STIPULATED TO STAND-BY POOL FOR ORAL ARGUMENT

No. 07-5092

IN THE

United States Court of Appeals for the District of Columbia Circuit

MICHIGAN GAMBLING OPPOSITION,
Plaintiff-Appellant,

-v.-

DIRK KEMPTHORNE, *et al.*,
Defendant-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR DEFENDANT-APPELLEE MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

All parties, intervenors, and amici appearing before the district court and in this Court are listed in the appellant's brief except for the following amici, who also supported defendants in the district court:

Amicus Kalamazoo Regional Chamber of Commerce

Amicus Allegan County Chamber of Commerce

II. RULINGS UNDER REVIEW

References to the rulings at issue appear in the appellant's brief.

III. RELATED CASES

Appellant's brief correctly lists one case—*Citizens Exposing Truth About Casinos v. Kempthorne*, No. 06-5354 (D.C. Cir.)—that raised an issue essentially identical to the "initial reservation" issue presented in this case. On July 3, 2007, this Court issued its opinion in *CETAC*, affirming the district court's decision (*CETAC v. Norton*, No. 02-1754, 2004 U.S. Dist. LEXIS 27498 (D.D.C. Apr. 23, 2004) granting summary judgment in favor of the Secretary of the Interior on the "initial reservation" issue.

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Treaty of September 26, 1833, 7 Stat. 431 3

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GLOSSARY

2002 Appropriations Act	Department of Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-443 (2001)
APA	Administrative Procedure Act
AR	Administrative Record
BIA	Bureau of Indian Affairs
Bradley Tract	The parcel of land at issue in this case
CEQ	Council on Environmental Quality
CETAC	Citizens Exposing Truth About Casinos
EA	Environmental Assessment
EIS	Environmental Impact Statement
FONSI	Finding of No Significant Impact
Gun Lake Tribe	Match-E-Be-Nash-She Wish Band of Pottawatomi Indians
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act of 1934
JA	Joint Appendix
LOS	Level of service (for evaluating traffic impacts)
MDOT	Michigan Department of Transportation
MichGO	Michigan Gambling Opposition
NEPA	National Environmental Policy Act
NIGC	National Indian Gaming Commission
Secretary	Secretary of the Interior
Tribe	Match-E-Be-Nash-She Wish Band of Pottawatomi Indians

STIPULATED TO STAND-BY POOL FOR ORAL ARGUMENT

STATEMENT OF ISSUES

Appellant Michigan Gambling Opposition ("MichGO") challenges the Secretary of the Interior's decision to acquire land into trust for the benefit of Intervenor-Defendant-Appellee the Match-E-Be-Nash-She Wish Band of Pottawatomi Indians (the "Tribe" or the "Gun Lake Tribe"). JA 15-59. MichGO raises three issues on appeal:

1. Whether the Secretary's decision to proceed on the basis of a extensive Environmental Assessment ("EA") and a Finding of No Significant Impact ("FONSI"), rather than preparing an Environmental Impact Statement ("EIS"), was arbitrary, capricious, or inconsistent with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*

2. Whether the Secretary properly determined that the land to be acquired will be the Gun Lake Tribe's "initial reservation" within the meaning of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(B)(ii).

3. Whether Section 5 of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. § 465, unconstitutionally delegates legislative power by authorizing the Secretary of the Interior to acquire land for the benefit of Indians.

STATUTES AND REGULATIONS

The pertinent statutory and regulatory provisions are contained in the briefs submitted by the Appellant and the Secretary, with the exception of the following, which are set forth in the Addendum:

Department of Interior Manual, 516 DM 6 (6.1-6.6) (Mar. 18, 1980)

Department of Interior Manual, 516 DM 6, Appendix 4 (Sept. 14, 1998)

Department of Interior Manual, 516 DM 10 (10.1-10.5) (May 27, 2004)

NEPA Handbook, 30 BIAM, Supp. 1, at 3.3, 4.2, 4.3 (Sept. 24, 1993)

STATEMENT OF FACTS

I. THE GUN LAKE TRIBE

The Gun Lake Tribe has a long history in what is now the western portion of the State of Michigan. JA 303-306. It descends from a band of Pottawatomi Indians led by Chief Match-E-Be-Nash-She-Wish, which, in the late 1700s, lived in a village near the present-day City of Kalamazoo, Michigan. JA 304 at ¶ 7. In 1821, the Indian tribes located in Michigan ceded all Michigan lands south of the Grand River to the United States in the Treaty of Chicago. Treaty of Chicago of August 29, 1821, 7 Stat. 288. Chief Match-E-Be-Nash-She-Wish signed that treaty on the Tribe's behalf, securing three square miles of land at Kalamazoo. *Id.* In 1827, however, the Pottawatomi ceded that tract to the United States in return for lands that enlarged their "Nottawaseppi Reserve." Treaty with Pottawatomi, 7

Stat. 305 (1827). By 1836, through treaties the Gun Lake Tribe did not sign, all the Tribe's land was ceded to the United States. Treaty of September 26, 1833, 7 Stat. 431; The Ottawa Treaty of 1836, 7 Stat. 491.

In the ensuing years the Tribe moved north of the Kalamazoo River, to avoid forcible removal further west. JA 305 at ¶¶ 10, 11; 319. In 1839, it placed itself under the protection of an Episcopalian Mission and occupied lands in Bradley, Michigan, known as the "Griswold Colony" or the "Bradley Property/Settlement." JA 305 at ¶ 11, 318-319. Most of this land was taken through tax foreclosures in the late 1800s, but a majority of the Tribe's approximately 300 members have remained in the immediate vicinity of the Griswold Colony, which lies less than three miles from the tract of land that is the subject of this litigation—the Bradley Tract. JA 305-306 at ¶¶ 11-13, 310 at ¶ 21.

While the Tribe has maintained its identity throughout recorded history, the federal government withheld formal acknowledgement beginning in 1870. JA 1772. Thus, for well over a century, the Tribe was denied both federal recognition and reservation lands on which it could pursue communal self-determination and self-sufficiency.

On August 23, 1999, after a four-year administrative process, the Secretary addressed the Tribe's legal status by formally recognizing the Tribe under federal law. Notice of Final Determination, 63 Fed. Reg. 56,936 (Dep't of Interior Oct.

23, 1998); *see* 25 C.F.R. pt. 83. That recognition means the Tribe "shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally-recognized historic tribes by virtue of their government-to-government relationship with the United States." 25 C.F.R. § 83.12(a). The Secretary's recognition did not, however, establish a reservation or take lands into trust for the Tribe, and to this day the Tribe has no land over which it exercises governmental authority.

II. THE PROPOSED GAMING PROJECT

After achieving legal acknowledgment, the Tribe sought ways to pursue economic development and self-sufficiency. This is important so the Tribe can support its governmental functions of providing services, infrastructure, administrative facilities, and housing for its members, and seek to alleviate the economic hardships they face. *See* JA 389, 391. At the time of the Environmental Assessment described below, for example, the Tribe's unemployment rate was around 27% (six times higher than that of surrounding Allegan County generally), and only 26% of Tribal members owned their own home (compared to 82.9% for Allegan County generally). AR 389.[1] Economic hardship has also eroded the Tribe's collective identity. The lack of local opportunities forces members to leave

[1] As stated in the EA, Allegan County's 2001 unemployment rate was 4.1%. JA 389.

the area, creating a "brain drain" and making it difficult for members to preserve a common culture.

The Tribe concluded it could best pursue self-sufficiency through the operation of a gaming enterprise—as expressly contemplated by the Indian Gaming Regulatory Act and the Secretary's regulations. *See, e.g.*, 25 U.S.C. § 2702(1) (declaring purpose of establishing "a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government"); 25 C.F.R. pts. 151, 501. While IGRA generally prohibits gaming on lands acquired after October 17, 1988, there are several exceptions to that rule, including for lands taken into trust for a tribe by the Secretary "as part of the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgement process." 25 U.S.C. § 2719(b)(1)(B)(ii). This allows tribes that were not formally recognized when IGRA was enacted a chance to pursue the same economic development opportunities the Act affords to other tribes. Here, development of a gaming facility would enable the Tribe to decrease its dependence on federal and state funds while creating jobs for tribal members (and others) and providing revenue for housing, education, and other needs. JA 389; *see also* JA 1204-1205, 1212-1213, 1255, 1257, 1263-1266, 1275-1277, 1294-1297, 1299, 1308-1309, 1395-1400; 1426-

1427 (letters of support from local governments, schools, chambers of commerce, and unions).[2]

The Tribe examined several potential sites in its local area and identified the Bradley Tract as land that was available and appropriate for redevelopment as a gaming and entertainment facility. JA 306-309. The Bradley Tract consists of approximately 146 acres zoned for light industrial use and partially occupied by a vacant industrial building of approximately 193,500 square feet, previously used to manufacture lawn products, that would be renovated to house the Tribe's proposed gaming facility. JA 379, 393-394, 407-411. The property is located between a railroad track and a four-lane federal highway, and none of the land is currently farmed. JA 407-408, 444-447. To the east and south of the property are industrial-type businesses, including a lumber company, a trucking company, and a seed and landscaping supply company. JA 407.

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[2] MichGO asserts (Br. 5-6) that in seeking legal acknowledgment the Tribe represented it would not engage in gaming, and that the Secretary granted recognition "on the basis of the Tribe's representation." Those allegations are unsupported as well as irrelevant. *See* Dist. Ct. Doc. No. 56, Tribe Reply 1-2 (Apr. 28, 2006). The record shows that the purported tribal constitution MichGO quotes (Br. 5) was an "unratified, undated" document. JA 1897 (note 194); *see* JA 1863 (related text) (describing factional history and noting that "[n]o minutes of discussions, or other documentation, was submitted to support" a statement regarding a no-gaming decision purportedly reached by one group). The Secretary's decision recognizing the Tribe makes no reference to any representation concerning gaming. 63 Fed. Reg. 56,936-01. Indeed, nothing in the applicable regulations would even *permit* consideration of such a representation. *See* 25 C.F.R. pt. 83.

On August 8, 2001, the Tribe filed a "fee-to-trust" application asking the Secretary to accept the Bradley Tract into trust for the Tribe so the Tribe can pursue its gaming project. In considering the Tribe's application, the Secretary determined that when taken into trust the land will be the Tribe's first post-acknowledgment federal trust land, and thus will qualify as part of the Tribe's "initial reservation" for purposes of IGRA. JA 60, 1657-1661.

III. THE NEPA PROCESS

Acceptance of the Bradley Tract into federal trust is a "federal action" for purposes of NEPA. Accordingly, in considering the Tribe's application the Secretary's Bureau of Indian Affairs ("BIA") oversaw the development of an extensive Environmental Assessment ("EA") of the Tribe's proposed project. JA 377-584. The actions evaluated under NEPA, referenced collectively in the EA as the "preferred alternative" or the "proposed action," consisted of both (1) the Secretary's trust acquisition of the Bradley Tract for the Tribe's construction and operation of its proposed gaming facility and (2) the related approval of a gaming management contract by the National Indian Gaming Commission ("NIGC"). JA 387. The NIGC participated in the NEPA review as a cooperating agency. JA 114.

As the EA describes, the Tribe proposes to redevelop a site in Wayland Township, in Allegan County in southwest Michigan, primarily using an existing

single-story, light industrial building which the Tribe will convert into an entertainment facility with gaming, restaurants, an entertainment lounge, and a sports bar. JA 393-396. There will be three entrances from an existing thoroughfare offering easy access to and from a four-lane federal highway that runs along one side of the property. JA 397 (Figure 2-2), 411 (Figure 3-3); Addendum A1, A2 (color copies of Figures 2-2 and 3-3). While the entire 146-acre site is zoned for light industrial use, JA 407-409, even with associated parking the Tribe's facility will leave approximately 100 acres, or 68% of the land, undeveloped. JA 497. Moreover, the Tribe's project is consistent with past, present, and projected future land uses. The site was previously used for manufacturing lawn products, JA 407-409, and before that as a local amusement park, JA 425. Local officials have determined the project complies with Wayland Township's zoning ordinances and the Wayland Township Land Use Plan, with the Township (which currently has jurisdiction over the land) commenting that the "site chosen is well-suited for a casino." JA 1205; *see also* JA 1255, 1257.

A. The Environmental Assessment

To develop the EA, the BIA and the Tribe's experienced environmental consultant, Analytical Environmental Services ("AES"), undertook an intensive

review of the project's potential environmental effects.[3] The first phase, during which the BIA reviewed and revised multiple drafts of the EA, lasted from December 2001 to November 2002, when a draft was published for public comment. JA 2100. The usual public comment period of thirty (30) days was extended to seventy-five (75) days. *See* JA 1175, 1179, 1181. After reviewing the comments received, the BIA directed that the EA be expanded, corrected and refined. JA 1482-1483, 2210-2242. The final EA (JA 377-584) did not issue until December 2003, after the additional analysis was completed and approved.

The diligence underlying the EA is evident from a review of the document itself. The EA identifies and addresses all potential environmental effects of the project. While MichGO now focuses—tellingly—on just one aspect of one issue covered by the EA, this Court should appreciate the scope and thoroughness of the agency's overall analysis. The Tribe therefore briefly reviews the unchallenged portions of the EA before describing the traffic analysis with which MichGO takes issue.

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[3] As authorized by the CEQ NEPA Regulations, 40 C.F.R. § 1506.5(b), the BIA's NEPA Handbook, 30 BIAM Supplement 1, NEPA Handbook, § 4.2.B (1993) (JA 141-142), requires project applicants to prepare environmental assessments in the first instance, subject to the BIA's review and direction. The BIA retains final responsibility for the scope and content of the EA.

1. Non-Traffic Issues

To begin with, the BIA properly considered a range of alternatives. The EA discusses the relative merits of the proposed alternative, the no action alternative, and several others, including a redesigned casino at the proposed site and casino ventures at other sites. JA 393-405. The Tribe evaluated several potential sites throughout Allegan County. JA 131-134, 306-309, 404. Most lacked necessary infrastructure, were not commercially viable, contained unique environmental resources, and/or had local zoning or surrounding land uses inconsistent with the Tribe's proposed use. *Id.* The Tribe then conducted an in-depth evaluation of three remaining sites in addition to the Bradley Tract. *Id.* After detailed analysis, all three were rejected for environmental and economic reasons. *Id.* The Tribe discussed alternative sites with the BIA, and acted in accordance with BIA guidance in evaluating them. *Id.*

The BIA also considered potential effects on "waters of the United States," including wetlands—both on and beyond the proposed trust land. JA 460-462, 537-538, 558-559, 689-811. It concluded that road improvements along the fronting road would impact .44 acres of wetlands in ditches just north and south of the roadway. JA 461. The Tribe committed to undertake appropriate protective measures, under the supervision of the Michigan Department of Environmental Quality ("MDEQ"). JA 558-559. The EA notes that wetland mitigation "is

enforceable by the MDEQ or the [United States Army] Corps [of Engineers.]" JA 559; *see also* JA 1494, 1496-1498.

