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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff,

v.

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

Defendants.

CASE NO. 2:12-CV-03021-TLN-AC

PLAINTIFFS CITIZENS FOR A BETTER WAY, STAND UP FOR CALIFORNIA!, GRASS VALLEY NEIGHBORS, WILLIAM F. CONNELLY, JAMES M. GALLAGHER, ANDY VASQUEZ, DAN LOGUE, ROBERT EDWARDS, AND ROBERTO'S RESTAURANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT FOR CITIZENS

CITIZENS FOR A BETTER WAY, *et al.*,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Defendants.

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INTRODUCTION

This case challenges a decision by the Secretary of the Interior ("Secretary") to transfer 40 acres of land in Yuba County (the "Yuba site") into trust for the Estom Yumeka Maidu Tribe of Indians of the Enterprise Rancheria ("Enterprise") for an off-reservation casino.[1] Citizens for a Better Way, Stand Up for California!, Grass Valley Neighbors, William F. Connelly, James M. Gallagher, Andy Vasquez, Dan Logue, Robert Edwards, and Roberto's Restaurant (collectively, "Citizens") are neighbors, non-profits, community leaders, Native Americans and businesses, each of which objects to the detrimental impacts the project will have on their community.

In making this decision, the Secretary committed several legal errors. First, the Secretary exceeded her authority under the Indian Reorganization Act ("IRA") by adopting a flawed construction of Section 18 of the Act, which is inconsistent with the statutory language, a contemporaneous interpretation of the provision, and with the Secretary's position in other pending litigation. The Secretary also violated the Indian Gaming Regulatory Act ("IGRA"), by improperly dismissing significant impacts as mitigated to conclude that gaming "would not be detrimental" to the surrounding community and by failing to send the Governor the entire application record to allow him to review her determination on an informed basis. The Secretary additionally violated the National Environmental Policy Act ("NEPA") and the Clean Air Act ("CAA"), by failing to comply with basic regulatory requirements.

For the reasons set forth in this Memorandum, the Court should grant Citizens' Motion for Summary Judgment and order the removal of the Yuba site from federal trust.

BACKGROUND

In 1906, a special agent for the Office of Indian Affairs prepared a report on the status of California Indians recommending that Congress appropriate "a sufficient sum for the purchase of land . . . where the Indians live[,] to be allotted or assigned to them in small tracts." *See* Att. 1 to

[1] Defendants are the Secretary of the Interior ("Secretary"), the Assistant Secretary-Indian Affairs, the Bureau of Indian Affairs ("BIA"), and the Department of the Interior ("Department"). This Memorandum primarily refers to the Secretary, as the entity ultimately responsible for the final decisions in this case.

Request for Judicial Notice ("RJN") (Report of C.E. Kelsey at 15–16 (Mar. 21, 1906)). Congress appropriated money for that purpose by Acts of June 21, 1906, Pub. L. No. 59-258, 34 Stat. 325, 333, April 30, 1908, Pub. L. No. 60-104, 35 Stat. 70, 76–77, and August 1, 1914, Pub. L. No. 63-160, 38 Stat. 582, 589. To effectuate these Acts, the Indian Service conducted a census of "the Indians in and near Enterpri[s]e," EN_AR_NEW_0027015, a construction camp founded in 1852 in Butte County, California, and later a supply center for nearby gold mining operations. Fifty-one Indians were identified living near Enterprise, including Nancy Martin, her son George and his family, and Emma Walters. *Id.*

In October 1915, an Indian Service agent visited Mrs. Martin, who had been living on land owned by the Central Pacific Railway Company for many years. *See* Att. 2 to RJN (Letter from W.C. Randolph, U.S. Indian Service to H.G. Wilson, Supervisor (Oct. 18, 1915)) ("1st Martin Letter"); *see also* Att. 3 to RJN (Letter from U.S. Indian Service to Nancy Martin (Sept. 23, 1916)) ("2d Martin Letter"). Using funds appropriated by Congress, the Indian Service agent informed Mrs. Martin on September 23, 1916, that the United States had purchased the 40-acre lot so that "yourself, your son, George, and his entire family may have a permanent home on this land." 2d Martin Letter.

