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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

12 STAND UP FOR CALIFORNIA!, ET AL.

13 Plaintiffs,

14 v.

15 UNITED STATES DEPARTMENT OF
16 THE INTERIOR, ET AL.

17 Defendants.

CASE NO. 2:16-CV-02681-AWI-EPG

ORDER DENYING STAND UP FOR CALIFORNIA!'S MOTION FOR SUMMARY JUDGMENT
(Doc. 29)

ORDER GRANTING NORTH FORK'S MOTION FOR SUMMARY JUDGMENT
(Doc. 36)

ORDER GRANTING THE UNITED STATES' MOTION FOR SUMMARY JUDGMENT
(Doc. 40)

ORDER DENYING MOTION TO STAY
(Doc. 28)

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I. Introduction

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

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

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

9 II. Background

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

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

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

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

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

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

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

13 **B. Related Actions**

14 *1. Good Faith Litigation*

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

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

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

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

9 2. *The District of Columbia Action*

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

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

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

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

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

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

20 3. *The Gubernatorial Concurrence Action*

21 In March of 2013, Stand Up filed suit in the Madera County Superior Court, contending
22 that the Governor lacked the authority under California law to concur in the Secretary of the
23 Interior's two-part determination. *Stand Up for California v State of California et al.*, 5th DCA
24 Case No. F069302. The Madera County Superior Court held that the Governor's authority to

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27 ⁵ Picayune challenged, but Stand Up did not challenge, the district court’s determination that California is a
28 necessary party to an action containing “any challenge to the validity of the Governor's concurrence.” *Stand Up for*
California v. Dept. of the Interior, 204 F.Supp.3d at 251; *Stand Up For California! v. Dept. of the Interior*, 2018
WL 385220, *6.

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

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

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

17 **III. Legal Standard**

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

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

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

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

27 B. FOIA Claim

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

1 judgment if the movant shows that there is no genuine dispute as to any material fact and the
2 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a) (quotation marks
3 omitted); *Washington Mut. Inc. v. United States*, 636 F.3d 1207, 1216 (9th Cir. 2011). Each
4 party's position, whether it be that a fact is disputed or undisputed, must be supported by (1)
5 citing to particular parts of materials in the record, including but not limited to depositions,
6 documents, declarations, or discovery; or (2) showing that the materials cited do not establish the
7 presence or absence of a genuine dispute or that the opposing party cannot produce admissible
8 evidence to support the fact. Fed. R. Civ. P. 56(c)(1) (quotation marks omitted). The Court may
9 consider other materials in the record not cited to by the parties, but it is not required to do so.
10 Fed. R. Civ. P. 56(c)(3); *Carmen v. San Francisco Unified Sch. Dist.*, 237 F.3d 1026, 1031 (9th
11 Cir. 2001); *accord Simmons v. Navajo Cnty., Ariz.*, 609 F.3d 1011, 1017 (9th Cir. 2010).

12 In resolving cross-motions for summary judgment, the Court must consider each party's
13 evidence. *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 960 (9th Cir. 2011). A plaintiff
14 bears the burden of proof at trial, and to prevail on summary judgment, it must affirmatively
15 demonstrate that no reasonable trier of fact could find other than for the plaintiff. *Soremekun v.*
16 *Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). Defendants do not bear the burden of
17 proof at trial or in moving for summary judgment, they need only prove an absence of evidence
18 to support the plaintiff's case. *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376, 387 (9th Cir. 2010).
19 In judging the evidence at the summary judgment stage, the Court does not make credibility
20 determinations or weigh conflicting evidence, *Soremekun*, 509 F.3d at 984 (quotation marks and
21 citation omitted), and it must draw all inferences in the light most favorable to the nonmoving
22 party and determine whether a genuine issue of material fact precludes entry of judgment,
23 *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 942 (9th Cir.
24 2011) (quotation marks and citation omitted).

