made any time after the first seven (7) years in which Gaming Activities occur. The Secretary is not obligated to accept a request by the Tribe to reopen negotiations under this subdivision (b) unless the State has authorized another federally recognized Indian tribe to operate in excess of two thousand five hundred (2,500) Gaming Devices at any location within a sixty (60)-mile radius of the Madera Parcel, in which case the Secretary shall consider but not be required to accept the Tribe's request under this subdivision (b) and the Secretary may address other issues to negotiate related to the proposed increase in the number of Gaming Devices.

Sec. 4.2. Authorized Gaming Facility.

The Tribe may establish and operate not more than two (2) Gaming Facilities and engage in Class III Gaming only on eligible Indian lands held in trust for the Tribe, located within the boundaries of the Madera Parcel, as those boundaries exist as of the execution date of these Secretarial Procedures, as legally

described in and represented on the map at Appendix A, and on which Class III Gaming may lawfully be conducted under IGRA.

Sec. 4.3. Special Distribution Fund.

(a) The Tribe shall pay to the State on a pro rata basis the State's 25 U.S.C. § 2710(d)(3)(C) costs incurred for purposes consistent with IGRA, including the performance of all its duties under these Secretarial Procedures and funding for the Office of Problem Gambling, as determined by the monies appropriated in the annual Budget Act each fiscal year to carry out those purposes ("Appropriation"). The Appropriation and the maximum number of Gaming Devices operated by all federally recognized tribes in California pursuant to tribal-state gaming compacts in operation during the previous State fiscal year shall be reported annually by the State Gaming Agency to the Tribe on December 15. The term "operated" or "operation" as used in these Secretarial Procedures in relation to Gaming Devices describes each and every Gaming Device available to patrons (including slot contestants) for play at any given time. For purposes of this section 4.3, "tribal-state gaming compacts" refers to tribal-state class III gaming compacts under IGRA and procedures prescribed by the Secretary pursuant to 25 U.S.C. § [10] 2710(d)(7)(B)(vii) of IGRA for which the State has assumed regulatory responsibilities for the conduct of Class III Gaining. The Tribe's pro rata share of the State's 25 U.S.C. § 2710(d)(3)(C) regulatory costs in any given year these Secretarial Procedures are in effect shall be calculated by the following equation:

The maximum number of Gaming Devices operated in the Tribe's Gaming Facility during the previous State fiscal year as determined by the State Gaming Agency, divided by the maximum number of Gaming Devices operated by all federally recognized tribes in California pursuant to tribal-state gaming compacts during the previous State fiscal year, multiplied by the Appropriation, equals the Tribe's pro rata share.

(1) Beginning the first full quarter after Class III Gaming commences under these Secretarial Procedures, the Tribe shall pay its pro rata share to the State Gaining Agency for deposit into the Indian Gaming Special Distribution Fund established by the Legislature (Special Distribution Fund). The payment shall be made in four (4) equal quarterly installments due on the thirtieth (30th) day following the end of each calendar quarter, (i.e., by April 30 for the first quarter, July 30 for the second quarter, October 30 for the third quarter, and January 30 for the fourth quarter); provided, however, that in the event these Secretarial Procedures becomes effective during a calendar quarter, payment shall be prorated for the number of days remaining in that initial quarter, in addition to any remaining full quarters in the first calendar year of operation to obtain a full year of full quarterly payments of the Tribe's pro rata share specified above. A payment year will run from January through December. If any portion of the Tribe's quarterly pro rata share payment is overdue, the Tribe shall pay to the State for purposes of

deposit into the Special Distribution Fund, the amount overdue plus interest accrued thereon at the rate of one percent (1%) per month or the maximum rate permitted by state law for delinquent payments owed to the State, whichever is less. All quarterly payments shall be accompanied by the Quarterly Contribution Report specified in section 4.5, subdivision (b).

(2) If the Tribe objects to the State's determination of the Tribe's pro rata share, or to the amount of the Appropriation as including matters not consistent with IGRA, the matter shall be [11] resolved in accordance with the dispute resolution provisions of section 13.0. Any State determination of the Tribe's pro rata share challenged by the Tribe shall govern and must be paid by the Tribe to the State when due.

(3) The foregoing payments have been negotiated between the State and the Tribe as a fair and reasonable contribution, based upon the State's costs of regulating and mitigating certain impacts of tribal Class III Gaming Activities, as well as the Tribe's market conditions, its circumstances, and the rights afforded and consideration provided by these Secretarial Procedures.

Sec. 4.3.1. Use of Special Distribution Funds.

Revenue placed in the Special Distribution Fund shall be available for appropriation by the Legislature for the following purposes:

(a) Grants, including any administrative costs, for programs designed to address and treat gambling addiction;

(b) Grants, including any administrative costs and environmental review costs, for the support of State and local government agencies impacted by tribal government gaming;

(c) Compensation for regulatory costs incurred by the State in connection with the implementation and administration of Class III Gaming compacts in California; and

(d) Any other purposes specified by the Legislature that are consistent with IGRA.

Sec. 4.4. Quarterly Payments and Quarterly Contribution Report.

(a) (1) The Tribe shall remit quarterly to the State Gaming Agency (i) the payments described in section 4.3, for deposit into the Special Distribution Fund and (ii) the payments described in section 5.2, for deposit into the Revenue Sharing Trust Fund or the Tribal Nation Grant Fund.

[12] (2) If the Gaming Activities authorized by these Secretarial Procedures commence during a calendar quarter, the first

payment shall be due on the thirtieth (30th) day following the end of the first full quarter of the Gaming Activities and shall cover the period from the commencement of the Gaming Activities to the end of the first full calendar quarter.

(3) All quarterly payments shall be accompanied by the certification specified in subdivision (b).

(b) At the time each quarterly payment is due, regardless of whether any monies are owed, the Tribe shall submit to the State Gaming Agency a certification (the "Quarterly Contribution Report") that specifies the following:

(1) calculation of the maximum number of Gaming Devices operated in the Gaming Facility for each day during the given quarter;

(2) the Gross Gaming Revenue calculation reflecting the quarterly Gross Gaming Revenue from the operation of all Gaming Devices in the Facility;

(3) the amount due pursuant to section 4.3;

(4) calculation of the amount due pursuant to section 5.2; and

(5) the total amount of the quarterly payment paid to the State.

The Quarterly Contribution Report shall be prepared or attested to by the chief financial officer of the Gaming Operation.

(c) (1) At any time after the fourth quarter, but in no event later than April 30 of the following calendar year, the Tribe shall provide to the State Gaming Agency an audited annual certification of its Gross Gaming Revenue calculation from the operation of Gaming Devices. The audit shall be conducted in accordance with generally accepted auditing standards, as applied to audits for the gaming industry, by an independent certified public accountant who is not employed by the Tribe, the Tribal [13] Gaming Agency, the Management Contractor, or the Gaming Operation, is only otherwise retained by any of these entities to conduct regulatory audits or independent audits of the Gaming Operation, and has no financial interest in any of these entities. The auditor used by the Tribe for this purpose shall be approved by the State Gaming Agency, or other State Designated Agency, but the State shall not unreasonably withhold its consent.

(2) If the audit shows that the Tribe made an overpayment from its Gross Gaming Revenue to the State during the year covered by the audit, the Tribe's next quarterly payment may be reduced by the amount of the overage. If the audit shows that the Tribe made an underpayment to the State during the year covered by the audit, the Tribe's next quarterly payment shall be increased by the amount of the underpayment.

(3) The State Gaming Agency shall be authorized to confer with the auditor at the conclusion of the audit process and to review all of the independent certified public accountant's final work papers and documentation relating to the audit. The Tribal Gaming Agency shall be notified of and provided the opportunity to participate in and attend any such conference or document review.

(d) The State Gaming Agency may audit the calculations in subdivision (b) and Gross Gaming Revenue calculations specified in the audit provided pursuant to subdivision (c). The State Gaming Agency shall have access to all records deemed necessary by the State Gaming Agency to verify the calculations in subdivision (b) and Gross Gaming Revenue calculations, including access to the Gaming Device accounting systems and server-based systems and software, and to the data contained therein on a read only basis. If the State Gaming Agency determines that the Gross Gaming Revenue is understated or the deductions overstated, it will promptly notify the Tribe and provide a copy of the audit. The Tribe within twenty (20) days will either accept the difference or provide reconciliation satisfactory to the State Gaming Agency. If the Tribe accepts the difference or does not provide a reconciliation satisfactory to the State Gaming Agency, the Tribe must immediately pay the amount of the resulting [14] deficiency, plus accrued interest thereon at the rate of one percent (1%) per month or the

maximum rate permitted by state law for delinquent payments owed to the State, whichever is less. If the Tribe does not accept the difference but does not provide a reconciliation satisfactory to the State Gaming Agency, the Tribe may commence dispute resolution under section 13.0. The parties expressly acknowledge that the Quarterly Contribution Reports provided for in subdivision (b) are subject to section 8.4, subdivision (h).

(e) Notwithstanding anything to the contrary in section 13.0, any failure of the Tribe to remit the payments referenced in subdivision (a), in a timely manner shall be deemed a material breach of these Secretarial Procedures.

(f) If any portion of the payments under subdivision (a) of this section is overdue after the State Gaming Agency has provided written notice to the Tribe of the overdue amount with an opportunity to cure of at least fifteen (15) business days, and if more than sixty (60) calendar days have passed from the due date, and the Tribe has not commenced dispute resolution under section 13.0, then the Tribe shall be deemed to be in material breach of these Secretarial Procedures.

Sec. 4.5. Exclusivity.

In recognition of the Tribe's agreement to make the payments specified in sections 4.3 and 5.2, the Tribe shall have the following rights:

(a) In the event the exclusive right of Indian tribes to operate Gaming Devices in California is abrogated by the enactment, amendment, or repeal of a State statute or constitutional provision, or the conclusive and dispositive judicial construction of a statute or the State Constitution by a California appellate court after the effective date of these Secretarial Procedures that Gaming Devices may lawfully be operated by another person, organization, or entity (other than an Indian tribe) within California, the Tribe shall have the right to exercise one of the following options:

(1) Terminate these Secretarial Procedures, in which case the Tribe will lose the right to operate Gaming Devices and other Class III Gaming authorized by these Secretarial Procedures; or

[15] (2) Continue under these Secretarial Procedures with an entitlement to a reduction of the rates specified in section 5.2 following the conclusion of negotiations, to provide for: (A) compensation to the State for the costs of regulation, as set forth in section 4.3; (B) reasonable payments to local governments impacted by tribal government gaming, the amount to be determined based upon any intergovernmental agreement entered into pursuant to section 11.7; (C) grants for programs designed to address and treat gambling addiction; and (D) such assessments as authorized at such time under

federal law. The negotiations shall commence within thirty (30) days after receipt of a written request by a party to enter into negotiations, unless both parties agree in writing to an extension of time. If the Tribe and the State fail to reach agreement on the amount of reduction of such payments within sixty (60) days following commencement of the negotiations specified in this section, the amount shall be determined by arbitration pursuant to section 13.2.

(b) Nothing in this section is intended to preclude the California State Lottery from offering any lottery games or devices that are currently or may hereafter be authorized by state law.

SECTION 5.0. REVENUE SHARING WITH NON-GAMING AND LIMITED-GAMING TRIBES.

Sec. 5.1. Definitions.

For purposes of this section 5.0, the following definitions apply:

(a) The "Revenue Sharing Trust Fund" is a fund created by the Legislature and administered by the State Gaming Agency that, as limited trustee, is not a trustee subject to the duties and liabilities contained in the California Probate Code, similar state or federal statutes, rules or regulations, or under state or federal common law or equitable principles, and has no duties, responsibilities, or obligations hereunder except for the receipt, deposit, and

distribution of monies paid by gaming tribes for the benefit of Non-Gaming Tribes and Limited-Gaming Tribes. The State Gaming Agency shall allocate and disburse the Revenue Sharing Trust Fund monies on a quarterly basis [16] as specified by the Legislature. Each eligible Non-Gaming Tribe and Limited-Gaming Tribe in the State shall receive the sum of one million one hundred thousand dollars ($1,100,000) per year from the Revenue Sharing Trust Fund. In the event there are insufficient monies in the Revenue Sharing Trust Fund to pay one million one hundred thousand dollars ($1,100,000) per year to each eligible Non-Gaming Tribe and Limited-Gaming Tribe, any available monies in that fund shall be distributed to eligible Non-Gaming Tribes and Limited-Gaming Tribes in equal shares. Monies deposited into the Revenue Sharing Trust Fund in excess of the amount necessary to distribute one million one hundred thousand dollars ($1,100,000) to each eligible Non-Gaming Tribe and Limited-Gaming Tribe shall remain in the Revenue Sharing Trust Fund available for disbursement in future years and shall not be diverted to any non-Revenue Sharing Trust Fund or any non-Tribal Nation Grant Fund use or any purpose. In no event shall the State's general fund be obligated to make up any shortfall in the Revenue Sharing Trust Fund or to pay any unpaid claims connected therewith, and, notwithstanding any provision of law, including any existing provision of law implementing the State Gaming Agency's obligations

related to the Revenue Sharing Trust Fund under any Class III Gaming compact, Non-Gaming Tribes and Limited-Gaming Tribes are not third-party beneficiaries of these Secretarial Procedures and shall have no right to seek any judicial order compelling disbursement of any Revenue Sharing Trust Fund monies to them.

(b) The "Tribal Nation Grant Fund" is a fund created by the Legislature to make discretionary distribution of funds to Non-Gaming Tribes and Limited-Gaming Tribes upon application of such tribes for purposes related to effective self-governance, self-determined community, and economic development. The fiscal operations of the Tribal Nation Grant Fund are administered by the State Gaming Agency, which acts as a limited trustee, not subject to the duties and liabilities contained in the California Probate Code, similar state or federal statutes, rules or regulations, or under state or federal common law or equitable principles, and with no duties or obligations hereunder except for the receipt, deposit, and distribution of monies paid by gaming tribes for the benefit of Non-Gaming Tribes and Limited-Gaming Tribes, as those payments are directed by a State Designated Agency. The State Gaming Agency shall allocate and disburse the Tribal Nation Grant [17] Fund monies as specified by a State Designated Agency to one or more eligible Non-Gaming and Limited-Gaming Tribes upon a competitive application basis. The State Gaming Agency shall exercise no discretion or control over, nor bear

any responsibility arising from, the recipient tribes' use or disbursement of Tribal Nation Grant Fund monies. The State Designated Agency shall perform any necessary audits to ensure that monies awarded to any tribe are being used in accordance with their disbursement in relation to the purpose of the Tribal Nation Grant Fund. In no event shall the State's general fund be obligated to pay any monies into the Tribal Nation Grant Fund or to pay any unpaid claims connected therewith, and, notwithstanding any provision of law, including any existing provision of law implementing the State's obligations related to the Tribal Nation Grant Fund or the Revenue Sharing Trust Fund under any Class III Gaming compact, Non-Gaming Tribes and Limited-Gaming Tribes are not third-party beneficiaries of these Secretarial Procedures and shall have no right to seek any judicial order compelling disbursement of any Tribal Nation Grant Fund monies to them.

(c) A "Non-Gaming Tribe" is a federally recognized tribe in California, with or without a tribal-state Class III Gaming compact, that has not engaged in, or offered, class II gaming or Class III Gaming in any location whether within or without California, as of the date of distribution to such tribe from the Revenue Sharing Trust Fund or the Tribal Nation Grant Fund, or during the immediately preceding three hundred sixty-five (365) days.

(d) A "Limited-Gaming Tribe" is a federally recognized tribe in California that has a Class III

Gaming compact with the State but is operating fewer than a combined total of three hundred fifty (350) Gaming Devices in all of its gaming operations wherever located, or does not have a Class III Gaming compact but is engaged in class II gaming, whether within or without California, during the immediately preceding three hundred sixty-five (365) days.

Sec. 5.2. Payments to the Revenue Sharing Trust Fund or the Tribal Nation Grant Fund.

[18] (a) In recognition of the predevelopment expenses incurred by the Tribe, the needs of the Tribe's more than 2,000 tribal citizens and the existence of binding and enforceable agreements with the County, the City of Madera, and the Madera Irrigation District providing for mitigation and other investments in the local community, during the first seven (7) years in which Gaming Activities occur the Tribe shall have no obligation to pay any amount to the State Gaming Agency for deposit into the Revenue Sharing Trust Fund or the Tribal Nation Grant Fund. After the first seven (7) years in which Gaming Activities occur, if the Tribe operates more than three hundred fifty (350) Gaming Devices at any time in a given calendar year, it shall pay to the State Gaming Agency, for deposit into the Revenue Sharing Trust Fund or the Tribal Nation Grant Fund, two percent (2.0%) of its Gross Gaming Revenue from the operation of Gaming Devices in excess of three hundred fifty (350) commencing on the first day of the first

calendar quarter of the eighth (8th) calendar year in which Gaming Activities occur. While the Tribe and the County, the City of Madera, and the Madera Irrigation District shall have the discretion to amend their existing agreements to address evolving needs and circumstances in a manner that is mutually beneficial, the Tribe's obligation to contribute to the Revenue Sharing Trust Fund or the Tribal Nation Grant Fund as specified in this section shall be subject to renegotiation if the Tribe's obligation to make payments to the County, the City of Madera, or the Madera Irrigation District pursuant to a binding enforceable agreement is no longer in effect.

(b) The Tribe shall remit the payments referenced in subdivision (a) to the State Gaming Agency in quarterly payments, which payments shall be due thirty (30) days following the end of each calendar quarter (i.e., by April 30 for the first quarter, July 30 for the second quarter, October 30 for the third quarter, and January 30 for the fourth quarter).

(c) The quarterly payments referenced in subdivision (b) required by subdivision (a) and (b), as appropriate, shall be determined by first determining the total number of all Gaming Devices operated by the Tribe during a given quarter (Quarterly Device Base). The Quarterly Device Base is equal to the sum total of the maximum number of Gaming Devices in operation for each day of the calendar quarter divided by the number of days in the calendar quarter that the Gaming [19] Operation

operates any Gaming Devices during the given calendar quarter.

(d) If any portion of the payments under subdivision (b) is overdue after the State Gaming Agency has provided written notice to the Tribe of the overdue amount with an opportunity to cure of at least fifteen (15) business days, and if more than sixty (60) calendar days have passed from the due date, then the Tribe shall cease operating all of its Gaming Devices until full payment is made.

(e) All payments made by the Tribe to the State Gaming Agency pursuant to subdivision (b) shall be deposited into the Revenue Sharing Trust Fund and the Tribal Nation Grant Fund in a proportion to be determined by the Legislature, provided that if there are insufficient monies in the Revenue Sharing Trust Fund to pay one million one hundred thousand dollars ($1,100,000) per year to each eligible Non-Gaming Tribe and Limited-Gaming Tribe, the State Gaming Agency shall deposit all payments into the Revenue Sharing Trust Fund.

[20] **SECTION 6.0. LICENSING.**

Sec. 6.1. Gaming Ordinance and Regulations.

(a) All Gaming Activities conducted under these Secretarial Procedures shall, at a minimum, comply (i) with a Gaming Ordinance duly adopted by the Tribe and approved in accordance with IGRA, (ii) with all rules, regulations, procedures, specifications, and standards duly

adopted by the NIGC, the Tribal Gaming Agency, and the State Gaming Agency, and (iii) with the provisions of these Secretarial Procedures.

(b) The Tribal Gaming Agency shall transmit a copy of the Gaming Ordinance, and all of its rules, regulations, procedures, specifications, ordinances, or standards applicable to the Gaming Activities and Gaming Operation, to the State Gaming Agency within twenty (20) days following issuance of these Secretarial Procedures, or within twenty (20) days following their adoption or amendment, whichever is later.

(c) The Tribe and the Tribal Gaming Agency shall make available an electronic or hard copy of the following documents to any member of the public upon request and in the manner requested: the Gaming Ordinance; the rules of each Class III game operated by the Tribe; the Tribe's constitution or other governing document(s) to the extent they impact the public in relation to the Gaming Activities or Gaming Operation; the tort ordinance specified in section 12.5, subdivision (b); the employment discrimination complaint ordinance specified in section 12.3, subdivision (f); the regulations promulgated by the Tribal Gaming Agency concerning patron disputes pursuant to section 10.0; and the NIGC minimum internal control standards and these Secretarial Procedures, including all appendices hereto, in the event they are not available on

the NIGC's or the State Gaming Agency's website(s).

Sec. 6.2. Tribal Ownership, Management, and Control of Gaming Operation.

The Gaming Operation authorized under these Secretarial Procedures shall be owned solely by the Tribe.

[21] **Sec. 6.3. Prohibitions Regarding Minors.**

(a) The Tribe shall prohibit persons under the age of twenty-one (21) years to be present in any room or area in which Gaming Activities are being conducted unless the person is en route to a non-gaming area of the Gaming Facility, or is employed at the Gaming Facility in a capacity other than as a Gaming Employee.

(b) If the Tribe permits the consumption of alcoholic beverages in the Gaming Facility, the Tribe shall prohibit persons under the age of twenty-one (21) years from purchasing, consuming, or possessing alcoholic beverages. The Tribe shall also prohibit persons under the age of twenty-one (21) years from being present in any room or area in which alcoholic beverages may be consumed, except to the extent permitted by the State Department of Alcoholic Beverage Control for other commercial establishments serving alcoholic beverages.

Sec. 6.4. Licensing Requirements and Procedures.

Sec. 6.4.1. Summary of Licensing Principles.

All persons in any way connected with the Gaming Operation or Gaming Facility who are required to be licensed or to submit to a background investigation under IGRA, and any others required to be licensed under these Secretarial Procedures, including, without limitation, all Gaming Employees, Gaming Resource Suppliers, Financial Sources, and any other person having a significant influence over the Gaming Operation, must be licensed by the Tribal Gaming Agency and cannot have had any determination of suitability denied or revoked by the State Gaming Agency. The parties intend that the licensing process provided for in these Secretarial Procedures shall involve joint cooperation between the Tribal Gaming Agency and the State Gaming Agency, as more particularly described herein.

Sec. 6.4.2. Gaming Facility.

(a) The Gaming Facility authorized by these Secretarial Procedures shall be licensed by the Tribal Gaming Agency in conformity with the [22] requirements of these Secretarial Procedures, the Tribe's Gaming Ordinance, IGRA, and any applicable regulations adopted by the NIGC. The license shall be reviewed and renewed every two (2) years thereafter. Verification that this requirement has been met shall be provided by the Tribe to the State by

sending a copy of the initial license and each renewal license to the State Gaming Agency within twenty (20) days after issuance of the license or renewal. The Tribal Gaming Agency's certification that the Gaming Facility is being operated in conformity with these requirements shall be posted in a conspicuous and public place in the Gaming Facility at all times.