In November 1915, an Indian Service agent visited Emma Walters, who had been living on a separate parcel of land, also owned by the Central Pacific Railway Company and also for many years. On September 23, 1916, the Indian Service agent wrote to Emma Walters, informing her that the United States had purchased 40 acres of land so "that yourself and other Indians related to you may have a permanent home on this land." EN_AR_NEW_0028121. These two parcels were commonly referred to as Enterprise 1 (land set aside for Walters family) and Enterprise 2 (land set aside for Martin family), EN_AR_NEW_0000517, or collectively, as "Enterprise Rancheria."

In 1934, Congress passed the Indian Reorganization Act ("IRA"), Pub. L. No. 73-383, 48 Stat. 984. Between 1934 and 1935, the Department held elections under Section 18 of the Act so that Indians living on reservations or rancherias had the opportunity to "opt out" of the Act. *See* Pub. L. No. 73-383, 48 Stat. 984, 988 (providing that the "Act shall not apply to any reservation

wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application"). The Department prepared lists of Indians living on reservations for that purpose, including one for the Enterprise Rancheria, which included 25 individuals. EN_AR_NEW_0000102. The Department held an election on the Enterprise Rancheria in June of 1935; seven voted in favor of the IRA and seventeen voted to reject it. EN_AR_NEW_0000105.[2]

In 1964, Congress enacted Public Law No. 88-453, "An act to authorize the Secretary of the Interior to sell Enterprise Rancheria numbered 2 to the State of California, and to distribute the proceeds of the sale to Henry B. Martin, Stanley Martin, Ralph G. Martin, and Vera Martin Kiras," the four surviving children of George and Sadie Martin. Act of August 20, 1964, 78 Stat. 534. A Senate report stated that "[w]hen the land has been sold and the proceeds distributed, the Bureau of Indian Affairs will have terminated supervisory responsibilities over Enterprise Rancheria No. 2 and its inhabitants." Att. 5 to RJN (S. Rep. No. 1857, *Act Authorizing the Secretary of the Interior to Sell Enterprise Rancheria No. 2 to the State of California*, 88th Cong. 2d Sess. (1964)).

In 1994, Arthur Angle, the grandson of Nancy Martin, led efforts to organize Enterprise over the objections of the descendants of Enterprise No. 1. *See* Att. 6 to RJN (Letter of Michael R. Smith, Acting Area Director, BIA, to Art Angle, at 1 (Apr. 12, 1995)) ("Appeal Decision"). An election was held in September of 1994 for organizational purposes, but, in December, BIA invalidated the election, because "only eleven individuals actually cast ballots" even though "an estimated two hundred thirty resident Indians [we]re eighteen years of age and over," and therefore eligible to vote. *Id.* BIA reversed that decision in April 1995, concluding that "there are no guidelines in existence which require[] a minimum number of individuals . . . to hold a tribal organizational meeting." *Id.* at 2. Enterprise adopted a tribal constitution on May 5, 1996.

[2] *See also* Att. 4 to RJN (Theodore H. Haas, U.S. Indian Service, Ten Years of Tribal Government Under I.R.A., at 15 (1947)) ("Haas Report"). The election returns list includes twenty-nine eligible voters. EN_AR_NEW_0000105; Haas Report at 15. There is no obvious explanation for the discrepancy between the election returns and the list of eligible voters prepared before the election.

On January 6, 2004, plaintiff Robert Edwards, the great grandson of Emma Walters, sent a letter to BIA arguing that the Indians of Enterprise No. 1 and Enterprise No. 2 were not a single "band," and provided evidence showing that the Department acquired land *separately* on behalf of two families. BIA rejected Mr. Edwards' petition on March 31, 2004 and his subsequent appeal on January 3, 2005. Att. 7 to RJN (Letter from Clay Gregory, Regional Director, Pacific Regional Office BIA to Mr. Edwards (Jan. 3, 2005)). On May 17, 2007, the Interior Board of Indian Appeals ("IBIA") issued a decision affirming the January 3, 2005 decision. *Robert Edwards v. Pacific Regional Director*, IBIA 05-44-A, 45 IBIA 42 (May 17, 2007).