25 In the FOIA context, courts review an agency's decision whether or not to disclose de
26 novo. 5 U.S.C. § 552(a)(4)(B); *see also Louis v. United States Dep't of Labor*, 419 F.3d 970, 977
27 (9th Cir. 2005) (De novo review “requir[es] no deference to the agency's determination or
28 rationale regarding disclosures.”) However, courts “accord substantial weight to an affidavit of

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

5 **IV. Discussion**

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

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

12 1. The Johnson Act

13 The Johnson Act, enacted in 1951, prohibits the possession or use of “any gambling
14 device⁶ ... within Indian country.” 15 U.S.C. § 1175(a). Stand Up argues that IGRA provides an
15 exception to the general prohibition on use of slot machines in Indian country *only when* a valid
16 Tribal-State compact has been entered into to govern gaming on the Indian land. Doc. 29 at 16
17 (citing 25 U.S.C. § 2710(d)(6) (“The provisions of section 1175 of Title 15 shall not apply to any
18 gaming conducted under a Tribal-State compact that (A) is entered into ... by a state in which
19 gambling devices are legal, and (B) is in effect.”) It is agreed that no effective Tribal-State
20 compact has ever been entered into by North Fork and the State of California. Indeed, that fact
21 was the predicate for North Fork’s good faith negotiation action, which ultimately resulted in the
22 issuance of Secretarial Procedures and not a Tribal-State compact. *See North Fork v. California*,
23 2015 WL 11438206 at *2-3. Accordingly, Plaintiff argues that “[b]ecause North Fork ... has not
24 entered into a compact with the state that is effective under IGRA,” the Johnson Act prohibits
25 gaming “at the Madera Site.” Doc. 29 at 16-17. In sum, Stand Up contends that any prescribing
26 of Secretarial Procedures pursuant to 25 U.S.C. § 2710(d)(7)(B)(vii)—which can only take place
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28 ⁶ “Gaming device,” for purposes of the Johnson Act, includes “slot machine[s].” 15 U.S.C. § 1171(a).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27
28 ¹² NEPA also requires an EIS to accompany “every recommendation or report on proposals for legislation.” 42 U.S.C. § 4332(2)(C). No proposed legislation was at issue here.

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

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

23 a. Major Federal action

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

26 ¹³ The Court reads the “rule of reason” outlined in *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770
27 (2004) obviate the need for a determination as to whether an agency action was a major Federal action when the
28 agency is not permitted to prevent the action even with the benefit of an EIS. As such, the Court considers whether
the issuance of Secretarial Procedures was the cause of the alleged environmental effect and does not decide whether
the Secretarial Procedures constitute a major Federal action.

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

12 b. Rule of Reason

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

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

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

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

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

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

6 Stand Up’s proposed reading is again inconsistent with IGRA. First, the Secretary’s
7 modification of the mediator-selected compact in a manner designed to avoid offending the
8 Tenth Amendment¹⁴ is not an indication that he is equally bound by NEPA.¹⁵ The text and
9 legislative history of IGRA, as well as subsequent judicial decisions regarding IGRA make clear:
10 a State cannot be compelled to negotiate with an Indian tribe toward entering into a compact or
11 take *any* action gaming-related action with respect to an Indian tribe. 25 U.S.C. §§ 2710(d)(3)(A)
12 (authorizing a Tribe to request negotiations with a State), 2710(d)(7)(B) (establishing a
13 mechanism for authorizing gaming notwithstanding a State’s non-participation and framing the
14 State’s involvement as a matter of state consent); S. Rep. 100-446 at *13-14 (IGRA is designed
15 to “mak[e] use of existing State regulatory systems” but only “through negotiated compacts”
16 between an Indian tribe and a State.) *Ponca Tribe of Oklahoma v. State of Oklahoma*, 37 F.3d
17 1422, 1435 (10th Cir.1994) (“Had Congress intended to mandate that the states enter into
18 compacts with Indian tribes, it would not have included these latter sections in § 2710(d)(7).”);
19 *Cheyenne River Sioux Tribe v. South Dakota.*, 3 F.3d 273, 281 (8th Cir. 1993) (IGRA gives

