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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED AUBURN INDIANCOMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff

v.

SALLY JEWELL, et al.

Defendants

CITIZENS FOR A BETTER WAY, et al.

Plaintiffs

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY,

Plaintiff,

v.

KENNETH LEE SALAZAR, et al.,

Defendants

Civil Action No. 2:12-CV-3021-TLN-AC (Consolidated)

FEDERAL DEFENDANTS' CONSOLIDATED AND AMENDED REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

1 **TABLE OF CONTENTS**

2 INTRODUCTION 1

3 I. THE SECRETARY HAS AUTHORITY TO TAKE LAND IN TRUST FOR
4 ENTERPRISE UNDER THE IRA 1

5 II. THE SECRETARY COMPLIED WITH PART 151 5

6 III. INTERIOR COMPLIED WITH PART 292 7

7 A. The Department Properly Consulted With Nearby Indian Tribes 7

8 B. The Department Is Not Required To Guarantee That All Mitigation Measures Will Be
9 Enforced In Finding Gaming Would Not Be Detrimental To The Surrounding
10 Community. 8

11 C. Any Failure To Provide The FEIS To The Governor Of California Was Harmless Error.
12 10

13 IV. DEFENDANTS COMPLIED WITH NEPA 11

14 A. Auburn's and Colusa's Economic Impact Arguments Fail 11

15 B. Defendants Properly Analyzed Alternatives 13

16 C. Defendants Complied With Executive Order 11988 (Floodplains) 15

17 D. There Was Nothing Wrong In The Roles Played By Enterprise and AES 15

18 V. DEFENDANTS COMPLIED WITH THE CLEAN AIR ACT 17

19
20

1 **TABLE OF AUTHORITIES**

2 Cases

3 *'Ilio'ulaokalani v. Rumsfeld*, 464 F.3d 1083 (9th Cir. 2006) 12

4 *Am.'s Cmty. Bankers v. FDIC*, 200 F.3d 822 (D.C. Cir. 2000) 2

5 *Carcieri v. Salazar*, 555 U.S. 379 (2009) 4

6 *Christine A. May v. Acting Phoenix Area Director*, 33 IBIA 125 (1999) 6

7 *City of Lincoln City v. DOI*, 229 F. Supp. 2d 1109 (D. Or. 2001).. 6, 9

8 *Cnty. of San Diego v. Babbitt,* 847 F. Supp. 768 (S.D. Cal. 1994).. 11

9 *County of Charles Mix v. DOI*, 674 F.3d 898 (8th Cir. 2012) 6

10 *County of Sauk v. Midwest Reg'l Dir.*, 45 IBIA 201 (2007).. 5

11 *Environmental Defense Fund v. Corps of EngineersU.S. Army,* 470 F.2d 289 (8th Cir. 1972)...... 14

12 *George v. Bay Area Rapid Transit*, 577 F.3d 1105, 1011 (9th Cir. 2009).. 6

13 *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836 (9th Cir. 2013)................................. 15

14 *Havasupai Tribe v. Robertson*, 943 F.2d 32 (9th Cir.1991) 12

15 *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F. 3d 957 (9th Cir. 2002) 15

16 *Lands Council v. Powell*, 395 F.3d 1019 (9th Cir.2005) 14

17 *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569 (9th Cir. 1998) 14

18 *Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1103-04 (9th Cir. 2012) 9

19 *Residents in Protest-I-35E v. Dole*, 583 F. Supp. 653 (D. Minn. 1984)... 14

20 *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790 (8th Cir. 2005) 5

21 *Stand Up for California! v. U.S. Dept. of the Interior*, 919 F. Supp.2d 51 (D.D.C. 2012) ... 5, 14, 15

22 *United States v. John,* 437 U.S. 634 (1978).. 4

23 Statutes

24 25 U.S.C. § 465... 1, 4

25 25 U.S.C. § 476... 3

1 25 U.S.C. § 479 2
2 Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq.* 4
3 Regulations
4 25 C.F.R. § 151.10(b) 5
5 25 C.F.R. § 151.11(b) 5
6 25 C.F.R. § 151.11(c) 6
7 25 C.F.R. § 292.19(a) 7
8 25 CFR 151.11(b) 6
9

1 **INTRODUCTION**

2 Defendants are entitled to entry of judgment in their favor. The decisions at issue are amply
3 supported by the administrative record and fully comply with applicable statutes and regulations.
4 For the same reasons Plaintiffs' motions for summary judgment should be denied.[1]

5 **I. THE SECRETARY HAS AUTHORITY TO TAKE LAND IN TRUST FOR**
6 **ENTERPRISE UNDER THE IRA**
7
8 The Secretary concluded that statutory authority exists under the IRA to take land into trust
9 because in 1935, pursuant to the IRA, the Secretary called a Section 18 vote on the Enterprise
10 reservation and that "Section 18 election conclusively establishes that the Tribe was under federal
11 jurisdiction for *Carcieri* purposes." AR NEW 30214. Plaintiff Citizens objects that such a vote
12 does not establish that Enterprise was a tribe under federal jurisdiction at the time the IRA was
13 enacted: "The Secretary only determined that they were 'adult Indians,' and that the Rancheria
14 was, for Section 18 purposes, a reservation." ECF No. 128 at 4. However, this argument
15 demonstrates that statutory authority exists to take land into trust for Enterprise.

