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THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA

Plaintiff.

vs.

KENNETH LEE SALAZAR, et al

Defendants, and

THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA,

Intervenor Defendant.

CITIZENS FOR A BETTER WAY, et al.

Plaintiffs.

vs.

CASE NO. 12-CV-03021-TLN-AC

(Consolidated Cases)

INTERVENOR-DEFENDANT'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants, and

THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA,

Intervenor Defendant.

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,

Plaintiff,

vs.

S.M.R. JEWELL, Secretary of the Interior, et al.,

Defendants, and

THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA,

Intervenor Defendant.

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I. INTRODUCTION

The Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("Enterprise" or "Tribe") has been without a viable land base since 1965, when the United States transferred the Tribe's only usable property to the State of California in connection with the State's construction of the Oroville Dam. The taking left the Tribe without any reasonable means of providing its members with employment, health care, education, or economic opportunity.

Congress enacted the Indian Reorganization Act ("IRA") and the Indian Gaming Regulatory Act ("IGRA") to help tribes re-establish viable land bases and achieve economic self-sufficiency. 25 U.S.C. §§ 465, 2702. Consistent with those two statutes and their implementing regulations, and in recognition of the need to remedy the 1965 taking of the Tribe's land, the Bureau of Indian Affairs and the Secretary of the Interior (together, "Interior") acquired in trust for the Tribe 40 acres of land zoned for entertainment uses in Yuba County (the "Yuba Site") and approved the Tribe's proposal to develop a casino and hotel project on that property (together, "the Project"). AR 29749-29820, 30166-30220. The Governor of California concurred in that decision, noting that the Project will be in the best interest of the Tribe and will not be detrimental to the community. AR 29207-08, 30171.

Indeed, the Project will have a net positive economic impact of approximately $165 million per year on the surrounding area and would create more than 1,900 new jobs. AR 24686, 24690-93, 24700-11. The Tribe will use revenues from the Project to fund housing, education, and health programs; to decrease its members' reliance on federal and state aid; and to pursue its long-term goals of self-government and economic self-sufficiency. AR 23339-40.

Interior approved the Project after a careful, decade-long review process involving the preparation of both an Environmental Assessment ("EA") (AR 1615-2236) and an Environmental Impact Statement ("EIS") (AR 23207-26799) pursuant to the National Environmental Policy Act ("NEPA"); numerous opportunities for public review and comment (AR 2976, 3042, 3052-3110, 23917-24, 26551-26651, 285905-09, 29207, 29756, 30173-74); and extensive consultation with other local, state, and federal agencies (AR 18786-95, 22793-804, 24454-59, 29207-08, 30171, 30210-13).

The administrative record shows that this process fully complied with NEPA, the IRA, IGRA, and the Clean Air Act. Plaintiffs have failed to satisfy their heavy burden to prove otherwise. Therefore, Interior's approval of the Project must be upheld.

II. INTERIOR COMPLIED WITH NEPA

A. Colusa and UAIC Fail The Zone Of Interests Test

The Tribe's MSJ explained that (i) NEPA's zone of interests is limited to environmental protection; and (ii) Colusa and UAIC are not within NEPA's zone of interests because they seek to protect their lucrative casino businesses from economic competition, not to protect an environmental interest or resource. Enterprise MSJ at 10-12.

In response, Colusa offers two paragraphs of generalized speculation about "significant adverse impacts" and (unspecified) "gains [Colusa] and its neighbors have made in ameliorating their environment" Colusa Opp. at 6. But Colusa does not provide specific *evidence* of a concrete environmental interest or harm. That failure is fatal. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990) (requiring specific facts to satisfy zone of interests test).

Relying on the extra-record Guerrero Affidavit, UAIC claims that it falls within NEPA's zone of interests because the Project will interfere with UAIC members' ability to gather culturally-important resources at the Yuba Site. UAIC Opp. at 2:27 to 3:2. Even if it were properly before the Court, the Affidavit would not validate UAIC's position. The Affidavit states only that construction of the Project would "restrict the UAIC's ability to gather and collect natural resources" at the Yuba Site; it does not establish that UAIC actually uses the Yuba Site for those purposes. *Id*. Guerrero Affidavit at ¶ 7. Indeed, UAIC does not own the Yuba Site and has no right to access it. Thus, the Guerrero Affidavit does not demonstrate that UAIC's actual gathering and collection activities will be impacted.