(b) To assure the protection of the health and safety of all Gaming Facility patrons, guests, and employees, the Tribe shall adopt, or has already adopted, and shall maintain throughout the term of these Secretarial Procedures, an ordinance that requires any Gaming Facility construction to meet or exceed the Applicable Codes. The Gaming Facility and construction, expansion, improvement, modification, or renovation will also comply with the federal Americans with Disabilities Act, P. L. 101-336, as amended, 42 U.S.C. § 12101 et seq. Notwithstanding the foregoing, the Tribe need not comply with any standard that specifically applies in name or in fact only to tribal facilities. Without limiting the rights of the State under this section, reference to Applicable Codes is not intended to confer jurisdiction upon the State or its political subdivisions. For purposes of this section, the terms "building official" and "code enforcement agency" as used in titles 19 and 24 of the California Code of Regulations mean the Tribal Gaming Agency or such other tribal government agency or official as may be designated by the Tribe's law.

(c) To assure compliance with the Applicable Codes, in all cases where those codes would otherwise require a permit, the Tribe shall employ for any Gaming Facility construction qualified plan checkers or review firms. To be qualified as a plan checker or review firm for purposes of these Secretarial Procedures, plan checkers or review firms must be either California licensed architects or engineers with relevant experience, or California licensed architects or engineers on the list, if any, of approved plan checkers or review firms provided by the city or county in which the Gaming Facility is located. The Tribe shall also employ qualified project inspectors. To be qualified as a project inspector for purposes of these Secretarial Procedures, project [23] inspectors must possess the same qualifications and certifications as project inspectors utilized by the county in which the Gaming Facility is located. The plan checkers, review firms, and project inspectors shall hereinafter be referred to as "Inspector(s)." The Tribe shall require the Inspectors to report in writing any failure to comply with the Applicable Codes to the Tribal Gaming Agency and the State Gaming Agency.

(d) The Tribe shall cause the design and construction calculations, and plans and specifications that form the basis for the construction (the "Design and Building Plans") to be available to the State Gaming Agency for inspection and copying by the State Gaming Agency upon its request.

(e) In the event that material changes to a structural detail of the Design and Building Plans will result from contract change orders or any other changes in the Design and Building Plans, such changes shall be reviewed by the qualified plan checker or review firm and field verified by the Inspectors for compliance with the Applicable Codes.

(f) The Tribe shall maintain during construction all other contract change orders for inspection and copying by the State Gaming Agency upon its request.

(g) The Tribe shall maintain the Design and Building Plans depicting the as-built Gaming Facility, which shall be available to the State Gaming Agency for inspection and copying by the State Gaming Agency upon its request, for the term of these Secretarial Procedures.

(h) Upon final certification by the Inspectors that the Gaming Facility meets the Applicable Codes, the Tribal Gaming Agency shall forward the Inspectors' certification to the State Gaming Agency within ten (10) days of issuance. If the State Gaming Agency objects to that certification, the Tribe shall make a good faith effort to address the State's concerns, but if the State Gaming Agency does not withdraw its objection, the matter will be resolved in accordance with the dispute resolution provisions of section 13.0.

(i) Any failure to remedy within a reasonable period of time any material and timely raised deficiency shall be deemed a violation of these

[24] Secretarial Procedures, and furthermore, any deficiency that poses a serious or significant risk to the health or safety of any occupant shall be grounds for the State Gaming Agency to prohibit occupancy of the affected portion of the Gaming Facility pursuant to a court order until the deficiency is corrected. The Tribe shall not allow occupancy of any portion of the Gaining Facility that is constructed or maintained in a manner that endangers the health or safety of the occupants.

(j) The Tribe shall also take all necessary steps to reasonably ensure the ongoing availability of sufficient and qualified fire suppression services to the Gaming Facility, and to reasonably ensure that the Gaming Facility satisfies all requirements of titles 19 and 24 of the California Code of Regulations applicable to similar facilities in the County as set forth below:

(1) Not less than thirty (30) days before the commencement of the Gaining Activities, and not less than biennially thereafter, and upon at least ten (10) days' notice to the State Gaming Agency, the Gaming Facility shall be inspected, at the Tribe's expense, by an independent expert for purposes of certifying that the Gaming Facility meets a reasonable standard of fire safety and life safety.

(2) The State Gaming Agency shall be entitled to designate and have a qualified representative or representatives, which

may include local fire suppression entities, present during the inspection. During such inspection, the State's representative(s) shall specify to the independent expert any condition which the representative(s) reasonably believes would preclude certification of the Gaming Facility as meeting a reasonable standard of fire safety and life safety.

(3) The independent expert shall issue to the Tribal Gaming Agency and the State Gaming Agency a report on the inspection within fifteen (15) days after its completion, or within thirty (30) days after commencement of the inspection, whichever first occurs, identifying any deficiency in fire safety or life safety at the Gaming Facility or in the ability of the Tribe to meet reasonably expected fire suppression needs of the Gaming Facility.

[25] (4) Within twenty-one (21) days after the issuance of the report, the independent expert shall also require and approve a specific plan for correcting deficiencies, whether in fire safety or life safety, at the Gaming Facility or in the Tribe's ability to meet the reasonably expected fire suppression needs of the Gaming Facility, including those identified by the State Gaming Agency's representatives. A copy of the report shall be delivered to the State Gaming Agency and the Tribal Gaming Agency.

(5) Immediately upon correction of all deficiencies identified in the report, the independent expert shall certify in writing to the Tribal Gaming Agency and the State Gaming Agency that all deficiencies have been corrected.

(6) Any failure to correct all deficiencies identified in the report within a reasonable period of time shall be a violation of these Secretarial Procedures and any failure to promptly correct those deficiencies that pose a serious or significant risk to the health or safety of any occupants shall be a violation of these Secretarial Procedures and grounds for the State Gaming Agency to request that the NIGC prohibit occupancy of the affected portion of the Gaming Facility until the deficiency is corrected.

(7) Consistent with its obligation to ensure the safety of those within the Gaming Facility, the Tribe shall promptly notify the State Gaming Agency of circumstances that pose a serious and significant risk to the health or safety of occupants and take prompt action to correct such circumstances. Any failure to remedy within a reasonable period of time any serious and significant risk to public safety shall be deemed a violation of this these Secretarial Procedures, and furthermore, any circumstance that poses a serious or significant risk to the health or safety of any occupant shall be grounds for the

State Gaming Agency to prohibit occupancy of the affected portion of the Gaming Facility pursuant to a court order until the deficiency is corrected.

[26] **Sec. 6.4.3. Gaming Employees.**

(a) Every Gaming Employee shall obtain, and thereafter maintain current, a valid tribal gaming license, and except as provided in subdivision (b), shall obtain, and thereafter maintain current, a State Gaming Agency determination of suitability, which license and determination shall be subject to biennial renewal; provided that in accordance with section 6.4.9, those persons may be employed on a temporary or conditional basis pending completion of the licensing process and the State Gaming Agency determination of suitability.

(b) A Gaming Employee who is required to obtain and maintain current a valid tribal gaming license under subdivision (a) is not required to obtain or maintain a State Gaming Agency determination of suitability if any of the following applies:

(1) The employee is subject to the licensing requirement of subdivision (a) solely because he or she is a person who conducts, operates, maintains, repairs, or assists in Gaming Activities, provided that this exception shall not apply if he or she supervises Gaming Activities or persons who conduct, operate, maintain, repair, assist, account for or supervise any such Gaming

Activity, *and* is empowered to make discretionary decisions affecting the conduct of the Gaming Activities.

(2) The employee is subject to the licensing requirement of subdivision (a) solely because he or she is a person whose employment duties require or authorize access to areas of the Gaming Facility that are not open to the public, provided that this exception shall not apply if he or she supervises Gaming Activities or persons who conduct, operate, maintain, repair, assist, account for or supervise any such Gaming Activity, *and* is empowered to make discretionary decisions affecting the conduct of the Gaming Activities.

(3) The State Gaming Agency, in consultation with the Tribal Gaming Agency, exempts the Gaming Employee from the requirement to obtain or maintain current a State Gaming Agency determination of suitability.

[27] (c) Notwithstanding subdivision (b), where the State Gaming Agency determines it is reasonably necessary, the State Gaming Agency is authorized to review the tribal license application, and all materials and information received by the Tribal Gaming Agency in connection therewith, for any person whom the Tribal Gaming Agency has licensed, or proposes to license, as a Gaming Employee. If the State Gaming Agency determines that the person would be unsuitable for issuance of a

license or permit for a similar level of employment in a gambling establishment subject to the jurisdiction of the State, it shall notify the Tribal Gaming Agency of its determination and the reasons supporting its determination. The Tribal Gaming Agency shall thereafter conduct a hearing, in accordance with section 6.5.5, to reconsider issuance of the tribal gaming license and shall immediately notify the State Gaming Agency of its determination after the hearing, which shall be final unless made the subject of dispute resolution pursuant to section 13.0 within thirty (30) days of such notification.

(d) The Tribe shall not employ, or continue to employ, any person whose application to the State Gaming Agency for a determination of suitability or for a renewal of such a determination has been denied, or whose determination of suitability has expired without renewal.

(e) At any time after five (5) years following the effective date of this these Secretarial Procedures, the Tribe may request that the Secretary consider adjusting the scope of coverage of subdivision (b) or (c).

(f) This section shall not apply to members of the Tribal Gaming Agency.

Sec. 6.4.4. Gaming Resource Suppliers.

(a) Every Gaming Resource Supplier shall be licensed by the Tribal Gaming Agency prior to

the sale, lease, or distribution, or further sale, lease, or distribution, of any Gaming Resources to or in connection with the Tribe's Gaming Operation or Facility. Unless the Tribal Gaming Agency licenses the Gaming Resource Supplier pursuant to subdivision (d), the Gaming Resource Supplier shall also apply to, and the Tribe shall require it to apply to, the State Gaming Agency for a determination of suitability at least thirty (30) days prior to the sale, lease, or distribution, or further sale, lease, or distribution, of any Gaming Resources to or in connection with the Tribe's Gaming [28] Operation or Facility, except that for Gaming Devices the period specified under section 7.1, subdivision (a)(1), shall govern. The period during which a determination of suitability as a Gaming Resource Supplier is valid expires on the earlier of (i) the date two (2) years following the date on which the determination is issued, unless a different expiration date is specified by the State Gaming Agency, or (ii) the date of its revocation by the State Gaming Agency. If the State Gaming Agency denies or revokes a determination of suitability, the Tribal Gaming Agency shall immediately deny or revoke the license and shall not reissue any license to that Gaming Resource Supplier unless and until the State Gaming Agency makes a determination that the Gaming Resource Supplier is suitable. The license and determination of suitability shall be reviewed at least every two (2) years for continuing compliance. For purposes of section 6.5.2, such a review shall be deemed to

constitute an application for renewal. In connection with such a review, the Tribal Gaming Agency shall require the Gaming Resource Supplier to update all information provided in the previous application.

(b) Any agreement between the Tribe and a Gaming Resource Supplier shall include a provision for its termination without further liability on the part of the Tribe, except for the bona fide payment of all outstanding sums (exclusive of interest) owed as of, or payment for services or materials received up to, the date of termination, upon revocation or non-renewal of the Gaming Resource Supplier's license by the Tribal Gaming Agency based on a determination of unsuitability by the State Gaming Agency. Except as set forth above, the Tribe shall not enter into, or continue to make payments to a Gaming Resource Supplier pursuant to, any contract or agreement for the provision of Gaming Resources with any person or entity whose application to the State Gaming Agency for a determination of suitability has been denied or revoked or whose determination of suitability has expired without renewal.

(c) Notwithstanding subdivision (a), the Tribal Gaming Agency may license a Management Contractor for a period of no more than seven (7) years, but the Management Contractor must still apply for renewal of a determination of suitability by the State Gaming Agency at least every two (2) years, and where the State Gaming Agency denies or revokes a

determination of suitability, the Tribal Gaming Agency [29] shall immediately deny or revoke the license and shall not reissue any license to that Management Contractor unless and until the State Gaming Agency makes a determination that the Management Contractor is suitable. Except where the State Gaming Agency has denied or revoked its determination of suitability, nothing in this subdivision shall be construed to bar the Tribal Gaming Agency from issuing additional new licenses to the same Management Contractor following the expiration of a seven (7)-year license.

(d) The Tribal Gaming Agency may elect to license a person or entity as a Gaming Resource Supplier without requiring it to apply to the State Gaming Agency for a determination of suitability under subdivision (a) if the Gaming Resource Supplier has already been issued a determination of suitability that is then valid. In that case, the Tribal Gaming Agency shall immediately notify the State Gaming Agency of its licensure of the person or entity as a Gaming Resource Supplier, and shall identify in its notification the State Gaming Agency determination of suitability on which the Tribal Gaming Agency has relied in proceeding under this subdivision (d). Subject to the Tribal Gaming Agency's compliance with the requirements of this subdivision, a Gaming Resource Supplier licensed under this subdivision may, during and only during the period in which the determination of suitability remains valid, engage in the sale,

lease, or distribution of Gaming Resources to or in connection with the Tribe's Gaming Operation or Facility, without applying to the State Gaming Agency for a determination of suitability. The issuance of a license under this subdivision is in all cases subject to any later determination by the State Gaming Agency that the Gaming Resource Supplier is not suitable or to a tribal gaming license suspension or revocation pursuant to section 6.5.1, and does not extend the time during which the determination of suitability relied on by the Tribal Gaming Agency is valid. A license issued under this subdivision expires upon the revocation or expiration of the determination of suitability relied on by the Tribal Gaming Agency. Nothing in this subdivision affects the obligations of the Tribal Gaming Agency, or of the Gaming Resource Supplier, under section 6.5.2 and section 6.5.6 of these Secretarial Procedures.

(e) Except where subdivision (d) applies, within twenty-one (21) days of the issuance of a license to a Gaming Resource Supplier, the Tribal [30] Gaming Agency shall transmit to the State Gaming Agency a copy of the license and a copy of all tribal license application materials and information received by it from the Applicant which is not otherwise prohibited or restricted from disclosure under applicable federal law or regulation.

Sec. 6.4.5. Financial Sources.

(a) Subject to subdivision (g) of this section 6.4.5, each Financial Source shall be licensed by the Tribal Gaming Agency prior to the Financial Source extending financing in connection with the Tribe's Gaming Facility or Gaming Operation.

(b) Every Financial Source required to be licensed by the Tribal Gaming Agency shall, contemporaneously with the filing of its tribal license application, apply to the State Gaming Agency for a determination of suitability. In the event the State Gaming Agency denies the determination of suitability, the Tribal Gaming Agency shall immediately deny or revoke the license.

(c) A license issued under this section 6.4.5 shall be reviewed at least every two (2) years for continuing compliance. In connection with such a review, the Tribal Gaming Agency shall require the Financial Source to update all information provided in the Financial Source's previous application. For purposes of this section 6.5.2, that review shall be deemed to constitute an application for renewal.

(d) Any agreement between the Tribe and a Financial Source shall include, and shall be deemed to include, a provision for its termination without further liability on the part of the Tribe, except for the bona fide repayment of all outstanding sums (including accrued interest) owed as of the date of termination upon revocation or non-renewal of the Financial Source's license by the Tribal Gaming Agency based on a determination of unsuitability by the State Gaming Agency. The Tribe shall not

enter into, or continue to make payments pursuant to, any contract or agreement for the provision of financing with any person whose application to the State Gaming Agency for a determination of suitability has been denied or revoked or expired without renewal.

[31] (e) A Gaming Resource Supplier who provides financing exclusively in connection with the provision, sale, or lease of Gaming Resources obtained from that Gaming Resource Supplier may be licensed solely in accordance with the licensing procedures applicable, if at all, to Gaming Resource Suppliers, and need not be separately licensed as a Financial Source under this section.

(f) Within twenty-one (21) days of the issuance of a license to a Financial Source, the Tribal Gaming Agency shall transmit to the State Gaming Agency a copy of the license. Upon issuance of a license, the Tribal Gaming Agency shall direct the Financial Source licensee to transmit to the State Gaming Agency within twenty-one (21) days a copy of all license application materials and information submitted to the Tribal Gaming Agency.

(g)(1) The Tribal Gaming Agency may, at its discretion, exclude from the licensing requirements of this section the following Financial Sources under the circumstances stated:

(A) A federally-regulated or state-regulated bank, savings and loan association, or other federally- or state-regulated lender and any fund or other investment vehicle, including, without limitation, a bond indenture or syndicated loan, which is

administered or managed by any such entity.

(B) An entity identified by Regulation CGCC-2, subdivision (f) (as in effect on the date the parties execute these Secretarial Procedures) of the Commission, when that entity is a Financial Source solely by reason of being (i) a purchaser or a holder of debt securities or other forms of indebtedness issued directly or indirectly by the Tribe for a Gaming Facility or for the Gaming Operation or (ii) the owner of a participation interest in any amount of indebtedness for which a Financial Source described in subdivision (e)(1)(A), or any fund or other investment vehicle which is administered or managed by any such Financial Source, is the creditor.

[32] (C) An investor who, alone or together with any person(s) controlling, controlled by or under common control with such investor, holds less than ten percent (10%) of all outstanding debt securities issued directly or indirectly by the Tribe for a Gaming Facility or for the Gaming Operation.

(D) An agency of the federal, state or local government providing financing, together with any person purchasing any debt securities or other forms of indebtedness of the agency to provide such financing.

(E) A real estate investment trust (as defined in 26 U.S.C. § 856(a)) that is publicly

traded on a stock exchange, registered with the Securities and Exchange Commission, and subject to regulatory oversight of the Securities and Exchange Commission.

(F) An entity or category of entities that the State Gaming Agency and the Tribal Gaming Agency jointly determine can be excluded from the licensing requirements of this section 6.4.5 without posing a threat to the public interest or the integrity of the Gaming Operation.

(2) In any case where the Tribal Gaming Agency elects to exclude a Financial Source from the licensing requirements of this section 6.4.5, the Tribal Gaming Agency shall give immediate notice to the State Gaming Agency of any extension of financing by the Financial Source in connection with the Tribe's Gaming Operation or Facility, and upon request of the State Gaming Agency, shall provide it with all documentation supporting the Tribal Gaming Agency's exclusion of the Financial Source from the licensing requirements of this section 6.4.5. The Tribal Gaming Agency and the State Gaming Agency shall confer and make good faith efforts to promptly resolve any dispute regarding the Tribal Gaming Agency's decision to exclude a Financial Source from the licensing requirements of this section 6.4.5.

[33] (3) Notwithstanding subdivision (g)(1), the State Gaming Agency continues to have the

right to find a Financial Source unsuitable. The Tribal Gaming Agency and the State Gaming Agency shall work collaboratively to resolve any reasonable concerns regarding the initial or ongoing excludability of an individual or entity as a Financial Source. If the State Gaming Agency finds that an investigation of any Financial Source is warranted, the Financial Source shall be required to submit an application for a determination of suitability to the State Gaming Agency and shall pay the costs and charges incurred in the investigation and processing of the application, in accordance with the provisions set forth in California Business and Professions Code sections 19867 and 19951. Any dispute between the Tribal Gaming Agency and the State Gaming Agency pertaining to the excludability of an individual or entity as a Financial Source shall be resolved by the Dispute Resolution provisions in section 13.0.

(4) The following are not Financial Sources for purposes of this section 6.4.5.

(A) An entity identified by Regulation CGCC-2, subdivision (h) (as in effect on the date the parties execute these Secretarial Procedures) of the Commission.

(B) A person or entity whose sole connection with a provision or extension of financing to the Tribe is to provide loan brokerage or debt servicing for a Financial Source at no cost to the Tribe or the Gaming Operation, provided that no portion of any

financing provided is an extension of credit to the Tribe or the Gaming Operation by that person or entity.

(C) A person or entity that the State Gaming Agency has determined does not require licensure pursuant to any process the State Gaming Agency deems necessary due to the nature of financing services provided, the existence of current and effective federal or state agency oversight or licensure, attenuated interests of the person or entity as passive investors without the ability to exert significant [34] influence over the Gaming Operation, or other grounds which the State Gaming Agency determines appropriate, subject to its responsibilities under state law.

(h) In recognition of changing financial circumstances, this section shall be subject to revision by the Secretary after five (5) years from the effective date of these Secretarial Procedures upon the request of the Tribe; provided such renegotiation shall not retroactively affect transactions that have already taken place where the Financial Source has been excluded or exempted from licensing requirements.

Sec. 6.4.6. Processing Tribal Gaming License Applications.

(a) Each Applicant for a tribal gaming license shall submit the completed application along with the

required information and an application fee, if required, to the Tribal Gaming Agency in accordance with the rules and regulations of that agency.

(b) At a minimum, the Tribal Gaming Agency shall require submission and consideration of all information required under IGRA, including part 556.4 of title 25 of the Code of Federal Regulations, for licensing primary management officials and key employees.

(c) For Applicants that are business entities, these licensing provisions shall apply to the entity as well as: (i) each of its officers, members, and directors; (ii) each of its principal management employees, including any chief executive officer, chief financial officer, chief operating officer, and general manager; (iii) each of its owners or partners, if an unincorporated business; (iv) each of its shareholders who owns more than ten percent (10%) of the shares of the corporation, if a corporation, or who has a direct controlling interest in the Applicant; and (v) each person or entity (other than a Financial Source that the Tribal Gaming Agency has determined does not require a license under section 6.4.5) that, alone or in combination with others, has provided financing in connection with any Gaming Operation or Class III Gaming authorized under these Secretarial Procedures, if that person or entity provided more than ten percent (10%) of either the start-up capital or the operating capital, or of a combination thereof, over a twelve (12)-month period. For purposes of this subdivision, where there is any commonality of the [35] characteristics identified in this section 6.4.6, subdivisions (c)(i) through (c)(v), inclusive, between any

two (2) or more entities, those entities may be deemed to be a single entity. For purposes of this subdivision, a direct controlling interest in the Applicant referred to in subdivision (c)(iv) excludes any passive investor or anyone who has an indirect or only a financial interest and does not have ability to control, manage, or direct the management decisions of the Applicant.

(d) Nothing herein precludes the Tribe or Tribal Gaming Agency from requiring more stringent licensing requirements.

Sec. 6.4.7. Suitability Standard Regarding Gaming Licenses.

(a) In reviewing an application for a tribal gaming license, and in addition to any standards set forth in the Tribe's Gaming Ordinance, the Tribal Gaming Agency shall consider whether issuance of the license is inimical to public health, safety, or welfare, and whether issuance of the license will undermine public trust that the Tribe's Gaming Operation is free from criminal and dishonest elements and would be conducted honestly.

(b) A license may not be issued unless, based on all information and documents submitted, the Tribal Gaming Agency is satisfied that the Applicant, and in the case of an entity, each individual identified in section 6.4.6, meets all the following requirements:

(1) The person is of good character, honesty, and integrity.

(2) The person's prior activities, criminal record (if any), reputation, habits, and associations do not pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, or activities in the conduct of gaming, or in the carrying on of business and financial arrangements incidental thereto.

(3) The person is in all other respects qualified to be licensed as provided, and meets the criteria established in these Secretarial Procedures, IGRA, NIGC regulations, the Tribe's Gaming Ordinance, and any other criteria adopted by the Tribal Gaming [36] Agency or the Tribe; provided, however, an Applicant shall not be found to be unsuitable solely on the ground that the Applicant was an employee of a tribal gaming operation in California that was conducted prior to May 16, 2000.

Sec. 6.4.8. Background Investigations of Applicants.