16 Section 465 of the IRA provides the Secretary authority to take land into trust "for the
17 purpose of providing land for Indians." 25 U.S.C. § 465. "Indians" is defined in Section 19 as

[1] Pursuant to Fed. R. Civ. P. 25(d), Sally Jewell is substituted for Kenneth Lee Salazar as Secretary of the Interior. For purposes of this brief, citations to the Administrative Record take the form AR NEW XXXX. The citations refer to the bates numbering EN_AR_NEW_XXXX which is found in the lower right hand corner of each page. The bates numbering prefix EN_AR_XXXX found at the bottom center of each page has been superseded. Interior's November 21, 2012 Record of Decision: Trust Acquisition of the 40-acre Yuba County site in Yuba County, California, for the Enterprise Rancheria of Maidu Indians of California (AR NEW 30166-30220) is referenced as "ROD," while the September 1, 2011 Record of Decision: Secretarial Determination Pursuant to the Indian Gaming Regulatory Act for the 40-acre Yuba County site in Yuba County, California, for the Enterprise Rancheria is referenced as "IGRA ROD. Plaintiff Cachil Dehe Band of Wintun Indians of the Colusa Indian Community is "Colusa," Plaintiff United Auburn Indian Community of Auburn Rancheria is "UAIC," and Plaintiffs Citizens for a Better Way, et al., are "Citizens." The Yumeka Maidu Tribe of the Enterprise Rancheria is "Enterprise." The Secretary of the Interior is "Secretary" while the Department of the Interior is "Department."

1 including (1) "members of any recognized Indian tribe now under Federal jurisdiction," as well as
2 (2) "all persons who are descendants of such members who were, on June 1, 1934, residing with
3 the present boundaries of any Indian reservation," and also (3) "all other persons of one-half or
4 more Indian blood." 25 U.S.C. § 479. As Citizens correctly notes, the Section 18 vote establishes
5 that Enterprise consisted of "Indians" under Section 19 of the IRA. But that point is sufficient to
6 bring the *Carcieri* inquiry to an end. Citizens' contention that we cannot know, based on the fact
7 of the Section 18 vote alone, whether Enterprise's members constituted a tribe is irrelevant so long
8 as Enterprise's members were "Indians" within the terms of the IRA. If they qualified as "Indians"
9 under the IRA, the Secretary may take land into trust for them.
10 Nevertheless, and despite Enterprise's attempts to confuse the issue, the Secretary properly
11 concluded that Enterprise met the first definition of Indian in the IRA. Indeed, Section 19, besides
12 defining "Indians," also defines "tribe" for purposes of the IRA and includes in that definition "the
13 Indians residing on one reservation." *Id.* Therefore, the adult Indians residing on the Enterprise
14 Rancheria who were eligible to vote in the Section 18 election also constituted a tribe under federal
15 jurisdiction for purposes of the IRA.
16 Citizens argues that this is an impermissible post hoc rationalization. ECF No. 128 at 9-10.
17 There is nothing post hoc about it. The plain language of Section 19 explains why the Section 18
18 vote demonstrates that there was authority under the IRA to take land into trust. *See Am.'s Cmty.*
19 *Bankers v. FDIC*, 200 F.3d 822, 836 (D.C. Cir. 2000) (an agency may permissibly offer an
20 argument "in support of its administrative position which bolsters rather than duplicates the
21 consistent position upon which its decision was made"); *Caritas Med. Ctr. v. Johnson*, 603 F.
22 Supp. 2d 81, 92 (D.D.C. 2009) (rejecting the argument that an agency's justifications were

1 prohibited "post-hoc rationalizations" because "[w]hile the defendant's arguments in this litigation
2 expand on the points raised in the text of the final rule, [its] position has not changed").
3 The plain language of the statute is hard to get around, but Citizens tries. They misread a
4 1934 Solicitor's Opinion to suggest Interior did not regard residents of reservations as constituting
5 tribes under the IRA. ECF 128 at 11. That Opinion construes the notion of "residency" for
6 purposes of Section 18. In that opinion, the Solicitor notes that residence has to mean something
7 more than physical presence on the reservation on the day of the IRA vote, and concludes
8 residence will be established by meeting two qualifications: (1) residence which is "not simply
9 physical presence but the maintenance of a home," and (2) a "legal interest in the affairs of the
10 reservation." ECF No. 100-8 at 486. Thus, because a Section 18 vote was held for Enterprise,
11 those voting consisted of adult Indians residing on the Reservation in more than just a temporary
12 manner who also had a legal interest in the Reservation. Indians meeting those two qualifications
13 are "residents" of a reservation for IRA purposes and thus constitute a tribe under Section 19.
14 Citizens relies on the same Opinion to assert that Interior viewed tribal organization under
15 the IRA as voluntary in order to argue that Section 19 does not mean what it says. ECF 128 at 10.
16 But the relevant portion of the Opinion, "Question 4," ECF 100-8 at 487, is addressed to Section
17 16 of the IRA which concerns the right of tribes to reorganize their tribal governments pursuant to
18 the IRA, 25 U.S.C. § 476, and that Section is not at issue here. The Solicitor explains that the IRA
19 "contemplates two distinct and alternative types of tribal organization" eligible to utilize Section
20 16: (1) entities that the Department concluded were an Indian tribe "without regard to any
21 requirements of residence" and (2) entities consisting of the residents of a reservation who can
22 "organize without regard to past tribal affiliations." ECF 100-8 at 487. The latter type of
23 organization under Section 16 is voluntary, as Citizens notes, but it is only available to such