The Enterprise Constitution provides that Enterprise No. 1 "shall be held under the sole individual ownership of all heirs of said individual and shall not be owned by the Rancheria. EN_AR_NEW_0027577. It also provides that the "lands of Enterprise Rancheria No. 2 were sold pursuant to Public Law 88-453 and were owned by the descendant's [sic] of Nancy Martin; however, the Rancheria may acquire in the future an additional forty (40) acres of lands to be held under the sole ownership of all the heirs of Nancy Martin for homestead purposes, which lands shall not be utilized by the Rancheria for economic purposes." *Id.*

On August 13, 2002, Enterprise submitted a fee-to-trust application for a 40-acre parcel of land in Yuba County, California to develop a resort hotel and "tribal gaming facility." EN_AR_NEW_0000516–17; EN_AR_NEW_0000520. Enterprise's environmental consultant produced an environmental assessment of the proposed hotel and casino project in May 2004, which BIA reviewed and adopted in August of that year. EN_AR_NEW_0001428–2049; EN_AR_NEW_0002298. In May 2005, BIA published a notice of intent to prepare an EIS for the project. EN_AR_NEW_0002704. In April 2006, Enterprise requested that BIA make a two-part determination pursuant to 25 U.S.C. § 2719(b)(1)(A), to make the Yuba Site eligible for gaming. EN_AR_NEW_0003336. That request was amended and restated in March 2009. EN_AR_NEW_0022964.

The Secretary published the EIS for the project in August 2010. EN_AR_NEW_0028249. Thirteen months later, the Secretary concluded that the project would not be detrimental to the surrounding community and requested the concurrence of the California Governor.

EN_AR_NEW_0029749 (hereinafter, "2011 ROD"). The Governor concurred in August 2012. EN_AR_NEW_0029207. That November, BIA issued its decision to acquire the Yuba Site in trust for the project. EN_AR_NEW_30166 (hereinafter, "2012 ROD").

LEGAL STANDARD

Under the Administrative Procedure Act ("APA"), the district court must "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Engineering Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985). "[S]ummary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *Id.* at 770; *accord City & County of San Francisco v. United States*, 130 F.3d 873, 877 (9th Cir. 1997).

ARGUMENT

A. The Secretary arbitrarily and capriciously concluded that she had authority to acquire land in trust for Enterprise.

The IRA authorizes the Secretary to acquire land and hold it in trust only "for the purpose of providing land for Indians." 48 Stat. 985 (codified at 25 U.S.C. § 465). As relevant here, Congress has defined the term "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe <u>now</u> under Federal jurisdiction." 25 U.S.C. § 479 (emphasis added). In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that the word "now" in that provision "refers solely to events contemporaneous with the Act's enactment" in 1934. *Id.* at 389; *see also Big Lagoon Rancheria v. California*, 741 F.3d 1032, 1035 (9th Cir. 2014).

As a matter of ordinary usage, the phrase "recognized Indian tribe now under Federal jurisdiction," 25 U.S.C. § 479, refers to an Indian tribe that is both recognized and under Federal jurisdiction "now"—that is, at the time of the statute's enactment. If a tribe was not a "recognized Indian tribe" in 1934, then it cannot have been a "recognized Indian tribe now under Federal jurisdiction" at that time. And if it was not a "recognized Indian tribe now under Federal jurisdiction" when the IRA was enacted, then the Secretary cannot take land into trust on its

behalf now. The Secretary's authority to take land into trust extends only to tribes that were recognized and under federal jurisdiction in 1934.

The Secretary concluded that Enterprise was a recognized Indian tribe under federal jurisdiction in 1934. EN_AR_NEW_0030213–14. She based this conclusion on a single fact—that, in 1935, the Indians living on the Enterprise Rancheria (Enterprise Nos. 1 and 2) voted under Section 18 of the IRA. This fact, the Secretary claims, "conclusively establishes" that the Indians who voted were a recognized Indian tribe, and that the tribe was "under federal jurisdiction for *Carcieri* purposes." EN_AR_NEW_0030214. "Thus," her record of decision explains, "the Secretary is authorized to acquire land in trust for the Tribe under Section 5 of the IRA." *Id.* The record contains no further analysis of the Secretary's authority to take land into trust.

1. Because Section 18 applies to reservations and not to tribes, a Section 18 election on a particular reservation does not demonstrate that any tribe was extant, recognized, and under federal jurisdiction when the election was held.