(a) The Tribal Gaming Agency shall conduct or cause to be conducted all necessary background investigations reasonably required to determine that the Applicant is qualified for a gaming license under the standards set forth in section 6.4.7, and to fulfill all requirements for licensing under IGRA, NIGC regulations, the Tribe's Gaming Ordinance, and these Secretarial Procedures. The Tribal Gaming Agency shall not issue a gaming license, other than a temporary license pursuant to section

6.4.9, until a determination is made that those qualifications have been met.

(b) In lieu of completing its own background investigation, and to the extent that doing so does not conflict with or violate IGRA or the Tribe's Gaming Ordinance, the Tribal Gaming Agency may contract with the State Gaming Agency for the conduct of background investigations, may rely on a State determination of suitability previously issued under a Class III Gaming compact involving another tribe and the State, or may rely on a State Gaming Agency license previously issued to the Applicant, to fulfill some or all of the Tribal Gaming Agency's background investigation obligations.

(c) If the Tribal Gaming Agency contracts with the State Gaming Agency for the conduct of background investigations, then an Applicant for a tribal gaming license shall be required to provide releases to the State Gaming Agency to make available to the Tribal Gaming Agency background information regarding the Applicant. The State Gaming Agency shall cooperate in furnishing to the Tribal Gaming Agency that information, unless doing so would violate state or federal law, would violate any agreement the State Gaming Agency has with a source of the information other than the Applicant, or would impair or impede a criminal investigation, or unless the Tribal Gaming Agency cannot provide sufficient safeguards to assure the State Gaming Agency that the information will remain confidential.

[37] (d) In lieu of obtaining summary criminal history information from the NIGC, the Tribal Gaming Agency may, pursuant to the provisions in subdivisions (d) through (i), obtain such information from the California Department of Justice. If the Tribe adopts an ordinance confirming that article 6 (commencing with section 11140) of chapter 1 of title 1 of part 4 of the California Penal Code is applicable to members, investigators, and staff of the Tribal Gaming Agency, and those members, investigators, and staff thereafter comply with that ordinance, then, for purposes of carrying out its obligations under this section, the Tribal Gaming Agency shall be eligible to be considered an entity entitled to request and receive state summary criminal history information, within the meaning of subdivision (b)(13) of section 11105 of the California Penal Code.

(e) The information received shall be used by the requesting agency solely for the purpose for which it was requested and shall not be reproduced for secondary dissemination to any other employment or licensing agency. The unauthorized access and misuse of criminal offender record information may affect an individual's civil rights. Additionally, any person intentionally disclosing information obtained from personal or confidential records maintained by a state agency or from records within a system of records maintained by a government agency may be subject to prosecution.

(f) The Tribal Gaming Agency shall submit to the California Department of Justice fingerprint images and related information required by the California Department of Justice of all Gaming Employees, as defined by section 2.12, for the purposes of obtaining information as to the existence and content of a record of state or federal convictions and state or federal arrests and also information as to the existence and content of a record of state or federal arrests for which the Department of Justice establishes that the person is free on bail or on his or her recognizance pending trial or appeal.

(g) When received, the California Department of Justice shall forward to the Federal Bureau of Investigation requests for federal summary criminal history information received pursuant to this section. The California Department of Justice shall review the information returned from [38] the Federal Bureau of Investigation and compile and disseminate a response to the Tribal Gaming Agency.

(h) The California Department of Justice shall provide a state or federal level response to the Tribal Gaming Agency pursuant to Penal Code section 11105, subdivision (p)(1).

(i) The Tribal Gaming Agency shall request from the California Department of Justice subsequent notification service, as provided pursuant to section 11105.2 of the Penal Code, for persons described in subdivision (f) above.

Sec. 6.4.9. Temporary Licensing of Gaming Employees.

(a) If the Applicant has completed a license application in a manner satisfactory to the Tribal Gaming Agency, and that agency has conducted a preliminary background investigation, and the investigation or other information held by that agency does not indicate that the Applicant has a criminal history or other information in his or her background that would either automatically disqualify the Applicant from obtaining a tribal gaming license or cause a reasonable person to investigate further before issuing a license, or that the Applicant is otherwise unsuitable for licensing, the Tribal Gaming Agency may issue a temporary tribal gaming license and may impose such specific conditions thereon pending completion of the Applicant's background investigation, as the Tribal Gaming Agency in its sole discretion shall determine.

(b) Special fees may be required by the Tribal Gaming Agency to issue or maintain a temporary tribal gaming license.

(c) A temporary tribal gaming license shall remain in effect until suspended or revoked, or a final determination is made on the application, or for a period of up to one (1) year, whichever comes first.

(d) At any time after issuance of a temporary tribal gaming license, the Tribal Gaming Agency shall or may, as the case may be, suspend or revoke it in accordance with the

provisions of sections 6.5.1 or 6.5.5, [39] and the State Gaming Agency may request suspension or revocation before making a determination of unsuitability.

(e) Nothing herein shall be construed to relieve the Tribe of any obligation under part 558 of title 25 of the Code of Federal Regulations.

Sec. 6.5.0. Tribal Gaming License Issuance.

Upon completion of the necessary background investigation, the Tribal Gaming Agency may issue a tribal gaming license on a conditional or unconditional basis. Nothing herein shall create a property or other right of an Applicant in an opportunity to be licensed, or in a tribal gaming license itself, both of which shall be considered to be privileges granted to the Applicant in the sole discretion of the Tribal Gaming Agency.

Sec. 6.5.1. Denial, Suspension, or Revocation of Licenses.

(a) Any Applicant's application for a tribal gaming license may be denied, and any license issued may be revoked, if the Tribal Gaming Agency determines that the application is incomplete or deficient, or if the Applicant is determined to be unsuitable or otherwise unqualified for a tribal gaming license.

(b) Pending consideration of revocation, the Tribal Gaming Agency may suspend a tribal gaming license in accordance with section 6.5.5.

(c) All rights to notice and hearing shall be governed by tribal law and comport with federal procedural due process by, at a minimum, providing the employee with notice reasonably calculated to apprise the employee of the pendency of the determination, access to the materials upon which the charge is based, and an opportunity to be heard. The Applicant shall be notified in writing of the hearing and given notice of any intent to suspend or revoke the tribal gaming license.

(d) Notwithstanding anything to the contrary herein, upon receipt of notice that the State Gaming Agency has determined that a person would be unsuitable for licensure in a gambling establishment subject [40] to the jurisdiction of the State Gaming Agency, the Tribal Gaming Agency shall deny that person a tribal gaming license and promptly, and in no event more than thirty (30) days from the State Gaming Agency notification, revoke any tribal gaming license that has theretofore been issued to that person; provided that the Tribal Gaming Agency may, in its discretion, reissue a tribal gaming license to the person following entry of a final judgment reversing the determination of the State Gaming Agency in a proceeding in state court conducted pursuant to section 1085 of the California Code of Civil Procedure.

Sec. 6.5.2. Renewal of Licenses; Extensions; Further Investigation.

(a) Except as provided in section 6.4.4, subdivision (c), the term of a tribal gaming license shall not exceed two (2) years, and application for renewal of a license must be made prior to its expiration. Applicants for renewal of a license shall provide updated material, as requested, on the appropriate renewal forms, but, at the discretion of the Tribal Gaming Agency, may not be required to resubmit historical data previously submitted or which is otherwise available to the Tribal Gaming Agency. At the discretion of the Tribal Gaming Agency, an additional background investigation may be required at any time if the Tribal Gaming Agency determines the need for further information concerning the Applicant's continuing suitability or eligibility for a license.

(b) Prior to renewing a license, the Tribal Gaming Agency shall deliver to the State Gaming Agency copies of all information and documents received in connection with the application for renewal of the tribal gaming license, which is not otherwise prohibited or restricted from disclosure under applicable federal law or regulation, for purposes of the State Gaming Agency's consideration of renewal of its determination of suitability.

(c) At the discretion of the State Gaming Agency, an additional background investigation may be required if the State Gaming Agency

determines the need for further information concerning the Applicant's continuing suitability for a license.

Sec. 6.5.3. Identification Cards.

[41] (a) The Tribal Gaming Agency shall require that all persons who are required to be licensed wear, in plain view at all times while in the Gaming Facility, identification badges issued by the Tribal Gaming Agency.

(b) Identification badges must display information, including, but not limited to, a photograph and the person's name, which is adequate to enable members of the public and agents of the Tribal Gaming Agency to readily identify the person and determine the validity and date of expiration of his or her license.

(c) Upon request, the Tribe shall provide the State Gaming Agency with the name, badge identification number (if any), and job title of all Gaming Employees.

Sec. 6.5.4. Fees for Tribal Gaming License.

The fees for all tribal gaming licenses shall be set by the Tribal Gaming Agency.

Sec. 6.5.5. Suspension of Tribal Gaming License.

The Tribal Gaming Agency shall summarily suspend the tribal gaming license of any employee if the

Tribal Gaming Agency determines that the continued licensing of the person could constitute a threat to the public health or safety or may summarily suspend the license of any employee if the Tribal Gaming Agency determines that the continued licensing of the person may violate the Tribal Gaming Agency's licensing or other standards. Any hearing in regard thereto shall be governed by tribal law and comport with federal due process by, at a minimum, providing the employee with notice reasonably calculated to apprise the employee of the pendency of the determination, access to the materials upon which the charge is based, and an opportunity to be heard.

Sec. 6.5.6. State Determination of Suitability Process.

(a) With respect to Gaming Employees, upon receipt of an Applicant's completed license application and a determination to issue either a temporary or permanent license, the Tribal Gaming Agency shall transmit within twenty-one (21) days to the State Gaming Agency for [42] a determination of suitability for licensure under the California Gambling Control Act a notice of intent to license the Applicant, together with all of the following:

(1) A copy of all tribal license application materials and information received by the Tribal Gaming Agency from the Applicant which is not otherwise prohibited or restricted from disclosure under applicable federal law or regulation.

(2) A complete set of fingerprint impressions, rolled by a certified fingerprint roller, which may be on a fingerprint card or transmitted electronically.

(3) A current photograph.

(4) Except to the extent waived by the State Gaming Agency, such releases of information, waivers, and other completed and executed forms as have been obtained by the Tribal Gaming Agency.

(b) Upon receipt of a written request from a Gaming Resource Supplier or a Financial Source for a determination of suitability, the State Gaming Agency shall transmit an application package to the Applicant to be completed and returned to the State Gaming Agency for purposes of allowing it to make a determination of suitability for licensure.

(c) Investigation and disposition of applications for a determination of suitability shall be governed entirely by State law, and the State Gaming Agency shall determine whether the Applicant would be found suitable for licensure in a gambling establishment subject to the State Gaming Agency's jurisdiction. Additional information may be required by the State Gaming Agency to assist it in its background investigation, to the extent permitted under State law for licensure in a gambling establishment subject to the State Gaming Agency's jurisdiction.

(d) The Tribal Gaming Agency shall require a licensee to apply for renewal of a determination of suitability by the State Gaming Agency at such time as the licensee applies for renewal of a tribal gaming license.

[43] (e) Upon receipt of completed license or license renewal application information from the Tribal Gaming Agency, the State Gaming Agency may conduct a background investigation pursuant to state law to determine whether the Applicant is suitable to be licensed for association with Class III Gaming operations. While the Tribal Gaming Agency shall ordinarily be the primary source of application information, the State Gaming Agency is authorized to directly seek application information from the Applicant. The Tribal Gaming Agency shall provide to the State Gaming Agency reports of the background investigations conducted by the Tribal Gaming Agency and the NIGC and related applications, if any, for Gaming Employees, Gaming Resource Suppliers, and Financial Sources. If further investigation is required to supplement the investigation conducted by the Tribal Gaming Agency, the Applicant will be required to pay the application fee charged by the State Gaming Agency pursuant to California Business and Professions Code section 19951, subdivision (a), but any deposit requested by the State Gaming Agency pursuant to section 19867 of that Code shall take into account reports of the background investigation already conducted by the Tribal Gaming Agency and the NIGC, if any. Failure to

provide information reasonably required by the State Gaming Agency to complete its investigation under State law or failure to pay the application fee or deposit can constitute grounds for denial of the application by the State Gaming Agency. The State Gaming Agency and the Tribal Gaming Agency shall cooperate in sharing as much background information as possible, both to maximize investigative efficiency and thoroughness, and to minimize investigative costs.

(f) Upon completion of the necessary background investigation or other verification of suitability, the State Gaming Agency shall issue a notice to the Tribal Gaming Agency certifying that the State has determined that the Applicant is suitable, or that the Applicant is unsuitable, for licensure in a Gaming Operation and, if unsuitable, stating the reasons therefore. Issuance of a determination of suitability does not preclude the State Gaming Agency from a subsequent determination based on newly discovered information that a person or entity is unsuitable for the purpose for which the person or entity is licensed. Upon receipt of notice that the State Gaming Agency has determined that a person or entity is or would be [44] unsuitable for licensure, the Tribal Gaming Agency shall deny that person or entity a license and promptly, and in no event more than thirty (30) days from the issuance of the State Gaming Agency notification, revoke any tribal gaming license that has theretofore been issued to that person or entity; provided that the Tribal Gaming Agency may,

in its discretion, reissue a tribal gaming license to the person or entity following entry of a final judgment reversing the determination of the State Gaming Agency in a proceeding in state court conducted pursuant to section 1085 of the California Code of Civil Procedure.

(g) Prior to denying an application for a determination of suitability, or to issuing notice to the Tribal Gaming Agency that a person or entity previously determined to be suitable had been determined unsuitable for licensure, the State Gaming Agency shall notify the Tribal Gaming Agency and afford the Tribe an opportunity to be heard. If the State Gaming Agency denies an application for a determination of suitability, or issues notice that a person or entity previously determined suitable has been determined unsuitable for licensure, the State Gaming Agency shall provide that person or entity with written notice of all appeal rights available under state law.

(h) The Commission, or its successor, shall maintain a roster of Gaming Resource Suppliers and Financial Sources that it has determined to be suitable pursuant to the provisions of this section, or through separate procedures to be adopted by the Commission. Upon application to the Tribal Gaming Agency for a tribal gaming license, a Gaming Resource Supplier or Financial Source that appears on the Commission's suitability roster may be licensed by the Tribal Gaming Agency in the same manner as a Gaming Resource Supplier

under subdivision (d) of section 6.4.4, subject to any later determination by the State Gaming Agency that the Gaming Resource Supplier or Financial Source is not suitable or to a tribal gaming license suspension or revocation pursuant to section 6.5.1; provided that nothing in this subdivision exempts the Gaming Resource Supplier or Financial Source from applying for a renewal of a State determination of suitability.

[45] Sec. 6.6. Submission of New Application.

Nothing in section 6.0 shall be construed to preclude an Applicant who has been determined to be unsuitable for licensure by the State Gaming Agency, or the Tribe on behalf of such Applicant, from submitting a new application for a determination of suitability by the State Gaming Agency in accordance with section 6.0, provided that the new application cannot be filed sooner than one (1) year from when the State Gaming Agency's finding of unsuitability has become final under state law.

SECTION 7.0. APPROVAL AND TESTING OF GAMING DEVICES.

Sec. 7.1. Gaming Device Approval.

(a) No Gaming Device may be offered for play unless all the following occurs:

(1) The manufacturer or distributor which sells, leases, or distributes such Gaming Device (i) has applied for a determination of suitability by the State Gaming Agency at least fifteen (15) days before it is offered for play, (ii) has not been found to be unsuitable by the State Gaming Agency, and (iii) has been licensed by the Tribal Gaming Agency;

(2) The software for the game authorized for play on the Gaming Device has been tested, approved and certified by an independent gaming test laboratory or state governmental gaming test laboratory (the "Gaming Test Laboratory") as operating in accordance with the standards of Gaming Laboratories International, Inc. known as GLI-11, GLI-12, GLI-13, GLI-21, and GLI-26, or the technical standards approved by the State of Nevada, or such other technical standards as the State Gaming Agency and the Tribal Gaming Agency shall agree upon, which agreement shall not unreasonably be withheld;

(3) A copy of the certification by the Gaming Test Laboratory, specified in subdivision

(a)(2), is provided to the State Gaming Agency by electronic transmission or by mail, unless the State Gaming Agency waives receipt of copies of the certification;

[46] (4) The software for the game authorized for play on the Gaming Device is tested by the Tribal Gaming Agency to ensure each game authorized for play on the Gaming Device has the correct electronic signature prior to operation of the Gaming Device by the public, or if already inserted, tested prior to being made available for patron play on the gaming floor;

(5) The hardware and associated equipment for each type of Gaming Device has been tested by the Gaming Test Laboratory prior to operation by the public to ensure operation in accordance with the applicable Gaming Test Laboratory standards; and

(6) The hardware and associated equipment for the Gaming Device has been tested by the Tribal Gaming Agency to ensure operation in accordance with the manufacturer's specifications.

Sec. 7.2. Gaming Test Laboratory Selection.

(a) The Gaming Test Laboratory shall be an independent or state governmental gaming test laboratory recognized in the gaming industry which (1) is competent and qualified to

conduct scientific tests and evaluations of Gaming Devices, and (2) is licensed or approved by any of the following states: Arizona, California, Colorado, Illinois, Indiana, Iowa, Michigan, Missouri, Nevada, New Jersey, or Wisconsin. The Tribal Gaming Agency shall submit to the State Gaming Agency documentation that demonstrates the Gaming Test Laboratory satisfies (1) and (2) herein at least thirty (30) days before the commencement of Gaming Activities pursuant to this these Secretarial Procedures, or if such use follows the commencement of Gaming Activities, within fifteen (15) days prior to reliance thereon. If, at any time, the Gaming Test Laboratory license and/or approval required by (2) herein is suspended or revoked by any of those states or the Gaming Test Laboratory is found unsuitable by the State Gaming Agency, then the State Gaming Agency may reject the use of such Gaming Test Laboratory, and upon such rejection, the Tribal Gaming Agency shall ensure that such Gaming Test Laboratory discontinues its responsibilities under this section.

[47] (b) The Tribe and the State Gaming Agency shall inform the Gaming Test Laboratory in writing that, irrespective of the source of payment of its fees, the Gaming Test Laboratory's duty of loyalty runs equally to the State and the Tribe.

Sec. 7.3. Maintenance of Records of Testing Compliance.

The Tribal Gaming Agency shall prepare and maintain records of its compliance with section 7.1 while any Gaming Device is on the gaming floor and for a period of one (1) year after the Gaming Device is removed from the gaming floor, and shall make those records available for inspection by the State Gaming Agency upon request.

Sec. 7.4. State Gaming Agency Inspections.

(a) The State Gaming Agency, utilizing such consultants, if any, it deems appropriate, may inspect the Gaming Devices in operation at the Gaming Facility on a random basis not to exceed four (4) times annually to confirm that they operate and play properly pursuant to the manufacturer's technical standards. The inspections may be conducted onsite or remotely and include all Gaming Device software, hardware, associated equipment, software maintenance records, and components critical to the operation of the Gaming Device. The Tribal Gaming Agency shall cooperate with the State Gaming Agency's reasonable efforts to obtain information that facilitates the conduct of remote but effective inspections that minimize disruption to Gaming Activities. The random inspections conducted pursuant to this subdivision shall occur during normal business hours outside of weekends and holidays and shall not remove from play more than five percent (5%) of the

Gaming Devices then in operation at the Gaming Facility, provided that the five percent (5%) limitation on removal of Gaming Devices shall not apply where a Gaming Device, including but not limited to a progressive controller, makes limiting removal from play to no more than five percent (5%) infeasible or impossible. Whenever practicable, the State Gaming Agency shall not require removal from play any Gaming Device that the State Gaming Agency determines may be fully and adequately tested while still in play.

(b) The State Gaming Agency shall provide notice to the Tribal Gaming Agency of such inspection at or prior to the commencement of the [48] random inspection, and the Tribal Gaming Agency may accompany the State Gaming Agency inspector(s).

(c) The State Gaming Agency, utilizing such consultants, if any, it deems appropriate, may conduct additional inspections at additional times upon reasonable belief of any irregularity and after informing and consulting with the Tribal Gaming Agency regarding the factual basis for such belief

Sec. 7.5. Technical Standards.

The Tribal Gaming Agency shall provide to the State Gaming Agency copies of its regulations for technical standards applicable to the Tribe's Gaming Devices at least thirty (30) days before the commencement of the Gaming Operation and at least

thirty (30) days before the effective date of any revisions to the regulations.

Sec. 7.6. Transportation of Gaming Devices.

(a) Subject to the provisions of subdivision (b), the Tribal Gaming Agency shall not permit any Gaming Device to be transported to or from the Tribe's Indian lands except in accordance with procedures established by agreement between the State Gaming Agency and the Tribal Gaming Agency and upon at least ten (10) days' notice to the Sheriff's Department for the County.

(b) Transportation of a Gaming Device from a Gaming Facility within California is permissible only if:

(1) The final destination of the Gaming Device is a gaming facility of any tribe in California that has a compact with the State which makes lawful the receipt of such Gaming Device;

(2) The final destination of the Gaming Device is any other state in which possession of the Gaming Device is made lawful by state law or by tribal-state compact;

[49] (3) The final destination of the Gaming Device is another country, or any state or province of another country, wherein possession of the Gaming Device is lawful; or

(4) The final destination is a location within California for testing, repair, maintenance, or

storage by a person or entity that has been licensed by the Tribal Gaming Agency and has been found suitable for licensure by the State Gaming Agency.

(c) Any Gaming Device transported from or to the Tribe's Indian lands in violation of this section 7.6, or in violation of any permit issued pursuant thereto, shall be considered a violation of these Secretarial Procedures and subject to seizure by California peace officers in accordance with California law.

SECTION 8.0. INSPECTIONS.

Sec. 8.1. Investigation and Sanctions.

(a) The Tribal Gaming Agency shall investigate any reported violation of these Secretarial Procedures and shall require the Gaming Operation to correct the violation upon such terms and conditions as the Tribal Gaming Agency determines are necessary.

(b) The Tribal Gaming Agency shall be empowered by the Gaming Ordinance to impose fines or other sanctions within the jurisdiction of the Tribe against gaming licensees who interfere with or violate the Tribe's gaming regulatory requirements and obligations under IGRA, NIGC gaming regulations, the Gaming Ordinance, or these Secretarial Procedures as long as the fines or sanctions comport with federal due process by, at a minimum, providing the licensee with notice reasonably

calculated to apprise the licensee of the pendency of the determination, access to the materials upon which the charge is based, and an opportunity to be heard.

(c) The Tribal Gaming Agency shall report violations of these Secretarial Procedures that pose a substantial threat to gaming integrity, public health and safety, or the environment, or continued violations that, if isolated might not require reporting, but cumulatively pose a threat to gaming integrity, public health and safety or the environment, and any [50] failures to comply with the Tribal Gaming Agency's orders to the Commission and the Bureau of Gambling Control in the California Department of Justice within ten (10) days of discovery.

Sec. 8.2. Assistance by State Gaming Agency.

(a) The mediator's selected compact provides the State Gaming Agency with authority to regulate the Tribe's class III gaming activities. The Secretary, however, cannot unilaterally obligate the State to carry out those regulatory responsibilities under these Secretarial Procedures.