1 residents of a reservation because, as the Solicitor explains, those residents were already
2 "considered a tribe for purposes of this act, under section 19." *Id.*[2]
3 Citizens also argues that the term "recognized" in the phrase "recognized Indian tribe now
4 under Federal jurisdiction" means a tribe must have been recognized at the time the IRA was
5 enacted (even though Enterprise was). ECF 128 at 7-8. As they concede, ECF 128 at 7, the
6 nearest-reasonable-referent canon argues against this: "recognized" modifies "tribe" and the phrase
7 "now under Federal jurisdiction" modifies "tribe," but "recognized" and "now under Federal
8 jurisdiction" do not modify each other. Moreover, as Citizens notes, Justice Breyer's reading of
9 the statute in *Carcieri*[3] supports Interior's own deference-deserving interpretation, and he is the
10 only Justice on the Court to have considered the issue.[4]
11 Citizens asserts the phrase "recognized Indian tribe" is a legal term of art. ECF 128 at 8.
12 But that is wrong and as noted in the Federal Defendants' opening brief, ECF 116-1 at 15-16, both
13 Interior and a federal court have wrestled with what "this ambiguous statutory term" meant in

[2] Citizens also wonders if a tribe created upon enactment of the IRA by virtue of Section 19's definition of "tribe" ceases to exist upon rejecting the IRA in a Section 18 vote. ECF 128 at 11n.12. Tribes that rejected the IRA pursuant to Section 18 did lose the right to have land taken in trust under the IRA as a result of that vote, but Congress brought such tribes back within reach of the IRA by enacting the Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq*.. That Act "by its terms simply ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478," and applies to "those who satisfied the definition of 'Indian' in § 479 at the time of the statute's enactment but opted out of the IRA shortly thereafter." *Carcieri v. Salazar*, 555 U.S. 379, 394-95 (2009).

[3] The Court in *Carcieri* did not purport to construe anything other than the meaning of the phrase "now under Federal jurisdiction," contrary to Citizens assertion otherwise, ECF 128 at 12. *See Carcieri*, 555 U.S. at 381. Similarly, *United States v. John* did not address the meaning of "recognized" and only suggested in passing dicta that recognition was required in 1934. 437 U.S. 634, 650 (1978).

[4]Citizens argues that Justice Breyer's examples of occasions where Interior recognized a tribe subsequent to the enactment of the IRA suggest that Justice Breyer really supports a view that recognition must be contemporaneous. But Justice Breyer's examples are just that: examples. They are not meant to define the universe of ways a tribe could be under federal jurisdiction in 1934 yet not recognized until later.

1 1934. *Stand Up for California! v. U.S. Dept. of the Interior*, 919 F. Supp.2d 51, 70 (D.D.C. 2012)
2 (finding the Department's interpretation of "recognized" deserves judicial deference and adopting
3 Department's interpretation that "recognized Indian tribe" "in the IRA refers to recognition in the
4 cognitive or quasi anthropological sense").

5 The Federal Defendants explained in their opening brief that even if Citizens were right
6 (contrary to Interior's construction of the statute) that "recognized" equates to the modern notion
7 of "federal recognition," Enterprise was a federally recognized tribe as of 1915. ECF No. 116-1 at
8 15-16.[5] That conclusion is documented in the Administrative Record and so is not a post hoc
9 argument. AR NEW 29799. Citizens' arguments, therefore, do not advance their cause.

10 **II. THE SECRETARY COMPLIED WITH PART 151**

11 Auburn, ECF 126 at 11-12, and Colusa, ECF 130 at 3, assert that the Secretary failed to
12 give heightened scrutiny to the benefits of the acquisition pursuant to 25 C.F.R. § 151.11(b) and
13 claim heightened scrutiny also applies to the analysis of a tribe's need for land under 25 C.F.R. §
14 151.10(b). ECF 126 at 11-12. As the plain language of Part 151.11(b) makes clear, the heightened
15 scrutiny requirement does not apply to the analysis of a tribe's need for land.[6] As to the
16 Department's analysis of the anticipated benefits of the acquisition, Plaintiffs again fail to meet
17 their burden of under the APA and the land-into-trust regulations to specify the shortcomings in

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[5] Citizens' speculations about the significance of the federal census do not make the Secretary's reliance upon it unreasonable, particularly since their concerns do not appear to have been voiced in the agency proceedings.