The BIA evaluated whether the project would significantly affect Allegan County's air quality, and concluded it would not. JA 442-444, 488-495. The Tribe retained an expert consultant, SME, to study the issue. JA 1089-1155, 2104-2125. SME followed EPA and Federal Highway Administration procedures, and the EA thus considered all state and federal air quality standards applicable at the time. After a Federal standard appeared to change, the BIA appropriately considered the new standard and confirmed that the EA's conclusions remained valid. JA 2126-2130.

The Tribe also retained an outside consulting firm to evaluate potential social and economic impacts, addressing, among other issues, concerns that a casino would create "problem gamblers," resulting in lost jobs, increased crime, and higher divorce rates. JA 965-1082. The EA comprehensively analyzes local demographic and socioeconomic factors, including employment, housing, and crime, and the potential effects of the casino. JA 428-435, 465-474. It concludes that the Tribe's project will be an economic boon for the County, creating 4,900 jobs in an area with rising unemployment and generating $2.8 million for local governments (and $32 million in off-site sales) in an area that faces an "unsustainable" economic situation in which the "demand for [government]

services [] is increasing while revenue to Allegan County is decreasing." JA 995, 998, 1308-1309; *see also* JA 465-468. This conclusion has been endorsed by local governments, chambers of commerce, and unions. *See* JA 1205, 1211, 1213, 1257, 1255, 1264-1266, 1308-1309. The EA further concludes that the project will substantially improve the socioeconomic status of the Tribe's members, enabling the Tribe to provide jobs, housing, education, health care, and other services. JA 468-469. And it notes that the Tribe agreed with local governments on ways to address specific concerns:

- In response to concern over increased costs for fire protection, the Tribe agreed to reimburse the City of Wayland for labor costs associated with firefighting or rescue responses to the facility. JA 588-589 at ¶ 3.
- In response to concern over increased crime, the Tribe contracted with Allegan County to pay the cost of stationing a full-time deputy sheriff at the facility at all times. That translates into a commitment to pay $250,000 for new equipment plus all annual operating costs associated with five new officers—from approximately $400,000 the first year to more than $450,000 in the fifth year. JA 605-606 at § 4.0, 1489-1490.
- In the face of concern over emergency services, the Tribe committed to contract with a local ambulance service to handle responses to its facility. JA 562, 614-616.

The EA specifically evaluates potential cumulative impacts of the project, considering other foreseeable projects and general growth and development trends. JA 506-517. It concludes there will be no cumulatively significant impact in any category of environmental concern. *Id.*

The EA also considers possible "indirect" impacts that might occur later in time or at some distance from the project. JA 517-554. It identifies a geographic area where indirect effects would most likely occur (here subdivided into "core," "outer core," and "outer" areas), and assesses the nature and extent of possible adverse effects. JA 517-554, 965-1082. It concludes that the project could spur some new residential and commercial development, but that the surrounding area could easily accommodate it. JA 521, 526, 533-535, 965-1082. For example, over 500,000 people already live within a 30-minute drive of the site, and there are 12,000 vacant housing units in that same area. JA 518. Thus, while the project will create new employment and business opportunities, it is not likely to spur significant increases in population or residential construction. Likewise, while incremental spending by casino patrons could conceivably spur some increase in hotel rooms and restaurants or a new gas station, the amount of space and land available for commercial development "far exceeds the needs" resulting from growth that might be induced by the casino. JA 533.

In short, the EA comprehensively considers all potential environmental impacts. *See also, e.g.*, JA 418-422, 463-464 (state- or federally-listed sensitive plants or wildlife species); JA, 428-428, 464-465 (significant historical resources); JA 449-450, 501 (visual impacts); JA 505-506 (possible gambling addiction).

2. Traffic Issues

Ignoring all this, MichGO focuses its challenge on one aspect of one issue considered by the EA: possible impacts on local traffic. But the EA's treatment of traffic is equally meticulous. It carefully evaluates whether the casino's projected 8,500 patrons per day would adversely affect traffic flows. JA 435-441, 474-488, 813-888. It concludes—with the concurrence of a respected traffic engineering consultant, URS Corporation ("URS"), and the Michigan Department of Transportation ("MDOT")—that no traffic impact would be significant, particularly in view of the Tribe's commitment to specific mitigation measures. JA 480, 486-488, 957-962.

URS conducted its analysis with input from MDOT and the Allegan County Board of County Road Commissioners, which together possess both local traffic expertise and jurisdiction over the relevant roads. JA 813-888, 957-962, 1448, 1453-1454. URS evaluated potential traffic flows under existing and future conditions on surrounding intersections and roads, taking into account cumulative increases in traffic. JA 843; *see also* JA 956-961. It evaluated the traffic that would likely be generated by the Tribe's casino and identified potential increases. JA 480. Finally, it analyzed those increases and found that they would be sufficiently diffuse to allow the free flow of traffic in all directions during the morning peak traffic period. JA 486.

URS found that casino traffic could affect the flow of afternoon rush-hour traffic in two directions at two nearby intersections. JA 486. In consultation with MDOT and the County Road Commissioners, however, URS identified improvements that would either eliminate the projected congestion or alleviate it to the satisfaction of the MDOT. JA 560-561, 846, 1448-1449, 1453-1454. The Tribe committed to the necessary mitigation. JA 560-561; *see* JA 63 at ¶ 6. Thus, through a study conducted by a respected expert, and with the benefit of cooperation from state and local agencies, the BIA considered all potential traffic impacts and ultimately concluded that none would be significant.

3. Public Comment

During an extended public comment period, the BIA received comments on a draft of the EA from regulatory agencies, local governments, and members of the general public. Naturally some commenters, such as MichGO, opposed the project. Many, however, including local governments, area residents, and local civic organizations, concluded the project will benefit the community. JA 1204-1205, 1211-1213, 1257, 1255, 1263-1266, 1275-1277, 1294-1297, 1299, 1308-1309, 1312-1313, 1395-1400, 1426-1427. For example, local unions (such as the International Electrical Brotherhood of Workers and the Plumbers, Pipefitters & HVAC's Local Union 357) and business organizations (such as the Barry County Economic Development Alliance and the Gun Lake Area, Wayland Area, and

Barry County Area Chambers of Commerce) supported the project because of its anticipated economic benefits. *See, e.g.*, JA 1211, 1265-1266, 1277, 1294, 1299. Local law enforcement organizations likewise supported the project. JA 1312-1313.

Wayland Township (which currently has jurisdiction over the land) and the adjacent Dorr Township commented that the "site chosen is well-suited for a casino," JA 1205, and praised the EA's "continued respect for the natural characteristics of the location." JA 1297. The Allegan County Public Schools and Allegan County Health Department also voiced their support, based in part on the community's "dire need of increased employment opportunities," JA 1264, and the evidence that both neighboring property and the surrounding environment will be "adequately protect[ed]." JA 1275-1276. In December 2002, the State House of Representatives and Senate overwhelmingly approved resolutions approving, and urging the governor to sign, a compact with the Tribe covering gaming at the Bradley Tract. JA 1212-1214, 1394, 1426-1427.

The BIA carefully considered and responded to all comments it received. The agency provided individual responses to forty-three comments which raised distinct substantive issues. *See* JA 1432-1516. For the remainder it identified common themes (*e.g.*, concerns about gambling addictions, economic impacts, etc.) and responded to each category of concerns. JA 1517-1561. Where

appropriate, the BIA refined and modified the EA in light of these comments. *Id.*; *see also* JA 1476-1477. The BIA issued its final EA in December 2003.

B. The Secretary's Decision

Based on the EA's analysis, on February 27, 2004, the Deputy Assistant Secretary for Indian Affairs signed a formal Finding of No Significant Impact, or "FONSI." JA 62-64.[4] In light of the FONSI, the agency was not required to prepare an Environmental Impact Statement before deciding whether to take the Bradley Tract into trust for the Tribe. On April 18, 2005, the Secretary decided to grant the Tribe's application and take the land into trust. JA 1605. That decision was published in the Federal Register on May 13, 2005. JA 375; Notice of Final Determination, 70 Fed. Reg. 25,596-597 (Dep't of Interior May 13, 2005).

IV. PROCEEDINGS BELOW

On June 13, 2005, MichGO filed this suit challenging the Secretary's decision. The Tribe intervened as a defendant. JA 67-71. On February 23, 2006, the district court granted the Secretary's motion to dismiss and the Tribe's motion for judgment on the pleadings. JA 238-274. As relevant here, the court held that

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[4] As noted above, the NIGC participated as a cooperating agency in the BIA's NEPA review. Relying on the same EA, the NIGC issued its own FONSI (*see* 40 C.F.R. § 1508.13) on September 21, 2005. JA 114-124. As a matter of longstanding practice, however, the NIGC will not take final action on the Tribe's request for approval of its gaming management contract until the Secretary has taken land into trust for the Tribe.

in reaching his decision the Secretary complied with NEPA (JA 249-267) and permissibly interpreted and applied IGRA's "initial reservation" provision (JA 244-249), and that the statutory provision authorizing him to take the land into trust—Section 5 of the IRA, 25 U.S.C. § 465—is not an unconstitutional delegation of legislative power. (JA 270-276).[5] The district court ordered the Secretary not to take the land into trust before resolution of MichGO's appeal. JA 366-372.

SUMMARY OF ARGUMENT

MichGO provides no basis for overturning the Secretary's decision to take the Bradley Tract into trust as part of the Gun Lake Tribe's "initial reservation" within the meaning of IGRA.

First, there is nothing arbitrary, capricious, or unlawful about the Secretary's decision not to prepare an EIS. MichGO argues that a revision to an internal agency checklist required the Secretary to prepare an EIS because the Tribe's project is "large" and "controversial," and the Secretary relied on mitigation measures adopted by the Tribe in concluding that the project would have no significant environmental impact. The argument fails at the threshold because the

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[5] The district court also dismissed MichGO's claim that the Secretary could not accept the Bradley Tract into trust before the Tribe concluded a gaming compact with the State of Michigan. JA 267-270. MichGO has abandoned that claim on appeal. MichGO Br. 2.

revised checklist is irrelevant to this case, and in any event is not an agency "procedure" within the meaning of the regulations on which MichGO relies. It is also well-established that neither the use of mitigation nor the size of the Tribe's project requires preparation of an EIS, and that a project is not "controversial" in the NEPA sense simply because a plaintiff opposes it.

On the merits, it is clear that the Secretary properly took a "hard look" at potential environmental impacts and found that no significant impact would result from the action. In the few instances in which the EA identified a potentially significant impact, the Tribe agreed to implement enforceable mitigation measures that reduce any potential impact below the threshold of significance. In the case of traffic—the only alleged impact MichGO specifically addresses—both MDOT and the Allegan County Road Commissioners reviewed the project and concluded that with agreed mitigation measures it would not adversely affect traffic flows. JA 957-961. Moreover, MDOT can require additional improvements if it determines they are necessary in light of actual experience. JA 63 at ¶ 6, 560-561, 846, 1449, 1453-1454. When mitigation renders a potential impact insignificant, no EIS is required. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678 (D.C. Cir. 1982).

Second, the Secretary permissibly (indeed, properly) interpreted IGRA in recognizing that the Bradley Tract, as the first land taken into trust for the Tribe

since its legal recognition pursuant to the federal acknowledgment process, will be part of the Tribe's "initial reservation" for purposes of IGRA. MichGO argues that a "reservation" must be used for housing, and that the Bradley Tract cannot be the Tribe's "initial" reservation because the Tribe arguably had a recognized reservation in the distant past. As this Court recently confirmed, however, the Secretary has reasonably interpreted "initial reservation" in the IGRA context to include property taken into trust under the IRA for gaming purposes where the tribe had no federally-recognized reservation when IGRA was enacted in 1988. *CETAC v. Kempthorne*, No. 06-5354, slip op. 13-21 (D.C. Cir. July 3, 2007).

Finally, MichGO's argument that authorizing the Secretary to acquire land in trust for Indians is an unconstitutional delegation lacks merit. To the extent that authorization delegates legislative power at all, it provides intelligible standards for the exercise of that power.

STANDARDS OF REVIEW

This Court reviews the district court's decision de novo, *TOMAC v. Norton*, 433 F.3d 852, 860 (D.C. Cir. 2006), but the Secretary's underlying decision may be set aside under the Administrative Procedure Act ("APA") only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A).

Deferential APA review is particularly appropriate in NEPA challenges. NEPA is a procedural statute that mandates no substantive result. *Grand Council of Crees v. FERC*, 198 F.3d 950, 959 (D.C. Cir. 2000); *see also Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989). It only requires agencies to take a "hard look" at the environmental consequences of actions before taking or approving them, *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989), including by preparing an EA to analyze whether a particular action could significantly affect the environment. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1508.9, 1508.13, 1508.27. If an EA finds the project—either as initially proposed or as modified to mitigate potential impacts—will not have significant environmental impacts, the agency may properly issue a FONSI. *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682-683 (D.C. Cir. 1982).

A reviewing court's role is only to ensure that the agency has adequately identified and considered potential environmental impacts of its actions. *City of Olmsted Falls v. FAA*, 292 F.3d 261, 269 (D.C. Cir. 2002). The party challenging agency action bears the burden of proof. *Id.* at 271. Review is "deferential," with the court "presum[ing] the agency action to be valid" and respecting agency decisions absent a "clear error of judgment." *Young v. General Serv. Admin.*, 99 F. Supp. 2d 59, 66 (D.D.C.), *aff'd*, No. 00-5240, 2000 U.S. App. Lexis 38685 (D.C. Cir. Dec. 14, 2000). The court may not substitute its judgment for that of the

agency. *Communitys Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 685-686 (D.C. Cir. 2004) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

ARGUMENT

I. THE SECRETARY TOOK THE REQUISITE "HARD LOOK" AT POTENTIAL ENVIRONMENTAL IMPACTS AND PROPERLY DETERMINED THAT NONE WOULD BE SIGNIFICANT

MichGO originally alleged a cornucopia of purported NEPA violations. JA 26-49, 183-195. After briefing and argument below, it has prudently abandoned most of them. *E.g.*, *Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996) (issues not briefed are waived); *Democratic Cent. Comm. v. Washington Metro. Area Transit Comm'n.*, 485 F.2d 786, 790 n.16 (D.C. Cir. 1973). It now makes two arguments (the first with three sub-parts), only one of which questions the BIA's substantive analysis:

- That an agency "Checklist" required the BIA to prepare an EIS, rather than an EA and FONSI, as a matter of internal agency procedure (MichGO Br. 13, 16-17, 19-20), in particular because:
  - The EA and FONSI rely on mitigation, Br. 13, 17-19;
  - The casino will be "large," Br. 13, 17-18; and
  - The project is "controversial," Br. 13, 18.
- That traffic impacts, specifically at two intersections, required preparation of an EIS. Br. 13, 20-22.