(b) The State may, within sixty (60) days of the date of issuance of these Secretarial Procedures, provide written notice to the Tribe, with copies to the Secretary and the NIGC, that the State will assume the regulatory responsibilities vested by these Secretarial Procedures in the State Gaming Agency.

(c) The Tribe shall acknowledge and consent to the State's notice of the State Gaming Agency's assumption of responsibilities from NIGC by resolution of its governing body. The Tribe shall provide a copy of its resolution to the State, the Secretary, and the NIGC.

(d) The Tribe may request the assistance of the State Gaming Agency whenever it reasonably appears that such assistance may be necessary to carry out the purposes described in section 8.1, or otherwise to protect public health, safety, or welfare.

(e) If the State does not consent to carrying out the regulatory responsibilities identified in these Secretarial Procedures, or withdraws its consent, the Tribe shall enter into a Memorandum of Understanding (MOU) with the Chairman of the NIGC authorizing the NIGC to regulate the class III gaming authorized by these Secretarial Procedures.

The Tribe shall not operate any class III gaming under these Secretarial Procedures in the absence of either State regulatory participation or an MOU with the Chairman of the NIGC, as described above.

[51] **Sec. 8.3. Access to Premises by State Gaming Agency; Notification; Inspections.**

(a) Notwithstanding that the Tribe and its Tribal Gaming Agency have the primary responsibility to administer and enforce the regulatory requirements of these Secretarial Procedures, the State Gaming Agency, including but not limited to any consultants retained by it, shall have the right to inspect the Tribe's Gaming Facility, and all Gaming Operation or Facility records relating to Class III Gaming as is reasonably necessary to ensure Secretarial Procedure compliance, including such records located in off-site facilities dedicated to their storage subject to the conditions in subdivisions (b), (c), and (d).

(b) Except as provided in section 7.4, the State Gaming Agency may inspect public areas of the Gaming Facility at any time without prior notice during normal Gaming Facility business hours.

(c) Inspection of areas of the Gaming Facility not normally accessible to the public may be made at any time the Gaming Facility is open to the public, immediately after the State Gaming Agency's authorized inspector notifies the Tribal Gaming Agency of his or her presence on the premises, presents proper identification, and requests access to the non-public areas of the Gaming Facility. The Tribal Gaming Agency, in its sole discretion, may require a member of the Tribal Gaming Agency to accompany the State Gaming Agency inspector

at all times that the State Gaming Agency inspector is in a non-public area of the Gaming Facility. If the Tribal Gaming Agency imposes such a requirement, it shall require such member to be available at all times for those purposes and shall ensure that the member has the ability to gain immediate access to all non-public areas of the Gaming Facility.

(d) Nothing in these Secretarial Procedures shall be construed to limit the State Gaming Agency to one (1) inspector during inspections.

Sec. 8.4. Inspection, Copying and Confidentiality of Documents.

(a) Inspection and copying of Gaming Operation papers, books, and records may occur at any time, immediately after the State Gaming Agency gives notice to the Tribal Gaming Agency, during the hours [52] from 8:00 a.m. to 5:00 p.m. Monday through Friday, and at any other time that a Tribal Gaming Agency employee, a Gaming Facility employee, or a Gaming Operation employee is available on-site with physical access to offices, including off-site facilities, where the papers, books, and records are kept. The Tribe shall cooperate with, and cannot refuse, the inspection and copying, provided that the State Gaming Agency inspectors cannot require copies of papers, books, or records in such volume that it unreasonably interferes with the normal

functioning of the Gaming Operation or Facility.

(b) In lieu of onsite inspection and copying of Gaming Operation papers, books, and records by its inspectors, the State Gaming Agency may request in writing that the Tribal Gaming Agency provide copies of such papers, books, and records as the State Gaming Agency deems necessary to ensure compliance with the terms of these Secretarial Procedures. The State Gaming Agency's written request shall describe those papers, books, and records requested to be copied with sufficient specificity to reasonably identify the requested documents. Within ten (10) days after it receives the request, or such other time as the State Gaming Agency may agree in writing, the Tribal Gaming Agency shall provide one (1) copy of the requested papers, books, and records to the requesting State Gaming Agency. An electronic version of the requested papers, books, and records may be submitted to the State Gaming Agency in lieu of a paper copy so long as the software required to access the electronic version is reasonably available to the State Gaming Agency and the State Gaming Agency does not object.

(c) Notwithstanding any other provision of California law, any confidential information and records, as defined in subdivision (d), that the State Gaming Agency obtains or copies pursuant to these Secretarial Procedures shall be, and remain, the property solely of the Tribe; provided that such confidential information

and records and copies may be retained by the State Gaming Agency as is reasonably necessary to assure the Tribe's compliance with these Secretarial Procedures or to complete any investigation of suspected criminal activity; and provided further that the State Gaming Agency may provide such confidential information and records and copies to federal law enforcement and other state agencies or consultants that the State deems reasonably necessary in order to assure the Tribe's [53] compliance with these Secretarial Procedures, in order to renegotiate any provision thereof, or in order to conduct or complete any investigation of suspected criminal activity in connection with the Gaming Activities or the operation of the Gaming Facility or the Gaming Operation.

(d) For purposes of this section 8.4, "confidential information and records" means any and all information and documents received from the Tribe pursuant to these Secretarial Procedures, except for information and documents that are part of the public domain, or otherwise required to be disclosed to third parties pursuant to these Secretarial Procedures.

(e) The State Gaming Agency and all other state agencies and consultants to which it provides information and records obtained pursuant to subdivisions (a) or (b) of this section, which are confidential pursuant to subdivision (d), will exercise care in the preservation of the confidentiality of such information and records and will apply the highest standards of

confidentiality provided under California state law to preserve such information and records from disclosure until such time as the information or record is no longer confidential or release is authorized by the Tribe, by mutual agreement of the Tribe and the State, or pursuant to the arbitration procedures under section 13.2. The State Gaming Agency and all other state agencies and consultants may disclose confidential information or records as necessary to fully adjudicate or resolve a dispute arising pursuant to these Secretarial Procedures, in which case the State Gaming Agency and all other state agencies and consultants agree to preserve confidentiality to the greatest extent feasible and available. Before the State Gaming Agency provides confidential information and records to a consultant as authorized under subdivision (c), it shall enter into a confidentiality agreement with that consultant that meets the standards of this subdivision.

(f) The Tribe may avail itself of any and all remedies under State law for the improper disclosure of confidential information and records. In the case of any disclosure of confidential information and records compelled by judicial process, the State Gaming Agency will endeavor to give the Tribe prompt notice of the order compelling [54] disclosure and a reasonable opportunity to interpose an objection thereto with the court.

(g) The Tribal Gaming Agency and the State Gaming Agency shall confer regarding

protocols for the release to law enforcement agencies of information obtained during the course of background investigations.

(h) Confidential information and records received by the State Gaming Agency from the Tribe in compliance with these Secretarial Procedures, or information compiled by the State Gaming Agency from those confidential records, shall be exempt from disclosure under the California Public Records Act.

(i) Notwithstanding any other provision of these Secretarial Procedures, the State Gaming Agency shall not be denied access to papers, books, records, equipment, or places where such access is reasonably necessary to ensure compliance with these Secretarial Procedures or to conduct or complete an investigation of suspected criminal activity in connection with the Gaming Activities or the operation of the Gaming Facility or the Gaming Operation.

Sec. 8.5. NIGC Audit Reports.

The Tribe shall provide to the State Gaming Agency, within twenty (20) days of their submission to the NIGC, copies of the audited financial statements of Class III Gaming and management letter(s), if any, provided to the NIGC. All submissions to the State Gaming Agency made pursuant to this section 8.5 shall be subject to the confidentiality protections and assurances set forth in section 8.4, subdivision (h) of these Secretarial Procedures.

Sec. 8.6. Cooperation with Tribal Gaming Agency.

The State Gaming Agency shall meet periodically with the Tribal Gaming Agency and cooperate in all matters relating to the enforcement of the provisions of these Secretarial Procedures and its Appendices.

Sec. 8.7. Secretarial Procedures Compliance Review.

The State Gaming Agency is authorized to conduct an annual comprehensive Secretarial Procedure compliance review of the Gaming Operation, [55] Gaming Facility, and Gaming Activities to ensure compliance with all provisions of these Secretarial Procedures, any appendices hereto, including, without limitation, minimum internal control standards set forth in section 9.1.1, and with all laws, ordinances, codes, rules, regulations, policies, internal controls, standards, and procedures that are required to be adopted, implemented, or complied with pursuant to these Secretarial Procedures. Upon the discovery of an irregularity that the State Gaming Agency reasonably determines may be a threat to gaming integrity or public safety, and after consultation with the Tribal Gaming Agency, the State Gaming Agency may conduct additional periodic reviews of any part of the Gaming Operation, Gaming Facility, and Gaming Activities and other activities subject to these Secretarial Procedures to ensure compliance with all provisions of these Secretarial Procedures and its appendices. Nothing in this section shall be construed to supersede any other audits,

inspections, investigations, and monitoring authorized by these Secretarial Procedures.

SECTION 9.0. RULES AND REGULATIONS FOR THE OPERATION AND MANAGEMENT OF THE GAMING OPERATION AND FACILITY.

Sec. 9.1. Adoption of Regulations for Operation and Management; Minimum Standards.

It is the responsibility of the Tribal Gaming Agency to conduct on-site gaming regulation and control in order to enforce the terms of these Secretarial Procedures, of IGRA, of NIGC gaming regulations, of State Gaming Agency regulations, and of the Gaming Ordinance, to protect the integrity of the Gaming Activities and the Gaming Operation for honesty and fairness, and to maintain the confidence of patrons that tribal governmental gaming in California meets the highest standards of fairness and internal controls. To meet those responsibilities, the Tribal Gaming Agency shall be vested with the authority to promulgate, and shall promulgate, rules and regulations governing, at a minimum, the following subjects pursuant to the standards and conditions set forth therein:

(a) The enforcement of all relevant laws and rules with respect to the Gaming Activities, Gaming Operation and Gaming Facility, and the conduct of investigations and hearings with respect thereto, and to any other subject within its jurisdiction.

(b) The physical safety of Gaming Facility patrons and employees, and any other person while in the Gaming Facility. Except as provided in section 12.2, nothing herein shall be construed, however, to make [56] applicable to the Tribe any State laws, regulations, or standards governing the use of tobacco.

(c) The physical safeguarding of assets transported to, within, and from the Gaming Facility.

(d) The prevention of illegal activity within the Gaming Facility or with regard to the Gaming Operation or Gaming Activities, including, but not limited to, the maintenance of employee procedures and a surveillance system as provided in subdivision (e).

(e) Maintenance of a closed-circuit television surveillance system consistent with industry standards for gaming facilities of the type and scale operated by the Tribe, which system shall be approved by, and may not be modified without the approval of, the Tribal Gaming Agency. The Tribal Gaming Agency shall have current copies of the Gaming Facility floor plan and closed-circuit television system at all times.

(f) The recording of any and all occurrences within the Gaming Facility that deviate from normal operating policies and procedures (hereinafter "incidents"). The regulations shall provide that the Tribal Gaming Agency shall immediately transmit copies of incident reports that concern a significant or continued

threat to public safety or gaming integrity to the State Gaming Agency. The procedure for recording incidents pursuant to the regulations shall also do all of the following:

(1) Specify that security personnel record all incidents, regardless of an employee's determination that the incident may be immaterial (all incidents shall be identified in writing).

(2) Require the assignment of a sequential number to each report.

(3) Provide for permanent reporting in indelible ink in a bound notebook from which pages cannot be removed and in which entries are made on each side of each page and/or in electronic form, provided the information is recorded in a manner so that, once the information is entered, it cannot be deleted or altered [57] and is available to the State Gaming Agency pursuant to sections 8.3 and 8.4.

(4) Require that each report include, at a minimum, all of the following:

(A) The record number.

(B) The date.

(C) The time.

(D) The location of the incident.

(E) A detailed description of the incident.

(F) The persons involved in the incident.

(G) The security department employee assigned to the incident.

(g) The establishment of employee procedures designed to permit detection of any irregularities, theft, cheating, fraud, or the like, consistent with industry practice.

(h) Maintenance of a list of persons permanently excluded from the Gaming Facility who, because of their past behavior, criminal history, or association with persons or organizations, pose a threat to the integrity of the Gaming Activities of the Tribe or to the integrity of regulated gaming within the State. The Tribal Gaming Agency shall transmit a copy of the list to the State Gaming Agency quarterly and shall make a copy of the current list available to the State Gaming Agency upon request. Notwithstanding anything in these Secretarial Procedures to the contrary, the State Gaming Agency is authorized to make the copies of the list available to other tribal gaming agencies, to licensees of the Commission, the California Horse Racing Board, and other law enforcement agencies. To the extent permissible under law, the State Gaming Agency may share information about individuals permanently excluded from other tribal gaming facilities or other [58] gaming establishments within California with the Tribal Gaming Agency.

(i) The conduct of an audit, at the Tribe's expense, of the annual financial statements of the Gaming Operation.

(j) Submission to, and prior approval by, the Tribal Gaming Agency of the rules and regulations of each class III game to be operated by the Tribe, and of any changes in those rules and regulations. No class III game may be played that has not received Tribal Gaming Agency approval.

(k) The obligation of the Gaming Facility and the Gaming Operation to maintain a copy of the rules, regulations, and procedures for each game as played, including, but not limited to, the method of play and the odds and method of determining amounts paid to winners.

(l) Specifications and standards to ensure that information regarding the method of play, odds, and payoff determinations is visibly displayed or available to patrons in written form in the Gaming Facility and to ensure that betting limits applicable to any gaming station is displayed at that gaming station.

(m) Maintenance of a cashier's cage in accordance with industry standards for such facilities.

(n) Specification of minimum staff and supervisory requirements for each Gaming Activity to be conducted.

(o) Technical standards and specifications in conformity with the requirements of these Secretarial Procedures for the operation of Gaming Devices and other games authorized herein to be conducted by the Tribe.

Sec. 9.1.1. Minimum Internal Control Standards (MICS).

(a) The Tribe shall conduct its Gaming Activities pursuant to an internal control system that implements minimum internal control standards for Class III Gaming that are no less stringent than those contained in [59] the Minimum Internal Control Standards of the NIGC (25 C.F.R. § 542), as they existed on October 10, 2006, and as they may be amended from time to time, without regard to the NIGC's authority to promulgate, enforce, or audit the standards. These standards are posted on the State Gaming Agency website(s) and are referred to herein as the "Compact MICS." This requirement is met through compliance with the provisions set forth in this section and in section 9.1 or in the alternative by compliance with the state-wide uniform regulation CGCC-8, as it exists currently and as it may be amended.

(b) Before commencement of Gaming Operations, the Tribal Gaming Agency shall, in accordance with the Gaming Ordinance, establish written internal control standards for the Gaming Facility that shall: (i) provide a level of control that equals or exceeds the minimum internal control standards set forth in the Compact MICS, as they exist currently and as they may be revised; (ii) contain standards for currency transaction reporting that comply with title 31 Code of Federal Regulations part 103, as it exists currently and as it may be amended; (iii) satisfy the requirements of

section 9.1; (iv) be consistent with these Secretarial Procedures; and (v) require the Gaming Operation to comply with the internal control standards.

(c) The Gaming Operation shall operate the Gaming Facility pursuant to a written internal control system. The internal control system shall comply with and implement the internal control standards established by the Tribal Gaming Agency pursuant to subdivision (b) of this section 9.1.1. The internal control system, and any proposed changes to the system, must be approved by the Tribal Gaming Agency prior to implementation. The internal control system shall be designed to reasonably assure that: (i) assets are safeguarded and accountability over assets is maintained; (ii) liabilities are properly recorded and contingent liabilities are properly disclosed; (iii) financial records including records relating to revenues, expenses, assets, liabilities, and equity/fund balances are accurate and reliable; (iv) transactions are performed in accordance with the Tribal Gaming Agency's general or specific authorization; (v) access to assets is permitted only in accordance with the Tribal Gaming Agency's approved procedures; (vi) recorded accountability for assets is compared with actual assets at frequent intervals and appropriate action is taken with respect to any discrepancies; and (vii) functions, duties and responsibilities are [60] appropriately segregated and performed in accordance with sound practices by qualified personnel.

(d) The Tribal Gaming Agency shall provide a copy of its written internal control standards and any changes to those control standards to the State Gaming Agency within thirty (30) days of approval by the Tribal Gaming Agency. The State Gaming Agency will review and submit to the Tribal Gaming Agency written comments or objections, if any, to the internal control standards and any changes to the standards, within thirty (30) days of receiving them, or by another date agreed upon by the Tribal Gaming Agency and the State Gaming Agency. The State Gaming Agency's review shall be for the purpose of determining whether the internal control standards and any changes to the standards provide a level of control which equals or exceeds the level of control required by the Compact MICS, as they exist currently and as they may be revised, and are consistent with these Secretarial Procedures.

(e) The Compact MICS shall apply to all Gaming Activities, Gaming Facilities and the Gaming Operation; however, the Compact MICS are not applicable to any activities not expressly permitted in these Secretarial Procedures. Should the terms in the Compact MICS be inconsistent with these Secretarial Procedures., the terms in these Secretarial Procedures shall prevail.

(f) The Tribal Gaming Agency shall provide the State Gaming Agency with a copy of the "Agreed-Upon Procedures" report prepared annually pursuant to part 542.3, subdivision

(f), of the Compact MICS, as they may be revised, within thirty (30) days after the Tribal Gaming Agency's receipt of the report. The "Agreed-Upon Procedures" report shall be prepared by an independent auditor, who for the purposes of this section, shall be a certified public accountant who is licensed in the state of California to practice as an independent certified public accountant or who holds a California practice privilege, as provided in the California Accountancy Act, California Business and Professions Code, section 5000 et seq., who is not employed by the Tribe, the Tribal Gaming Agency, the Management Contractor, or the Gaming Operation, has no financial interest in any of these entities, and is only otherwise retained by any of these entities [61] to conduct regulatory audits, independent audits of the Gaming Operation, or audits under this section.

Sec. 9.2. Program to Mitigate Problem Gambling.

The Gaming Operation shall establish a program, approved by the Tribal Gaming Agency, to mitigate pathological and problem gambling by implementing the following measures:

(a) It shall train Gaming Facility supervisors and gaming floor employees on responsible gaming and to identify and manage problem gambling.

(b) It shall make available to patrons at conspicuous locations and ATMs in the Gaming Facility educational and informational materials which aim at the prevention of problem gambling and that specify where to find assistance.

(c) It shall establish self-exclusion programs whereby a self-identified problem gambler may request the halt of promotional mailings, the revocation of privileges for casino services, the denial or restraint on the issuance of credit and check cashing services, and exclusion from the Gaming Facility.

(d) It shall establish an involuntary exclusion program that allows the Gaming Operation to halt promotional mailings, deny or restrain the issuance of credit and cash checking services, and deny access to the Gaming Facility to patrons who have exhibited signs of problem gambling.

(e) It shall display at conspicuous locations and at ATMs within the Gaming Facility signage bearing a toll-free help-line number where patrons may obtain assistance for gambling problems.

(f) It shall make diligent efforts to prevent underage individuals from loitering in the area of the Gaming Facility where the Gaming Activities take place.

(g) It shall assure that advertising and marketing of the Gaming Activities at the Gaming Facility contain a responsible gambling

message and a [62] toll-free help-line number for problem gamblers, where practical, and that it make no false or misleading claims.

(h) It shall adopt a code of conduct, derived, *inter alia*, from that of the American Gaming Association, that addresses responsible gambling and responsible advertising.

Nothing herein is intended to grant any third party the right to sue based on a perceived violation of these standards.

Sec. 9.3. Enforcement of Regulations.

The Tribal Gaming Agency shall ensure the enforcement of the rules, regulations, and specifications promulgated under these Secretarial Procedures, including under section 9.1.

Sec. 9.4. State Civil and Criminal Jurisdiction.

Nothing in these Secretarial Procedures impairs the civil or criminal jurisdiction of the State, local law enforcement agencies and state courts under Public Law 280 (18 U.S.C. § 1162; 28 U.S.C. § 1360) or IGRA. Except as provided below, all State and local law enforcement agencies and state courts shall exercise jurisdiction to enforce the State's criminal laws on the Tribe's Indian lands, including the Gaming Facility and all related structures, in the same manner and to the same extent, and subject to the same restraints and limitations, imposed by the laws of the State and the United

States, as is exercised by State and local law enforcement agencies and state courts elsewhere in the State. The Tribe hereby consents to such criminal jurisdiction. However, no Gaming Activity conducted by the Tribe pursuant to these Secretarial Procedures may be deemed to be a civil or criminal violation of any law of the State. Except for such Gaming Activity conducted pursuant to these Secretarial Procedures, criminal jurisdiction to enforce State gambling laws on the Tribe's Indian lands, and to adjudicate alleged violations thereof, is hereby transferred to the State pursuant to 18 U.S.C. § 1166(d).

Sec. 9.5. Tribal Gaming Agency Members.

[63] (a) The Tribe shall take all reasonable steps to ensure that members of the Tribal Gaming Agency are free from corruption, undue influence, compromise, and conflicting interests in the conduct of their duties under these Secretarial Procedures; shall adopt a conflict-of-interest code to that end and shall ensure its enforcement; and shall ensure the prompt removal of any member of the Tribal Gaming Agency who is found to have acted in a corrupt or compromised manner or to have a conflict of interest.

(b) The Tribe shall conduct a background investigation on each prospective member of the Tribal Gaming Agency, who shall meet the background requirements of a management contractor under IGRA; provided that if such member is elected through a tribal election

process, that member may not participate in any Tribal Gaming Agency matters under these Secretarial Procedures unless a background investigation has been concluded and the member has been found to be suitable. If requested by the Tribe or the Tribal Gaming Agency, the State Gaming Agency may assist in the conduct of such a background investigation and may assist in the investigation of any possible corruption or compromise of a member of the Tribal Gaming Agency.

(c) In the event that the Tribe requests the assistance of the State Gaming Agency pursuant to subdivision (b) of this section and the State Gaming Agency determines that a member of the Tribal Gaming Agency is unsuitable, the State Gaming Agency shall serve upon the Tribe a written notice of its finding of unsuitability and request the removal of the member. Upon receipt of notice that the State Gaming Agency has determined the member to be unsuitable, the Tribe shall either immediately remove that member from the Tribal Gaming Agency or demand an expedited arbitration pursuant to section 13.2.

(d) If the Tribe demands an expedited arbitration of the State Gaming Agency's determination of unsuitability, the arbitrator shall make a *de novo* determination as to whether the State Gaming Agency's determination of unsuitability is justified using the following bases for such determination.

(1) To be found suitable, the member must be all of the following:

[64] (A) A person of good character, honesty, and integrity.

(B) A person whose prior activities, criminal record, if any, reputation, habits, and associations do not pose a threat to the public interest of the State, or to the effective regulation and control of controlled gambling, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of controlled gambling or in the carrying on of the business and financial arrangements incidental thereto.

(C) A person that is in all other respects qualified to be licensed as provided in section 6.4.7 of these Secretarial Procedures.