[6] Both Auburn, ECF 126 at 12n.6 and Colusa, ECF 130 at 1-2, attack the Federal Defendants' reliance on *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 801 (8th Cir. 2005). But that case says exactly what it was cited for: that the Secretary fulfills the requirements of 25 C.F.R. § 151.10(b) if she "express[es] the Tribe's needs and conclude[s] generally that IRA purposes were served," which was done here. Further, the Interior Board of Indian Affairs has expressly rejected the notion that the regulation requires an examination of whether other land, including land already owned by a tribe, could address the need. *County of Sauk v. Midwest Reg'l Dir.*, 45 IBIA 201, 212 n.13 (2007).

1 the Department's consideration. *George v. Bay Area Rapid Transit*, 577 F.3d 1105, 1011 (9th Cir.
2 2009) (plaintiff bears burden of proof under APA); *Christine A. May v. Acting Phx. Area Dir.*, 33
3 IBIA 125, 134 (1999) (plaintiff bears burden to demonstrate noncompliance with land to trust
4 regulations). The Department carefully considered the parcel's off-reservation location pursuant to
5 Part 151.11(b) and then carefully considered the anticipated benefits pursuant to Part 151.11(c)
6 with the appropriate level of scrutiny as shown by the fact that no Plaintiff has been able to suggest
7 any flaw in that consideration. AR NEW 30218.

8 Colusa asserts that the regulations require the Secretary to consider to whether other parcels
9 closer to a tribe's reservation could provide similar benefits. ECF 130 at 3. The regulation only
10 requires consideration of "the anticipated economic benefits associated with the proposed use." 25
11 C.F.R. § 151.11(c).[7] In any event, the Department considered, in detail, whether "more proximate
12 economic opportunities" existed as alternatives to taking the Yuba parcel in trust. As discussed in
13 the Federal Defendants' opening brief, the Department considered a range of alternative sites
14 pursuant to NEPA, including a number of sites in Enterprise's aboriginal territory and elsewhere,
15 but they were rejected for various reasons, including the fact that they were not economically
16 viable alternatives. ECF 116-1 at 34-39. Accordingly, Colusa's argument for consideration of

[7] To be sure, in promulgating the regulation, the Department stated in response to comments that "It should be noted that the absence of more proximate economic opportunities would provide part of the 'greater justification' required by 25 CFR 151.11(b)." Land Acquisitions (Nongaming), 60 Fed. Reg. 32874-01, 32876 (June 23, 1995). However, comments in the rulemaking process cannot impose requirements that are not found in the language of the regulations themselves. *Wyo. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) ("language in the preamble of a regulation is not controlling over the language of the regulation itself"). In any event, the Department need not repeat in the context of its Part 151 analysis an analysis that it performed elsewhere in the ROD and FEIS as long as it is clear that the relevant factor was considered as part of the decision. *See City of Lincoln City v. DOI*, 229 F. Supp. 2d 1109, 1122-1123 (D. Or. 2002) (upholding Department decision because "the administrative record shows that the BIA considered [the Part 151] factors"); *County of Charles Mix v. DOI*, 674 F.3d 898, 903-904 (8th Cir. 2012) (rejecting plaintiff's argument that BIA failed to consider various aspects of tribe's need for land where either the Secretary or the Acting Regional Director addressed them).

closer potential economic opportunities lacks merit because the Secretary did precisely that as part of the NEPA analysis.

III. INTERIOR COMPLIED WITH PART 292

A. The Department Properly Consulted With Nearby Indian Tribes.

Auburn relies upon a Yuba County 2005 advisory vote referendum in which opposition to the gaming facility outweighed support by a bare four percent margin to argue the Secretary had no reasonable basis to find "strong local support" for the gaming facility. ECF 126 at 12-13. But the Secretary acknowledged local opposition and such opposition does not preclude local support as well – the result of the very vote Auburn relies upon shows considerable support. The Secretary reasonably found local support in the fact that the democratically elected governments of Yuba County and the City of Marysville have had an on-going relationship with Enterprise since 2005 and have successfully concluded Memoranda of Understandings with the tribe in connection with the proposed gaming facility. AR NEW 29817.

Auburn complains that the Department failed to consider late comments submitted on November 3, 2010, well outside the Department's IGRA regulations' 60 day comment period, 25 C.F.R. § 292.19(a).[8] Comments received outside the comment period, like these submitted six months late, were not required to be considered by the Department.

That late letter did not warrant consideration in any event. Auburn alleges that the November 3, 2010 comments undermine the Department's conclusion that Auburn failed to offer "specific evidence that is sufficient to demonstrate that it has an exclusive significant historical connection to the Site." ECF 126 at 14 (quoting AR NEW 29818). The letter impugns a State government body, the California Native American Heritage Commission whose members are

[8] The late submission occurred even though Auburn received an extension. AR NEW 26813.

appointed by the Governor of California with the advice consent of the State Senate, California Public Resources Code §5097.91, a public entity upon whom the Department appropriately relied. ECF 54-3 (Auburn November 3, 2010 letter). The letter also asserts that Auburn's service area encompasses Yuba County, a fact considered by the Secretary. AR NEW 29817. And finally it asserts that the Department should not rely on Enterprise's constitution to find a significant connection with the Yuba site. But the Department was mainly guided by the fact that State and federal agencies viewed Enterprise as having such a connection. AR NEW 29799. The Department's conclusion that Auburn failed to demonstrate an *exclusive* connection to the Yuba site was warranted.