These contentions lack merit.

A. MichGO's "Checklist" Argument Misstates The Law

MichGO points out (Br. 13) that "an agency must prepare an EIS for any project that is of a type that '[n]ormally requires an environmental impact statement' under the agency's internal procedures," citing 40 C.F.R. § 1501.4(a)(1). It then argues that an informal "Checklist" prepared to assist BIA regional officials is an agency "procedure[]" for purposes of Section 1501.4(a)(1). That is wrong.

As a threshold matter, the checklist revision on which MichGO relies has no bearing on this case. It is dated March 7, 2005 (JA 223)—more than a year after the agency made its finding of no significant impact under NEPA on February 27, 2004 (JA 62-64), almost a year after the BIA Regional Office relied on that finding in recommending approval of the Tribe's fee-to-trust application on March 25, 2004 (JA 1636), and only shortly before the Secretary's April 18, 2005, final action on the application (JA 1605). The revised checklist is not "newly disclosed" (MichGO Br. 16); it has simply never been relevant to this case.

In any event, no version of the checklist is an agency "procedure" within the meaning of the Council on Environmental Quality ("CEQ") regulation on which MichGO relies.[6] That regulation—40 C.F.R. § 1501.4—states:

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[6] The CEQ NEPA Regulations, 40 C.F.R. §§ 1500-1508, constitute a "single set of uniform, mandatory regulations" for the Federal Government. *Andrus v.*

> In determining whether to prepare an environmental impact statement the Federal agency shall:
>
> (a) Determine under its procedures supplementing these regulations (described in §1507.3) whether the proposal is one which:
>
> (1) Normally requires an environmental impact statement
> . . . .

MichGO quotes (Br. 13, 16) subsection (a)(1), but it alters the meaning by omitting subsection (a)'s cross-reference to Section 1507.3. That provision requires agencies to adopt "procedures to supplement these regulations," but "only after an opportunity for public review and after review by the [CEQ] for conformity with [NEPA] and these regulations." 40 C.F.R. § 1507.3(a). Revisions, likewise, are to be made "in consultation with the [CEQ]." *Id.* The procedures are to specify classes of actions that "normally do require environmental impact statements." 40 C.F.R. § 1507.3(b)(2)(i).

The Interior Department has adopted procedures under Section 1507.3. On the date of the Gun Lake FONSI (March 7, 2004), they were found in Departmental Manual 516 DM 6.[7] The Department required individual bureaus,

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Sierra Club, 442 U.S. 347, 357–58 (1979); *see U.S. Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 757 (2004). They are entitled to "substantial deference." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 356 (1989).

[7] The Department reissued its NEPA procedures on May 27, 2004. The BIA action list quoted below now appears (verbatim) at 516 DM 10, at § 10.4.

including the BIA, to prepare lists of actions for which an EIS is normally prepared, and these lists appeared as appendices to the Department's procedures. 516 DM 6, § 6.5. BIA's list appeared in Appendix 4, and stated in its entirety:

> 4.3 Major Actions Normally Requiring an EIS
>
> A. The following BIA actions normally require the preparation of an Environmental Impact Statement (EIS):
>
> 1. Proposed mining contracts (for other than oil and gas), or the combination of a number of smaller contracts comprising a mining unit for:
>
> a. New mines of 640 acres or more, other than surface coal mines.
>
> b. New surface coal mines of 1,280 acres or more, or having an annual full production level or 5 million tons or more.
>
> 2. Proposed water development projects which would, for example, inundate more than 1,000 acres, or store more than 30,000 acre-feet, or irrigate more than 5,000 acres of undeveloped land.
>
> 3. Construction of a treatment, storage or disposal facility for hazardous waste or toxic substances.
>
> 4. Construction of a solid waste facility for commercial purposes.
>
> B. If, for any of these actions, it is proposed not to prepare an EIS, an Environmental Assessment (EA) will be developed in accordance with 40 CFR 1501.4(a)(2).[8]

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[8] The Court will have noted that subsection B specifically provides that for any action which normally requires an EIS, BIA may prepare an EA. 516 DM 6 App. 4, § 4.3.B. We also note that the less formal guidance documents put out by

516 DM 6, App. 4, § 4.3.

This list—not the "checklist" on which MichGO relies—is the list required by 40 C.F.R. § 1507.3 and referred to in 40 C.F.R. § 1501.4(a). It does not include casinos, or even allegedly "large" or "controversial" casinos. MichGO's argument rests on a misstatement of the law.

B. Use of Mitigation Does Not Require An EIS

MichGO concedes that, as a matter of NEPA law, there is no need for an EIS if "mitigation measures will reduce [an] impact to acceptable levels." MichGO Br. 16. Nonetheless, relying on its checklist-revision argument, MichGO asserts that the Gun Lake project should have "trigger[ed] the EIS requirement" in part because the agency's FONSI "relies on purported mitigation measures to address significant impacts." Br. 13; *see* Br. 17-18. That assertion is baseless.

First, as just discussed, the revised checklist is irrelevant here.

Second, as MichGO acknowledges, this Court has long made clear that an agency may properly rely on mitigation measures in finding that an action will have no significant environmental impact. *E.g.*, MichGO Br. 16; *Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682-83 (D.C. Cir. 1982);

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the agencies responsible for approving the casino contain nothing inconsistent with the BIA procedures. BIA NEPA Handbook § 3.3; NIGC NEPA Procedures Manual, § 3 (JA 155-159).

TOMAC v. Norton, No. 01-0398, 2005 U.S. Dist. Lexis 4633 (D.D.C. Mar. 24, 2005) (mitigated FONSIs have long been appropriate under D.C. Circuit law), *aff'd*, 433 F.3d 852 (D.C. Cir. 2006).

Third, the mitigation measures here are not "purported" (MichGO Br. 13). The EA details specific measures covering issues such as land resources, water resources, biological resources, historic properties, religious issues, socioeconomic impacts, environmental justice, resource use patterns, and traffic. JA 555-562. Those measures are incorporated in the FONSIs issued both by the Secretary (JA 62-64) and by the NIGC (JA 114-124). They are real and enforceable, whether by the agencies themselves, *see Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998); 40 C.F.R. § 1505.3; 25 U.S.C. § 2706(b) (NIGC oversight of certain gaming operations), or by local governments with which the Tribe has entered into enforceable agreements, *see* JA 587-597, 601-613, or by other government agencies such as the Michigan Department of Transportation, JA 560, 119-120. The Secretary's reliance on them was perfectly appropriate.

C. The Allegation That The Casino Is "Large" Does Not Require An EIS

Again relying on the agency's revised checklist, MichGO argues (Br. 17-18) that an EIS is required because, it asserts, the proposed casino is "large." But the NEPA test is whether an action "significantly affect[s] the quality of the human environment," 42 U.S.C. § 4332(2)(C); and what is "significant[]" for this purpose

involves "considerations of both context and intensity," 40 C.F.R. § 1508.27, that require case-by-case evaluation. There is, accordingly, no basis for suggesting that a casino of the size proposed here must always require an EIS. In recent years the Secretary has relied on—and courts have upheld—EAs and FONSIs in approving several casino projects of at least comparable scope. *See TOMAC*, 2005 U.S. Dist. Lexis 4633; *El Dorado County v. Norton*, No. 02-1818 (E.D. Cal. Jan. 10, 2005), *appeal dismissed*, No. 05-15224 (9th Cir. Oct. 27, 2006); *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 166-167 (D.D.C. 2002), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003). Indeed, as the United States noted in the District Court (JA 221), in late 2006 the Secretary issued a FONSI for a casino project in the Catskills, which will reportedly be substantially larger than project at issue here. *See* St. Regis Mohawk Tribe, "Department of Interior Issues FONSI for Monticello [Raceway] Casino Project," http://srmt-nsn.gov/press_releases/pr_122206.html (visited July 2, 2007) (announcing issuance of FONSI for proposed two-story, 766,000-square-foot casino and entertainment complex).

In considering environmental significance, it bears emphasis that the Tribe's casino will be created by renovating an existing industrial building, which was previously used to manufacture lawn products—and which would remain, and presumably be used for something else, if the Tribe's project did not go forward. JA 402, 407-411. The site is bordered on one side by railroad tracks and on the

other by US Highway 31. JA 407, 411. It is immediately adjacent to an existing highway interchange. *Id.* It is zoned light industrial. JA 407, 409. Nearby businesses include a seed and landscaping company, a timber company, and a transportation/freight operation. JA 407, 411. The site is midway between Kalamazoo (25 miles to the south) and Grand Rapids (30 miles to the north) and is within a 30 minute drive of 1.5 million people. JA 389-390, 518. In short, the casino is ideally placed. The BIA can hardly be found to have acted arbitrarily or capriciously in approving the proposed site.

D. The Tribe's Project Is Not "Controversial" For NEPA Purposes

In its final checklist-based argument, MichGO contends (Br. 18) that an EIS was required because the Tribe's project is "controversial." That contention misapprehends what "controversial" means in the NEPA context.[9]

This Court has held that, in the CEQ's NEPA regulations, "'controversial' refers to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." *Town of Cave Creek v. FAA*, 325 F.3d 320, 331 (D.C. Cir. 2003) (emphasis altered); *see also Indiana Forest Alliance, Inc. v. U.S. Forest Service*, 325 F.3d 851, 858 (7th

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[9] Moreover, even properly used, the degree of controversy is only one of ten factors to be considered in analyzing the significance of potential impacts. 40 C.F.R. § 1508.27(b)(4); *Society Hill Towers Owners' Ass'n v. Rendell*, 210 F.3d 168, 184 (3d Cir. 2000).

Cir. 2003) (the "controversy' to which NEPA refers is "a substantial dispute" about "potential environmental consequences"); *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005) ("Simply because a challenger can cherry pick information and data out of the administrative record to support its position does not mean that a project is highly controversial or highly uncertain."). If the mere existence of some opposition made a project "controversial" under NEPA, the "opposition, and not the reasoned analysis set forth in the environmental assessment, would determine whether an environmental impact statement would have to be prepared." *North Carolina v. FAA*, 957 F.2d 1125, 1133-34 (4th Cir. 1992). The outcome would be governed by a "heckler's veto." *River Road Alliance. Inc. v. Corps of Eng'rs*, 764 F.2d 445, 451 (7th Cir. 1985); *North Carolina*, 957 F.2d at 1134.

Here there is no substantial controversy concerning potential impacts. For example, the BIA's draft EA was circulated to "any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved" so that the "comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards" could be secured. *See* 42 U.S.C. § 4332(2)(C). No such agency lodged an objection.

The local government with current jurisdiction, Wayland Township, and adjacent Dorr Township praised the site selection and the project's "continued respect for the natural characteristics of the location." JA 1205, 1255, 1257, 1263, 1297. The local health department supported the project, based on its conclusion the Tribe would "be in the best possible position to provide the resources necessary for water and especially wastewater treatment services." JA 1275. State regulatory authorities have likewise signed-off on the project (JA 480, 956-961, 1086, 1087, 1165, 1212-1213, 1296; *see also* 1394, 1426), along with federal authorities (JA 463, 1084, 1085, 1215, 1310). There is, moreover, widespread community support, ranging from the Kalamazoo and other Chambers of Commerce to local unions and governments, and reflected in an amicus brief filed by Wayland Township and others in the district court. *See* JA 174, 181, 1205, 1211, 1255, 1257, 1263-1266, 1275, 1294, 1297, 1299. No amicus brief was filed opposing the project.

As this Court has long recognized, "[w]hen local zoning regulations and procedures are followed in site location decisions by the Federal Government, there is an assurance" that any impacts will be both modest and in accord with the choices of the local elected representatives. *Maryland-National Capital Park & Planning Comm'n v. U.S. Postal Serv.*, 487 F.2d 1029, 1036-1037 (D.C. Cir. 1973); *see also Public Citizen v. National Highway Traffic Safety Admin.*, 848 F.2d

256, 268 (D.C. Cir. 1988) ("a construction project's compliance with local zoning regulations supports the finding that the project's environmental impacts will be insignificant"). Moreover, no *private* environmental organization—typically the plaintiffs in NEPA cases—has criticized the EA's analysis or the Tribe's proposal.

In this case, official and environmental commentators are the dogs that have not barked. *See, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991). Plaintiff-appellant "Michigan Gambling Opposition" is free to invoke NEPA for its own purposes. *Cf.* JA 2284-2285. As the Fifth Circuit has observed, however, while "all [NEPA] ensures is that a particular process will be followed," plaintiffs such as MichGO "really don't want more process." *Spiller v. White*, 352 F.3d 235, 244-245 (5th Cir. 2003). Or, rather, they do not want more process for any substantive reason. "Indeed, considering the extensive and comprehensive nature of the EA conducted here, it is unclear exactly what more process would involve." *Id.* Instead, as in a similar case recently considered by this Court, their "objective is to delay or, if possible, prevent the construction of the [Tribe's] proposed casino altogether." *CETAC v. Kempthorne*, No. 06-5354, slip op. 7 (D.C. Cir. July 3, 2007) (quoting district court). NEPA's environmental goals are ill-served when it is invoked to delay a project embodying the economic aspirations of a long-dispossessed Indian tribe.

E. The Secretary Took The Requisite Hard Look At Potential Traffic Impacts And Properly Concluded That Those Impacts, As Mitigated, Would Not Be Environmentally Significant

Finally, in its only challenge to the EA's actual analysis, MichGO alleges (Br. 20-22) that traffic impacts at two intersections require preparation of an EIS. But MichGO cannot show that the Secretary's conclusions regarding traffic impacts were arbitrary or capricious.

1. The EA's Methodology

As described above (at pp. 14-15), the EA's traffic analysis rests on work done by a respected consultant, URS, in consultation with the Michigan Department of Transportation and the Allegan County Board of Road Commissioners. URS and the local agencies concluded that the casino could cause impacts at two intersections during the afternoon rush hour, but that mitigation would reduce the impacts to the satisfaction of MDOT. *Id.*; *see* JA 956-961.