(2) A member is deemed unsuitable if any of the following apply:

(A) The person, any partner, or any officer, director, or shareholder of any corporation in which the person has a controlling interest, has any financial interest in any business or organization that is engaged in any form of gambling prohibited by section 330 of the California Penal Code, whether within or without the State of California, unless such

gambling is lawful within the jurisdiction in which it is being conducted.

(B) The person fails to clearly establish eligibility and qualification in accordance with section 6.4.7 of these Secretarial Procedures.

(C) The person fails to provide information, documentation, and assurances required by sections 6.4.7, 6.4.8, subdivision (c), or 6.5.6 of these Secretarial Procedures or requested by the Tribal Gaming Agency, or fails to reveal any fact material to qualification, or supplies information that is untrue or misleading as to a material fact pertaining to the qualification criteria.

(D) The person has been convicted of a felony in any state or federal court, including a conviction by a federal court or [65] by a court in another state for a crime that would constitute a felony if committed in California.

(E) The person has been convicted of any misdemeanor involving dishonesty or moral turpitude within the ten (10)-year period immediately preceding the beginning of his or her service on the Tribal Gaming Agency, unless the applicant has been granted relief pursuant to section 1203.4, 1203.4a,

or 1203.45 of the California Penal Code; provided, however, that the granting of relief pursuant to section 1203.4, 1203.4a, or 1203.45 of the California Penal Code shall not constitute a limitation on the discretion of the arbitrator to determine the person's compliance with the requirements of sections 6.4.7 and 9.5, subdivision (d)(1), of these Secretarial Procedures.

(F) The person has been associated with criminal profiteering activity or organized crime, as defined by section 186.2 of the California Penal Code.

(G) The person has exhibited contumacious defiance of any legislative investigatory body, or other official investigatory body of any state or of the United States, when that body is engaged in the investigation of crimes relating to gambling, official corruption related to gambling activities, or criminal profiteering activity or organized crime, as defined by section 186.2 of the California Penal Code.

(H) The person is less than twenty-one (21) years of age.

In all cases, in coming to a decision, the arbitrator must give due consideration for the proper protection of the health, safety and welfare of the residents of the

State, and must take into account whether membership on the Tribal Gaming Agency would undermine public trust that the Gaming Operation is free from criminal and dishonest elements and would be conducted honestly.

Sec. 9.6. Uniform Tribal Gaming Regulations.

[66] (a) Uniform Tribal Gaming Regulations CGCC-1, CGCC-2, CGCC-7, and CGCC-8 (as in effect on the date the parties execute these Secretarial Procedures), adopted by the State Gaming Agency and approved by the Association, shall apply to the Gaming Operation until amended or repealed, without further action by the State Gaming Agency, the Tribe, the Tribal Gaming Agency or the Association.

(b) Any subsequent Uniform Tribal Gaming Regulations adopted by the State Gaming Agency and approved by the Association shall apply to the Gaming Operation until amended or repealed.

(c) No State Gaming Agency regulation adopted pursuant to this section 9.6 shall be effective with respect to the Tribe's Gaming Operation unless it has first been approved by the Association and the Tribe has had an opportunity to review and comment on the proposed regulation.

(d) Every State Gaming Agency regulation adopted pursuant to this section 9.6 that is intended to apply to the Tribe (other than a

regulation proposed or previously approved by the Association) shall be submitted to the Association for consideration prior to submission of the regulation to the Tribe for comment as provided in subdivision (c). A regulation adopted pursuant to this section 9.6 that is disapproved by the Association shall not be submitted to the Tribe for comment unless it is re-adopted by the State Gaming Agency as a proposed regulation, in its original or amended form, with a detailed, written response to the Association's objections.

(e) Except as provided in subdivision (d), no regulation of the State Gaming Agency adopted pursuant to this section 9.6 shall be adopted as a final regulation in respect to the Tribe's Gaming Operation before the expiration of 30 (thirty) days after submission of the proposed regulation to the Tribe for comment as a proposed regulation, and after consideration of the Tribe's comments, if any.

(f) In exigent circumstances (e.g., imminent threat to public health and safety), the State Gaming Agency may adopt a regulation that becomes effective immediately. Any such regulation shall be accompanied by a detailed, written description of the exigent circumstances, and shall be submitted immediately to the Association [67] for consideration. If the regulation is disapproved by the Association, it shall cease to be effective, but may be readopted by the State Gaming Agency as a proposed regulation, in its original or amended

form, with a detailed, written response to the Association's objections, and thereafter submitted to the Tribe for comment as provided in subdivision (e).

(g) The Tribe may object to a State Gaming Agency regulation adopted pursuant to this section 9.6 on the ground that it is unnecessary, unduly burdensome, or unfairly discriminatory, and may seek repeal or amendment of the regulation through the dispute resolution process of section 13.0.

SECTION 10.0. PATRON DISPUTES.

The Tribal Gaming Agency shall promulgate regulations governing patron disputes over the play or operation of any game, including any refusal to pay to a patron any alleged winnings from any Gaming Activities, which regulations must meet the following minimum standards:

(a) A patron who makes an oral or written complaint to appropriate personnel of the Gaming Operation over the play or operation of any game within three (3) days of the play or operation at issue shall be notified in writing of the patron's right to request in writing, within fifteen (15) days of the Gaming Operation's written notification to the patron of that right, resolution of the dispute by the Tribal Gaming Agency, and if dissatisfied with the resolution, to seek resolution in either the Tribe's tribal court system, once a tribal court system is established, or through binding arbitration of

the dispute before a retired judge pursuant to the terms and provisions in subdivision (c). If the patron is not provided with the aforesaid notification within thirty (30) days of the patron's complaint, the deadlines herein shall be removed, leaving only the relevant statutes of limitations under California law that would otherwise apply.

(b) Upon receipt of the patron's written request for a resolution of the patron's complaint pursuant to subdivision (a), the Tribal Gaming Agency shall conduct an appropriate investigation, shall provide to the patron a copy of its regulations concerning patron complaints, and shall render a decision in accordance with industry practice extant in [68] Nevada or New Jersey. The decision shall be issued within sixty (60) days of the patron's request, shall be in writing, shall be based on the facts surrounding the dispute, and shall set forth the reasons for the decision.

(c) If the patron is dissatisfied with the decision of the Tribal Gaming Agency issued pursuant to subdivision (b), or no decision is issued within the sixty (60)-day period, the patron may request that the dispute be settled either in the Tribe's tribal court system, once a tribal court system is established, or by binding arbitration before a JAMS arbitrator, in accordance with the Streamlined Arbitration Rules and Procedures of JAMS (or if those rules no longer exist, the closest equivalent) (hereafter "JAMS Streamlined Arbitration"). The decision to choose either the tribal court system or

JAMS Streamlined Arbitration shall be at the patron's sole discretion. Resolution of the patron dispute before the tribal court system shall be at no cost to the patron (excluding patron's attorney's fees). The cost and expenses of the JAMS Streamlined Arbitration shall be initially borne equally by the Tribe and the patron (for purposes of this section, the "parties") and both parties shall pay their share of the arbitration costs at the time of election of the arbitration option, but the arbitrator shall award to the prevailing party its costs and expenses (but not attorney's fees).

(d) Upon a patron's request pursuant to subdivision (c), the Tribe and its Gaming Operation shall consent to tribal court adjudication or JAMS Streamlined Arbitration of the matter, and agree to abide by the decision of the tribal court or JAMS arbitrator; provided, however, that if any alleged winnings are found to be a result of a mechanical, electronic or electromechanical failure and not due to the intentional acts or gross negligence of the Tribe or its agents, the tribal court or JAMS arbitrator shall deny the patron's claim for the winnings but shall award reimbursement of the amount wagered by the patron which was lost as a result of any said failure.

(e) Any party dissatisfied with the award of the tribal court or JAMS arbitrator issued pursuant to subdivision (c), may at the party's election invoke the JAMS Optional Arbitration Appeal Procedure (and if those rules no longer exist, the closest equivalent); provided that

the party making such election shall bear all costs and expenses of [69] JAMS and the JAMS arbitrators associated with the Appeal Procedure, regardless of the outcome.

(f) To effectuate its consent to the tribal court system or JAMS Streamlined Arbitration and JAMS Optional Arbitration Appeal Procedure in this section 10.0, the Tribe shall, in the exercise of its sovereignty, waive its right to assert sovereign immunity in connection with the tribal court jurisdiction and JAMS arbitrator's jurisdiction and in any action to (i) enforce the Tribe's or the patron's obligation to arbitrate, (ii) confirm, correct, modify, or vacate the tribal court award or the arbitral award rendered in the arbitration, or (iii) enforce or execute a judgment based upon the award.

SECTION 11.0. OFF-RESERVATION ENVIRONMENTAL AND ECONOMIC IMPACTS.

Sec. 11.1. Tribal Environmental Impact Report.

(a) Before the commencement of any Project as defined in section 2.25, other than the Preferred Alternative as defined in section 2.23, for which a comprehensive environmental review has already been prepared, the Tribe shall cause to be prepared a comprehensive and adequate tribal environmental impact report (TEIR), analyzing the potentially significant off-reservation environmental impacts of the Project pursuant to the process set forth

in this section 11.0; provided, however, that information or data that is relevant to the TEIR and is a matter of public record or is generally available to the public need not be repeated in its entirety in the TEIR, but may be specifically cited as the source for conclusions stated therein; and provided further that such information or data shall be briefly described, that its relationship to the TEIR shall be indicated, and that the source thereof shall be reasonably available for inspection at a public place or public building. The TEIR shall provide detailed information about the Significant Effect(s) on the Environment which the Project is likely to have, including each of the matters set forth in Appendix B, shall list ways in which the Significant Effects on the Environment might be minimized, and shall include a detailed statement setting forth all of the following:

[70] (1) A description of the physical environmental conditions in the vicinity of the Project (the environmental setting and existing baseline conditions), as they exist at the time the notice of preparation is issued;

(2) All Significant Effects on the Environment of the proposed Project;

(3) In a separate section:

(A) Any Significant Effect on the Environment that cannot be avoided if the Project is implemented;

(B) Any Significant Effect on the Environment that would be irreversible if the Project is implemented;

(4) Mitigation measures proposed to minimize Significant Effects on the Environment, including, but not limited to, measures to reduce the wasteful, inefficient, and unnecessary consumption of energy;

(5) Alternatives to the Project; provided that the Tribe need not address alternatives that would cause it to forgo its right to engage in the Gaming Activities authorized by these Secretarial Procedures on its Indian lands;

(6) Whether any proposed mitigation would be feasible;

(7) Any direct growth-inducing impacts of the Project; and

(8) Whether the proposed mitigation would be effective to substantially reduce the potential Significant Effects on the Environment.

(b) In addition to the information required pursuant to subdivision (a), the TEIR shall also contain a statement indicating the reasons for determining that various effects of the Project on the off-reservation environment are not significant and consequently have not been discussed in detail in the TEIR. In the TEIR, the direct and indirect Significant Effects on the Environment, including each of the items

on [71] Appendix B, shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. The discussion of mitigation measures shall describe feasible measures which could minimize significant adverse effects, and shall distinguish between the measures that are proposed by the Tribe and other measures proposed by others. Where several measures are available to mitigate an effect, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures should not be deferred until some future time. The TEIR shall also describe a range of reasonable alternatives to the Project or to the location of the Project, which would feasibly attain most of the basic objectives of the Project and which would avoid or substantially lessen any of the Significant Effects on the Environment, and evaluate the comparative merits of the alternatives; provided that the Tribe need not address alternatives that would cause it to forgo its right to engage in the Gaming Activities authorized by these Secretarial Procedures on its Indian lands. The TEIR must include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison. The TEIR shall also contain an index or table of contents and a summary, which shall identify each Significant Effect on the Environment with proposed measures and alternatives that would reduce or avoid that effect, and issues to be resolved, including the choice among alternatives and

whether and how to mitigate the Significant Effects on the Environment. Previously approved land use documents, including, but not limited to, general plans, specific plans, and local coastal plans, may be used in the cumulative impact analysis. The Tribe shall consider any recommendations from the County concerning the person or entity to prepare the TEIR.

Sec. 11.2. Notice of Preparation of Draft TEIR.

(a) Upon commencing the preparation of the draft TEIR, the Tribe shall issue a Notice of Preparation to the State Clearinghouse in the State Office of Planning and Research (State Clearinghouse) and to the County for distribution to the public. The Tribe shall also post the Notice of Preparation on its website. The Notice of Preparation shall provide all Interested Persons, as defined in section 2.19, with information describing the Project and its potential Significant Effects on the Environment sufficient to enable Interested Persons to make a [72] meaningful response or comment. At a minimum, the Notice of Preparation shall include all of the following information:

(1) A description of the Project;

(2) The location of the Project shown on a detailed map, preferably topographical, and on a regional map; and

(3) The probable off-reservation environmental effects of the Project.

(b) The Notice of Preparation shall also inform Interested Persons of the preparation of the draft TEIR and shall inform them of the opportunity to provide comments to the Tribe within thirty (30) days of the date of the receipt of the Notice of Preparation by the State Clearinghouse and the County. The Notice of Preparation shall also request Interested Persons to identify in their comments the off-reservation environmental issues and reasonable mitigation measures that the Tribe will need to have explored in the draft TEIR.

Sec. 11.3. Notice of Completion of Draft TEIR.

(a) Within no less than thirty (30) days following the receipt of the Notice of Preparation by the State Clearinghouse and the County, the Tribe shall file a copy of the draft TEIR and a Notice of Completion with the State Clearinghouse, the State Gaming Agency, the County, and the California Department of Justice, Office of the Attorney General. The Tribe shall also post the Notice of Completion and a copy of the draft TEIR on its website. The Notice of Completion shall include all of the following information:

(1) A brief description of the Project;

(2) The proposed location of the Project;

(3) An address where copies of the draft TEIR are available; and

(4) Notice of a period of forty-five (45) days during which the Tribe will receive comments on the draft TEIR.

[73] (b) The Tribe will submit ten (10) copies each of the draft TEIR and the Notice of Completion to the County, which will be asked to post public notice of the draft TEIR at the office of the County Board of Supervisors and to furnish the public notice to the public libraries serving the County. The County shall also be asked to serve in a timely manner the Notice of Completion to all Interested Persons, which Interested Persons shall be identified by the Tribe for the County, to the extent it can identify them. In addition, the Tribe will provide public notice by at least one of the procedures specified below:

(1) Publication at least one (1) time by the Tribe in a newspaper of general circulation in the area affected by the Project. If more than one (1) area is affected, the notice shall be published in the newspaper of largest circulation from among the newspapers of general circulation in those areas; or

(2) Direct mailing by the Tribe to the owners and occupants of property adjacent to, but outside, the Indian lands on which the Project is to be located. Owners of such property shall be identified as shown on the latest equalization assessment roll.

Sec. 11.4. Issuance of Final TEIR.

The Tribe shall prepare, certify and make available to the County, the State Clearinghouse, the State Gaming Agency, and the California Department of Justice, Office of the Attorney General, at least fifty-five (55) days before the completion of negotiations pursuant to section 11.7 a Final TEIR, which shall consist of:

(a) The draft TEIR or a revision of the draft;

(b) Comments and recommendations received on the draft TEIR either verbatim or in summary;

(c) A list of persons, organizations, and public agencies commenting on the draft TEIR;

[74] (d) The responses, which shall include good faith, reasoned analyses, of the Tribe to significant environmental points raised in the review and consultation process; and

(e) Any other information added by the Tribe.

Sec. 11.5. Cost Reimbursement to County.

The Tribe shall reimburse the County for copying and mailing costs resulting from making the Notice of Preparation, Notice of Completion, and draft TEIR available to the public under this section 11.0.

Sec. 11.6. Failure to Prepare Adequate TEIR.

The Tribe's failure to prepare an adequate TEIR when required shall be deemed a breach of these Secretarial Procedures.

Sec. 11.7. Intergovernmental Agreement.

(a) Before the commencement of a Project, and no later than the issuance of the Final TEIR to the County, the Tribe shall offer to commence negotiations with the County, and upon the County's acceptance of the Tribe's offers, shall negotiate with the County and shall enter into enforceable written agreements (hereinafter "intergovernmental agreements") with the County with respect to the matters set forth below:

(1) The timely mitigation of any Significant Effect on the Environment (which effects may include, but are not limited to, aesthetics, agricultural resources, air quality, biological resources, cultural resources, geology and soils, hazards and hazardous materials, water resources, land use, mineral resources, traffic, noise, utilities and service systems, and cumulative effects), where such effect is attributable, in whole or in part, to the Project unless the parties agree that the particular mitigation is infeasible, taking into account economic, environmental, social, technological, or other considerations.

[75] (2) Compensation for law enforcement, fire protection, emergency medical services and any other public services to be provided by the County and its special districts to the Tribe for the purposes of the Gaming Operation, including the Gaming Facility, as a consequence of the Project.

(3) Reasonable compensation for programs designed to address and treat gambling addiction.

(4) Mitigation of any effect on public safety attributable to the Project, including any compensation to the County as a consequence thereof

(5) Mitigation of any effects attributable to the Project within or upon the City of Madera not otherwise mitigated.

(b) The Tribe shall not commence a Project until the intergovernmental agreements specified in subdivisions (a) and (c) are executed by the parties or are effectuated pursuant to section 11.8.

(c) If the Final TEIR identifies traffic impacts to the state highway system or facilities that are directly attributable in whole or in part to the Project, then before the commencement of the Project, the Tribe shall negotiate an intergovernmental agreement with the California Department of Transportation that provides for timely mitigation of all traffic impacts on the state highway system and facilities directly

attributable to the Project, and payment of the Tribe's fair share of cumulative traffic impacts. Alternatively, the California Department of Transportation may agree in writing that the Tribe may negotiate and conclude, prior to commencement of the Project, an intergovernmental agreement with the County that mitigates the traffic impacts to the state highway system or facilities.

(d) Nothing in this section 11.7 requires the Tribe to enter into any other intergovernmental agreements with a local governmental entity other than as set forth in subdivisions (a) and (c).

(e) To the extent that the Project remains within the scope of the Preferred Alternative, the County MOU, the Tribe's agreement with the City of Madera dated October 18, 2006, and the Tribe's agreement [76] with the Madera Irrigation District dated December 19, 2006, as amended on May 5, 2015, as each of those agreements may be amended from time to time, satisfy the requirements for an intergovernmental agreement with the County under this section 11.7 and the Tribe accepts its obligation to implement the applicable off-reservation mitigation measures as prescribed in the "Final Environmental Impact Statement, North Fork Casino, North Fork Rancheria of Mono Indians Fee-to-Trust and Casino/Hotel Project," dated February 2009, prepared by the Bureau of Indian Affairs of the United States Department of the Interior pursuant to the National Environmental Policy Act of

1969 for the acquisition of 305.49 acres of land located in Madera County, California, in trust for the Tribe, noticed on August 6, 2010 ("FEIS") and the Record of Decision related thereto, including all attachments, dated November 26, 2012.

Sec. 11.8. Arbitration.

To foster good government-to-government relationships and to assure that the Tribe is not unreasonably prevented from commencing a Project and benefiting therefrom, if an intergovernmental agreement with the County, or the California Department of Transportation if required by section 11.7, subdivision (c), is not entered within seventy-five (75) days of the submission of the Final TEIR, or such further time as the Tribe and the County, or the Tribe and the California Department of Transportation if required by section 11.7, subdivision (c) (for purposes of this section "the parties") may agree in writing, any party may demand binding arbitration before a JAMS arbitrator pursuant to JAMS Comprehensive Arbitration with respect to any remaining disputes arising from, connected with, or related to the negotiation:

(a) The arbitration shall be conducted as follows: Each party shall exchange with each other within five (5) days of the demand for arbitration its last, best written offer made during the negotiation pursuant to section 11.7. The arbitrator shall schedule a hearing to be heard within thirty (30) days of his or her appointment unless the parties agree to a longer

period. The arbitrator shall be limited to awarding only one (1) of the offers submitted, without modification, based upon that proposal which best provides feasible mitigation of Significant Effects on the Environment and on public safety and most reasonably compensates for public services pursuant to section 11.7, without unduly interfering with the principal objectives of the Project [77] or imposing environmental mitigation measures which are different in nature or scale from the type of measures that have been required to mitigate impacts of a similar scale of other projects in the surrounding area, to the extent there are such other projects. The arbitrator shall take into consideration whether the Final TEIR provides the data and information necessary to enable the County, or the California Department of Transportation if required by section 11.7, subdivision (c), to determine both whether the Project may result in a Significant Effect on the Environment and whether the proposed measures in mitigation are sufficient to mitigate any such effect. If the respondent does not participate in the arbitration, the arbitrator shall nonetheless conduct the arbitration and issue an award, and the claimant shall submit such evidence as the arbitrator may require therefore. Review of the resulting arbitration award is waived.

(b) To effectuate this section 11.8, and in the exercise of its sovereignty, the Tribe agrees to expressly waive, and to waive its right to assert, sovereign immunity in connection with the

arbitrator's jurisdiction and in any action to (i) enforce the other party's obligation to arbitrate, (ii) enforce or confirm any arbitral award rendered in the arbitration, or (iii) enforce or execute a judgment based upon the award.

(c) The arbitral award will become part of the intergovernmental agreements with the County required under section 11.7.

(d) An arbitral award entered pursuant to this section 11.8 as the result of arbitration between the Tribe and the California Department of Transportation, when an intergovernmental agreement is required by section 11.7, subdivision (c), will become the intergovernmental agreement with the California Department of Transportation.

Sec. 11.9. State Designated Agency Review.

Before commencing arbitration provided by section 11.8, where the parties involved in the negotiation of an intergovernmental agreement pursuant to section 11.7 have reached an impasse, either party may request that a State Designated Agency review the Final TEIR and the proposed intergovernmental agreements to determine if the Tribe's proposed agreement fairly and effectively mitigates the [78] potential off-reservation environmental impacts associated with the Project, pursuant to the following process.

(a) The requesting party shall serve all relevant documents upon the State Designated Agency

and shall contemporaneously serve a copy of the documents on the other party, who may within ten (10) days submit additional information for the State Designated Agency to consider.

(b) The State Designated Agency will have sixty (60) days from the date of its receipt of the items described in section 11.9, subdivision (a), to review the information to determine whether the Tribe's proposed intergovernmental agreement fairly and effectively mitigates the potential off-reservation environmental impacts associated with the Project, unless the Tribe consents in writing to allow the State Designated Agency one (1) additional sixty- (60) day period.

(c) As part of its review, the State Designated Agency will evaluate the TEIR to determine whether it fully and effectively identifies, analyzes, and addresses the potential off-reservation impacts. The State Designated Agency may consult with subject-matter experts outside of that agency as appropriate to inform its analysis and reach a sound decision.

(d) The State Designated Agency will provide each party with a concise explanation of and rationale for its determination under this section 11.9. If the State Designated Agency does not make a decision within the specified timeframe as it may be extended, the request will be deemed to have lapsed and the parties may continue to negotiate, or proceed to arbitration.

(e) If the State Designated Agency determines that the Tribe's proposed intergovernmental agreement does not fairly and effectively mitigate the potential off-reservation environmental impacts associated with the Project, the parties may continue to negotiate or proceed to arbitration.