Finally, Auburn reiterates that competition with a new gaming facility at the Yuba site will impact the revenues of its own facility which in turn may affect the tribe fiscally. However, because those impacts derive from business competition – Auburn having to share the gaming market with another tribe – the Department was not required to consider them, as explained in our opening brief. ECF 116-1 at 40-41 (citing cases for the proposition that IGRA does not protect tribes from competition by other tribes).

B. The Department Is Not Required To Guarantee That All Mitigation Measures Will Be Enforced In Finding Gaming Would Not Be Detrimental To The Surrounding Community.

The Secretary noted that the FEIS "indicates that the Tribe has worked with the local communities to identify and mitigate any environmental impacts of the proposed Resort," and concluded that the gaming facility would not have a "detrimental impact to the environment in the area." AR NEW 29816. Citizens asks this Court to overturn the IGRA ROD because concrete measures to ensure that all mitigation measures will be carried out have not been put in place. ECF 128 at 14-17. The Federal Defendants pointed out that neither NEPA nor IGRA imposes

1 such an unworkable precondition on the Department. ECF 116-1 at 18-21. Citizens rejoins that
2 the fact that their argument is wholly unsupported by any relevant law "misses the point," and says
3 that because the Secretary relies upon the FEIS in finding no detriment, the Secretary has
4 shouldered the responsibility of guaranteeing all mitigation will be enforced. ECF 128 at 15. But
5 the Secretary said no such thing. Moreover, the Secretary is entitled to rely upon the FEIS and its
6 mitigation measures in considering whether there will be detrimental impacts to the environment in
7 making a Secretarial Determination under IGRA.

8 The Mitigation measures of the FEIS are identified in Section 5.0 of the FEIS. AR NEW
9 22262-309. Further, the FEIS contains a Mitigation Monitoring and Enforcement Program
10 ("MMEP") which identifies for each proposed mitigation measure the party responsible for
11 monitoring and reporting on the mitigation and the timing for when the mitigation will occur. AR
12 NEW 26701-61. The MMEP provides the means by which implementation of mitigation measures
13 will be verified and by whom. Citizens' proposed interpretation of the Secretary's responsibilities
14 under IGRA allows it to argue that the Secretarial Determination must be overturned because it
15 does not foreclose speculation about whether Enterprise and other parties will carry out their
16 mitigation commitments, even though such speculation is foreclosed under NEPA. *See Pac. Coast*
17 *Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1103-04 (9th Cir. 2012). Citizens' proposed
18 interpretation further allows it to second guess the Secretary's reliance on a tribe's representations
19 about what it will do with land once it is placed in trust, ECF 128 at 16, even though courts have
20 held that the "BIA is permitted to rely on the Tribe's representations that it would undertake
21 mitigation measures." *City of Lincoln City*, 229 F. Supp. 2d. at 1127. Such speculation provides

no basis for a claim under the APA, NEPA, or IGRA and provides no basis to overturn the Secretarial Determination here.[9]

C. Any Failure To Provide The FEIS To The Governor Of California Was Harmless Error.

Citizens correctly notes that error is only harmless in the administrative context where it "*clearly* had no *bearing* on the procedure used or the substance of the decision reached." *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004). If the Secretary omitted the FEIS from the package of materials provided to the Governor of California to consider (the Department cannot verify whether it was sent), its omission *clearly* had no *bearing*. The requirement that NEPA materials be considered in making the Secretarial Determination, 25 C.F.R. § 292.18(a), is stated in the Secretary's request for the Governor's concurrence, along with the fact that the notice of the FEIS had issued in the Federal Register on August 6, 2010. AR NEW 30006-07. The August 6 Federal Register Notice, in turn, provided a website where the FEIS could be accessed. 75 Fed. Reg. 47618; AR NEW 28249. The Governor's Office had clear notice of the FEIS and had it wished to review it before concurring with the Secretary, it could have easily acquired it from the Secretary by simply asking.

Citizens notes that the Governor's Office did not have the comment letters that were written in response to the publication of the FEIS. ECF 128 at 18-19. But those were not part of the FEIS, postdating it, and were instead addressed in the 2011 IGRA ROD. AR NEW 29771 (IGRA ROD noting that comment letters were addressed by the BIA); AR NEW 28512-629 (comment letters and BIA responses). In short, Section 292.18(a) requires that an application for a

[9] Citizens wonders if Enterprise will ever negotiate agreements relating to things like fire protection and traffic, things that are in Enterprise's own best interest if it wants to operate a safe and viable gaming facility and which therefore one can reasonably conclude it would be highly motivated to achieve. ECF 128 at 15. The Secretary reasonably, in the NEPA and IGRA context, can expect Citizens to negotiate such necessary agreements.