UAIC also argues that it falls within NEPA's zone of interests because the Project will introduce light pollution onto a property known as the "Sheridan Lands." UAIC Opp. at 3:3 to 3:7. These allegations ring hollow in light of (i) the fact that the Sheridan Lands are more than 10 miles from the Yuba Site and (ii) UAIC's own proposal to develop the Sheridan Lands with

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more than 100 homes, an RV park, and a sewage plant, among other things.[1] UAIC cannot satisfy the zone of interests test by complaining of (alleged) impacts that are associated with its own conduct. *United States v. W. Radio Servs.*, 869 F.Supp. 2d 1282, 1286 (D. Or. 2012).[2]

Throughout this litigation, Colusa and UAIC have tried their best to convince this Court that the Project will have devastating economic impacts on their existing casino businesses.[3] The flimsy environmental interests they now claim (in response to the Tribe's MSJ) are but a pretext for their efforts to suppress economic competition, and therefore cannot satisfy the zone of interests test. *See, e.g., Nev. Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993); *Los Angeles v. Dep't of Agric.,* 950 F. Supp. 1005, 1014 (C.D. Cal. 1996).

B. Interior Reasonably Defined The Project's Purpose And Need

The Tribe's MSJ explained that (i) controlling case law provides agencies with "considerable discretion" to define purpose and need; (ii) Interior's purpose and need statement reasonably accounts for the Tribe's needs, the statutory purposes of IGRA, and the Department's own policies and mission; and (iii) Interior's definition of purpose and need was broad enough to permit the EIS to evaluate a range of reasonable alternatives. Enterprise MSJ at 12-14.

Colusa (but not UAIC or Stand Up) argues that Interior erred by defining the Project's purpose and need in terms of the Tribe's goals rather than the objectives of the Indian Gaming Regulatory Act ("IGRA"). Colusa Opp. at 8-9. But Interior's definition of purpose and need was not limited to the Tribe's needs; the definition also addressed the statutory mandates of IGRA, as well as Interior's own regulations, policies, and mandates. AR 23333-40, 30172. In addition, it was perfectly permissible for Interior to address the Tribe's objectives in the purpose and need statement; in fact, it would have been improper for Interior to do otherwise. *Alaska*

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[1] The Sheridan Lands development proposal is available on UAIC's website: http://www.auburnrancheria.com/programs/community-development/UAIC-Housing-Project.pdf. In addition to the items identified above, the proposal includes an equestrian center, a school, a community center, a medical facility, and more than eight miles of private roads.

[2] Indeed, the Project will incorporate design features that strictly limit lighting on the Yuba Site. *See, e.g.,* AR 28662, 30209 (prohibiting lighting that illuminates the night sky).

[3] *See, e.g.,* Colusa Complaint (Doc. 1) at ¶ 1-19; Colusa Motion for Preliminary Injunction (Doc. 8-1) at 15-20; UAIC Complaint (Case No. 13-cv-00064, Doc. 1) at ¶ 59-61.

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Survival v. Surface Transp. Bd., 705 F.3d 1073, 1084-85 (9th Cir. 2013); *Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986). Moreover, Colusa misrepresents the purpose of IGRA. Contrary to Colusa's representation, IGRA's purposes do *not* include "avoid gaming establishments on land that was not held in trust for tribes…in 1988"; rather, the statute was explicitly intended to provide a basis for "gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government." *Compare* Colusa Opp. at 9 *with* 25 U.S.C. § 2702; *see also Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) (IGRA does not guarantee protection from competition).

UAIC argues that Interior's statement of purpose and need was too narrow to permit the EIS to evaluate alternatives to the Project. UAIC Opp. at 4-5. In particular, it objects to a reference to "Class III gaming" in the definition of purpose and need. *Id*. at 5. The objection is without basis. The EIS fully evaluated a range of reasonable alternatives, including two *non-gaming* options (Alternatives C and E). AR 23345-94, 23593-23835; *see also* part II.C, *infra*.