In earlier proceedings, MichGO and others questioned the assumptions underlying URS' study. JA 1207-1208, 1440-1441, 1474, 1504-1507. Of course, mere disagreement with an agency's findings does not render them arbitrary and capricious, *City of Alexandria v. Virginia*, 198 F.3d 862, 867 (D.C. Cir. 1999), and agencies may rely upon experts of their choice. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989).

Moreover, URS's methodology made sense and was approved by the local agencies with traffic expertise. JA 480; *see also* JA 813-888. With input from local officials, *see* JA 956-961, URS identified the existing "level of service" ("LOS") during the "AM Peak" and "PM peak" hours for intersections potentially affected by traffic to and from the casino. JA 436-437, 818-819.[10] It then estimated a "trip generation rate" for the proposed facility, JA 479-481, and evaluated whether service would deteriorate unacceptably with the addition of casino-related traffic, JA 818-843.[11]

The EA concludes, with the agreement of MDOT and the County, that most patrons would travel along U.S. Highway 131 and then only a few hundred yards

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[10] LOS is a qualitative measure (from A to F) reflecting, for example, "speed and travel time." JA 437. Although Allegan County has no LOS standards for roadways, the Federal Highway Administration typically considers LOS C to constitute acceptable performance. *Id.* The EA treats performance as acceptable if it is at LOS C or better or is deemed acceptable by MDOT or the County Road Commissioners. *Id.*

[11] The trip-generation estimate was based primarily on data collected from another Michigan Indian gaming facility, the Turtle Creek Casino, which is also located on a state highway, in a similar area, and combines a casino and two restaurants. JA 480. The Turtle Creek data was adjusted upward by 25% to account for the proposed project's larger size and other characteristics. *Id.* URS ultimately estimated that the Gun Lake project would generate 1,110 vehicle trips (685 entering, 425 leaving) during a typical evening peak hour (6:00-7:00 p.m.) on a typical weekday. JA 480-481. That estimate may overstate likely traffic impacts. In responding to comments, the BIA noted that the trip generation rate for another Indian casino, nearly double the size of the Gun Lake project and located on an interstate highway with more traffic than US 131, was estimated at only 492 vehicle trips per hour. JA 1474.

along 129th Avenue to the project site. JA 408-409, 480-482. That traffic flow would lead to congestion at two intersections, but with mitigation the impact would be reduced below the threshold of significance. JA 486, 560-561, 957-961. At the request of the Village of Hopkins, a nearby town, the BIA expanded its analysis to evaluate potential impacts there. JA 486-487, 880-888, 1461. It concluded that the casino would cause no significant traffic impacts in Hopkins. *Id.*

In sum, the BIA proceeded conservatively when evaluating casino-generated traffic flows, and reasonably found no significant impacts would result with the implementation of specific mitigation under the authority of the relevant local and state agencies. Its conclusion was not arbitrary or capricious.

2. The Intersections MichGO Cites

MichGO argues that traffic impacts at two local intersections, and one four miles away in Hopkins, require preparation of an EIS. That is not correct.

(a) US 131 And 129th Avenue

As discussed above, URS found that casino traffic could reduce traffic flow below acceptable levels during the afternoon rush hour for traffic flowing in two (out of six) directions at two intersections at the interchange of US-131 and 129th Avenue, at the corner of the project site: southbound where the southbound highway exit ramp joins a four-way intersection, and northbound where exiting highway traffic turns east or west on 129th Avenue. JA 482, 485-486. In

consultation with state and local authorities, URS identified road improvements that would either eliminate the projected traffic congestion at the identified intersections or alleviate it to the satisfaction of MDOT. Accordingly, the Tribe committed to:

- Install a four-way stop where the southbound highway exit joins the surface-road intersection;
- Construct a right-turn lane for cars turning east from the northbound highway off-ramp.

JA 560-561. In addition, to address traffic flow along 129th Avenue (fronting the casino), the Tribe agreed to:

- Construct a continuous, exclusive, bi-directional center turn lane on 129th Avenue to serve all three casino driveways; and
- Construct westbound-to-northbound right-turn flares on 129th Avenue at all three casino driveways.

JA 560-561, 846, 957-961, 1473-1474, 1497-1498, 1506, 1507.

The Secretary's FONSI is contingent on these measures, and on MDOT's permitting process. JA 62 at ¶ 3; *see* JA 556, 560. Moreover, as the EA explains with respect to the southbound intersection, while further mitigation in the form of a traffic signal "may be required if the all-way stop does not provide acceptable intersection operations," that decision is best deferred in accordance with local practice, because "MDOT typically performs the traffic study that determines the need for a traffic signal based on actual traffic volumes, rather than estimated

traffic volumes." JA 561. Thus, if MDOT determines, based on actual conditions, that additional improvements are necessary, it can require them. JA 560-561, 846, 1449, 1453-1454; *see also* JA 63 at ¶ 6. It was not arbitrary or capricious for the Secretary to determine that, with these measures in place, traffic impacts will be less than significant. JA 486.

(b) The Hopkins Intersection

MichGO's argument based on one intersection in the Village of Hopkins is appropriately consigned to a footnote in its statement of facts (Br. 10 n.4). URS found that during the afternoon peak period for commuters and casino traffic (4-6 p.m.), all movements at that intersection—at A-42 and 22d Street, just north of three Hopkins schools, and about 4 miles from the casino—will operate at LOS A. JA 486-487, 881-884. Indeed, the peak volume of casino traffic is only 70 cars per hour—a little over *one per minute*—eastbound, and even less (40 cars per hour) westbound. JA 883, 886, 888. The only traffic issue in Hopkins is *northbound* traffic from the school, to which the casino adds nothing: Delays at the intersection occur only during the *school* peak hour (2-3 p.m.). JA 486-487. Moreover, the Allegan County Road Commissioners concluded the casino would cause no significant impacts to roads under its jurisdiction, which include A-42. JA 487, 961, 1461. The EA's conclusion that the casino would create no significant traffic impact in Hopkins was not arbitrary or capricious.

II. THE SECRETARY PROPERLY CONCLUDED THAT THE BRADLEY TRACT WILL BE THE TRIBE'S "INITIAL RESERVATION" WITHIN THE MEANING OF IGRA

MichGO next challenges (Br. 22-31) the district court's order upholding the Secretary's determination that the Bradley Tract will be the Tribe's "initial reservation" for purposes of IGRA, 25 U.S.C. § 2719(b)(1)(B)(ii). It argues that (1) the Tribe had a reservation more than a century ago, Br. 23-26, and (2) the Bradley Tract will not be used for housing, Br. 26-30. Those arguments fail as a matter of law. Indeed, they are now foreclosed by this Court's recent decision in *CETAC v. Kempthorne*, No. 06-5354, slip op. 13-21 (D.C. Cir. July 3, 2007)—a case materially indistinguishable from this one with respect to MichGO's "initial reservation" arguments.[12]

A. *Chevron* Deference And The Indian Canon

The Secretary's statutory interpretations in areas within his responsibility and expertise are entitled to deference from the courts. *See, e.g., Chevron, U.S.A.,*

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[12] Like this case, *CETAC* involved a challenge to the Secretary's decision to take land into trust so that a recently-acknowledged Michigan Indian tribe could pursue its economic development goals by building and operating an IGRA casino. *CETAC*, slip op. 1. CETAC, like MichGO (which is represented by the same counsel), argued that land could not be a "reservation" if it was not used as a tribal residence, and could not be the "initial" reservation of the tribe in question because that tribe held other land that, while not a federally recognized reservation, had been used by the tribe for a long time and was arguably a "state reservation." *Id.* at 14, 19. This Court rejected both arguments, instead deferring to the Secretary's interpretation and application of IGRA and the IRA. *Id.* at 14-21.

Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843-845 (1984). As this Court has confirmed, that principle applies to an interpretation of IGRA's "initial reservation" provision reached by the Secretary in the course of deciding to take land into trust so that a tribe may build and operate an IGRA casino. *CETAC*, slip op. 10-13. The same analysis applies here. *Compare id.* at 6-7 (describing decision process), 12-13 ("given the formal decision making process involved, *Chevron* applies") *with* JA 375-376 (Federal Register notice of Gun Lake trust acquisition determination), 1605-1617, 1636-1650 (decisional memoranda), 1657-1661 (Acting Associate Solicitor's opinion that IGRA "initial reservation" provision will apply if land is taken into trust).

In addition to ordinary principles of *Chevron* deference, "statutes [relating to Indian affairs] are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985); *see generally, e.g.*, *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992). This Court has repeatedly acknowledged and applied that rule, most recently in *CETAC*: "[A]s IGRA is designed to promote the economic viability of Indian tribes, the Indian canon of statutory construction requires the court to resolve any doubt in favor of the Band." Slip op. 21; *see City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003); *see also San Manuel Indian Bingo & Casino v. NLRB*, 475 F.3d 1306,

1311 (D.C. Cir. 2007) (acknowledging canon); *Arizona Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1292-1294 (D.C. Cir. 2000) (deferring, under *Chevron* and Indian canon, to EPA's interpretation of "reservation" as used in Clean Air Act).

B. The Secretary Properly Determined That The Bradley Tract Would Be The Tribe's "Initial" Reservation Under IGRA

IGRA permits gaming by Indian Tribes on land acquired in trust after October 17, 1988, if the land is acquired as part of "the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgement process." 25 U.S.C. § 2719(b)(1)(B)(ii). The Secretary properly concluded that this provision would apply to the Bradley Tract, which would be the Tribe's first reservation after it was formally acknowledged in 1999. *See* JA 375, 1606, 1657-1661.

MichGO first argues (Br. 23-26) that the Bradley Tract cannot be the Tribe's "initial" reservation because the Tribe briefly had a reservation during the early part of the 19th century. As *CETAC* confirms, that interpretation is fatally flawed.

The question under IGRA is not whether an Indian tribe had (and then, in this case, lost) reservation or similar land more than a century ago. Almost all tribes would fit that description. The question is whether the tribe had a federally-recognized reservation on October 17, 1988, when IGRA was enacted, or at certain later dates—here, when the Tribe was "acknowledged by the Secretary under the Federal acknowledgment process." 25 U.S.C. § 2719(b)(1)(B)(ii); *see CETAC*,

slip op. 18 (argument based on tribe's longtime possession of non-federally-protected land "conflates the question of the Band's historical home with the inquiry into the land's status for the purposes of IGRA, which are two distinct inquiries").[13] The Gun Lake Tribe had no reservation or trust lands when it was first legally acknowledged under the federal acknowledgment process. Accordingly, the Secretary correctly determined that land taken into trust in response to the Tribe's initial fee-to-trust application after acknowledgment will be part of its "initial reservation" for purposes of IGRA. *See CETAC*, slip op. 21 ("The Secretary could reasonably conclude that . . . the 'initial reservation' for purposes of Section 2719 is the land identified in the initial reservation proclamation under [25 U.S.C. §] 467 after the tribe receives federal recognition.").

As *CETAC* recognizes (slip op. 19-21), the Secretary's determination is consistent with the purposes of the Act. The exceptions to IGRA's general rule against gaming on land acquired after the Act was passed, including the "initial reservation" exception, were enacted to "ensure[] that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones."

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[13] The acknowledgment process referenced in IGRA was first established by regulation in 1978. *See* 59 Fed. Reg. 9280 (Dep't of Interior Feb. 25, 1994) (explaining history); 25 C.F.R. pt. 83 (current regulations).

Roseville, 348 F.3d at 1030; *see CETAC*, slip op. 17-18, 19-20; *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for W. Dist. of Mich.*, 46 F. Supp. 2d 689, 698 (W.D. Mich. 1999) (provisions enacted to "place tribes belatedly acknowledged or restored in the same or similar position as tribes recognized by the United States earlier in their history"). As the NIGC has explained, Congress intended to give newly-recognized tribes (or those that had no land in 1988) an equal opportunity to pursue economic development through the operation of at least one gaming facility in the present:

> Clearly, one compelling reason for providing such exemptions is to provide all tribes with at least one opportunity for the economic advantages of gaming. . . . If Congress had limited gaming [to] lands within known reservation boundaries, then newly acknowledged tribes or tribes that settled land claims would have been denied the opportunities that IGRA provides.

JA 163-164 (December 5, 2001, NIGC Memorandum regarding *Confederated Tribes of Coos, Lower Umpqua & Siusiaw Indians v. Babbitt*, 116 F. Supp. 2d 155 (D.D.C. 2000)); *see also* JA 171-173 (December 13, 2000, NIGC Memorandum regarding Trust Acquisition for Huron Potawatomi, Inc.).

The Gun Lake Tribe was not federally recognized and had no reservation when IGRA was enacted; it has no reservation now; and it has not had a reservation since it was first restored to recognition in 1999. As the Secretary properly concluded, these are precisely the circumstances Congress meant to

address by enacting the Initial Reservation exception. *Compare CETAC*, slip op. 17-18, 19-21. Any other interpretation would perversely penalize many tribes, including Gun Lake, solely because the federal government unjustly terminated their legal recognition and took their land at some point in the past.

The Secretary's construction is consistent with the language and purpose of IGRA and with this Court's decisions in *CETAC* and *Roseville*. It is entitled to deference from this Court.

C. The Secretary Properly Concluded That The Bradley Tract Need Not Be Used For Housing To Qualify As A "Reservation"

MichGO also argues (Br. 26-30) that the Bradley Tract cannot be the Tribe's initial "reservation," because it will not be used for housing. The district court properly deferred to the Secretary's contrary construction. JA 245-248.

MichGO first relies (Br. 27-28) on a discussion of the term "reservation" in the 1982 edition of the Cohen treatise on Federal Indian Law: "[d]uring the 1850's the modern meaning of [the term] emerged, referring to land set aside under federal protection *for the residence* of tribal Indians." Br. 28, quoting Felix S. Cohen, *Handbook of Federal Indian Law* 34 (1982 ed.) (alterations and emphasis

MichGO's). This Court considered and rejected precisely the same argument in *CETAC*, slip op. 14-15.[14] It has no more force here.

MichGO also cites a number of other statutory provisions. Br. 28-29. But the variant possible uses of "reservation" and similar terms cut against MichGO's position. As this Court recognized in *Arizona Public Service Company*, based in part on just such an analysis, "the term 'reservation' has no rigid meaning," but rather is ambiguous in the *Chevron* sense. 211 F.3d at 1292-1294. Likewise, in *CETAC* the Court rejected the argument "that the word 'reservation' has an established meaning that would limit it to lands used for tribal housing," concluding instead that "[b]ecause IGRA was designed primarily to establish a legal basis for Indian gaming as part of fostering tribal economic self-sufficiency, the Secretary's interpretation that the 'initial reservation' exception includes lands acquired in trust . . . for use for a casino is permissible under *Chevron*." Slip op. 18.