(f) If the State Designated Agency determines that the Tribe's proposed intergovernmental agreement fairly and effectively mitigates the potential off-reservation environmental impacts associated with the Project, the parties will have thirty (30) days to execute a final [79] intergovernmental agreement. In the event the parties do not execute a final intergovernmental agreement within the thirty (30) days provided in this subdivision (f), at the expiration of that time the Tribe's proposed intergovernmental agreement will be deemed final and the Tribe will be deemed to have fulfilled its obligations under section 11.7 of these Secretarial Procedures. The Tribe's obligations under an unexecuted intergovernmental agreement that is deemed effective under this subdivision (f) shall be enforceable as provided in the intergovernmental agreement and a failure to fulfill those obligations shall be deemed to be a breach of these Secretarial Procedures.

The State Designated Agency is under no obligation to make a decision pursuant to this section 11.9, in which case notice shall be provided to both parties within thirty (30) days following the request.

SECTION 12.0. PUBLIC AND WORKPLACE HEALTH, SAFETY, AND LIABILITY.

Sec. 12.1. General Requirements.

The Tribe shall not conduct Class III Gaming in a manner that endangers the public health, safety, or welfare, provided, however, that nothing herein shall be construed to make applicable to the Tribe any State laws or regulations governing the use of tobacco.

Sec. 12.2. Tobacco Smoke.

Notwithstanding section 12.1, the Tribe agrees to provide a non-smoking area in the Gaming Facility and to utilize a ventilation system throughout the Gaming Facility that exhausts tobacco smoke to the extent reasonably feasible under state-of-the-art technology existing as of the date of the construction or significant renovation of the Gaming Facility, and further agrees not to offer or sell tobacco to anyone under eighteen (18) years of age.

Sec. 12.3. Health and Safety Standards.

To protect the health and safety of patrons and employees of the Gaming Facility, the Tribe shall, for the Gaming Facility:

[80] (a) Adopt, at the Tribe's election, and comply with tribal health standards for food and beverage handling that are no less stringent as those of the United States Public Health Service or the State of California. Nothing herein

shall be construed as submission of the Tribe to the jurisdiction of any non-tribal governmental health inspectors, except an agency of the United States pursuant to federal law.

(b) Adopt and comply with federal water quality and safe drinking water standards applicable in California.

(c) Comply with the building and safety standards set forth in section 6.4.2.

(d) Adopt and comply with federal workplace and occupational health and safety standards. The Tribe will allow inspection of Gaming Facility workplaces by State inspectors, during normal hours of operation, to assess compliance with these standards; provided that there is no right to inspection by State inspectors where an inspection has been conducted by an agency of the United States pursuant to federal law or, alternatively, a State-licensed or federally trained inspector, during the previous calendar quarter and the Tribe has provided a copy of the federal agency's report to the State Gaming Agency within ten (10) days of the federal inspection.

(e) Adopt and comply with tribal codes to the extent consistent with the provisions of these Secretarial Procedures and other applicable federal law regarding public health and safety.

(f) Adopt and comply with tribal law that is no less stringent than federal laws and state laws forbidding harassment, including sexual

harassment, in the workplace, forbidding employers from discrimination in connection with the employment of persons to work or working for the Gaming Operation or in the Gaming Facility on the basis of race, color, religion, ancestry, national origin, gender, marital status, medical condition, sexual orientation, age, or disability, and forbidding employers from retaliation against persons who oppose discrimination or participate in employment discrimination proceedings (hereinafter "harassment, retaliation, or employment discrimination"); provided that nothing herein shall preclude the Tribe [81] from giving a preference in employment to members of federally recognized Indian tribes pursuant to a duly adopted tribal ordinance.

(1) The Tribe shall obtain and maintain an employment practices liability insurance policy consistent with industry standards for non-tribal casinos and underwritten by an insurer with an A.M. Best rating of A or higher which provides coverage of at least three million dollars ($3,000,000) per occurrence for unlawful harassment, retaliation, or employment discrimination arising out of the claimant's employment in, in connection with, or relating to the operation of, the Gaming Operation, Gaming Facility or Gaming Activities. To effectuate the insurance coverage, the Tribe, in the exercise of its sovereignty, shall expressly waive, and waive its right to assert, sovereign immunity and any and all defenses based thereon up to the

greater of three million dollars ($3,000,000) or the limits of the employment practices insurance policy, in accordance with the tribal ordinance referenced in subdivision (f)(2) below, in connection with any claim for harassment, retaliation, or employment discrimination arising out of the claimant's employment in, in connection with, or relating to the operation of, the Gaming Operation, Gaming Facility or Gaming Activities; provided, however, that nothing herein requires the Tribe to agree to liability for punitive damages or to waive its right to assert sovereign immunity in connection therewith. The employment practices liability insurance policy shall acknowledge in writing that the Tribe has expressly waived, and waived its right to assert, sovereign immunity and any and all defenses based thereon for the purpose of arbitration of those claims for harassment, retaliation, or employment discrimination up to the limits of such policy and for the purpose of enforcement of any ensuing award or judgment and shall include an endorsement providing that the insurer shall not invoke tribal sovereign immunity up to the limits of such policy; however, such endorsement or acknowledgement shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity for any portion of the claim that exceeds such policy limits or three million dollars ($3,000,000),

whichever is greater. Nothing in this provision shall be interpreted to supersede any requirement in the Tribe's employment [82] discrimination complaint ordinance that a claimant must exhaust administrative remedies as a prerequisite to arbitration.

(2) The Tribe's harassment, retaliation, or employment discrimination standards shall be subject to enforcement pursuant to an employment discrimination complaint ordinance which shall be adopted by the Tribe within thirty (30) days of the effective date of these Secretarial Procedures and which shall continuously provide at least the following:

(A) That tribal law provisions that are no less stringent than California law shall govern all claims of harassment, retaliation, or employment discrimination arising out of the claimant's employment in, in connection with, or relating to the operation of, the Gaming Operation, Gaming Facility or Gaming Activities; provided that California law governing punitive damages need not be a part of the ordinance. Nothing in this provision shall be construed as a submission of the Tribe to the jurisdiction of the California Department of Fair Employment and Housing or the California Fair Employment and Housing Commission.

(B) That a claimant shall have one (1) year from the date that an alleged discriminatory act occurred to file a written notice with the Tribe that he or she has suffered prohibited harassment, retaliation, or employment discrimination.

(C) That, in the exercise of its sovereignty, the Tribe expressly waives, and also waives its right to assert, sovereign immunity with respect to the binding arbitration of claims for harassment, retaliation, or employment discrimination, but only up to the greater of three million dollars ($3,000,000) or the limits of the employment practices insurance policy referenced in subdivision (f)(1) above; provided, however, such waiver shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity for any portion of the claim [83] that exceeds three million dollars ($3,000,000) or the insurance policy limits, whichever is greater.

(D) That the Tribe consents to binding arbitration before a JAMS arbitrator in accordance with JAMS Comprehensive Arbitration, that discovery in the arbitration proceedings shall be governed by section 1283.05 of the California Code of Civil Procedure, that the Tribe shall initially bear the cost of JAMS and the JAMS

arbitrator, but the arbitrator may award costs, excluding attorney's fees, to the prevailing party not to exceed those allowable in a suit in California superior court, and that any party dissatisfied with the award of the arbitrator may at the party's election invoke the JAMS Optional Arbitration Appeal Procedure (or if those rules no longer exist, the closest equivalent), provided that the party making such election must bear all costs and expenses of JAMS and the JAMS arbitrators associated with the Appeal Procedure, regardless of the outcome, and shall not be eligible for an award of attorney's fees. The arbitration shall take place within seventy-five (75) miles of the Gaming Facility, or as otherwise mutually agreed by the parties. To effectuate its consent to the foregoing arbitration procedure, the Tribe shall, in the exercise of its sovereignty, expressly waive, and also waive its right to assert, sovereign immunity in connection with the arbitrator's jurisdiction and in any state or federal court action to (i) enforce the parties' obligation to arbitrate, (ii) confirm, correct, or vacate the arbitral award rendered in the arbitration in accordance with section 1285 et seq. of the California Code of Civil Procedure, or (iii) enforce or execute a judgment

based upon the award. The Tribe agrees not to assert, and will waive, any defense alleging improper venue or forum non conveniens as to any state court located within the County or any federal court located in the Eastern District of California in any such action brought with respect to the arbitration award.

[84] (3) The employment discrimination complaint ordinance required under subdivision (f)(2) may require, as a prerequisite to binding arbitration under subdivision (f)(2)(D), that the claimant exhaust the Tribe's administrative remedies, if any exist, in the form of a tribal employment discrimination complaint resolution process, for resolving the claim in accordance with the following standards:

(A) Upon notice that the claimant alleges that he or she has suffered prohibited harassment, retaliation, or employment discrimination, the Tribe or its designee shall provide notice by personal service or certified mail, return receipt requested, that the claimant is required to proceed with the Tribe's employment discrimination complaint resolution process in the event that the claimant wishes to pursue his or her claim.

(B) The claimant must bring his or her claim within one hundred eighty (180) days of receipt of the written notice ("limitation period") of the Tribe's employment discrimination complaint resolution process as long as the notice thereof is served personally on the claimant or by certified mail with an executed return receipt by the claimant and the one hundred eighty (180)-day limitation period is prominently displayed on the front page of the notice.

(C) The arbitration may be stayed until the completion of the Tribe's employment discrimination complaint resolution process or one hundred eighty (180) days from the date the claim was filed, whichever first occurs, unless the parties mutually agree upon a longer period.

(D) The decision of the Tribe's employment discrimination complaint resolution process shall be in writing, shall be based on the facts surrounding the dispute, shall be a reasoned decision, and shall be rendered within one hundred eighty (180) days from the date the claim was filed, unless the parties mutually agree upon a longer period.

[85] (4) Within fourteen (14) days following notification that a claimant claims that

he or she has suffered harassment, retaliation, or employment discrimination, the Tribe shall provide notice by personal service or certified mail, return receipt requested, that the claimant is required within the specified limitation period to first exhaust the Tribe's employment discrimination complaint resolution process, if any exists, and if dissatisfied with the resolution, is entitled to arbitrate his or her claim before a retired judge in a binding arbitration proceeding, at no cost to the claimant (except for the claimant's attorney's fees).

(5) In the event the Tribe fails to adopt the ordinance specified in subdivision (f)(2), such failure shall constitute a breach of these Secretarial Procedures.

(6) The Tribe shall provide written notice of the employment discrimination complaint ordinance and the procedures for bringing a complaint in its employee handbook. The Tribe also shall post and keep posted in prominent and accessible places in the Gaming Facility where notices to employees and applicants for employment are customarily posted, a notice setting forth the pertinent provisions of the employment discrimination complaint ordinance and information pertinent to the filing of a complaint.

(g) Adopt and comply with standards that are no less stringent than State laws prohibiting a

gambling enterprise from cashing any check drawn against a federal, state, county, or city fund, including but not limited to, Social Security, unemployment insurance, disability payments, or public assistance payments.

(h) Adopt and comply with standards that are no less stringent than State laws, if any, prohibiting a gambling or other gaming enterprise from providing, allowing, contracting to provide, or arranging to provide alcoholic beverages, or food or lodging, for no charge or at reduced prices at a gambling establishment or lodging facility as an incentive or enticement.

[86] (i) Adopt and comply with standards that are no less stringent than State laws, if any, prohibiting extensions of credit.

(j) Comply with provisions of the Bank Secrecy Act, P.L. 91-508, October 26, 1970, 31 U.S.C. §§ 5311-5314, as amended, and all reporting requirements of the Internal Revenue Service, insofar as such provisions and reporting requirements are applicable to gambling establishments.

(k) Adopt and comply with the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., the United States Department of Labor regulations implementing the Fair Labor Standards Act, 29 C.F.R. § 500, et seq., the State's minimum wage law set forth in California Labor Code section 1182.12, and the State Department of Industrial Relations regulations implementing the State's minimum wage law, California Code of Regulations, title 8, section 1100 et

seq. Notwithstanding the foregoing, only the federal minimum wage laws set forth in the Fair Labor Standards Act, 29 Code of Federal Regulations, part 500 et seq., shall apply to tipped employees. Nothing herein shall make applicable state law concerning overtime.

Sec. 12.4. Tribal Gaming Facility Standards Ordinance.

The Tribe shall adopt in the form of an ordinance the standards described in subdivisions (a) through (k) of section 12.3 to which the Gaming Operation is held, and shall transmit the ordinance to the State Gaming Agency not later than sixty (60) days after the effective date of these Secretarial Procedures, or sixty (60) days prior to the commencement of Gaming Activities under these Secretarial Procedures. In the absence of a promulgated tribal standard in respect to a matter identified in those subdivisions, or the express adoption of an applicable federal and/or State statute or regulation, as the case may be, in respect of any such matter, the otherwise applicable federal and/or State statute or regulation shall be deemed to have been adopted by the Tribe as the applicable standard.

Sec. 12.5. Insurance Coverage and Claims.

(a) The Tribe shall obtain and maintain commercial general liability insurance consistent with industry standards for non-tribal casinos in the United States underwritten by an insurer with an A.M. Best rating of A or higher

which provides coverage of no less than ten million [87] dollars ($10,000,000) per occurrence for bodily injury, personal injury, and property damage arising out of, connected with, or relating to the operation of the Gaming Facility or Gaming Activities (Policy). To effectuate the insurance coverage, the Tribe shall expressly waive, and waive its right to assert, sovereign immunity up to the greater of ten million dollars ($10,000,000) or the limits of the Policy, in accordance with the tribal ordinance referenced in subdivision (b) below, in connection with any claim for bodily injury, personal injury, or property damage, arising out of, connected with, or relating to the operation of the Gaming Operation, Gaming Facility, or the Gaming Activities, including, but not limited to, injuries resulting from entry onto the Tribe's land for purposes of patronizing the Gaming Facility or providing goods or services to the Gaming Facility; provided, however, that nothing herein requires the Tribe to agree to liability for punitive damages or to waive its right to assert sovereign immunity in connection therewith. The Policy shall acknowledge in writing that the Tribe has expressly waived, and waived its right to assert, sovereign immunity for the purpose of arbitration of those claims up to the greater of ten million dollars ($10,000,000) or the limits of the Policy referred to above and for the purpose of enforcement of any ensuing award or judgment and shall include an endorsement providing that the insurer shall not invoke tribal sovereign immunity up to the limits of

the Policy; however, such endorsement or acknowledgement shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity for any portion of the claim that exceeds ten million dollars ($10,000,000) or the Policy limits, whichever is greater.

(b) The Tribe shall adopt, and at all times hereinafter shall maintain in continuous force, an ordinance that provides for all of the following:

(1) The ordinance shall provide that the Tribe shall adopt as tribal law, provisions that are the same as California tort law to govern all claims of bodily injury, personal injury, or property damage arising out of, connected with, or relating to the operation of the Gaming Operation, Gaming Facility, or the Gaming Activities, including but not limited to injuries resulting from entry onto the Tribe's land for purposes of patronizing the Gaming Facility or providing goods or services to the Gaming Facility, provided that California law governing [88] punitive damages need not be a part of the ordinance. Further, the Tribe may include in the ordinance required by this subdivision a requirement that a person with claims for money damages against the Tribe file those claims within the time periods applicable for the filing of claims for money damages against public entities under California Government Code section 810, et seq.

(2) The ordinance shall also expressly provide for waiver of the Tribe's sovereign immunity and its right to assert sovereign immunity with respect to the arbitration or resolution of such claims in the Tribe's tribal court system, once a tribal court system is established, but only up to the greater of ten million dollars ($10,000,000) or the limits of the Policy; provided, however, such waiver shall not be deemed to waive or otherwise limit the Tribe's sovereign immunity for any portion of the claim that exceeds ten million dollars ($10,000,000) or the Policy limits, whichever is greater.

(3) The ordinance shall allow for the dispute to be settled either in the Tribe's tribal court system, once a tribal court system is established, or by binding arbitration before a JAMS arbitrator, in accordance with JAMS Comprehensive Arbitration. The decision to choose either the tribal court system or JAMS Comprehensive Arbitration shall be at the claimant's sole discretion. Resolution of the dispute before the tribal court system shall be at no cost to the claimant (excluding claimant's attorney's fees). The cost and expenses of the JAMS Comprehensive Arbitration shall be initially borne equally by the parties and the parties shall pay their share of the arbitration costs at the time of claimant's election of the arbitration option, but the arbitrator may award costs (but not attorney's fees) to the prevailing

party not to exceed those allowable in a suit in California Superior Court.

(4) The Tribe shall consent to tribal court adjudication or binding JAMS Comprehensive Arbitration before a JAMS arbitrator to the extent of the limits of the Policy, that discovery in the arbitration proceedings shall be governed by section 1283.05 of the California Code of Civil Procedure, that the Tribe and the [89] claimant shall initially bear the cost of JAMS and the JAMS arbitrator equally, to be paid at the time of election of arbitration but that the JAMS arbitrator may award costs (but not attorney's fees) to the prevailing party not to exceed those allowable in a suit in California Superior Court, and that any party dissatisfied with the award of the arbitrator may at the party's election invoke the JAMS Optional Arbitration Appeal Procedure (or if those rules no longer exist, the closest equivalent), provided that the party making such election must bear all costs and expenses of JAMS and the JAMS arbitrators associated with the Appeal Procedure, regardless of the outcome.

(5) To effectuate its consent to the tribal court system or JAMS Comprehensive Arbitration, and JAMS Optional Arbitration Appeal Procedure in the ordinance, the Tribe shall, in the exercise of its sovereignty, expressly waive, and also waive its right to assert, sovereign immunity in

connection with the arbitrator's jurisdiction and in any action to (i) enforce the parties' obligation to arbitrate, (ii) confirm, correct, modify, or vacate the arbitral award rendered in the arbitration, or (iii) enforce or execute a judgment based upon the award.

(6) The ordinance may also require that the claimant first exhaust the Tribe's administrative remedies for resolving the claim (hereinafter the "Tribal Dispute Process") in accordance with the following standards: The claimant must bring his or her claim within one hundred eighty (180) days of receipt of written notice of the Tribal Dispute Process as long as notice thereof is served personally on the claimant or by certified mail with an executed return receipt by the claimant and the one hundred eighty (180)-day limitation period is prominently displayed on the front page of the notice. The ordinance may provide that any arbitration or tribal court adjudication shall be stayed until the completion of the Tribal Dispute Process or one hundred eighty (180) days from the date the claim is filed in the Tribal Dispute Process, whichever first occurs, unless the parties mutually agree to a longer period.

[90] (c) Upon notice that a claimant claims to have suffered an injury or damage covered by this section, the Tribe shall provide notice by personal service or certified mail, return receipt requested, that the claimant is required within the specified limitation period to first exhaust the Tribal Dispute Process, if any, and if dissatisfied with the resolution, entitled to adjudicate his or her claim *de novo* in the Tribe's tribal court system, once a tribal court system is established, or arbitrate his or her claim *de novo* before a retired judge.

(d) In the event the Tribe fails to adopt the ordinance specified in subdivision (b), such failure shall constitute a breach of these Secretarial Procedures.

(e) The Tribe shall not invoke on behalf of any employee or agent, the Tribe's sovereign immunity in connection with any claim for, or any judgment based on any claim for, intentional injury to persons or property committed by the employee or authorized agent, without regard to the Tribe's liability insurance limits. Nothing in this subdivision prevents the Tribe from invoking sovereign immunity on its own behalf or authorizes a claim against the Tribe or a tribally owned entity.

Sec. 12.6. Participation in State Programs Related to Employment.

(a) The Tribe agrees that it will participate in the State's workers' compensation program with respect to employees employed at the Gaming

Operation and the Gaming Facility. The workers' compensation program includes, but is not limited to, state laws relating to the securing of payment of compensation through one or more insurers duly authorized to write workers' compensation insurance in this State or through self-insurance as permitted under the State's workers' compensation laws. All disputes arising from the workers' compensation laws shall be heard by the Workers' Compensation Appeals Board pursuant to the California Labor Code. The Tribe hereby consents to the jurisdiction of the Workers' Compensation Appeals Board and the courts of the State of California for purposes of enforcement. The parties agree that independent contractors doing business with the Tribe are bound by all state workers' compensation laws and obligations.

[91] (b) In lieu of permitting the Gaming Operation to participate in the State's workers' compensation system, the Tribe may create and maintain a system that provides redress for employee work-related injuries through requiring insurance or self-insurance, which system must include a scope of coverage, provision of up to ten thousand dollars ($10,000) in medical treatment for alleged injury until the date that liability for the claim is accepted or rejected, employee choice of physician (either after thirty (30) days from the date of the injury is reported or if a medical provider network has been established, within the medical provider network), quality and timely medical treatment provided comparable to the state's

medical treatment utilization schedule, availability of an independent medical examination to resolve disagreements on appropriate treatment (by an Independent Medical Reviewer on the state's approved list, a Qualified Medical Evaluator on the state's approved list, or an Agreed Medical Examiner upon mutual agreement of the employer and employee), the right to notice, hearings before an independent tribunal, a means of enforcement against the employer, and benefits (including, but not limited to, disability, rehabilitation and return to work) comparable to those mandated for comparable employees under state law. Not later than the effective date of these Secretarial Procedures, or sixty (60) days prior to the commencement of Gaming Activities under these Secretarial Procedures, the Tribe will advise the State of its election to participate in the State's workers' compensation system or, alternatively, will forward to the State all relevant ordinances that have been adopted and all other documents establishing the system and demonstrating that the system is fully operational and compliant with the comparability standard set forth above. The parties agree that independent contractors doing business with the Tribe must comply with all state workers' compensation laws and obligations.

(c) The Tribe agrees that it will participate in the State's program for providing unemployment compensation benefits and unemployment compensation disability benefits with respect to employees employed at the Gaming

Operation or Gaming Facility, which participation shall include compliance with the provisions of the California Unemployment Insurance Code, and the Tribe consents to the jurisdiction of the State agencies charged with the enforcement of that Code and of the courts of the State of California for purposes of enforcement.

[92] (d) As a matter of comity, the Tribe shall, with respect to persons, including nonresidents of California, employed at the Gaming Operation or Gaming Facility, withhold all taxes due to the State as provided in the California Unemployment Insurance Code, except for tribal members living on the Tribe's reservation, as provided in the California Revenue and Taxation Code and the regulations thereunder, as may be amended from time to time, and shall forward such amounts to the State. The Tribe shall file with the Franchise Tax Board a copy of any information return filed with the Secretary of the Treasury, as provided in the California Revenue and Taxation Code and the regulations thereunder, except those pertaining to tribal members living on the Tribe's reservation. For purposes of this subdivision, "reservation" refers to the Tribe's Indian lands within the meaning of IGRA or lands otherwise held in trust for the Tribe by the United States, and "tribal members" refers to the enrolled citizens of the Tribe.

(e) As a matter of comity, the Tribe shall, with respect to the earnings of any person employed at the Gaming Operation or Gaming Facility,

comply with all earnings withholding orders for support of a child, or spouse or former spouse, and all other orders by which the earnings of an employee are required to be withheld by an employer pursuant to chapter 5 (commencing with section 706.010) of division 1 of title 9 of part 2 of the California Code of Civil Procedure, and with all earnings assignment orders for support made pursuant to chapter 8 (commencing with section 5200) of part 5 of division 9 of the California Family Code or section 3088 of the California Probate Code.