C. Interior Properly Evaluated Reasonable Alternatives To The Project

The Tribe's MSJ explained that (i) a deferential "rule of reason" governs both an agency's choice of alternatives and the extent to which an EIS must discuss each one; (ii) an EIS need only consider sufficient alternatives to foster informed decision-making; (iii) an EIS need not evaluate in detail alternatives determined to be infeasible, remote, or speculative; (iv) Interior's EIS addressed eight alternatives, five of which were evaluated in detail; (v) the five alternatives evaluated in detail included multiple locations, multiple land uses (including both gaming and non-gaming options), and multiple development intensities; and (vi) Interior reasonably determined that the three remaining alternatives were infeasible. Enterprise MSJ at 14-17.

UAIC argues that Interior was required to consider a broader range of alternatives. It is mistaken. As explained in the Tribe's MSJ, the EIS's alternatives analysis provided Interior with a reasonable set of options: approve the Project as proposed; require modifications to the proposed Project (by modifying the Project's size, modifying the Project's location, or requiring a non-gaming land use); or deny the proposal altogether. *See* Enterprise MSJ at 14:14 to 15:15.

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This approach satisfies NEPA. *See, e.g., N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th 2006); *Westlands Water Dist. v. United States*, 376 F.3d 853, 867-68 (9th Cir. 2004).

UAIC also takes issue with the fact that Alternative D (the alternative of developing a gaming facility on the Tribe's existing trust land) involved a small casino that would generate minimal profits, implying that the small size of Alternative D is evidence of arbitrary decision-making. UAIC Opp. at 7. Not so. Alternative D represents the largest casino that can reasonably be developed on the Tribe's existing trust land. *See* AR 24896-97 (larger facility would be infeasible and "cost prohibitive"). The size of Alternative D is not evidence of arbitrary decision-making; rather, it is evidence that the Tribe's existing trust land is fundamentally unsuitable for economic development.

In addition, UAIC contends that Interior improperly relied on the Tribe's representation that investors could not be secured for potential casino sites along Highway 65, Highway 99, and Highway 162. UAIC Opp. at 5-6. The argument fails for numerous reasons. First, the three sites were determined infeasible for both financial *and environmental* reasons. AR 23391-92. Second, controlling Ninth Circuit precedent allows agencies to rely on feasibility information submitted by a project proponent. *See, e.g., Alaska Survival v. Surface Transp. Bd.,* 705 F.3d 1073, 1087 (9th Cir. 2013).[4] Third, contrary to UAIC's suggestion, agencies are authorized to consider financial information when evaluating feasibility. 43 C.F.R. § 46.420(b) (alternatives must be "economically practical or feasible"); *see also Roosevelt Campobello Int'l Park Comm'n v. EPA,* 684 F.2d 1041, 1047 (1st Cir. 1982); "CEQ Guidance Regarding NEPA Regulations" 48 Fed. Reg. 34263, 34267 (Jul. 28, 1983) ("There is…no need to disregard the applicant's purposes and needs and the common sense realities of a given situation in the development of alternatives").[5] Fourth, UAIC has not met its burden to demonstrate the viability of the Highway 65, Highway 99, and Highway 162 sites. *See Alaska Survival*, 705 F.3d at 1087

[4] UAIC continues to rely on older Tenth Circuit case law; it has not even attempted to distinguish more recent Ninth Circuit decisions like *Alaska Survival*. UAIC Opp. at 6.

[5] UAIC reads too much into *Muckleshoot v. Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999), which invalidated a Forest Service decision that (i) failed to *investigate* funding options and (ii) arbitrarily assumed funding for some purposes but not for others. The case does

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(plaintiff bears burden); *Angoon*, 803 F.2d at 1022 (requiring "specific evidentiary facts" demonstrating viability).[6]

D. Interior Took A Hard Look At Potential Environmental Impacts

The Tribe incorporates Federal Defendants' arguments and submits 4 additional points:

(1) Waiver. UAIC's MSJ alleged that the EIS failed to take a "hard look" at the Project's potential to interfere with "UAIC members who gather resources on and near the Yuba Site for important cultural practices" and that the Project would "irreparably interfere with UAIC's viewshed…of the Sutter Buttes." UAIC MSJ at 12. The Tribe's MSJ explained that UAIC waived both arguments by failing to raise them during the EIS process. Enterprise MSJ at 17-18. UAIC's reply brief fails to address the specific contentions, evidence, and authority clearly set forth in the Tribe's MSJ. *See* UAIC Opp. at 9-11; *see also* Part II.A, *supra*.[7]

(2) Floodplains. The Tribe notes *Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (courts "may not flyspeck an EIS"); *Daingerfield Island Protective Soc'y v. Babbitt*, 40 F.3d 442, 447 (D.C. Cir. 1994) (upholding EIS against EO 11998 challenge where agency gave "serious consideration" to floodplains); and AR 233360-62, 23408-11, 24142-24273 (serious consideration of floodplains).

(3) Guerrero Affidavit. Even if it were properly before the Court, the Guerrero Affidavit would not validate UAIC's claim that the Project will "directly impact UAIC's…cultural uses of the Yuba Site." *See* UAIC Opp. at 10. *See* Part II.A, *supra*.

(4) Economic Data. Interior's reasonable decision not to further supplement the economic data and methodology in the record is entitled to great deference and must be upheld. *See*

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not stand for the proposition that inability to *obtain* financing is irrelevant to feasibility. *Id.*

[6] UAIC claims that it has "no duty to demonstrate the viability of any alternative," but fails to cite any support for that remarkable proposition. *See* UAIC Opp. at 7.

[7] It is particularly noteworthy that UAIC has not identified any evidence of EIS comments discussing (alleged) resource-gathering at the Yuba Site or visual impacts to the Sutter Buttes. UAIC Opp. at 9-11. The only portion of UAIC's reply brief that is even arguably responsive to the Tribe's contentions is a general assertion that "UAIC was not required to 'raise an issue using precise legal formulations.'" *Id.* at 9. But UAIC's comments on the EIS did not make *any* mention (precise, legal, or otherwise) of the activities (resource-gathering) and resources (the Sutter Buttes) at issue here. AR 28533-34 (cultural resources), 28539 (visual resources).

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Marsh v. Or. Nat'l Res. Council, 490 U.S. 360, 373 (1989) ("[t]o require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find new information outdated by the time a decision is made"); *Price Rd. N'hood Ass'n v. Dep't of Transp.*, 113 F.3d 1505, 1510 (9th Cir. 1997).

E. Interior Complied With NEPA's Conflict-Of-Interest Requirements

The Tribe's MSJ explained that (i) Interior complied with the conflict-of-interest requirements set forth in NEPA's implementing regulations; (ii) the role of Analytical Environmental Services ("AES") was properly disclosed and memorialized; (iii) the Council on Environmental Quality ("CEQ")[8] encourages tribes to serve as cooperating agencies; and (iv) the Tribe properly acted as a cooperating agency for the Project. Enterprise MSJ at 18-20.

Plaintiffs offer no specific response (UAIC Opp. at 8-9, Colusa Opp. at 7-13); accordingly, the Tribe incorporates Federal Defendants' arguments and submits 3 additional points:

(1) UAIC's argument that Interior failed to oversee the NEPA process (UAIC Opp. at 8) ignores contrary evidence cited in the Tribe's MSJ (Enterprise MSJ at 9). UAIC also ignores the "list of preparers" clearly identifying Interior officials directly responsible for overseeing the EIS. *See* AR 23890-92 (list of preparers); *Ctr. for Food Safety v. Vilsack*, 844 F. Supp. 2d 1006, 1022-23 (N.D. Cal. 2012) (relying on list of preparers to reject conflict-of-interest claim).

(2) UAIC contends that the Tribe's "dual role" as cooperating agency and project proponent created a conflict of interest. UAIC at 9. But NEPA does not prohibit project proponents from participating in the EIS process; on the contrary, a project proponent may even serve as the *lead agency* preparing an EIS. 40 C.F.R. § 1501.5; 43 C.F.R. §§ 46.220-230.[9]

(3) Plaintiffs do not dispute that CEQ encourages Indian tribes to serve as cooperating agencies for proposed actions such as the Project. *See* Enterprise MSJ at 20. Cooperating

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[8] CEQ is charged with overseeing and implementing NEPA and is entitled to "substantial deference" in the Act's interpretation. *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979). The Tribe's counsel previously served as General Counsel for CEQ and, in that capacity, was the principal draftsperson of NEPA's implementing regulations, 40 C.F.R parts 1500 to 1508.