Finally, MichGO relies (Br. 29-30) on *Sac & Fox Nation v. Norton*, 240 F.3d 1250 (10th Cir. 2001), which refused to defer to the Secretary's interpretation of "reservation" as used in 25 U.S.C. § 2719(a). *CETAC* squarely rejects this argument as well. Slip op. 4-5 & n.1, 10-11, 15 ("Congress overturned that

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[14] In addition, even the specific passage MichGO cites has been changed in the most recent edition of the Cohen treatise. Felix S. Cohen, *Handbook of Federal Indian Law* § 3.04[2][c][ii] (2005) ("referring to land set aside under federal protection for the residence *or use* of tribal Indians") (emphasis added).

decision, . . . and even if Congress ha[d] not so acted, this court has declined to follow *Sac & Fox*); *see also Roseville*, 348 F.3d at 1029 ("Congress rebuked [*Sac & Fox*] almost immediately, enacting legislation stating that the authority to determine whether land is a 'reservation' was delegated to the Secretary as of the effective date of IGRA," *citing* Department of Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, § 134, 115 Stat. 414, 442-443 (2001) (the "2002 Appropriations Act")).

In light of the 2002 Appropriations Act, *CETAC*, *Roseville*, and *Arizona Public Service Company*, it could not be clearer that the Secretary has the authority to construe IGRA's term "initial reservation." Moreover, his interpretation is consistent with IGRA's purpose of promoting "tribal economic development, self-sufficiency and strong tribal governments" through "the operation of gaming." 25 U.S.C. § 2702(1); *CETAC*, slip op. 4, 18, 19-20. Indeed, as this Court explained about the "restored lands" provision, "[t]he point of the . . . exception is that such lands may be used for commercial gaming; it would make no sense if a tribe's use of land for gaming could defeat the land's eligibility for gaming." *Roseville*, 348 F.3d at 1028. The Secretary's decision to take land into trust as the Tribe's initial federally-recognized reservation, for the specific purpose of allowing the Tribe to generate governmental revenue through a gaming business, accords precisely with

the text and purposes of IGRA. At a minimum it is entirely reasonable, and entitled to deference from this Court. *See CETAC*, slip op. 20.[15]

III. SECTION 5 OF THE INDIAN REORGANIZATION ACT OF 1934 DOES NOT VIOLATE THE NONDELEGATION DOCTRINE

MichGO argues (Br. 31-36) that Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C. § 465, is an unconstitutional delegation of legislative power because it lacks "intelligible standards to guide or limit the Secretary's discretion" (Br. 35).[16] The District Court properly rejected that claim. JA 270-274. First,

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[15] MichGO's claim that its interpretation would not harm the Tribe (Br. 30-31) is preposterous. Remitting newly-acknowledged tribes to the two-step determination process of 25 U.S.C. § 2719(b)(1)(A) would leave them at the mercy of state governors, who must agree to the siting of a casino, with no statutory standard restricting their ability to withhold consent. That clearly was not Congress's intent. The very purpose of the initial reservation exception is to permit newly-acknowledged tribes at least one opportunity for sustained economic development through gaming activity. *See CETAC*, slip op. 17-18, 19-20; *Roseville*, 348 F.3d at 1030; *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for W. Dist. of Mich*, 369 F.3d 960, 971 (6th Cir. 2004).

[16] Section 465 provides in relevant part:

> The Secretary of the Interior is authorized in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.
>
> For the acquisition of such lands . . . there is authorized to be appropriated out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the

Section 465 cannot violate the constitutional prohibition on delegating legislative power because the authority it grants the Secretary is essentially executive in nature. Second, as the First, Eighth, and Tenth Circuits have already held, any delegation in Section 465 is constitutionally sound because the statue establishes adequate standards to guide the Secretary's exercise of discretion. *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972-74 (10th Cir. 2005), *cert. denied*, 127 S. Ct. 38 (2006); *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 795-799 (8th Cir. 2005), *cert. denied*, 127 S. Ct. 67 (2006).

A. The Statute Does Not Delegate Legislative Power

The Constitution vests "all legislative powers" in the Congress. U.S. Const. art. I, § 1. The nondelegation doctrine recognizes that Congress cannot abdicate its responsibilities by authorizing others to legislate on its behalf. As the Supreme Court has explained, the crux of "the constitutional question is whether the statute has delegated *legislative* power to the agency." *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001) (emphasis added). The doctrine is not

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> exterior boundaries of the Navajo Indian Reservation in New Mexico . . . becomes law.

25 U.S.C. § 465.

implicated, however, where Congress merely authorizes the Secretary to carry out an executive function.[17]

With the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*, Congress established a federal policy "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *South Dakota*, 423 F.3d at 798 (citation omitted). Acquisition of land for Indians was one important means of implementing that policy. In Section 465, Congress authorized the Secretary to exercise the essentially executive authority to select and acquire land—for a particular purpose, by consensual means, and subject to the regular and rigorous oversight of the appropriations process.[18]

Section 465 does not authorize the Secretary to make law; to promulgate rules restricting private conduct; to compel any act; or to impose any tax. The Secretary's function under Section 465—deciding whether to acquire parcels of

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[17] For example, prosecutorial discretion, though nearly absolute, does not raise nondelegation concerns. *See United States v. Allen*, 160 F.3d 1096, 1108 n.16 (6th Cir. 1998) ("the 'intelligible principle' language . . . is not relevant to" prosecutorial discretion); *cf. United States v. Batchelder*, 442 U.S. 114, 125-126 (1979).

[18] Congress also prohibited allotting Indian land in severalty, extended existing restrictions on alienation, authorized the Secretary to return to tribal ownership any "surplus" lands previously opened to disposition, and prohibited the sale or transfer of restricted Indian lands except, with approval by the Secretary, to the Indian tribe in whose territory the lands are located. *See* 25 U.S.C. §§ 461-464.

land in trust for a particular purpose, or whether and how to spend any funds that might be appropriated for that purpose—is an executive one, not an exercise of delegated legislative power. *See, e.g.*, *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1937) ("Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated government agencies. . . . The constitutionality of this delegation of authority has never seriously been questioned."); *cf. Clinton v. City of New York*, 524 U.S. 417, 466-467 (1998) (Scalia, J., dissenting) ("From a very early date Congress also made permissive individual appropriations, leaving the decision whether to spend the money to the President's unfettered discretion. . . . The constitutionality of such appropriations has never seriously been questioned."). Section 465's provisional grant of discretion to the Executive to pursue a public purpose by particular means, including by spending any funds that may be appropriated to that end, does not implicate the nondelegation doctrine.[19]

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[19] It is not clear that the requirement that Congress establish "intelligible standards" should ever apply where a statute does not delegate the power to establish rules of general application that regulate private conduct. The Supreme Court has rarely discussed the doctrine outside that context, and when it has it has dispatched the issue quickly. *See, e.g.*, *City of New York*; *Batchelder*; *Cincinnati Soap*. Where a statute authorizes regulation, the degree of discretion left to the Executive may be the sole distinction between permissible execution of the laws and an impermissible delegation. A statute authorizing actions that are by their

B. Section 465 Establishes Constitutionally Adequate Standards

Even if Section 465 delegates legislative power, the guidance it provides to the Executive satisfies the nondelegation doctrine. A delegation is valid "if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of th[e] delegated authority." *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (internal citation omitted). Even a broad delegation is proper so long as Congress sets forth an "intelligible principle" to guide the implementing agency's discretion. *Touby v. United States*, 500 U.S. 160, 165 (1991). The Supreme Court has invalidated legislation on nondelegation grounds only twice, and not since 1935.[20]

MichGO argues that Section 465 fails the "intelligible principle" test because "there is no limiting principle or policy to constrain the Secretary's discretion to acquire land 'for Indians'" (Br. 32-33) and because "limiting standards cannot be supplied by . . . regulations but must be found in the statute itself" (Br. 35). As this Court has recognized, however, "the general polic[ies] and

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nature fundamentally executive, such as the acquisition and management of property, is qualitatively different.

[20] *A.L.A. Shechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (power to adopt codes of fair competition); *Panama Refining Co. v. Amazon Petroleum Corp.*, 293 U.S. 388 (1935) (power to prohibit interstate trade in oil). Both cases involved the power to regulate private conduct.

boundaries of a delegation 'need not be tested in isolation.' . . . Instead, the statutory language may derive content from the 'purpose of the Act, its factual background, and the statutory context in which they appear.'" *TOMAC v. Norton*, 433 F.3d 852, 866 (D.C. Cir. 2006), quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946). Here, Section 465 imposes at least three substantive restrictions on the Secretary's discretion.

First, the statute requires that land acquisitions must serve a particular purpose—"providing land for Indians." 25 U.S.C. § 465. This purposive standard satisfies the "intelligible principle" test, particularly in light of the federal government's unique relationship with the Nation's Indian tribes and the specific legislative and historical context in which this statute was enacted. *See United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999); *see generally, e.g., Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 666-674 (1974) (discussing federal law of Indian lands). The IRA, and Section 465 in particular, were enacted to redress the historical failure of the federal government's allotment policy, under which tribal lands were allotted to individual Indians and "surplus" land was sold to non-Indians, resulting in the decimation of Indian land holdings. *See, e.g., County of Yakima*, 502 U.S. at 253-256. Section 465 was designed to facilitate the re-acquisition and consolidation of lands for Indian tribes as an essential means of achieving tribal economic development and self-sufficiency.

See South Dakota, 423 F.3d at 798. In that context, the requirement that land be acquired solely "for the purpose of providing land to Indians" makes it possible to "ascertain whether the will of Congress has been obeyed." *Yakus v. United States*, 321 U.S. 414, 426 (1944); *cf. TOMAC*, 433 F.3d at 866-867 (interpreting and upholding the Pokagon Restoration Act "in light of the history of the relationship between the United States and the Tribe, and the Restoration Act's express purposes as a whole."). The Supreme Court has sustained delegations with significantly less rigorous "purposive" standards. *See, e.g.*, *New York Cent. Secs. Corp. v. United States*, 287 U.S. 12, 24 (1932) (sustaining "the public interest" standard in light of purpose of statute).

It is in this light that the district court's reliance on the Secretary's extensive regulations implementing Section 465, *see* JA 272-273, is best understood. Those regulations reflect purposes and standards generally implicit in the statute itself. *Cf. Whitman*, 531 U.S. at 472-473 (noting that Court has discussed regulations in nondelegation analysis where "customary practices in the area, implicitly incorporated into the statute, were reflected in the regulations"); *CETAC*, slip op. 18 (rejecting argument "that a newly recognized tribe may select any piece of land for its casino site" under IGRA, because "under the IRA, the land must still be acquired in trust by the Secretary whose determination is based on a number of factors" under the regulations).

Second, the statute restricts the means the Secretary may use to procure the land for Indians. It authorizes only consensual means of acquisition: "purchase, relinquishment, gift, exchange or assignment." 25 U.S.C. § 465.

Third, the statute subjects the Secretary's purchase authority to the appropriations process. It provides that "[f]or the acquisition of such lands . . . and for expenses incident to such acquisition . . . there is authorized to be appropriated . . . a sum not to exceed $2,000,000 in any one fiscal year" from funds not otherwise appropriated. 25 U.S.C. § 465.[21] Authorization, by itself, does not make funds available for expenditure, and the annual appropriations process provides ample opportunity for congressional oversight of the Secretary's past actions and future plans in carrying out the policies underlying Section 465.[22]

These limitations on the Secretary's discretion are sufficient to satisfy the nondelegation doctrine. Three courts of appeals and two district courts (in addition to the court below) have rejected nondelegation challenges to Section 465. *Shivwits Band of Paiute Indians*, 428 F.3d at 972-974; *South Dakota*, 423 F.3d at

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[21] The statute also prohibits use of these funds to acquire land for Navajo Indians outside of their established reservations in Arizona and New Mexico. *Id.*

[22] Indeed, during recent consideration of appropriations for the Interior Department, the House of Representatives considered and rejected a proposal to prohibit the use of funds to implement, administer, or enforce the provisions of IGRA allowing gaming on lands acquired after 1988, including the "initial reservation" provision. 153 Cong. Rec. H7135, H7150-H7151; H7188, H7193 (daily ed. June 26, 2007).

795-799; *United States v. Roberts*, 185 F.3d at 1136-1137; *City of Lincoln City v. U.S. Dep't of Interior*, 229 F. Supp. 2d 1109, 1128, 1132-1133 (D. Or. 2002); *City of Sault Ste. Marie v. Andrus*, 458 F. Supp. 465, 473 (D.D.C. 1978).[23] This Court should reach the same result.