1 Secretarial Determination contain "Information concerning environmental impacts and plans for
2 mitigating adverse impacts, including information that allows the Secretary to comply with the
3 requirements of [NEPA], e.g., . . . an Environmental Impact Statement." The FEIS was part of the
4 "application record" that 25 C.F.R. § 292.22(b) requires the Department to send to the Governor,
5 but comment letters post-dating the FEIS were not.[10]

6 **IV. DEFENDANTS COMPLIED WITH NEPA**

7 **A. Auburn's and Colusa's Economic Impact Arguments Fail**

8 First, arguments based on Colusa's and Auburn's prospective loss of gaming revenues were
9 waived.[11] The 2008 Draft EIS ("DEIS") specifically commented that other area tribes would lose
10 gaming revenue if Enterprise were allowed to enter the market, characterizing those losses as "less
11 than significant." AR NEW 12338. The comment period on the draft EIS closed on May 5, 2008.
12 AR NEW 15270. More than a month after the comment period closed, Colusa requested
13 "consultation." AR NEW 26980. BIA responded that Colusa did not meet the 25-mile rule for
14 consultation, but specifically invited Colusa to establish an exception to that rule by showing that

[10] Citizens also complains that the Secretary, in making the 2011 Secretarial Determination, should have considered all the information before her, both as part of the administrative process of making the Secretarial Determination that resulted in the 2011 ROD and as part of the fee-to-trust decision that resulted in the 2012 ROD. ECF 128 at 20. As a practical matter, information collected as part of one process was utilized and considered in the other, as with the FEIS for the fee-to-trust decision, because the Secretarial Determination process was enfolded within the fee-to-trust decision process. Citizens' goal, here, is to position itself to attack the 2011 ROD for not expressly addressing information collected as part of the Part 151 process utilized for the 2012 ROD and to attack the 2012 ROD for not expressly addressing information collected as part of the Part 292 process utilized in the 2011 ROD. It is sufficient that the relevant information for each administrative process was addressed in that process.

[11] Colusa (ECF 130 at 12-13) argues that it could not preserve the issue because its revenue data is confidential, but a NEPA commenter can request nondisclosure of "confidential commercial and financial information" (*Cnty. of San Diego v. Babbitt,* 847 F. Supp. 768, 773 & n.2 (S.D. Cal. 1994)), and neither Colusa nor Auburn did so. Also, if Colusa is unwilling to divulge its gaming revenues we do not understand how BIA is supposed to analyze potential impacts upon those revenues.

1 the tribe's "governmental functions, infrastructure or services will be directly impacted by the
2 proposed gaming establishment." AR NEW 30289 (ECF 113-1). Colusa never took up that
3 invitation. Instead, on September 7, 2010, Colusa sent a letter critiquing BIA's final EIS -- more
4 than two years after the comment period on the draft EIS had closed, and more than two years after
5 BIA had invited Colusa to demonstrate its entitlement to an exception to the 25-mile rule. Colusa
6 now cites the 2010 letter as showing that it has not waived any of its arguments. ECF 130 at 8,
7 citing ECF 36-2 at 40-49 (AR NEW 28549-58). The letter preserves those NEPA issues raised
8 because it was appropriately submitted during the final comment period on the FEIS, but not
9 Colusa's newly-developed arguments about impacts on its own gaming revenues.[12] *Havasupai*
10 *Tribe v. Robertson*, 943 F.2d 32, 33-34 (9th Cir.1991) (plaintiff failed to raise its claims during the
11 public comment period, despite the fact that its comments were specifically solicited). The same is
12 true of Auburn's argument along the same lines. *See* ECF 116-1 at 42 n.30.[13]
13 Second, purely economic injury is not cognizable under NEPA. *Portland Audubon Society*
14 *v. Hodel*, 866 F.2d 302, 309 (9th Cir.1989) ("NEPA provides no protection for ... purely economic
15 interests") (citing *Donaldson v. United States*, 400 U.S. 517, 531 (1971)) (abrogated on other
16 grounds, *Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011)); *Nev. Land Action*
17 *Ass'n v. U.S. Forest Serv*., 8 F.3d 713, 716 (9th Cir.1993) ("a plaintiff who asserts purely
18 economic injuries does not have standing to challenge an agency action under NEPA.") As noted
19 in our main brief (ECF 116-1 at -39-40), *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934 (9th

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[12] In challenging BIA's analysis of alternatives under NEPA Colusa does devote one paragraph to a critique of BIA's contractor's gaming revenue analysis, but it does not raise an issue regarding the amount by which Colusa's gaming revenues will be lost to new competition. AR NEW 28552.

[13] The case Colusa relies upon is inapposite, because there the issue plaintiffs raised had been pursued by others. *'Ilio'ulaokalani v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006) ("The Army had independent knowledge of the very issue that concerns Plaintiffs in this case"). Naturally, no commenter other than Colusa was in a position to comment on likely impacts to Colusa revenues.

Cir. 2005) is squarely on point. *See* 420 F.3d at 940, and cases there cited. Both Colusa and Auburn argue that their casino revenues *are* protected by NEPA because those revenues may be used to promote environmentally oriented projects, and are also used to provide tribal services. The former point would swallow the rule that NEPA does not protect purely economic interests, because *any* economically-impacted NEPA challenger could promise eco-friendly expenditures. The latter point is self-defeating, unless Auburn and Colusa believe that the Secretary is obligated to protect *their* government services while ignoring Enterprise's. And in any event, these types of issues can be and are more appropriately raised in the Part 292 consultation process.