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

27 ¹⁵ The Court would note that the Secretary made the same modification when prescribing Secretarial Procedures
28 regarding the Estom Yumeka Maidu Tribe of the Enterprise Rancheria of California in relation to *Estom Yumeka*
Maidu Tribe of the Enterprise Rancheria of California v. State of California, 2:14-cv-1939-TLN-CKD (E.D. Cal.
2016). *See* Letter to Glenda Nelson at p. 2, accompanying Secretarial Procedures for the Estom Yumeka Maidu
Tribe of the Enterprise Rancheria, located at <https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc2-056229.pdf> (BIA, Aug. 12, 2016) (last accessed on July 18, 2018). The same modification was also made when
prescribing Secretarial Procedures regarding the Rincon Band of Luiseno Indians. *See* Letter to Bo Mazzetti at p.3,
accompanying Secretarial Procedures for Rincon Band of Luiseno Indians, located at
<https://www.bia.gov/sites/bia.gov/files/assets/as-ia/oig/oig/pdf/idc1-026439.pdf> (BIA, Feb. 8, 2013) (last accessed
on July 18 2018). Both documents are judicially noticeable.

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

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

20
21 ¹⁶ The Court does not now comment on whether the Secretary could (or must) make other changes to a Tribal-State
compact that were compelled by the Constitution but not necessary to assure consistency with IGRA or relevant
state law. That question is not before the Court.

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

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

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

26
27 ¹⁹ Indeed, the Secretary holds trust obligations to the Tribe that are wholly inconsistent with the Secretary being
28 objective in setting aside portions of the mediator-selected compact. *See Texas*, 497 F.3d at 508 (finding that the
secretary’s trust obligation to an Indian tribe is inconsistent with the Secretary being a neutral party to select a
mediator where a state invokes Eleventh Amendment immunity in response to a good faith suit).

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

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

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

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

5 3. Clean Air Act (“CAA”)

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

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

1 is undisputed that the Secretary did not conduct a conformity determination with respect to the
2 impact of prescribing gaming procedures. Nor did the Secretary did indicate reliance on the
3 previously conducted conformity determination in prescribing gaming procedures.

4 Stand Up contends the Secretary was required to conduct a conformity determination
5 prior to prescribing gaming procedures and, by failing to do so, the Secretary violated the CAA.

6 The Secretary and North Fork both contend that, in the same way that the Secretary was
7 unable to consider environmental impacts shown by any EIS, the Secretary could not make
8 changes to the mediator-selected compact in response to the CAA emissions conformity
9 requirements. The Secretary was not delegated “practical control” over the terms of the gaming
10 procedures such that he could impact emissions. Doc. 37 at 44; Doc. 52 at 21; Doc. 51 at 26.

11 Thus, they argue, the Secretary is exempt from conducting a compliance determination because
12 he did not “cause new emissions to exceed” the relevant threshold amounts. *See Public Citizen*,
13 541 U.S. at 771. The Secretary also argues that his action in prescribing gaming procedures is “a
14 rulemaking or administrative action” that is exempt from the scope of the conformity
15 requirements. Doc. 41 at 36 (citing 40 C.F.R. § 93.153(c)(2)(iii)).