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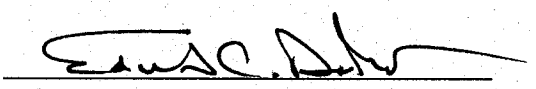
[23] MichGO quotes (Br. 33) *South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995). As its citations acknowledge (Br. 33-34), however, that decision was vacated by the Supreme Court. *South Dakota v. U.S. Dep't of Interior*, 519 U.S. 919 (1996). After further proceedings the district court upheld the constitutionality of Section 465, and the Eighth Circuit affirmed. *South Dakota v. U.S. Dep't of Interior*, 314 F. Supp. 2d 935 (D.S.D. 2004), *aff'd*, 423 F.3 790, 795-799 (8th Cir. 2005).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 12,580 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(a)(2). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionately spaced typeface using Microsoft Word 2003, in 12-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on July 6, 2007, I forwarded the above document to the Court, and forwarded via First-Class Mail, postage prepaid to:

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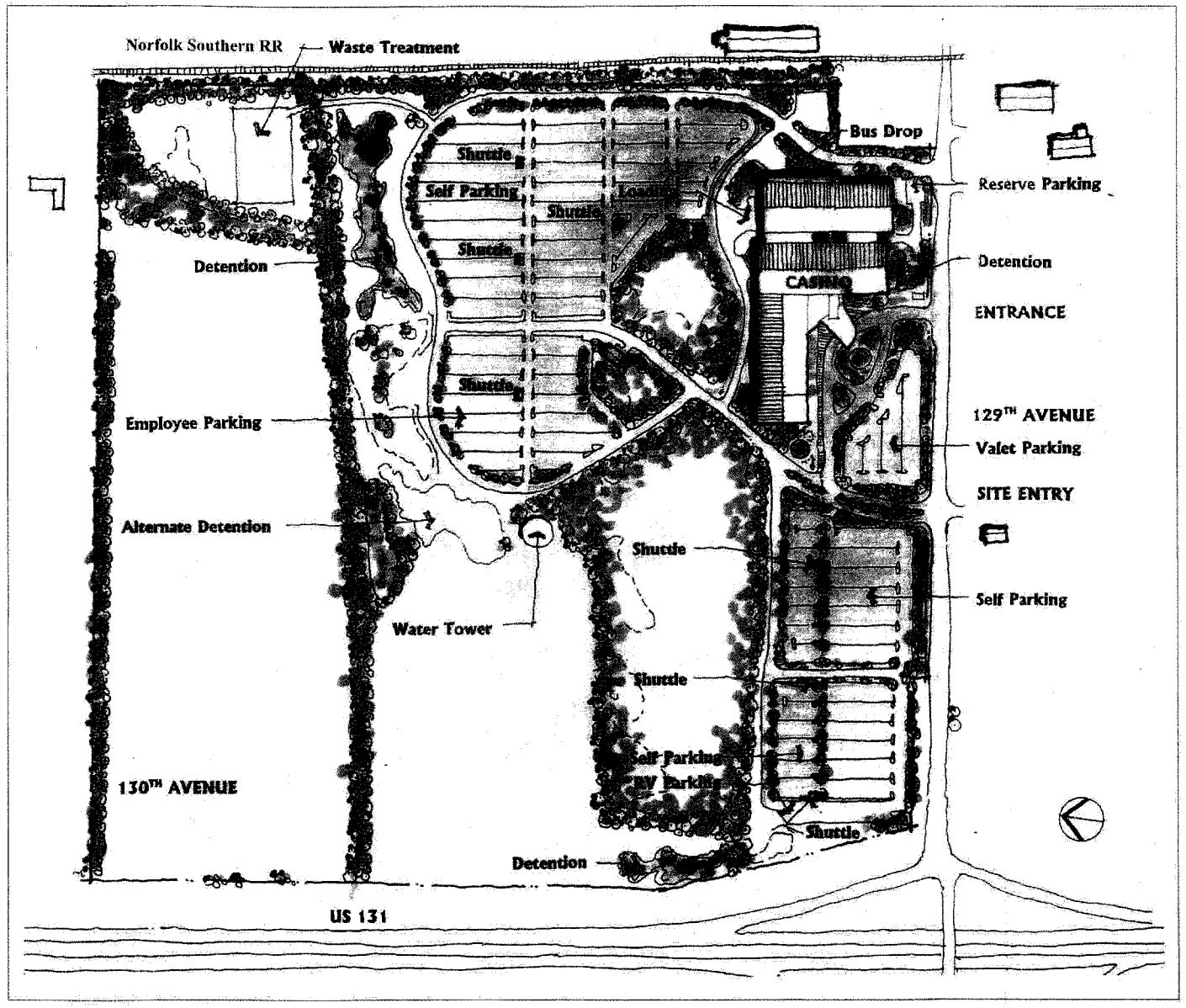
Department of Interior Manual, 516 DM 10 (10.1-10.5) (May 27, 2004)..... A16

NEPA Handbook, 30 BIAM, Supp. 1, at 3.3, 4.2, 4.3 (Sept. 24, 1993) A25

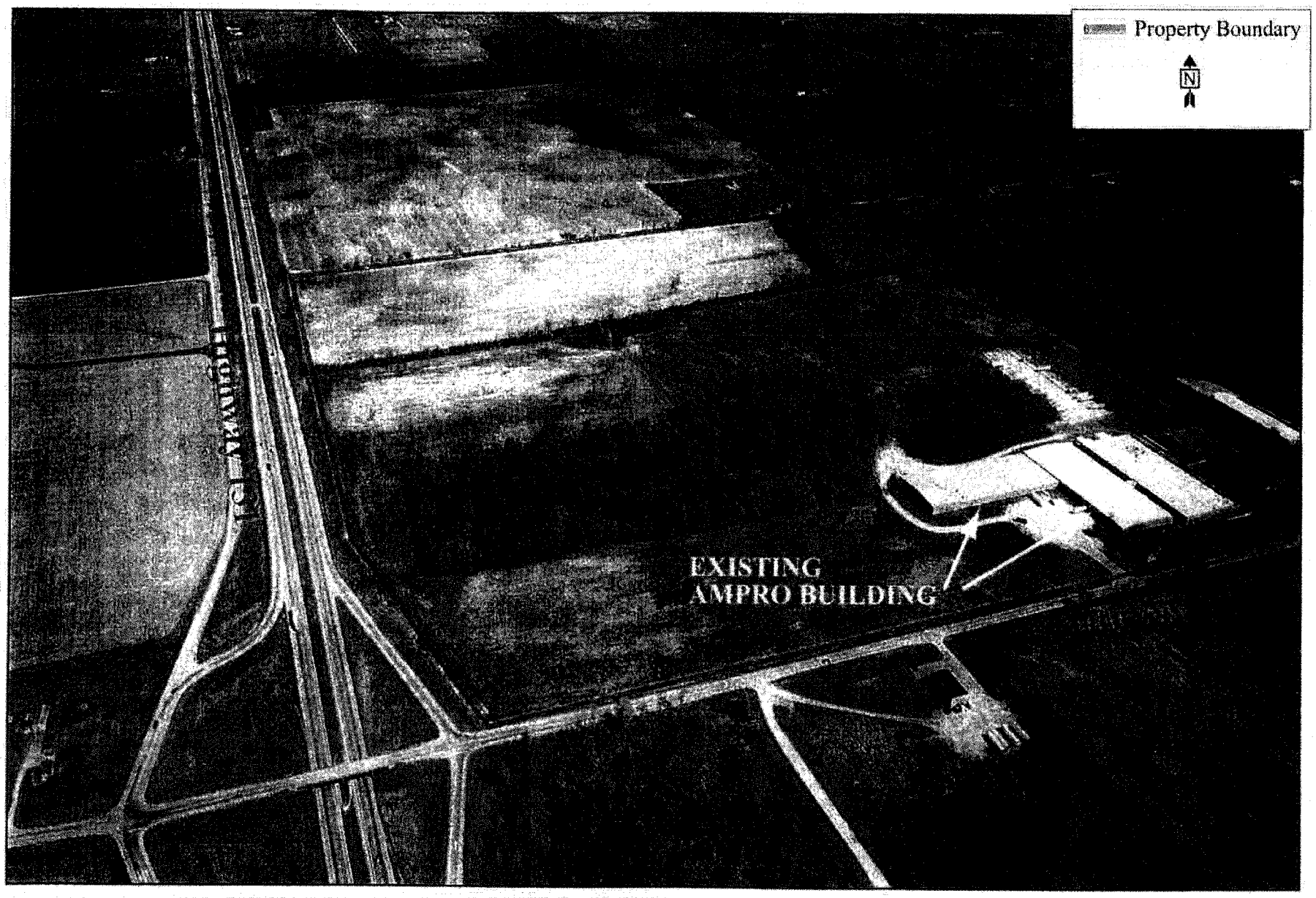


A1

SOURCE: Jeter Cook & Jepson, 2001 ; AES, 2001

Gun Lake / 201503

Figure 2-2
Conceptual Site Layout



SOURCE: AES, 2001

Gun Lake / 201503 ■

Figure 3-3
Aerial Photo of Casino Site

6.1 Purpose. This Chapter provides supplementary instructions for implementing those provisions of the CEQ regulations pertaining to procedures for implementing and managing the NEPA process.

6.2 Organization for Environmental Quality.

A. Office of Environmental Project Review. The Director, Office of Environmental Project Review, reporting to the Assistant Secretary--Policy, Budget and Administration (PBA), is responsible for providing advice and assistance to the Department on matters pertaining to environmental quality and for overseeing and coordinating the Departments compliance with NEPA, E.O. 11514, the CEQ regulations, and this Part. (See also 110 DM 22.)

B. Bureaus and Offices. Heads of bureaus and offices will designate organizational elements or individuals, as appropriate, at headquarters and regional levels to be responsible for overseeing matters pertaining to the environmental effects of the bureaus plans and programs. The individuals assigned these responsibilities should have management experience or potential, understand the bureau's planning and decision making processes, and be well trained in environmental matters, including the Department's policies and procedures so that their advice has significance in the bureau's planning and decisions. These organizational elements will be identified in the Bureau Appendix to this Chapter.

6.3 Approval of EISs.

A. A program Assistant Secretary is authorized to approve an EIS in those cases where the responsibility for the decision for which the EIS has been prepared rests with the Assistant Secretary or below. The Assistant Secretary may further assign the authority to approve the EIS if he or she chooses. The Assistant Secretary--PBA will make certain that each program Assistant Secretary has adequate safeguards to assure that the EISs comply with NEPA, the CEQ regulations, and the Departmental Manual.

B. The Assistant Secretary--PBA is authorized to approve an EIS in those cases where the decision-for which the EIS has been prepared will occur at a level in the Department above an individual program Assistant Secretary.

6.4 List of Specific Compliance Responsibilities.
3/18/80 #2244
Replaces 9/17/70 #1222 and 9/27/71 #1341

A. Bureaus and offices shall:
   (1) Prepare NEPA handbooks providing guidance on how to implement NEPA in principal program areas.
   (2) Prepare program regulations or directives for applicants.
   (3) Propose categorical exclusions.
   (4) Prepare and approve EAs.
   (5) Decide whether to prepare an EIS.
   (6) Prepare and publish NOIs and FONSI.
   (7) Prepare and, when assigned, approve EISs.

B. Assistant Secretaries shall:
   (1) Approve bureau handbooks.
   (2) Approve regulations or directives for applicants.
   (3) Approve categorical exclusions.
   (4) Approve EISs pursuant to 516 DM 6.3.

C. The Assistant Secretary--Policies Budget and Administration shall:
   (1) Concur with regulations or directives for applicants.
   (2) Concur with categorical exclusions.
   (3) Approve EISs pursuant to 516 DM 6.3.

6.5 Bureau Requirements.

A. Requirements specific to bureaus appear as appendices to this Chapter and include the following:
   (1) Identification of officials and organizational elements responsible for NEPA compliance (516 DM 6.2B).
   (2) List of program regulations or directives which provide information to applicants (516 DM 2.2B).
   (3) Identification of major decision points in principal programs (516 DM 5.3B) for which an EIS is normally prepared (516 DM 2.3E).
   (4) List of categorical exclusions (516 DM 2.3A).

B. Appendices are attached for the following bureaus:
   (1) Fish and Wildlife Service (Appendix 1).
   (2) Geological Survey (Appendix 2).
   (3) Heritage Conservation and Recreation Service (Appendix 3).
   (4) Bureau of Indian Affairs (Appendix 4).
   (5) Bureau of Land Management (Appendix 5).
   (6) Bureau of Mines (Appendix 6).
   (7) National Park Service (Appendix 7)
   (8) Office of Surface Mining (Appendix 8).
   (9) Water and Power Resources Service (Appendix 9).

C. The Office of the Secretary and other Departmental Offices do not have separate appendices, but must comply with this Part and will consult with the Office of Environmental Project Review about compliance activities

6.6 Information About the NEPA Process. The Office of Environmental Project Review

will publish periodically a Departmental list of contacts where information about the NEPA process and the status of EISs may be obtained.

Bureau of Indian Affairs

4.1 NEPA Responsibility

A. Deputy Commissioner of Indian Affairs is responsible for NEPA compliance of Bureau of Indian Affairs (BIA) activities and

programs.

B. Director, Office of Trust Responsibilities (OTR) is responsible for oversight of the BIA program for achieving compliance with NEPA, program direction, and leadership for BIA environmental policy, coordination and procedures.

C. Environmental Services Staff, reports to the Director (OTR). This office is the Bureau-wide focal point for overall NEPA policy and guidance and is responsible for advising and assisting Area Offices, Agency Superintendents, and other field support personnel in their environmental activities. The office also provides training and acts as the Central Office's liaison with Indian tribal governments on NEPA and other environmental compliance matters. Information about BIA NEPA documents or the NEPA process can be obtained by contacting the Environmental Services Staff.

D. Other Central Office Directors and Division Chiefs are responsible for ensuring that the programs and activities within their jurisdiction comply with NEPA.

E. Area Directors and Project Officers are responsible for assuring NEPA compliance with all activities under their jurisdiction and providing advice and assistance to Agency Superintendents and consulting with the Indian tribes on environmental matters related to NEPA. Area Directors and Project Officers are also responsible for assigning sufficient trained staff to ensure NEPA compliance is carried out. An Environmental Coordinator is located at each Area Office.

F. Agency Superintendents and Field Unit Supervisors are responsible for NEPA compliance and enforcement at the Agency or field unit level.

4.2 Guidance to Applicants and Tribal Governments

A. Relationship with Applicants and Tribal Governments.

1. Guidance to Applicants.

a. An "applicant" is an entity which proposes to undertake any activity which will at some point require BIA action. These may include tribal governments, private entities, state and local governments or other Federal agencies. BIA compliance with NEPA is Congressionally mandated. Compliance is initiated when a BIA action is necessary in order to implement a proposal.

b. Applicants should contact the BIA official at the appropriate level for assistance. This will be the Agency Superintendent, Area Director or the Director, Office of Trust Responsibilities.

c. If the applicant's proposed action will affect or involve more than one tribal government, one government agency, one BIA Agency, or where the action may be of State-wide or regional significance, the applicant should contact the respective Area Director(s). The Area Director(s), using sole discretion, may assign the lead NEPA compliance responsibilities to one Area Office or, as appropriate, to one Agency Superintendent. From that point, the Applicant will deal with the designated lead office.

d. Since much of the applicant's planning may take place outside the BIA system, it is the applicant's responsibility to prepare a milestone chart for BIA use at the earliest possible stage in order to coordinate the efforts of both parties. Early communication with the responsible BIA office will expedite determination of the appropriate type of NEPA documentation required. Other matters such as the scope, depth and sources of data for an environmental document will also be expedited and will help lead to a more efficient and more timely NEPA compliance process.

2. Guidance to Tribal Governments.

a. Tribal governments may be applicants, and/or be affected by a proposed action of BIA or another Federal agency. Tribal governments affected by a proposed action shall be consulted during the preparation of environmental documents and, at their option, may cooperate in the review or preparation of such documents. Notwithstanding the above, the BIA retains sole responsibility and discretion in all NEPA compliance matters.

b. Any proposed tribal actions that do not require BIA or other Federal approval, funding or "actions" are not subject to the NEPA process.