Third, the record supports BIA's determinations. According to the Technical Memo prepared by The Innovation Group (AR NEW 24883) Enterprise's "capture rate" for the entire Thunder Valley market (where Auburn's casino is located) is 5 percent; for the Colusa market, 7.5 percent. AR NEW 24892-93. These figures amply support the conclusion, as to Colusa and Auburn, that "[r]egardless of the scenario, there is no casino whose existence is threatened. In fact, given the low levels of per casino cannibalized revenue, it is likely that each of the casinos will continue to be at least as large as they are today and continue to generate positive cash flows for each of their host tribes." AR NEW 24812-13.[14]

B. Defendants Properly Analyzed Alternatives

Enterprise proposed that BIA take a particular parcel of land into trust so that Enterprise could build and operate a casino and related amenities of a certain scale. In evaluating that proposal under NEPA, BIA considered:

- Enterprise building a casino on its existing land, rather than newly-acquired land;

[14] As noted in our main brief (ECF 116-1 at 41-42) the "gravity model" analysis performed by Gaming Market Advisors projected a greater, but still modest, reduction in revenue for the Thunder Valley market (13.8 percent).

1 • Enterprise building a casino on the proposed tract, but of greatly reduced size;
2 • Enterprise building a non-gaming facility (a waterpark) on the proposed tract; and
3 • Doing nothing.

4 In addition, BIA considered (in less detail) three additional potential gaming sites that would need
5 to be acquired. On its face this is, conceptually, a reasonably broad spread of alternatives. *Stand*
6 *Up for California!* 919 F. Supp. 2d at 77-79.

7 In our opening brief, we exhaustively addressed Plaintiffs' arguments regarding these
8 alternatives and the statement of purpose and need in the light of which they were evaluated. ECF
9 116-1 at 33-39. Here we only note, first, that Plaintiffs nowhere identify a viable alternative that
10 was not considered, which is fatal to their arguments. *Morongo Band of Mission Indians v. F.A.A.*,
11 161 F.3d 569, 576-77 (9th Cir. 1998). We also note that Plaintiffs' arguments completely lose
12 sight of the purpose of NEPA, which is an *environmental* statute. The purpose of alternatives
13 analysis under NEPA is to consider "any choices or alternatives that might be pursued *with less*
14 *environmental harm*." *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir.2005) (emphasis
15 added); *see also Residents in Protest-I-35E v. Dole*, 583 F. Supp. 653, 659 (D. Minn. 1984) ("The
16 rationale for [the alternatives analysis] requirement is that the responsible decision maker should
17 be informed about the environmental consequences of each alternative prior to making his decision
18 so that he may balance the extent to which an alternative meets the project's goals against the
19 damage that will occur to the human environment") (citing *Environmental Defense Fund v. U.S.*
20 *Army Corps of Engineers,* 470 F.2d 289 (8th Cir. 1972)). Plaintiffs nowhere challenge the
21 Secretary's conclusions that the alternatives studied (other than the no-action alternative) would
22 offer little environmental benefit (although some would generate less traffic). AR NEW 23392-93.
23 Auburn's argument that BIA's stated purposes "preordained" the outcome thus ignores the fact
24 that the goal of the analysis was to determine whether those purposes could be acceptably served

by a project presenting a significantly more benign environmental profile. BIA concluded that they could not, and Plaintiffs nowhere provide the Court a basis for questioning that conclusion.

C. Defendants Complied With Executive Order 11988 (Floodplains)

In our main brief (ECF 116-1 at 42-43) we showed that, while neither Plaintiffs nor BIA specifically invoked EO 11988 during the NEPA process, BIA extensively considered the relevant floodplain issues. Citizens seeks to excuse its failure to raise EO 11988 by the bald assertion that "[t]here is no exhaustion requirement for EO 11198 . . ." (ECF 128 at 21 n.27), with which the Ninth Circuit appears to disagree. *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 849 (9th Cir. 2013) ("By citing EO 11988, Great Old Broads exhausted this claim."). On the merits Citizens' argument boils down to their critique of BIA's alternatives analysis (ECF 128 at 22), to which we have responded here and in our main brief.

D. There Was Nothing Wrong In The Roles Played By Enterprise and AES

Auburn (ECF 126 at 8-9) argues that Enterprise's dual role as project proponent and cooperating agency, and Enterprise's involvement in the contractor's NEPA work, creates a conflict of interest invalidating that work. No supporting caselaw is cited, and we are aware of none. On the contrary, similar arguments on virtually identical facts were rejected in *Stand Up for California!*, 919 F. Supp. 2d at 80. We also note that Enterprise's "dual … role" (ECF 126 at 8-9) has been known at least since January 2008, when the cover page of the draft EIS prominently identified Enterprise as a cooperating agency. AR NEW 11782. It is too late to make an issue of it now. *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F. 3d 957, 965 (9th Cir. 2002).

As we noted in our main brief (ECF 116-1 at 45 n.33), no statute or regulation supports Auburn's assertion that AES was required to sign a disclosure statement *under oath*. Auburn insists otherwise (ECF 126 at 8-9), but their citation is to an *illustrative exemplar* in the appendices

to BIA's handbook; the handbook itself, like the regulations, is silent on the subject, and even were it otherwise, the Handbook is nonbinding. ECF 116-1 at 45 n.33.