Sec. 12.7. Emergency Services Accessibility.

The Tribe shall make reasonable provisions for adequate emergency fire, medical, and related relief and disaster services for patrons and employees of the Gaming Facility.

Sec. 12.8. Alcoholic Beverage Service.

[93] Purchase, sale, and service of alcoholic beverages by or to patrons shall be subject to state alcoholic beverage laws.

Sec. 12.9. Possession of Firearms.

The possession of firearms by any person in the Gaming Facility is prohibited at all times, except for federal, state, or local law enforcement personnel, or

tribal law enforcement or security personnel authorized by tribal law and federal or state law to possess firearms at the Gaming Facility.

Sec. 12.10. Labor Relations.

The Gaming Activities authorized by these Secretarial Procedures may only commence after the Tribe has adopted an ordinance identical to the Tribal Labor Relations Ordinance attached hereto as Appendix C, and the Gaming Activities may only continue as long as the Tribe maintains the ordinance. The Tribe shall provide written notice to the State that it has adopted the ordinance, along with a copy of the ordinance, at least sixty (60) days prior to the commencement of Gaming Activities under these Secretarial Procedures.

SECTION 13.0. DISPUTE RESOLUTION PROVISIONS.

Sec. 13.1. Voluntary Resolution; Court Resolution.

In recognition of the government-to-government relationship of the Tribe and the State, the parties shall make their best efforts to resolve disputes that arise under these Secretarial Procedures by good faith negotiations whenever possible. Therefore, except for the right of either party to seek injunctive relief against the other when circumstances are deemed to require immediate relief, the Tribe and the State shall seek to resolve disputes by first meeting and conferring in good faith in order to foster a spirit of cooperation

and efficiency in the administration and monitoring of the performance and compliance of the terms, provisions, and conditions of these Secretarial Procedures, as follows:

(a) Either party shall give the other, as soon as possible after the event giving rise to the concern, a written notice setting forth the facts giving rise to the dispute and with specificity, the issues to be resolved.

[94] (b) The other party shall respond in writing to the facts and issues set forth in the notice within fifteen (15) days of receipt of the notice, unless both parties agree in writing to an extension of time.

(c) The parties shall meet and confer in good faith by telephone or in person in an attempt to resolve the dispute through negotiation within thirty (30) days after receipt of the notice set forth in subdivision (a), unless both parties agree in writing to an extension of time.

(d) If the dispute is not resolved to the satisfaction of the parties after the first meeting, either party may seek to have the dispute resolved by an arbitrator in accordance with this section, but neither party shall be required to agree to submit to arbitration.

(e) Disputes that are not otherwise resolved by arbitration or other mutually agreed means may be resolved in the United States District Court in the judicial district where the Tribe's Gaming Facility is located, or if those federal

courts lack jurisdiction, in any state court of competent jurisdiction in or over the County. The disputes to be submitted to court action are limited to claims of breach of these Secretarial Procedures, provided that the remedies expressly provided in section 13.4, subdivision (a)(ii) are the sole and exclusive remedies available to either party for issues arising out of these Secretarial Procedures, and supersede any remedies otherwise available, whether at law, tort, contract, or in equity and, notwithstanding any other provision of law or these Secretarial Procedures, neither the State nor the Tribe shall be liable for money damages or attorney's fees in any action based in whole or in part on the fact that the parties have either entered into these Secretarial Procedures, or have obligations under these Secretarial Procedures. The parties are entitled to all rights of appeal permitted by law in the court system in which the action is brought.

(f) In no event may the Tribe be precluded from pursuing any arbitration or judicial remedy against the State on the ground that the Tribe has failed to exhaust its State administrative remedies, and in no event may the State be precluded from pursuing any arbitration or judicial remedy against the Tribe on the ground that the State has failed to exhaust any tribal administrative remedies.

[95] **Sec. 13.2. Arbitration Rules for the Tribe and the State.**

Arbitration between the Tribe and the State shall be conducted before a JAMS arbitrator in accordance with JAMS Comprehensive Arbitration. Discovery in the arbitration proceedings shall be governed by section 1283.05 of the California Code of Civil Procedure, provided that no discovery authorized by that section may be conducted without leave of the arbitrator. The parties shall equally bear the cost of JAMS and the JAMS arbitrator. Either party dissatisfied with the award of the arbitrator may at the party's election invoke the JAMS Optional Arbitration Appeal Procedure (or if those rules no longer exist, the closest equivalent). In any JAMS arbitration under this section 13.2, the parties will bear their own attorney's fees. The arbitration shall take place within seventy-five (75) miles of the Gaming Facility, or as otherwise mutually agreed by the parties and the parties agree that either party may file a state or federal court action to (i) enforce the parties' obligation to arbitrate, (ii) confirm, correct, or vacate the arbitral award rendered in the arbitration in accordance with section 1285 et seq. of the California Code of Civil Procedure, or (iii) enforce or execute a judgment based upon the award. In any such action brought with respect to the arbitration award, the parties agree that venue is proper in any state court located within the County or in any federal court located in the Eastern District of California.

Sec. 13.3. No Waiver or Preclusion of Other Means of Dispute Resolution.

This section 13.0 may not be construed to waive, limit, or restrict any remedy to address issues not arising out of these Secretarial Procedures that is otherwise available to either party, nor may this section 13.0 be construed to preclude, limit, or restrict the ability of the parties to pursue, by mutual agreement, any other method of Secretarial Procedures dispute resolution, including, but not limited to, mediation.

Sec. 13.4. Limited Waiver of Sovereign Immunity.

(a) For the purpose of actions or arbitrations based on disputes between the State and the Tribe that arise under these Secretarial Procedures and the enforcement of any judgment or award resulting therefrom, the State and the Tribe expressly waive their right to assert their [96] sovereign immunity from suit and enforcement of any ensuing judgment or arbitral award and consent to the arbitrator's jurisdiction and further consent to be sued in federal or state court, as the case may be, provided that: (i) the dispute is limited solely to issues arising under these Secretarial Procedures, (ii) neither the Tribe nor the State makes any claim for restitution or monetary damages, except that payment of any money expressly required by the terms of these Secretarial Procedures may be sought, and solely injunctive relief, specific performance

(including enforcement of a provision of these Secretarial Procedures expressly requiring the payment of money to one or another of the parties), and declaratory relief (limited to a determination of the respective obligations of the parties under these Secretarial Procedures) may be sought, and (iii) nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State with respect to any third party that is made a party or intervenes as a party to the action.

(b) In the event that intervention, joinder, or other participation by any additional party in any action between the State and the Tribe would result in the waiver of the Tribe's or the State's sovereign immunity as to that additional party, the waivers of either the Tribe or the State provided herein may be revoked, except where joinder is required to preserve the court's jurisdiction, in which case the State and the Tribe may not revoke their waivers of sovereign immunity as to each other.

(c) The waivers and consents to jurisdiction expressly provided for under this section 13.0 and elsewhere in these Secretarial Procedures shall extend to all arbitrations and civil actions expressly authorized by these Secretarial Procedures, including actions to compel arbitration, any arbitration proceeding herein, any action to confirm, modify, or vacate any arbitral award or to enforce any judgment, and any appellate proceeding

emanating from any such proceedings, whether in state or federal court.

(d) Except as stated herein or elsewhere in these Secretarial Procedures, no other waivers or consents to be sued, either express or implied, are granted by either party, whether in state statute or otherwise, including but not limited to Government Code section 98005.

[97] **SECTION 14.0. EFFECTIVE DATE AND TERM OF SECRETARIAL PROCEDURES.**

Sec. 14.1. Effective Date.

These Secretarial Procedures shall be effective immediately when signed by the Assistant Secretary-Indian Affairs.

Sec. 14.2. Term of Secretarial Procedures; Termination.

(a) Once effective, these Secretarial Procedures shall be in full force and effect for twenty-five (25) years following the effective date.

(b) If the Tribe and the State have not agreed to enter into a new compact by the termination date, these Secretarial Procedures will automatically be extended one (1) calendar year, unless the Tribe and the State have agreed to a superseding Class III gaming compact. Six (6) months prior to the final expiration date, the Tribe may request an additional extension of these Secretarial Procedures, which shall be granted if the Tribe and the State have not

entered into a superseding Class III gaming compact.

(c) The Tribe, acting under a duly adopted resolution or ordinance of its governing body, may at any time, request that the Secretary withdraw these Secretarial Procedures, whereupon the Tribe would no longer be authorized to operate Class III gaming under IGRA on its Indian lands unless or until the Tribe and the State enter into a Class III gaming compact approved by the Secretary and published in the Federal Register.

SECTION 15.0. AMENDMENTS; RENEGOTIATIONS.

Sec. 15.1. Amendment by Agreement.

The terms and conditions of these Secretarial Procedures may be superseded at any time by a Class III gaming compact entered into by the mutual and written agreement of the Tribe and the State that is in effect under IGRA. Any such Class III gaming compact shall provide that these Secretarial Procedures be withdrawn and shall have no further force or effect upon publication of approval of the Class III gaming compact in the Federal Register.

[98] **Sec. 15.2. Negotiations.**

(a) These Secretarial Procedures are subject to amendment in the event the Tribe wishes to engage in forms of Class III gaming authorized in the state, provided that no such

amendment may be sought for 12 months following the effective date of these Secretarial Procedures.

(b) Nothing herein shall be construed to constitute a waiver of any rights under IGRA in the event of an expansion of the scope of permissible gaming resulting from a change in state law.

Sec. 15.3. Requests to Negotiate a New Compact.

All requests to negotiate a tribal-state Class III gaming compact shall be in writing, addressed to the Tribal Chair or the Governor, as the case may be, and shall include the activities or circumstances to be negotiated, together with a statement of the basis supporting the request. If the request meets the requirements of this section the parties are encouraged to confer promptly and determine a schedule for negotiations within 30 days of the request. Unless expressly provided otherwise herein, all matters involving negotiations for a new Class III gaming compact shall be governed, controlled, and conducted in conformity with the provisions and requirements of IGRA, including those provisions regarding the obligation of the State to negotiate in good faith and the enforcement of that obligation in Federal court.

SECTION 16.0. NOTICES.

Unless otherwise indicated by these Secretarial Procedures, all notices required or authorized to be served shall be served by first-class mail or facsimile transmission to the following addresses as applicable, or to such other address as either party may designate by written notice to the other:

Governor
Governor's Office
State Capitol
Sacramento, CA 95814

Director, Office of
Indian Gaming
1849 C Street, N. W.,
MS 3657-MIB
Washington, DC 20240

Tribal Chairperson
North Fork Rancheria
of Mono Indians
33143 Road 222
North Fork, CA 93643

[99] If the State Gaming Agency has undertaken the regulatory responsibilities vested in the Agency under the Secretarial Procedures:

California Gambling Control Commission
2399 Gateway Oaks Drive, Ste. 220
Sacramento, California 95833

SECTION 17.0. CHANGES TO IGRA.

These Secretarial Procedures are intended to meet the requirements of IGRA as it reads on the effective date of these Secretarial Procedures, and, when reference is made to IGRA or to an implementing regulation thereof, the referenced provision is deemed to have

been incorporated into these Secretarial Procedures as if set out in full. Subsequent changes to IGRA that diminish the rights of the State or the Tribe may not be applied retroactively to alter the terms of these Secretarial Procedures, except to the extent that federal law validly mandates retroactive application without the Tribe's consent.

SECTION 18.0. MISCELLANEOUS.

Sec. 18.1. Third-Party Beneficiaries.

Except to the extent expressly provided herein, these Secretarial Procedures are not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms.

Sec. 18.2. Complete Agreement.

These Secretarial Procedures, together with all appendices, set forth the full and complete authorization by the Secretary of the Interior for the Tribe to conduct class III gaming on its Indian lands pursuant to IGRA and supersede any prior agreements or understandings with respect to the subject matter hereof

On the effective date of these Secretarial Procedures, any and all prior tribal-state Class III gaming compacts entered into between the Tribe and the State shall be null and void and of no further force and effect.

[100] **Sec. 18.3. Construction.**

Neither the presence in another tribal-state Class III Gaming compact of language that is not included in these Secretarial Procedures, nor the absence in another tribal state Class III Gaming compact of language that is present in these Secretarial Procedures shall be a factor in construing the terms of these Secretarial Procedures

Compliance with Mediator's Choice of Last Best Offer Compact. These Secretarial Procedures are promulgated in compliance with the requirements of IGRA's remedial provisions, 25 U. S. C. §2710 (d)(7), and are consistent with the essential terms of the last best offer Class III gaming compact selected by the mediator appointed by the court in *North Fork Rancheria of Mono Indians of California vs. State of California*, No. 1:15-cv-00419-AWI-SAB (E.D. Cal. Filed Mar. 17, 2015), JAMS Reference Number 1100083303. Under IGRA, these Secretarial Procedures are properly viewed as a full substitute for a Class III gaming compact that would be in effect had a voluntary agreement been reached between the Tribe and the State, or if the State had consented to the court-appointed mediator's selection. Therefore, these Secretarial Procedures qualify for the exemption to the criminal prohibitions on gaming provided by Section 23 of IGRA.

Sec. 18.4. Successor Provisions.

Wherever these Secretarial Procedures make reference to a specific statutory provision, regulation, or

set of rules, it also applies to the provision or rules, as they may be amended from time to time, and any successor provision or set of rules.

Sec. 18.5. Ordinances and Regulations.

Whenever the Tribe adopts or amends any ordinance or regulations required to be adopted and/or maintained under these Secretarial Procedures, in addition to any other obligations to provide a copy to others, the Tribe shall provide a copy of such adopted or amended ordinance or regulations to the State Gaming Agency within thirty (30) days of the effective date of such ordinance or regulations.

Sec. 18.6. Calculation of Time.

In computing any period of time prescribed by these Secretarial Procedures, the day of the event from which the designated period of time begins to run shall [101] not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday under the Tribe's laws, State law, or federal law. Unless otherwise specifically provided herein, the term "days" shall be construed as calendar days.

Sec. 18.7. Most Favored Nation.

If, after the effective date of these Secretarial Procedures, the State enters into a Compact with any other tribe that contains more favorable provisions

with respect to any provisions of these Secretarial Procedures, at the Tribe's request, the Secretary, or her or his designee, shall meet and confer with the Tribe regarding modifying these Secretarial Procedures. The duration of any resulting modification of these Secretarial Procedures shall comply with Section 14.2 (c). The Secretary's agreement to modify these Secretarial Procedures as provided in this section shall be not unreasonably withheld or delayed.

IN WITNESS WHEREOF, the undersigned executes these Secretarial Procedures on behalf of the Secretary of the United States Department of the Interior.

Done, this 29 day of July, 2016

/s/ Lawrence S. Roberts
Lawrence S. Roberts,
Acting Assistant Secretary – Indian Affairs

APPENDICES

A. Description and Map of the Madera Parcel
B. Off-Reservation Environmental Impact Analysis Checklist
C. Tribal Labor Relations Ordinance

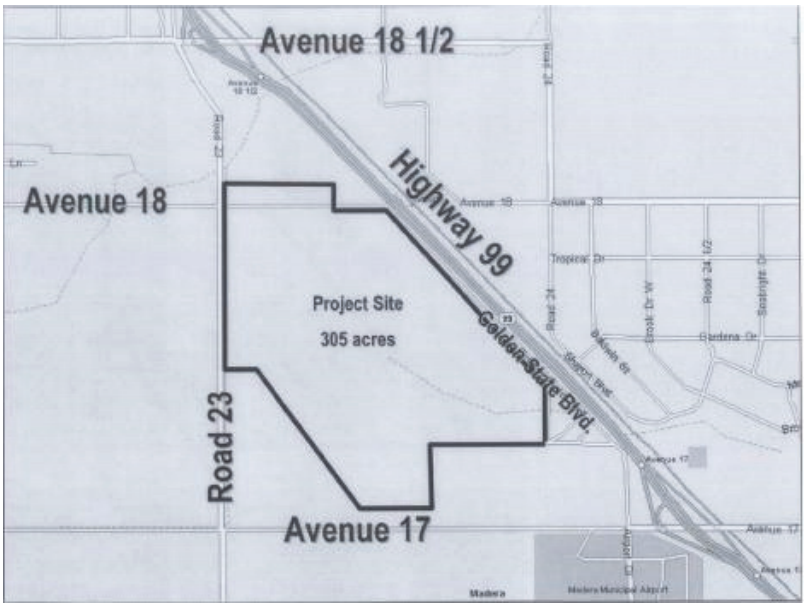
APPENDIX A

Map and Description of Proposed Class III Gaming Site

Real Property in the unincorporated area of the County of Madera, State of California, described as follows:

Parcel No. 1: APN: 033-030-010 thru 015 and 017.

Parcels 1, 2, 3, 4, 5, 6, and 8 of Parcel Map 3426 in the unincorporated area of the County of Madera, State of California, as per map recorded September 7, 1995, in Book 44, Pages 15 and 16 of Parcel Maps, in the office of the County Recorder of said county.



APPENDIX B

Off-Reservation Environmental Impact Analysis Checklist

I. Aesthetics

Would the project:

a) Have a substantial adverse effect on a scenic vista?

b) Substantially damage off-reservation scenic resources, including, but not limited to, trees, rock outcroppings, and historic buildings within a state scenic highway?

c) Create a new source of substantial light or glare, which would adversely affect day or nighttime views of historic buildings or views in the area?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

II. Agricultural and Forest Resources

Would the project:

a) Involve changes in the existing environment, which, due to their location or nature, could result in conversion of off-reservation farmland to non-agricultural use?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

III. Air Quality

Would the project:

a) Conflict with or obstruct implementation of the applicable air quality plan?

b) Violate any air quality standard or contribute to an existing or projected air quality violation?

c) Result in a cumulatively considerable net increase of any criteria pollutant for which the project region is non-attainment under an applicable federal or state ambient air quality standard (including releasing emissions, which exceed quantitative thresholds for ozone precursors)?

d) Expose off-reservation sensitive receptors to substantial pollutant concentrations?

e) Create objectionable odors affecting a substantial number of people off-reservation?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

IV. Biological Resources

Would the project:

a) Have a substantial adverse impact, either directly or through habitat modifications, on any species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?

b) Have a substantial adverse effect on any off-reservation riparian habitat or other sensitive natural community identified in local or regional plans, policies, and regulations or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?

c) Have a substantial adverse effect on federally protected off-reservation wetlands as defined by Section 404 of the Clean Water Act?

d) Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?

e) Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

V. Cultural Resources

Would the project:

a) Cause a substantial adverse change in the significance of an off-reservation historical or archeological resource?

b) Directly or indirectly destroy a unique off-reservation paleontological resource or site or unique off-reservation geologic feature?

c) Disturb any off-reservation human remains, including those interred outside of formal cemeteries?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

VI. Geology and Soils

Would the project:

a) Expose off-reservation people or structures to potential substantial adverse effects, including the risk of loss, injury, or death involving:

   i) Rupture of a known earthquake fault, as delineated on the most recent Alquist-Priolo Earthquake Fault Zoning Map issued by the State Geologist for the area or based on other substantial evidence of a known fault? Refer to Division of Mines and Geology Special Publication 42.

   ii) Strong seismic ground shaking?

   iii) Seismic-related ground failure, including liquefaction?

   iv) Landslides?

b) Result in substantial off-reservation soil erosion or the loss of topsoil?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

VII. Hazards and Hazardous Materials

Would the project:

a) Create a significant hazard to the off-reservation public or the off-reservation environment through the routine transport, use, or disposal of hazardous materials?

b) Create a significant hazard to the off-reservation public or the off-reservation environment through reasonably foreseeable upset and accident conditions involving the release of hazardous materials into the environment?

c) Emit hazardous emissions or handle hazardous or acutely hazardous materials, substances, or waste within one-quarter mile of an existing or proposed off-reservation school?

d) Expose off-reservation people or structures to a significant risk of loss, injury or death involving wildland fires.

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

VIII. Water Resources

Would the project:

a) Violate any water quality standards or waste discharge requirements?

b) Substantially deplete off-reservation groundwater supplies or interfere substantially with groundwater recharge such that there should be a net deficit in aquifer volume or a lowering of the local groundwater table level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted)?

c) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, in a manner which would result in substantial erosion of siltation off-site?

d) Substantially alter the existing drainage pattern of the site or area, including through the alteration of the course of a stream or river, or substantially increase the rate or amount of surface runoff in a manner which would result in flooding off-site?

e) Create or contribute runoff water which would exceed the capacity of existing or planned storm water drainage systems or provide substantial additional sources of polluted runoff off-reservation?

f) Place within a 100-year flood hazard area structures, which would impede or redirect off-reservation flood flows?

g) Expose off-reservation people or structures to a significant risk of loss, injury or death involving flooding, including flooding as a result of the failure of a levee or dam?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

IX. Land Use

Would the project:

a) Conflict with any off-reservation land use plan, policy, or regulation of an agency adopted for the purpose of avoiding or mitigating an environmental effect?

b) Conflict with any applicable habitat conservation plan or natural communities conservation plan covering off-reservation lands?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

X. Mineral Resources

Would the project:

a) Result in the loss of availability of a known off-reservation mineral resource classified MRZ-2 by the State Geologist that would be of value to the region and the residents of the state?

b) Result in the loss of availability of an off-reservation locally important mineral resource recovery site delineated on a local general plan, specific plan, or other land use plan?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

XI. Noise

Would the project result in:

a) Exposure of off-reservation persons to noise levels in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies?

b) Exposure of off-reservation persons to excessive groundborne vibration or groundborne noise levels?

c) A substantial permanent increase in ambient noise levels in the off-reservation vicinity of the project?

d) A substantial temporary or periodic increase in ambient noise levels in the off-reservation vicinity of the project?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

XII. Population and Housing

Would the project:

a) Induce substantial off-reservation population growth?

b) Displace substantial numbers of existing housing, necessitating the construction of replacement housing elsewhere off-reservation?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

XIII. Public Services

Would the project:

a) Result in substantial adverse physical impacts associated with the provision of new or physically altered off-reservation governmental facilities, the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios, response times, or other performance objectives for any of the off-reservation public services:

Fire protection?

Police protection?

Schools?

Parks?

Other public facilities?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

XIV. Recreation

Would the project:

a) Increase the use of existing off-reservation neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐

XV. Transportation/Traffic

Would the project:

a) Cause an increase in off-reservation traffic, which is substantial in relation to the existing traffic load and capacity of the street system (i.e., result in a substantial increase in either the number of vehicle trips, the volume-to-capacity ratio on roads, or congestion at intersections)?

b) Exceed, either individually or cumulatively, a level of service standard established by the county congestion management agency for designated off-reservation roads or highways?

c) Substantially increase hazards to an off-reservation design feature (e.g., sharp curves or dangerous intersections) or incompatible uses (e.g., farm equipment)?

d) Result in inadequate emergency access for off-reservation responders?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

XVI. Utilities and Service Systems

Would the project:

a) Exceed off-reservation wastewater treatment requirements of the applicable Regional Water Quality Control Board?

b) Require or result in the construction of new water or wastewater treatment facilities or expansion of existing facilities, the construction of which could cause significant off-reservation environmental effects?

c) Require or result in the construction of new storm water drainage facilities or expansion of existing facilities, the construction of which could cause significant off-reservation environmental effects?

d) Result in a determination by an off-reservation wastewater treatment provider (if applicable), which serves or may serve the project that it has inadequate capacity to serve the project's projected demand in addition to the provider's existing commitments?