B. Prepared Program Guidance. BIA has implemented regulations for environmental guidance for surface mining in 25 CFR Part 216 (Surface Exploration, Mining and Reclamation of Lands.) Environmental guidance for Forestry activities is found in 25 CFR 163.27 and 53 BIAM Supplements 2 and 3.

C. Other Guidance. Programs under 25 CFR for which BIA has not yet issued regulations or directives for environmental information for applicants are listed below. These programs may or may not require environmental documents and could involve submission of applicant information to determine NEPA applicability. Applicants for these types of programs should contact the appropriate BIA office for information and assistance:

1. Partial payment construction charges on Indian irrigation projects (25 CFR Part 134).

2. Construction assessments, Crow Indian irrigation project (25 CFR Part 135).

3. Fort Hall Indian irrigation project, Idaho (25 CFR Part 136).

4. Reimbursement of construction costs, San Carlos Indian irrigation project, Arizona (25 CFR Part 137).

5. Reimbursement of construction costs, Ahtanum Unit, Wapato Indian irrigation project, Washington CFR Part 138).

6. Reimbursement of construction costs, Wapato-Satus Unit, Wapato Indian Irrigation project, Washington (25 CFR Part 139).

7. Land acquisitions (25 CFR Part 151).

8. Leasing and permitting (Lands) (25 CFR Part 162).

9. Sale of lumber and other forest products produced by Indian enterprises from the forests on Indian reservation (25 CFR Part 164).

10. Sale of forest products, Red Lake Indian Reservation, Minn. (25 CFR Part 165).

11. General grazing regulations (25 CFR Part 166).

12. Navajo grazing regulations (25 CFR Part 167).

13. Grazing regulations for the Hopi partitioned lands (25 CFR Part 168).

14. Rights-of-way over Indian lands (25 CFR Part 169).

15. Roads of the Bureau of Indian Affairs (25 CFR Part 170).

16. Concessions, permits and leases on lands withdrawn or acquired in connection with Indian irrigation projects (25 CFR Part 173).

17. Indian Electric Power Utilities (25 CFR Part 175).

18. Resale of lands within the badlands Air Force Gunnery Range (Pine Ridge Aerial Gunnery Range) (25 CFR Part 178).

19. Leasing of tribal lands for mining (25 CFR Part 211).

20. Leasing of allotted lands for mining (25 CFR Part 212).

21. Leasing of restricted lands of members of Five Civilized Tribes, Oklahoma, for mining (25 CFR Part 213).

22. Leasing of Osage Reservation lands, Oklahoma, for mining, except oil and gas (25 CFR Part 214).

23. Lead and zinc mining operations and leases, Quapaw Agency (25 CFR Part 215).

24. Leasing of Osage Reservation lands for oil and gas mining (25 CFR Part 226).

25. Leasing of certain lands in Wind River Indian Reservation, Wyoming, for oil and gas mining (25 CFR Part 227).

26. Indian fishing in Alaska (25 CFR Part 241).

27. Commercial fishing on Red Lake Indian Reservation (25 CFR 242).

28. Use of Columbia River in-lieu fishing sites (25 CFR Part 248).

29. Off-reservation treaty fishing (25 CFR Part 249).

30. Indian fishing - Hoopa Valley Indian Reservation (25 CFR Part 150).

31. Housing Improvement Program (25 CFR Part 256).

32. Contracts under Indian Self-Determination Act (25 CFR Part 271).

33. Grants under Indian Self-Determination Act 25 CFR Part 272).

34. School construction or services for tribally operated previously private schools (25 CFR Part 274).

35. Uniform administration requirements for grants (25 CFR 276).

36. School construction contracts for public schools (25 CFR Part 277).

4.3 Major Actions Normally Requiring an EIS

A. The following BIA actions normally require the preparation of an Environmental Impact Statement (EIS):

1. Proposed mining contracts (for other than oil and gas), or the combination of a number of smaller contracts comprising a mining unit for:

a. New mines of 640 acres or more, other than surface coal mines.

b. New surface coal mines of 1,280 acres or more, or having an annual full production level of 5 million tons or more.

2. Proposed water development projects which would, for example, inundate more than 1,000 acres, or store more than 30,000 acre-feet, or irrigate more than 5,000 acres of undeveloped land.

3. Construction of a treatment, storage or disposal facility for hazardous waste or toxic substances.

4. Construction of a solid waste facility for commercial purposes.

B. If, for any of these actions, it is proposed not to prepare an EIS, an Environmental Assessment (EA) will be developed in accordance with 40 CFR 1501.4(a)(2).

4.4 Categorical Exclusions. In addition to the actions listed in the Department's categorical exclusions in Appendix 1 of 516 DM 2, many of which the BIA also performs, the following BIA actions are hereby designated as categorical exclusions unless the action qualifies as an exception under Appendix 2 of 516 DM 2. These activities are single, independent actions not associated with a larger, existing or proposed, complex or facility. If cases occur that involve larger complexes or facilities, an EA or supplement should be accomplished.

A. Operation, maintenance, and replacement of existing facilities. Examples are normal renovation of buildings, road maintenance and limited rehabilitation of irrigation structures.

B. Transfer of Existing Federal Facilities to Other Entities. Transfer of existing operation and maintenance activities of Federal facilities to tribal groups, water user organizations, or other entities where the anticipated operation and maintenance activities are agreed to in a contract, follow BIA policy, and no change in operations or maintenance is anticipated.

C. Human resources programs. Examples are social services, education services, employment assistance, tribal operations, law enforcement and credit and financing activities not related to development.

D. Administrative actions and other activities relating to trust resources. Examples are: Management of trust funds (collection and distribution), budget, finance, estate planning, wills and appraisals.

E. Self-Determination and Self-Governance.

1. Self-Determination Act contracts and grants for BIA programs listed as categorical exclusions, or for programs in which environmental impacts are adequately addressed in earlier NEPA analysis.

2. Self-Governance compacts for BIA programs which are listed as categorical exclusions or for programs in which environmental impacts are adequately addressed in earlier NEPA analysis.

F. Rights-of-Way.

1. Rights-of-Way inside another right-of-way, or amendments to rights-of-way where no deviations from or additions to the original right-of-way are involved and where there is an existing NEPA analysis covering the same or similar impacts in the right-of-way area.

2. Service line agreements to an individual residence, building or well from an existing facility where installation will involve no clearance of vegetation from the right-of-way other than for placement of poles, signs (including highway signs), or buried power/cable lines.

3. Renewals, assignments and conversions of existing rights-of-way where there would be essentially no change in use and continuation would not lead to environmental degradation.

G. Minerals.

1. Approval of permits for geologic mapping, inventory, reconnaissance and surface sample collecting.

2. Approval of unitization agreements, pooling or communitization agreements.

3. Approval of mineral lease adjustments and transfers, including assignments and subleases.

4. Approval of royalty determinations such as royalty rate adjustments of an existing lease or contract agreement.

H. Forestry.

1. Approval of free-use cutting, without permit, to Indian owners for on-reservation personal use of forest products, not to exceed 2,500 feet board measure when cutting will not adversely affect associated resources such as riparian zones, areas of special significance, etc.

2. Approval and issuance of cutting permits for forest

products not to exceed $5,000 in value.

3. Approval and issuance of paid timber cutting permits or contracts for products valued at less than $25,000 when in compliance with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

4. Approval of annual logging plans when in compliance with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

5. Approval of Fire Management Planning Analysis detailing emergency fire suppression activities.

6. Approval of emergency forest and range rehabilitation plans when limited to environmental stabilization on less than 10,000 acres and not including approval of salvage sales of damaged timber.

7. Approval of forest stand improvement projects of less than 2000 acres when in compliance with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

8. Approval of timber management access skid trail and logging road construction when consistent with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

9. Approval of prescribed burning plans of less than 2000 acres when in compliance with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

10. Approval of forestation projects with native species and associated protection and site preparation activities on less than 2000 acres when consistent with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

I. Land Conveyance and Other Transfers. Approvals or grants of conveyances and other transfers of interests in land where no change in land use is planned.

J. Reservation Proclamations. Lands established as or added to a reservation pursuant to 25 U.S.C. 467, where no change in land use is planned.

K. Waste Management.

1. Closure operations for solid waste facilities when done in compliance with other federal laws and regulations and where cover material is taken from locations which have been

approved for use by earlier NEPA analysis.

2. Activities involving remediation of hazardous waste sites if done in compliance with applicable federal laws such as the Resource Conservation and Recovery Act (P.L. 94-580), Comprehensive Environmental Response, Compensation, and Liability Act (P.L. 96-516) or Toxic Substances Control Act (P.L. 94-469).

L. Roads and Transportation.

1. Approval of utility installations along or across a transportation facility located in whole within the limits of the roadway right-of-way.

2. Construction of bicycle and pedestrian lanes and paths adjacent to existing highways and within the existing rights-of-way.

3. Activities included in a "highway safety plan" under 23 CFR 402.

4. Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

5. Emergency repairs under 23 U.S.C. 125.

6. Acquisition of scenic easements.

7. Alterations to facilities to make them accessible for the elderly or handicapped.

8. Resurfacing a highway without adding to the existing width.

9. Rehabilitation, reconstruction or replacement of an existing bridge structure on essentially the same alignment or location (e.g. widening, adding shoulders or safety lanes, walkways, bikeways or guardrails).

10. Approvals for changes in access control within existing right-of-ways.

11. Road construction within an existing right-of-way which has already been acquired for a HUD housing project and for which earlier NEPA analysis has already been prepared.

M. Other.

1. Data gathering activities such as inventories, soil and range surveys, timber cruising, geological, geophysical, archeological, paleontological and cadastral surveys.

2. Establishment of non-disturbance environmental quality monitoring programs and field monitoring stations including testing services.

3. Actions where BIA has concurrence or co-approval with another Bureau and the action is categorically excluded for that Bureau.

4. Approval of an Application for Permit to Drill for a new water source or observation well.

5. Approval of conversion of an abandoned oil well to a water well if water facilities are established only near the well site.

6. Approval and issuance of permits under the Archaeological Resources Protection Act (16 U.S.C. 470aa-11) when the permitted activity is being done as a part of an action for which a NEPA analysis has been, or is being prepared.

Department of the Interior
Departmental Manual

Effective Date: 5/27/04
Series: Environmental Quality Programs
Part 516: National Environmental Policy Act of 1969
Chapter 10: Managing the NEPA Process--Bureau of Indian Affairs

Originating Office: Bureau of Indian Affairs

516 DM 10

10.1 **Purpose.** This Chapter provides supplementary requirements for implementing provisions of 516 DM 1 through 6 within the Department=s Bureau of Indian Affairs (BIA). This Chapter is referenced in 516 DM 6.5.

10.2 **NEPA Responsibility.**

A. Deputy Commissioner of Indian Affairs is responsible for NEPA compliance of BIA activities and programs.

B. Director, Office of Trust Responsibilities (OTR) is responsible for oversight of the BIA program for achieving compliance with NEPA, program direction, and leadership for BIA environmental policy, coordination and procedures.

C. Environmental Services Staff, reports to the Director (OTR). This office is the Bureau-wide focal point for overall NEPA policy and guidance and is responsible for advising and assisting Area Offices, Agency Superintendents, and other field support personnel in their environmental activities. The office also provides training and acts as the Central Office's liaison with Indian tribal governments on NEPA and other environmental compliance matters. Information about BIA NEPA documents or the NEPA process can be obtained by contacting the Environmental Services Staff.

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(b) Applicants should contact the BIA official at the appropriate level for assistance. This will be the Agency Superintendent, Area Director or the Director, Office of Trust Responsibilities.

(c) If the applicant's proposed action will affect or involve more than one tribal government, one government agency, one BIA Agency, or where the action may be of State-wide or regional significance, the applicant should contact the respective Area Director(s). The Area Director(s), using sole discretion, may assign the lead NEPA compliance responsibilities to one Area Office or, as appropriate, to one Agency Superintendent. From that point, the Applicant will deal with the designated lead office.

(d) Since much of the applicant's planning may take place outside the BIA system, it is the applicant's responsibility to prepare a milestone chart for BIA use at the earliest possible stage in order to coordinate the efforts of both parties. Early communication with the responsible BIA office will expedite determination of the appropriate type of NEPA documentation required. Other matters such as the scope, depth and sources of data for an environmental document will also be expedited and will help lead to a more efficient and more timely NEPA compliance process.

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(a) Tribal governments may be applicants, and/or be affected by a proposed action of BIA or another Federal agency. Tribal governments affected by a proposed action shall be consulted during the preparation of environmental documents and, at their option, may cooperate in the review or preparation of such documents. Notwithstanding the above, the BIA retains sole responsibility and discretion in all NEPA compliance matters.

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(8) Leasing and permitting (Lands) (25 CFR Part 162).

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(17) Indian Electric Power Utilities (25 CFR Part 175).

(18) Resale of lands within the badlands Air Force Gunnery Range (Pine Ridge Aerial Gunnery Range) (25 CFR Part 178).

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(21) Leasing of restricted lands of members of Five Civilized Tribes, Oklahoma, for mining (25 CFR Part 213).

(22) Leasing of Osage Reservation lands, Oklahoma, for mining, except oil and gas (25 CFR Part 214).

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(31) Housing Improvement Program (25 CFR Part 256).

(32) Contracts under Indian Self-Determination Act (25 CFR Part 271).

(33) Grants under Indian Self-Determination Act 25 CFR Part 272).

(34) School construction or services for tribally operated previously private schools

(25 CFR Part 274).

(35) Uniform administration requirements for grants (25 CFR 276).

(36) School construction contracts for public schools (25 CFR Part 277).

10.4 **Major Actions Normally Requiring an EIS.**

A. The following BIA actions normally require the preparation of an Environmental Impact Statement (EIS):

(1) Proposed mining contracts (for other than oil and gas), or the combination of a number of smaller contracts comprising a mining unit for:

(a) New mines of 640 acres or more, other than surface coal mines.

(b) New surface coal mines of 1,280 acres or more, or having an annual full production level of 5 million tons or more.

(2) Proposed water development projects which would, for example, inundate more than 1,000 acres, or store more than 30,000 acre-feet, or irrigate more than 5,000 acres of undeveloped land.

(3) Construction of a treatment, storage or disposal facility for hazardous waste or toxic substances.

(4) Construction of a solid waste facility for commercial purposes.

B. If, for any of these actions, it is proposed not to prepare an EIS, an Environmental Assessment (EA) will be developed in accordance with 40 CFR 1501.4(a)(2).