Auburn asserts that "[b]esides an initial scoping meeting, there is no evidence in the record that BIA oversaw AES." ECF 126 at 8. That is incorrect. As but one example, at AR NEW 1596 and 1597-1604, the Court will find extensive, detailed comments by the Acting Deputy Assistant Secretary. There are many more illustrations of BIA's actively reviewing and guiding AES's work. *See*, *e.g.*:

- AR NEW 1014, 1027: BIA comments on EA;
- AR NEW 1556: email transmitting BIA comments on the draft EA to the Assistant Secretary at DC headquarters (actual comments at AR NEW 1557);
- AR NEW 1561: memo from Regional BIA natural resources officer to the regional BIA forester requesting assistance with the review of the draft EA (responsive memo from BIA forester at AR NEW 1563);
- AR NEW 1562: memo from Regional BIA natural resources officer to Regional BIA roads engineer requesting assistance with the review of the draft EA;
- AR NEW 1605: Memo from the Assistant Secretary to Regional BIA director providing extensive comments and criticism on the draft EA, including section-by-section feedback;
- AR NEW 2261: Fax from AES to Regional BIA transmitting biological resources assessment for further submission to FWS as part of BIA's request for Section 7 consultation under the Endangered Species Act; the purpose of the study was to "update earlier work…at the request of the Secretary of the Interior" (AR NEW 2263);
- AR NEW 2295: communication between Regional BIA employees describing their review of the EA and providing the distribution list for the EA.
- AR NEW 4015: fax from AES to Regional BIA transmitting administrative draft copy of draft EIS for BIA's review.
- AR NEW 4016: dozens of handwritten notes containing comments and criticisms from BIA on portion of draft DEIS;
- AR NEW 11735: fax from AES to BIA transmitting copy of DEIS for BIA's "final review;"
- AR NEW 28421: email from AES employee to Regional BIA seeking direction on whether to include comments on the fee-to-trust application in the decision package;
- AR NEW 28422: email from AES employee to Regional BIA thanking BIA for review comments on decision package and stating that AES will make the revisions as quickly as possible.

1 **V. DEFENDANTS COMPLIED WITH THE CLEAN AIR ACT**

2 Plaintiffs do not dispute that in determining whether indirect emissions from the project
3 will exceed the *de minimis* levels, and thus require a conformity determination, the only emissions
4 to be considered are those that occur in the same nonattainment or maintenance area as the federal
5 action. ECF No. 128 at 22-23. Plaintiffs do, however, point out that the relevant nonattainment
6 area, i.e., the Yuba City-Marysville nonattainment area, includes Sutter County as well as portions
7 of Yuba County. While true, that fact does not significantly alter the analysis presented in BIA's
8 brief, ECF No. 116-1 at 48-50, or change the ultimate determination that no conformity analysis
9 was required. The analysis described in BIA's brief estimated emissions within 20 miles of the
10 facility. Because nearly all of Sutter County is within 25 miles of the facility, this analysis
11 includes most of the emissions within Sutter County, as well as those within Yuba County.
12 Moreover, performing the same analysis considering emissions within 30 miles of the facility,
13 which will clearly overstate the emissions in the nonattainment area, results in calculated
14 emissions of 88 tons per year, which is still below the *de minimis* level of 100 tons per year. Thus,
15 no conformity analysis was required.

16 Plaintiffs' assertion that this analysis underestimates emissions because FEIS Table 4.4.1
17 considers one-way trips is meritless. The analysis in the brief is based on the percentage of total
18 trip miles that occur in the nonattainment area, and properly compares one-way distance within the
19 nonattainment area to the total one-way distance travelled to the facility. The percentage would be
20 the same if round trip miles were compared to round trip miles because the doubling of miles in
21 both numerator and denominator would cancel out. Plaintiffs are also incorrect in arguing that
22 BIA's analysis is based on asserted errors in the URBEMIS program. BIA is not asserting that the
23 modeling was incorrect, but that the value calculated for the total emissions associated with the

project is not the appropriate value to use for determining whether a conformity analysis is required. As explained in BIA's original brief, and as Plaintiffs have not disputed, only those emissions occurring in the Yuba City-Marysville nonattainment area considered for that purpose.

BIA is also not claiming an error in the URBEMIS modelling in asserting that actual emissions will be lower than those calculated in the FEIS because of lower vehicle emission rates. ECF No. 116-1 at 50. Rather, BIA's argument is that use of the model with emission rates appropriate for the actual date when the facility begins operation will result in considerably lower total emissions than those calculated using 2010 emission rate values, a fact noted in the FEIS cumulative effects analysis. AR NEW 23774. Finally, BIA is not relying on mitigation measures to demonstrate that no conformity determination was necessary. The analysis presented in the brief and discussed above demonstrates that emission within the nonattainment area will be below the *de minimis* level without mitigation. The brief simply noted that mitigation measures will further reduce emissions.

CONCLUSION

Respectfully submitted this 8th day of September, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2014, I electronically filed the foregoing Federal Defendants' Consolidated Reply in Support of Summary Judgment with the Clerk of the Court using the CM/ECF system which will send notification of such to counsel of record.

/s/*Peter Kryn Dykema*
PETER KRYN DYKEMA