[9] Indeed, a vast proportion of EISs are prepared by the entity proposing the action (*e.g.*, Department of Defense for a military base, Corps of Engineers for construction of a dam, etc.).

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agencies are authorized to help define the scope of an EIS, analyze data, and develop alternatives, among other things. 40 C.F.R. § 1501.6; 43 C.F.R. § 46.230.

III. INTERIOR COMPLIED WITH THE CLEAN AIR ACT

The Tribe incorporates Federal Defendants' arguments.

IV. INTERIOR COMPLIED WITH THE *CARCIERI* DECISION AND THE IRA

The Tribe's MSJ explained that (i) the IRA broadly authorizes Interior to acquire land in trust for "any recognized Indian Tribe…or the Indians residing on one reservation" that is "now under federal jurisdiction"; (ii) *Carcieri v. Salazar*, 555 U.S. 279 (2009) held that the phrase "now under federal jurisdiction" refers to the time of the IRA's enactment; (iii) immediately after the IRA's enactment, the United States convened the Tribe for a special IRA election; (iv) Interior reasonably concluded that the election demonstrates the Tribe was "under federal jurisdiction" at the time of the IRA's enactment; (v) Stand Up waived its arguments by failing to raise them during the administrative process; and (vi) Stand Up's arguments have been rejected by the United States District Court for the District of Columbia. Enterprise MSJ at 20-23.

The Tribe's MSJ noted that Stand Up only mentioned *Carcieri* on two occasions during the administrative process and explained that neither of the two mentions presented Stand Up's current position with sufficient clarity to satisfy the Ninth Circuit's strict waiver rules. Enterprise MSJ at 9-10, 22. Stand Up's response is a single footnote that fails to identify any additional evidence that its position was properly presented below. Stand Up Opp. at 14 n.15.

Even if Stand Up's claims were before the Court, they would fail on the merits. Stand Up's primary contention is that the special IRA election at Enterprise does not establish that the Tribe was a "tribe" for IRA purposes. Stand Up Opp. at 1-6. The argument boils down to speculation that Enterprise ***might*** not have participated in the special election as a tribe, but rather as (i) descendants of tribal members or (ii) individuals "of one-half or more Indian blood." *Id.* at 3-6. But there is no need to speculate. The record shows that Enterprise did, in fact, vote as a Tribe. *See* AR 29438 (Enterprise identified as a ***Tribe*** voting on the IRA). And even if the Enterprise voters had participated as "descendants" or "half-bloods," the Tribe would nonetheless meet the IRA's definition of "tribe." *See* 25 U.S.C. § 479; Enterprise MSJ at 22.

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Stand Up also argues that Interior erred by failing to make a specific finding that the Tribe was recognized by the United States at the time of the IRA's enactment. Stand Up. Opp. at 7-9. No such finding is required. *Carcieri*, 555 U.S. at 397-400 (Breyer, J concuring).[10] And, in any event, the record shows that Enterprise was recognized as a tribe at the relevant time. *See* AR 26793, 29438, 29799-800; *see also Edwards v. Pac. Reg'l Dir.*, 45 IBIA 42, 50-51 (2007).

It bears repeating (*see* Enterprise MSJ at 23) that Stand Up unsuccessfully made these same arguments to the United States District Court for the District of Columbia. *See Stand Up for California v. United States Dep't of the Interior,* 919 F. Supp. 2d 51, 66-70 (D.D.C. 2013). In a thorough and well-reasoned opinion, that court held that Stand Up's IRA claims were

> unlikely to succeed on the merits because…it was rational for [Interior] to conclude that the [ ] Tribe was 'under federal jurisdiction' based solely on the 1935 IRA election…

Stand Up, 919 F. Supp. 2d at 67. Stand Up's second bite at the apple is no more convincing than its first, and the result should be the same.