10.5 **Categorical Exclusions**. In addition to the actions listed in the Department's categorical exclusions in Appendix 1 of 516 DM 2, many of which the BIA also performs, the following BIA actions are hereby designated as categorical exclusions unless the action qualifies as an exception under Appendix 2 of 516 DM 2. These activities are single, independent actions not associated with a larger, existing or proposed, complex or facility. If cases occur that involve larger complexes or facilities, an EA or supplement should be accomplished.

A. Operation, Maintenance, and Replacement of Existing Facilities. Examples are normal renovation of buildings, road maintenance and limited rehabilitation of irrigation structures.

B. Transfer of Existing Federal Facilities to Other Entities. Transfer of existing operation and maintenance activities of Federal facilities to tribal groups, water user organizations, or other entities where the anticipated operation and maintenance activities are

agreed to in a contract, follow BIA policy, and no change in operations or maintenance is anticipated.

C. Human Resources Programs. Examples are social services, education services, employment assistance, tribal operations, law enforcement and credit and financing activities not related to development.

D. Administrative Actions and Other Activities Relating to Trust Resources. Examples are: Management of trust funds (collection and distribution), budget, finance, estate planning, wills and appraisals.

E. Self-Determination and Self-Governance.

(1) Self-Determination Act contracts and grants for BIA programs listed as categorical exclusions, or for programs in which environmental impacts are adequately addressed in earlier NEPA analysis.

(2) Self-Governance compacts for BIA programs which are listed as categorical exclusions or for programs in which environmental impacts are adequately addressed in earlier NEPA analysis.

F. Rights-of-Way.

(1) Rights-of-Way inside another right-of-way, or amendments to rights-of-way where no deviations from or additions to the original right-of-way are involved and where there is an existing NEPA analysis covering the same or similar impacts in the right-of-way area.

(2) Service line agreements to an individual residence, building or well from an existing facility where installation will involve no clearance of vegetation from the right-of-way other than for placement of poles, signs (including highway signs), or buried power/cable lines.

(3) Renewals, assignments and conversions of existing rights-of-way where there would be essentially no change in use and continuation would not lead to environmental degradation.

G. Minerals.

(1) Approval of permits for geologic mapping, inventory, reconnaissance and surface sample collecting.

(2) Approval of unitization agreements, pooling or communitization agreements.

(3) Approval of mineral lease adjustments and transfers, including assignments and subleases.

(4) Approval of royalty determinations such as royalty rate adjustments of an existing lease or contract agreement.

H. Forestry.

(1) Approval of free-use cutting, without permit, to Indian owners for on-reservation personal use of forest products, not to exceed 2,500 feet board measure when cutting will not adversely affect associated resources such as riparian zones, areas of special significance, etc.

(2) Approval and issuance of cutting permits for forest products not to exceed $5,000 in value.

(3) Approval and issuance of paid timber cutting permits or contracts for products valued at less than $25,000 when in compliance with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

(4) Approval of annual logging plans when in compliance with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

(5) Approval of Fire Management Planning Analysis detailing emergency fire suppression activities.

(6) Approval of emergency forest and range rehabilitation plans when limited to environmental stabilization on less than 10,000 acres and not including approval of salvage sales of damaged timber.

(7) Approval of forest stand improvement projects of less than 2000 acres when in compliance with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

(8) Approval of timber management access skid trail and logging road construction when consistent with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

(9) Approval of prescribed burning plans of less than 2000 acres when in compliance with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

(10) Approval of forestation projects with native species and associated protection and site preparation activities on less than 2000 acres when consistent with policies and guidelines established by a current management plan addressed in earlier NEPA analysis.

I. Land Conveyance and Other Transfers. Approvals or grants of conveyances and other transfers of interests in land where no change in land use is planned.

J. Reservation Proclamations. Lands established as or added to a reservation pursuant to 25 U.S.C. 467, where no change in land use is planned.

K. Waste Management.

(1) Closure operations for solid waste facilities when done in compliance with other federal laws and regulations and where cover material is taken from locations which have been approved for use by earlier NEPA analysis.

(2) Activities involving remediation of hazardous waste sites if done in compliance with applicable federal laws such as the Resource Conservation and Recovery Act (P.L. 94-580), Comprehensive Environmental Response, Compensation, and Liability Act (P.L. 96-516) or Toxic Substances Control Act (P.L. 94-469).

L. Roads and Transportation.

(1) Approval of utility installations along or across a transportation facility located in whole within the limits of the roadway right-of-way.

(2) Construction of bicycle and pedestrian lanes and paths adjacent to existing highways and within the existing rights-of-way.

(3) Activities included in a "highway safety plan" under 23 CFR 402.

(4) Installation of fencing, signs, pavement markings, small passenger shelters, traffic signals, and railroad warning devices where no substantial land acquisition or traffic disruption will occur.

(5) Emergency repairs under 23 U.S.C. 125.

(6) Acquisition of scenic easements.

(7) Alterations to facilities to make them accessible for the elderly or handicapped.

(8) Resurfacing a highway without adding to the existing width.

(9) Rehabilitation, reconstruction or replacement of an existing bridge structure on essentially the same alignment or location (e.g., widening, adding shoulders or safety lanes, walkways, bikeways or guardrails).

(10) Approvals for changes in access control within existing right-of-ways.

(11) Road construction within an existing right-of-way which has already been acquired for a HUD housing project and for which earlier NEPA analysis has already been

prepared.

M. Other.

(1) Data gathering activities such as inventories, soil and range surveys, timber cruising, geological, geophysical, archeological, paleontological and cadastral surveys.

(2) Establishment of non-disturbance environmental quality monitoring programs and field monitoring stations including testing services.

(3) Actions where BIA has concurrence or co-approval with another Bureau and the action is categorically excluded for that Bureau.

(4) Approval of an Application for Permit to Drill for a new water source or observation well.

(5) Approval of conversion of an abandoned oil well to a water well if water facilities are established only near the well site.

(6) Approval and issuance of permits under the Archaeological Resources Protection Act (16 U.S.C. 470aa-ll) when the permitted activity is being done as a part of an action for which a NEPA analysis has been, or is being prepared.

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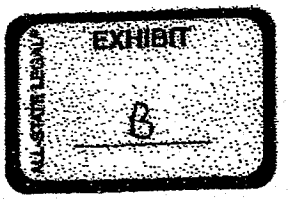

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C. Responses to Emergencies. In an emergency, a proposed action with significant environmental impacts may be taken without observing the provisions of the CEQ Regulations. These actions are generally related to immediate personnel relief (See §1506.11. and 516 DM 5.8). However, actions other than those necessary to control the immediate impacts of the emergency remain subject to the NEPA process. The Office of Environmental Affairs and the Office of the Solicitor must be contacted to set up emergency compliance actions in accordance with CEQ Regulations. The Central Office Environmental Services Staff will be the point of contact for this process.

3.3 Responsibility for Determination. The Bureau decisionmaker is responsible for making the determination that an action may be taken without preparation of either an EA or EIS. If the decisionmaker is not a line official, responsibility is shared by the line official from whom the decisionmaker's delegation of authority is derived. Area Directors may provide procedures for reviewing these determinations in Area Office addenda issued pursuant to § 2.5 of this Handbook.

3.4 Determination of Whether to Prepare an EA or an EIS. If none of the situations described in §3.2 apply, then an EA or EIS may be necessary. This section provides guidance for determining whether to initiate preparation of an EIS or to first prepare an EA.

A. EIS Required. The primary requirement of NEPA is that an EIS be prepared for every Federal action that will or may significantly affect the quality of the human environment. Pursuant to the CEQ regulations, there are three ways of reaching the conclusion that an EIS is required:

(1) EIS Normally Required. Bureau actions which have been determined to normally require the completion of an EIS prior to their implementation are listed in 516 DM 6, Appendix 4.3. {However, circumstances may exist in which an action normally requiring the preparation of an EIS does not result in significant environmental impacts. In such circumstances, an EA shall be prepared to determine whether any significant impacts may or will occur. In these, the CEQ Regulations impose additional public review requirements. See §1501.4(e)(2)}.

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4. ENVIRONMENTAL ASSESSMENT

4.1 Introduction. The purpose of this chapter is to provide guidance in preparing EAs. An EA is a concise public document which provides sufficient analysis for determining whether a proposed action may or will have a significant impact on the quality of the human environment. The EA should be completed early in the decisionmaking process so that if it becomes apparent that the proposed action may or will have significant impacts an EIS can be prepared early as well. If the EA reveals no significant impacts, a FONSI is prepared. Illustration 1 highlights this decision as one of the critical actions in the NEPA process.

4.2 Responsibility for Preparation. As soon as a decision has been made to prepare an EA, responsibility for preparing the EA should be assigned by the Bureau decisionmaker. To the extent possible, the Bureau will use an interdisciplinary team approach in preparing an EA.

A. Internally Initiated Proposals. (See 516 DM 1.4B.) An EA is normally prepared by the program staff which has identified the need for a proposed action and which has lead responsibility for implementing the action. Agency and Area Environmental Staff will provide assistance in the preparation of EAs. Staff of other programs will assist in preparing EAs if one or more of the alternatives or mitigation measures fall within their areas of responsibility or if their participation would enhance interdisciplinary analyses. Depending upon the complexity of the proposed action, the responsibility for preparation may be assigned to either an individual or an interdisciplinary team.

B. Externally Initiated Proposals. (See 516 DM 1.4C.) When the proposed Bureau action is a response to an externally initiated proposal, such as a lease of trust land, the applicant will normally be required to prepare the EA, if one is required, and to provide supporting information and analyses as appropriate. The EA should be submitted with the application, or as soon thereafter as possible. The Bureau shall make its own evaluation of the environmental issues and shall take

responsibility for the scope and content of the EA. (See §1506.5(b). The applicant may be required to submit additional information, analyses, or reports if necessary to adequately address the environmental issues or if it is determined that an EIS will be required. The responsible Bureau official many elect to prepare any or all of an EA.

4.3 EA Contents and Format. (See §§1508.9, and 516 DM 3.4.). An EA will, at a minimum, include: brief discussions of the need for the proposal, alternatives as required by §102(2)(E) of NEPA, and environmental impacts of the proposed action and alternatives. A listing of agencies and persons consulted shall also be included. In addition, an EA may be expanded to add detail to the description of the proposal, or to discuss a broader range of alternatives and mitigation measures if this facilitates planning and decisionmaking.

NOTE: It is important to keep in mind that an EA is not supposed to be a short EIS. Except as required by §102(2)(E) of NEPA, the analysis in an EA need not go beyond that needed to determine whether impacts will or may be significant. In conducting the analysis for an EA it will be helpful to refer to the guidance contained in Chapter 5 of this Handbook in order to limit the discussion to that which is necessary to determine significance. An EA should normally be no more that 15 or 20 pages in length, unless it has been decided to prepare a longer, more detailed EA to aid in planning and decisionmaking. An EA may be combined with another planning or decisionmaking document (516 DM 3.5B). An EA should be organized as follows.

A. Cover Sheet. This will include a brief description of the proposed action. If public comments are being sought, the cover sheet should be clearly marked as a draft and should state the date when comments are due. The cover sheet should be dated and should give the name of the preparer or team leader. If the proposed action is one in which an "applicant," such as an Indian landowner or tribal government, another governmental agency, or person, has requested the Bureau to take the proposed action, the cover sheet shall identify the applicant.

B. Table of Contents. (Optional) This lists chapter and section headings along with tables, figures and illustrations.

C. Purpose of Need for Action. This section explains in a few sentences the reason why the proposed action is being considered. The purpose of or need for the action should be stated clearly here, in order to ensure that the proposed action and alternatives address it directly. If a programmatic EIS or other program documents have previously been prepared, they should be referenced but not repeated.

D. Alternatives. All reasonable alternatives must be considered, including "no action". The alternatives should not be merely exercises done to fulfill this requirement; they should be honest attempts to find other ways to meet the identified need or achieve the identified purpose while reducing or eliminating harmful environmental impacts. The alternatives should be described in detail sufficient to permit comparison of their merits, especially if their impacts are different, e.g., in kind, size, location, intensity, or duration. (§1502.14)

E. Description of the Affected Environment. (Optional) The "Affected Environment" section (§1502.15) should succinctly describe the area in which the proposed action would occur. Page-sized maps of the general area and the project site help avoid superfluous description. Incorporation of sections of earlier environmental documents by reference may also be appropriate along with a summary of the key facts included in these references.

NOTE: Components of the environment which should be considered in preparing the EA are listed below. While all of these components should be considered, only those components which will be affected by the proposed action need be discussed (1500.4 (c) and 1502.2 (b)). If there are resources which require special attention under any of the statutes or Executive Orders listed in 516 DM 4, Appendix 1 as amended by PEP ES Memo 88-3, such resources should be highlighted.

(1) Land Resources

(a) Topography (land forms, drainage, gradients)

(b) Soils (types, characteristics)

(c) Geologic Setting and Mineral Resources

(2) Water Resources (quality, use, rights)

(3) Air (quality, visibility, etc.)

(4) Living Resources

(a) Wildlife (terrestrial, aquatic, threatened/endangered)

(b) Vegetation (terrestrial, aquatic, riparian, threatened/ endangered)

(c) Ecosystems and Biological Communities

(d) Agriculture (livestock, crops, prime and unique farmland)

(5) Cultural Resources

(a) Historic, Cultural, and Religious Properties

(b) Archeological Resource

(6) Socioeconomic Conditions

(a) Employment and Income

(b) Demographic Trends

(c) Attitudes, Expectations, Lifestyle and Cultural Values

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(d) Community Infrastructure

(7) Resource Use Patterns

(a) Hunting, Fishing, Gathering

(b) Timber Harvesting

(c) Agriculture

(d) Mining

(e) Recreation

(f) Transportation Networks

(g) Land Use Plans

(8) Other Value

(a) Wilderness

(b) Sound and Noise

(c) Public Health and Safety

F. Environmental Consequences. Good analyses in this section is the key to a good EA. Since the purpose of preparing an EA is to determine whether or not the proposed action will or may significantly affect the human environment, all potentially significantly effects, beneficial and adverse, must be noted.

The list provided in §4.3E, above shall be used in identifying impacts. Impacts on any of the resources which require special attention under the laws and Executive Orders listed in 516 DM 4, Appendix 1, as amended by PEP ES Memo 88-3, shall be highlighted.

(1) Organization. The discussion of environmental consequences may be organized in either of two ways: (a) all of the consequences of an alternative may be discussed before moving on the next alternative; or (b) the consequences of each