16 The Court agrees that the Secretary lacks sufficient control over the prescribing of
17 gaming procedures to be able to make modifications based on the requirements of the CAA. As a
18 result, the prescribing of Secretarial Procedures does not require a CAA conformity
19 determination. The Supreme Court explained in *Public Citizen* that “agenc[ies] [are] exempt
20 from general conformity determination[s] under the CAA if [their] action would not cause new
21 emissions to exceed certain threshold emission rates set forth in [section] 93.153(b).” *Public*
22 *Citizen*, 541 U.S. at 771. Section 93.153 requires agencies to conduct a conformity determination
23 “for each ... pollutant ... where the total of direct and indirect emissions ... in a nonattainment
24 ... area caused by a Federal action” would equal or exceed a certain level. 40 C.F.R. 93.153(b).
25 Indirect emissions are those emissions that are “caused or initiated ... and originate” in the same
26 nonattainment area as the Federal action but occur at a different time or place as the action, are
27 reasonably foreseeable, that the agency can practically control, and for which the agency has a
28

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

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

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

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

1 be considered in conformity determinations made pursuant to the CAA. As a result, the FMCSA
2 correctly did not consider any of the “emissions attributable to the increased presence of
3 Mexican trucks within the United States.” *Public Citizen*, 541 U.S. at 771, 773. Here, as
4 discussed above, the Secretary’s authority to modify the gaming procedures from those selected
5 by the mediator was limited. The Secretary’s role was only to ensure that the gaming procedures
6 prescribed were consistent with the mediator-selected compact, IGRA, and relevant California
7 law. 25 U.S.C. § 2710(d)(7)(B)(vii). The Secretary no more practicably controlled or maintained
8 control over emissions at the Madera Site than did the FMCSA in *Public Citizen*.

9 The Court cannot conclude that the Secretary’s decision to not conduct a conformity
10 determination into whether emissions at the proposed gaming site exceed threshold amounts was
11 arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; it was not
12 in excess of statutory jurisdiction or without observance of procedure required by law. Summary
13 adjudication will be denied to Stand Up and granted to North Fork and the Secretary.

14 4. Indian Gaming Regulatory Act (“IGRA”)

15 Stand Up’s IGRA challenge is straight-forward: “the Secretarial Procedures are invalid
16 because the Governor of California lacked authority to concur in the Secretary’s two-part
17 determination under 25 U.S.C. § 2719(b)(1)(A), and therefore the Madera Site is not eligible for
18 tribal gaming under IGRA.” Doc. 29 at 30. The premise that the Governor lacked the authority to
19 concur is not established. That question is now pending before the California Supreme Court.

20 a. Rule 19

21 With respect to the same question, this Court and the District of Columbia District Court
22 both found that the State of California is an indispensable party for any claims that “in any way
23 involv[e] the Governor’s concurrence.” *Stand Up for California*, 204 F.Supp.3d at 254; *Picayune*
24 *Rancheria of Chukchansi Indians v. United States Department of the Interior*, 2017 WL
25 3581735, *9-10 (E.D. Cal. Aug. 18, 2017). The same holds true here. Stand Up’s cause of action
26 relies upon the invalidity of the Governor’s concurrence. At least until the California Supreme
27 Court resolves the question before it, the State of California is an indispensable party.

1 b. Stay

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

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

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

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

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

1 c. Conclusion

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

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

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

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

24 On December 5, 2017, this Court received notice from the Federal Defendants that on
25 December 4, 2017, the DOI “responded to Stand Up’s request, providing all documents
26 answering to the request that are not otherwise subject to withholding under FOIA.” Doc. 53 at
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1 2.²² The documents produced amounted to “about 1,331 pages of documents.” Doc. 54 at 2. Two
2 days later, Stand Up responded that the documents provided were apparently incomplete and
3 seeking additional time to review the disclosed documents. Doc. 54. No party has updated the
4 Court on the status of the FOIA dispute since that time. In light of the Federal Defendants’
5 production of documents, and Stand Up’s failure to indicate to the Court that the documents
6 provided were in fact an incomplete response, the Court must conclude that the Federal
7 Defendants’ response was adequate and all FOIA relief available has been obtained.

8
9 **V. Order**

10 Accordingly, IT IS HEREBY ORDERED that:

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

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17 IT IS SO ORDERED.

18 Dated: July 18, 2018

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28 SENIOR DISTRICT JUDGE

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