V. INTERIOR COMPLIED WITH 25 C.F.R. PART 151

The Tribe incorporates Federal Defendants' arguments and submits 3 additional points:

(1) The record shows that (i) Tribal members suffer from extremely high rates of unemployment and poverty (AR 22974 (50% unemployed or earning less than $9,048)); (ii) the Tribe's only economically-viable land was taken in 1964 (AR 23561); and (iii) the Tribe's remaining land is a remote, steeply-sloped parcel that is accessible only by dirt roads and unsuitable for development (AR 517-19, 23333-40, 29755, 29794, 29814-15, 30214). This evidence is more than enough to support Interior's finding that the Tribe needs additional land.

(2) Colusa spends a considerable portion of its reply brief arguing that Interior erred by failing to investigate whether Congress terminated a portion of the Tribe in 1965. Colusa Opp.

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[10] Stand Up takes issue with the Tribe's reliance on Justice Breyer's concurrence, asserting that the *Carcieri* majority "pointedly did not endorse" it. Stand Up Opp. at 8. Not so. Nothing in the majority opinion contradicts Justice Breyer's conclusion that the IRA does not mandate formal recognition at the time of the IRA's enactment. The only courts to consider the matter since then have adopted Justice Breyer's reasoning and conclusions. *See Alabama v. PCI Gaming Auth.,* 2014 U.S. Dist. Lexis 49606, *49-50 (M.D. Ala. 2014); *Stand Up for California v. United States Dep't of the Interior*, 919 F.Supp. 2d 51, 66-69 (D.D.C. 2013); *see also* Solicitor's Opinion M-37029, 2014 WL 988828, * 17-26 (2014).

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at 4-6. Those arguments were fully reviewed and rejected by the Interior Board of Indian Appeals. *See Edwards,* 45 IBIA 42 at 52

(3) Colusa ultimately resorts to smear tactics, insinuating that the Tribe "padded" its membership and plans to exclude some members from Project benefits. Colusa at 4. These petty accusations are wholly irrelevant to Interior's compliance with 25 C.F.R. Part 151. They are also without basis: the entire Tribe will benefit from the Project. *See, e.g.,* AR 23339-40.

VI. INTERIOR COMPLIED WITH IGRA

The Tribe incorporates Federal Defendants' arguments and submits 2 additional points:

(1) UAIC's claim to use the Yuba Site "for cultural purposes" (UAIC at 15) is flat-out false. UAIC does not own the Yuba Site and has no right to use it. *See also* part II.A, *supra*.

(2) UAIC and Stand Up question the enforceability of Interior's mitigation measures. Stand Up Opp. at 14-17; UAIC Opp. at 15. Interior's RODs explicitly adopted each mitigation measure as a *binding condition* on the Project's approval, thereby rendering the measures fully enforceable. AR 29772-92, 30189-30209; 40 C.F.R. § 1503.3 ("mitigation…committed as part of the decision shall be implemented"). The Ninth Circuit has confirmed that federal agencies have continuing authority to enforce the terms of a ROD. *See Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998) ("if the agency does decide to enter into a mitigation measure, that measure shall be implemented"). Moreover, the Tribe remains committed to implementing all mitigation.

VII. PLAINTIFFS FAIL TO SATISFY APPLICABLE STANDARDS OF REVIEW

Plaintiffs' briefing is notable for its failure to confront applicable standards of review. Interior's decision-making is presumed valid and must be upheld if a reasonable basis exists (*Blank*, 693 F.3d at 109); its interpretations of IGRA and the IRA are entitled to "considerable" deference (*Chevron v. Nat. Res. Def. Council*, 467 U.S. 837 (1984)); and its interpretation of 25 C.F.R. parts 151 and 292 must be upheld unless "plainly erroneous" (*Decker v. Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1337 (2013)). Moreover, the Indian law canons of construction require that the IRA be "construed liberally" in the Tribe's favor. *See Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992). Plaintiffs simply have not satisfied the heavy burden of proof these standards impose.

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Dated: September 8, 2014

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2014, true and correct copies of **INTERVENOR-DEFENDANT'S REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT** were served electronically on all parties for which attorneys to be noticed have been designated, via the CM/ECF system for the U.S. District Court for the Eastern District of California.

Respectfully submitted,

Dated: September 8, 2014

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By: /s/ Matthew Adams

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