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐
☐	☐	☐	☐

XVII. Cumulative Effects

Would the project:

a) Have impacts that are individually limited, but cumulatively considerable off-reservation? "Cumulatively considerable" means that the incremental effects of a project are considerable when viewed in connection with the effects of past, current, or probable future projects.

Potentially Significant Impact	*Less Than Significant With Mitigation Incorporation*	*Less than Significant Impact*	*No Impact*
☐	☐	☐	☐

APPENDIX C

Tribal Labor Relations Ordinance

Section 1: Threshold of Applicability

(a) If the North Fork Rancheria of Mono Indians (Tribe) employs 250 or more persons in a tribal casino and related facility, it shall adopt this Tribal Labor Relations Ordinance (TLRO or Ordinance). For purposes of this Ordinance, a "tribal casino" is one in which class III gaming is conducted pursuant to the tribal-state compact. A "related facility" is one for which the only significant purpose is to facilitate patronage of the class III gaming operations.

(b) Upon the request of a labor union or organization (any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work), the Tribal Gaming Commission shall certify

the number of employees in a tribal casino or other related facility as defined in subsection (a) of this Section 1. Either party may dispute the certification of the Tribal Gaming Commission to the Tribal Labor Panel, which is defined in Section 13 herein.

Section 2: Definition of Eligible Employees

(a) The provisions of this ordinance shall apply to any person (hereinafter "Eligible Employee") who is employed within a tribal casino in which class III gaming is conducted pursuant to a tribal-state compact or other related facility, the only significant purpose of which is to facilitate patronage of the class III gaming operations, except for any of the following:

(1) any employee who is a supervisor, defined as any individual having authority, in the interest of the Tribe and/or employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;

(2) any employee of the Tribal Gaming Commission;

(3) any employee of the security or surveillance department, other than those who

are responsible for the technical repair and maintenance of equipment;

(4) any cash operations employee who is a "cage" employee or money counter; or

(5) any dealer.

(b) On [month] 1 of each year, the Tribal Gaming Commission shall certify the number of Eligible Employees employed by the Tribe to the administrator of the Tribal Labor Panel.

Section 3: Non-Interference with Regulatory or Security Activities

Operation of this Ordinance shall not interfere in any way with the duty of the Tribal Gaming Commission to regulate the gaming operation in accordance with the Tribe's National Indian Gaming Commission-approved gaming ordinance. Furthermore, the exercise of rights hereunder shall in no way interfere with the tribal casino's surveillance/security systems, or any other internal controls system designed to protect the integrity of the Tribe's gaming operations. The Tribal Gaming Commission is specifically excluded from the definition of Tribe and its agents.

Section 4: Eligible Employees Free to Engage in or Refrain From Concerted Activity

Eligible Employees shall have the right to self-organization, to form, to join, or assist employee organizations, to bargain collectively through representatives of their own choosing, to engage in other

concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities.

Section 5: Unfair Labor Practices for the Tribe

It shall be an unfair labor practice for the Tribe and/or employer or their agents:

(a) to interfere with, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;

(b) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it, but this does not restrict the Tribe and/or employer and a certified union from agreeing to union security or dues check off;

(c) to discharge or otherwise discriminate against an Eligible Employee because s/he has filed charges or given testimony under this Ordinance; or

(d) after certification of the labor organization pursuant to Section 10, to refuse to bargain collectively with the representatives of Eligible Employees.

Section 6: Unfair Labor Practices for the Union

It shall be an unfair labor practice for a labor organization or its agents:

(a) to interfere, restrain or coerce Eligible Employees in the exercise of the rights guaranteed herein;

(b) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a primary or secondary boycott or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce or other terms and conditions of employment. This section does not apply to Section 11;

(c) to force or require the Tribe and/or employer to recognize or bargain with a particular labor organization as the representative of Eligible Employees if another labor organization has been certified as the representative of such Eligible Employees under the provisions of this TLRO;

(d) to refuse to bargain collectively with the Tribe and/or employer, provided it is the representative of Eligible Employees subject to the provisions herein; or

(e) to attempt to influence the outcome of a tribal governmental election, provided, however,

that this section does not apply to tribal members.

Section 7: Tribe and Union Right to Free Speech

(a) The Tribe's and union's expression of any view, argument or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of interference with, restraint, or coercion if such expression contains no threat of reprisal or force or promise of benefit.

(b) The Tribe agrees that if a union first offers in writing that it and its local affiliates will comply with (b)(1) and (b)(2), the Tribe shall comply with the provisions of (c) and (d).

(1) For a period of three hundred sixty-five (365) days following delivery of a Notice of Intent to Organize (NOIO) to the Tribe:

(A) not engage in strikes, picketing, boycotts, attack websites, or other economic activity at or in relation to the tribal casino or related facility; and refrain from engaging in strike-related picketing on Indian lands as defined in 25 U.S.C. § 2703(4);

(B) not disparage the Tribe for purposes of organizing Eligible Employees;

(C) not attempt to influence the outcome of a tribal government election; and

(D) during the three hundred sixty-five (365) days after the Tribe received the NOIO, the Union must collect dated and signed authorization cards pursuant to Section 10 herein and complete the secret ballot election also in Section 10 herein. Failure to complete the secret ballot election within the three hundred sixty five (365) days after the Tribe received the NOIO shall mean that the union shall not be permitted to deliver another NOIO for a period of two years (730 days).

(2) Resolve all issues, including collective bargaining impasses, through the binding dispute resolution mechanisms set forth in Section 13 herein.

(c) Upon receipt of a NOIO, the Tribe shall:

(1) within two (2) days provide to the union an election eligibility list containing the full first and last names of the Eligible Employees within the sought-after bargaining unit and the Eligible Employees' last known addresses, telephone numbers and email addresses;

(2) for period of three hundred sixty-five (365) days thereafter, not act in any way which is or could reasonably be perceived to be anti-union. This includes refraining from making derisive comments about unions; publishing or posting pamphlets,

fliers, letters, posters or any other communication which should be interpreted as criticism of the union or advises Eligible Employees to vote "no" against the union. However, the Tribe shall be free at all times to fully inform Eligible Employees about the terms and conditions of employment it provides to employees and the advantages of working for the Tribe; and

(3) resolve all issues, including collective bargaining impasses, through the binding dispute resolution mechanisms set forth in Section 13 herein.

(d) The union's offer in subsection (b) of this Section 7 shall be deemed an offer to accept the entirety of this Ordinance as a bilateral contract between the Tribe and the union, and the Tribe agrees to accept such offer. By entering into such bilateral contract, the union and Tribe mutually waive any right to file any form of action or proceeding with the National Labor Relations Board for the three hundred sixty-five (365)-day period following the NOIO.

(e) The Tribe shall mandate that any entity responsible for all or part of the operation of the casino and related facility shall assume the obligations of the Tribe under this Ordinance. If at the time of the management contract, the Tribe recognizes a labor organization as the representative of its employees, certified pursuant to this Ordinance, the labor organization will provide the contractor, upon request,

the election officer's certification which constitutes evidence that the labor organization has been determined to be the majority representative of the Tribe's Eligible Employees.

Section 8: Access to Eligible Employees

(a) Access shall be granted to the union for the purposes of organizing Eligible Employees, provided that such organizing activity shall not interfere with patronage of the casino or related facility or with the normal work routine of the Eligible Employees and shall be done on non-work time in non-work areas that are designated as employee break rooms or locker rooms that are not open to the public. The Tribe may require the union and or union organizers to be subject to the same licensing rules applied to individuals or entities with similar levels of access to the casino or related facility, provided that such licensing shall not be unreasonable, discriminatory, or designed to impede access.

(b) The Tribe, in its discretion, may also designate additional voluntary access to the Union in such areas as employee parking lots and non-casino facilities located on tribal lands.

(c) In determining whether organizing activities potentially interfere with normal tribal work routines, the union's activities shall not be permitted if the Tribal Labor Panel determines that they compromise the operation of the casino:

(1) security and surveillance systems throughout the casino, and reservation;

(2) access limitations designed to ensure security;

(3) internal controls designed to ensure security; or

(4) other systems designed to protect the integrity of the Tribe's gaming operations, tribal property and/or safety of casino personnel, patrons, employees or tribal members, residents, guests or invitees.

(d) The Tribe agrees to facilitate the dissemination of information from the union to Eligible Employees at the tribal casino by allowing posters, leaflets and other written materials to be posted in nonpublic employee break areas where the Tribe already posts announcements pertaining to Eligible Employees. Actual posting of such posters, notices, and other materials shall be by employees desiring to post such materials.

Section 9: Indian Preference Explicitly Permitted

Nothing herein shall preclude the Tribe from giving Indian preference in employment, promotion, seniority, lay-offs or retention to members of any federally recognized Indian tribe or shall in any way affect the Tribe's right to follow tribal law, ordinances, personnel policies or the Tribe's customs or traditions regarding Indian preference in employment, promotion, seniority, layoffs or retention. Moreover, in the event of a conflict

between tribal law, tribal ordinance or the Tribe's customs and traditions regarding Indian preference and this Ordinance, the tribal law, tribal ordinance, or the Tribe's customs and traditions shall govern.

Section 10: Secret Ballot Elections

(a) The election officer shall be chosen within three (3) business days of notification by the labor organization to the Tribe of its intention to present authorization cards, and the same election officer shall preside thereafter for all proceedings under the request for recognition; provided, however, that if the election officer resigns, dies, or is incapacitated for any other reason from performing the functions of this office, a substitute election officer shall be selected in accordance with the dispute resolution provisions herein. Dated and signed authorized cards from thirty percent (30%) or more of the Eligible Employees within the bargaining unit verified by the elections officer will result in a secret ballot election. The election officer shall make a determination as to whether the required thirty percent (30%) showing has been made within one (1) working day after the submission of authorization cards. If the election officer determines the required thirty percent (30%) showing of interest has been made, the election officer shall issue a notice of election. The election shall be concluded within thirty (30) calendar days of the issuance of the notice of election.

(b) Upon the showing of interest to the election officer pursuant to subsection (a), within two (2) working days the Tribe shall provide to the union an election eligibility list containing the full first and last names of the Eligible Employees within the sought after bargaining unit and the Eligible Employees' last known addresses, telephone numbers and email addresses. Nothing herein shall preclude a Tribe from voluntarily providing an election eligibility list at an earlier point of a union organizing campaign with or without an election.

(c) The election shall be conducted by the election officer by secret ballot pursuant to procedures set forth in a consent election agreement in substantially the same form as Attachment 1. In the event either that a party refuses to enter into the consent election agreement or that the parties do not agree on the terms, the election officer shall issue an order that conforms to the terms of the form consent election agreement and shall have authority to decide any terms upon which the parties have not agreed, after giving the parties the opportunity to present their views in writing or in a telephonic conference call. The election officer shall be a member of the Tribal Labor Panel chosen pursuant to the dispute resolution provisions herein. All questions concerning representation of the Tribe and/or Eligible Employees by a labor organization shall be resolved by the election officer.

(d) The election officer shall certify the labor organization as the exclusive collective bargaining representative of a unit of employees if the labor organization has received the support of a majority of the Eligible Employees in a secret ballot election that the election officer determines to have been conducted fairly. The numerical threshold for certification is fifty percent (50%) of the Eligible Employees plus one. If the election officer determines that the election was conducted unfairly due to misconduct by the Tribe and/or employer or union, the election officer may order a re-run election. If the election officer determines that there was the commission of serious Unfair Labor Practices by the Tribe, or in the event the union made the offer provided for in Section 7(b) that the Tribe violated its obligations under Section 7(c), that interferes with the election process and precludes the holding of a fair election, and the labor organization is able to demonstrate that it had the support of a majority of the employees in the unit at any time before or during the course of the Tribe's misconduct, the election officer shall certify the labor organization as the exclusive bargaining representative.

(e) The Tribe or the union may appeal within five (5) days any decision rendered after the date of the election by the election officer to a three (3) member panel of the Tribal Labor Panel mutually chosen by both parties, provided that the Tribal Labor Panel must issue a decision within thirty (30) days after receiving the appeal.

(f) A union which loses an election and has exhausted all dispute remedies related to the election may not invoke any provisions of this ordinance at that particular casino or related facility until one (1) year after the election was lost.

Section 11: Collective Bargaining Impasse

(a) Upon recognition, the Tribe and the union will negotiate in good faith for a collective bargaining agreement covering bargaining unit employees represented by the union.

(b) Except where the union has made the written offer set forth in Section 7(b), if collective bargaining negotiations result in impasse, the union shall have the right to strike. Strike-related picketing shall not be conducted on Indian lands as defined in 25 U.S.C. § 2703(4).

(c) Where the union makes the offer set forth in Section 7(b), if collective bargaining negotiations result in impasse, the matter shall be resolved as set forth in Section 13(c).

Section 12: Decertification of Bargaining Agent

(a) The filing of a petition signed by thirty percent (30%) or more of the Eligible Employees in a bargaining unit seeking the decertification of a certified union, will result in a secret ballot election. The election officer shall make a determination as to whether the required thirty percent (30%) showing has been made within one (1) working day after the

submission of authorization cards. If the election officer determines the required thirty percent (30%) showing of interest has been made, the election officer shall issue a notice of election. The election shall be concluded within thirty (30) calendar days of the issuance of the notice of election.

(b) The election shall be conducted by an election officer by secret ballot pursuant to procedures set forth in a consent election agreement in substantially the same form as Attachment 1. The election officer shall be a member of the Tribal Labor Panel chosen pursuant to the dispute resolution provisions herein. All questions concerning the decertification of the union shall be resolved by an election officer. The election officer shall be chosen upon notification to the Tribe and the union of the intent of the Eligible Employees to present a decertification petition, and the same election officer shall preside thereafter for all proceedings under the request for decertification; provided however that if the election officer resigns, dies or is incapacitated for any other reason from performing the functions of this office, a substitute election officer shall be selected in accordance with the dispute resolution provisions herein.

(c) The election officer shall order the labor organization decertified as the exclusive collective bargaining representative if a majority of the Eligible Employees support decertification of the labor organization in a secret ballot election that the election officer determines to

have been conducted fairly. The numerical threshold for decertification is fifty percent (50%) of the Eligible Employees plus one (1). If the election officer determines that the election was conducted unfairly due to misconduct by the Tribe and/or employer or the union the election officer may order a re-run election or dismiss the decertification petition.

(d) A decertification proceeding may not begin until one (1) year after the certification of a labor union if there is no collective bargaining agreement. Where there is a collective bargaining agreement, a decertification petition may only be filed no more than ninety (90) days and no less than sixty (60) days prior to the expiration of a collective bargaining agreement. A decertification petition may be filed any time after the expiration of a collective bargaining agreement.

(e) The Tribe or the union may appeal within five (5) days any decision rendered after the date of the election by the election officer to a three (3) member panel of the Tribal Labor Panel chosen in accordance with Section 13(c), provided that the Tribal Labor Panel must issue a decision within thirty (30) days after receiving the appeal.

Section 13: Binding Dispute Resolution Mechanism

(a) All issues shall be resolved exclusively through the binding dispute resolution mechanisms herein.

(b) The method of binding dispute resolution shall be a resolution by the Tribal Labor Panel, consisting of ten (10) arbitrators appointed by mutual selection of the parties which panel shall serve all tribes that have adopted this ordinance. The Tribal Labor Panel shall have authority to hire staff and take other actions necessary to conduct elections, determine units, determine scope of negotiations, hold hearings, subpoena witnesses, take testimony, and conduct all other activities needed to fulfill its obligations under this Ordinance.

(1) Each member of the Tribal Labor Panel shall have relevant experience in federal labor law and/or federal Indian law with preference given to those with experience in both. Names of individuals may be provided by such sources as, but not limited to, Indian Dispute Services, Federal Mediation and Conciliation Service, and the American Academy of Arbitrators.

(2) One arbitrator from the Tribal Labor Panel will render a binding decision on the dispute under the Ordinance. Five (5) Tribal Labor Panel names shall be submitted to the parties and each party may strike no more than two (2) names. A coin toss shall determine which party may

strike the first name. The arbitrator will generally follow the American Arbitration Association's procedural rules relating to labor dispute resolution. The arbitrator must render a written, binding decision that complies in all respects with the provisions of this Ordinance within thirty (30) days after a hearing.

(c) (1) Upon certification of a union in accordance with Section 10 of this Ordinance, the Tribe and union shall negotiate for a period of ninety (90) days after certification. If, at the conclusion of the ninety (90)-day period, no collective bargaining agreement is reached and either the union and/or the Tribe believes negotiations are at an impasse, at the request of either party, the matter shall be submitted to mediation with the Federal Mediation and Conciliation Service. The costs of mediation and conciliation shall be borne equally by the parties.

(2) Upon appointment, the mediator shall immediately schedule meetings at a time and location reasonably accessible to the parties. Mediation shall proceed for a period of thirty (30) days. Upon expiration of the thirty (30)-day period, if the parties do not resolve the issues to their mutual satisfaction, the mediator shall certify that the mediation process has been exhausted. Upon mutual agreement of the parties, the mediator may extend the mediation period.

(3) Within twenty-one (21) days after the conclusion of mediation, the mediator shall file a report that resolves all of the issues between the parties and establishes the final terms of a collective bargaining agreement, including all issues subject to mediation and all issues resolved by the parties prior to the certification of the exhaustion of the mediation process. With respect to any issues in dispute between the parties, the report shall include the basis for the mediator's determination. The mediator's determination shall be supported by the record.

(d) In resolving the issues in dispute, the mediator may consider those factors commonly considered in similar proceedings.

(e) Either party may seek a motion to compel arbitration or a motion to confirm or vacate an arbitration award, under this Section 13, in the appropriate state superior court, unless a bilateral contract has been created in accordance with Section 7, in which case either party may proceed in federal court. The Tribe agrees to a limited waiver of its sovereign immunity for the sole purpose of compelling arbitration or confirming or vacating an arbitration award issued pursuant to the Ordinance in the appropriate state superior court or in federal court. The parties are free to put at issue whether or not the arbitration award exceeds the authority of the Tribal Labor Panel.

Attachment 1

CONSENT ELECTION AGREEMENT PROCEDURES

Pursuant to the Tribal Labor Relations Ordinance adopted pursuant to section 10.7 of the compact, the undersigned parties hereby agree as follows:

1. Jurisdiction. The North Fork Rancheria of Mono Indians (Tribe) is an employer within the meaning of the Ordinance; and each employee organization named on the ballot is an employee organization within the meaning of the Ordinance; and the employees described in the voting unit are Eligible Employees within the meaning of the Ordinance.

2. Election. An election by secret ballot shall be held under the supervision of the elections officer among the Eligible Employees of the Tribe named above, and in the manner described below, to determine which employee organization, if any, shall be certified to represent such employees pursuant to the Ordinance.

3. Voter Eligibility. Unless otherwise indicated below, the eligible voters shall be all Eligible Employees who were employed on the eligibility cutoff date indicated below, and who are still employed on the date they cast their ballots in the election, i.e., the date the voted ballot is received by the elections officer. Eligible Employees who are ill, on vacation, on leave of absence or sabbatical, temporarily laid off, and employees who are in the military service of the United States shall be eligible to vote.

4. Voter Lists. The Tribe shall electronically file with the elections officer a list of eligible voters within two (2) business days after receipt of a Notice of Election.

5. Notice of Election. The elections officer shall serve Notices of Election on the Tribe and on each party to the election. The Notice shall contain a sample ballot, a description of the voting unit and information regarding the balloting process. Upon receipt, the Tribe shall post such Notice of Election conspicuously on all employee bulletin boards in each facility of the employer in which members of the voting unit are employed. Once a Notice of Election is posted, where the union has made the written offer set forth in Section 7(b) of the Tribal Labor Relations Ordinance, the Tribe shall continue to refrain from publishing or posting pamphlets, fliers, letters, posters or any other communication which should be interpreted as criticism of the union or advises employees to vote "no" against the union. The Tribe shall be free at all times to fully inform employees about the terms and conditions of employment it provides to employees and the advantages of working for the Tribe.

6. Challenges. The elections officer or an authorized agent of any party to the election may challenge, for good cause, the eligibility of a voter. Any challenges shall be made prior to the tally of the ballots.

7. Tally of Ballots. At the time and place indicated below, ballots shall be co-mingled and tabulated by the elections officer. Each party shall be allowed to

station an authorized agent at the ballot count to verify the tally of ballots. At the conclusion of the counting, the elections officer shall serve a Tally of Ballots on each party.

8. Objections and Post-election Procedures. Objections to the conduct of the election may be filed with the elections officer within five (5) calendar days following the service of the Tally of Ballots. Service and proof of service is required.

9. Runoff Election. In the event a runoff election is necessary, it shall be conducted at the direction of the elections officer.

10. Wording on Ballot. The choices on the ballot shall appear in the wording and order enumerated below.

FIRST:	[***]
SECOND:	[***]
THIRD:	[***]

11. Cutoff Date for Voter Eligibility: [***]

12. Description of the Balloting Process. A secret ballot election will take place within thirty (30) days after delivery of the voter list referenced in paragraph 4. The employer will determine the location or locations of the polling places for the election. There must be at least one (1) neutral location (such as a high school, senior center, or similar facility) which is not within the gaming facility and employees must also be afforded the option of voting by mail through procedures established by the elections officer. Only voters,

designated observers and the election officer or supporting staff can be present in the polling area. Neither employer nor union representatives may campaign in or near the polling area. If the election officer or supporting staff questions an employee's eligibility to vote in the election, the ballot will be placed in a sealed envelope until your eligibility is determined. The box will be opened under the supervision of the election officer when voting is finished. Ballots submitted by mail must be received by the elections officer no later than the day of the election in order to be counted in the official tally of ballots.

13. Voter List Format and Filing Deadline: Not later than two (2) business days after receipt of the Notice of Election, the Tribe shall file with the elections officer, at [**address**], an alphabetical list of all eligible voters including their job titles, work locations and home addresses.

Copies of the list shall be served concurrently on the designated representative for the [***]; proof of service must be concurrently filed with elections officer.

In addition, the Tribe shall submit to the elections officer on or before [***], by electronic mail, a copy of the voter list in an Excel spreadsheet format, with columns labeled as follows: First Name, Last Name, Street Address, City, State, and Zip Code. Work locations and job titles need not be included in the electronic file. The file shall be sent to [***].

14. Notices of Election: Shall be posted by the Tribe no later than [***].

15. Date, Time and Location of Counting of Ballots: Beginning at [**time**] on [**date**], at the [**address**].

16. Each signatory to this Agreement hereby declares under penalty of perjury that s/he is a duly authorized agent empowered to enter into this Consent Election Agreement.

(Name of Party)
By
(Title) (Date)

(Name of Party)
By
(Title) (Date)

(Name of Party)
By
(Title) (Date)

(Name of Party)
By
(Title) (Date)

Date approved: _____

[**Author**]
Elections Officer