The Secretary's conclusion that a Section 18 election is sufficient proof of tribal existence, recognition, and federal jurisdiction cannot survive an encounter with the statutory text. Section 18 of the IRA provides that the "Act shall not apply *to any reservation* wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 478 (emphasis added); *see United States v. Consol. Mines & Smelting Co.*, 455 F.2d 432, 438 (9th Cir. 1971) ("Section 18 of the [IRA], 25 U.S.C. § 478, provided that the Act would not apply *to any reservation* on which a majority of the adult Indians voted against it." (emphasis added)); Haas Report at 2 ("The Act . . . provided that it should not be applicable *to any reservation* wherein a majority of all of the Indians entitled to vote, voted against its application." (emphasis added)). In her record of decision, the Secretary described Section 18 as "an opt-out provision . . . where a majority vote of Indians *of the reservation* voting at a special election called by the Secretary of the Interior could opt out of the Act." EN_AR_NEW_003021 (emphasis added).[3]

[3] If a reservation voted against the IRA, the reservation rejected the Act in its entirety. The existing trust periods for Indian lands on the reservation would not be extended, *see* IRA § 2, 48 Stat. 984, nor would the Secretary be authorized "to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management," IRA § 6, 48 Stat. 986, nor "to

By its plain terms, Section 18 applies to *reservations*, not to *tribes*. But the Secretary nonetheless found that a Section 18 election "conclusively establishes" that the Indians who voted in that election were a tribe was "under federal jurisdiction for *Carcieri* purposes." EN_AR_NEW_0030214. She cited no other evidence in support of her determination that she had the authority to take the Yuba site into trust. Because Section 18 elections were conducted by reservation or rancheria, and not by tribe, a Section 18 election does not prove that a tribe was living on either Enterprise 1 or Enterprise 2—nor on the two combined—when the IRA was enacted. That election only proves that the Secretary considered Enterprise Rancheria to be a reservation. Because the Secretary has adduced no other evidence of her authority to acquire the Yuba site in trust, her decision to do so must be vacated for lack of reasoned decision-making.

2. The Secretary's interpretation of her authority is inconsistent with contemporaneous interpretations of Section 18 and the Department's position in other cases.

The plain text of Section 18 is reinforced by the Department's contemporaneous interpretation, which is entitled to "great weight." *See Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1220 (9th Cir. 2002) (citing *Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983)); *see also Watt v. Alaska*, 451 U.S. 259, 272–73 (1981) ("persuasive weight"). The Solicitor of the Interior explained in a December 1934 opinion that "Section 18 . . . provides simply that the [IRA] shall not apply *to a reservation* wherein a majority of the adult Indians shall vote against the application of the act. If, therefore, the Secretary should call an election within the time and in the manner prescribed by section 18, and such election should result in an adverse vote by a majority of the qualified voters, the act would . . . cease to apply *to that reservation*." Att. 8 to RJN (1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917–1974, at 485 (1934)) ("Solicitor Op.") (emphasis added). The Solicitor explained that the IRA "modifies the

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restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal," IRA § 3, 48 Stat. 984; *see Consol. Mines & Smelting*, 455 F.2d at 444 (concluding that the Secretary could not exercise power under "section 3 of the [IRA] because of the adverse [Section 18] vote" on the Colville Indian Reservation); *but cf. United States v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980). A reservation's rejection of the IRA, however, no longer affects any tribe's eligibility to have land taken into trust under Section 5. *See* 25 U.S.C. § 2202.

status of Indian restricted property *on those reservations* where the act may apply" and "purports to change the personal status of Indians *on the reservation*." *Id.* at 486 (emphases added).

The Solicitor stated that "the construction of section 18 . . . should be such as to grant a vote in this referendum to those Indians and only those Indians who may be seriously affected by the application of the [IRA] *to a given reservation*." *Id.* (emphasis added). There are three classes of Indians that qualified. First, "those who own restricted property *within the reservation* have such an interest in the affairs *of the reservation* as to entitle them to vote on the question of whether basic changes should be made in the present system of property holding." *Id.* (emphases added). Second, "[t]hose Indians who are entitled to participate in tribal elections or other tribal affairs *on a given reservation*, clearly have a legal interest within the protection of section 18." *Id* (emphasis added). Third, "those Indians who receive benefits of any sort, *e.g.* rations, from the representatives of the Interior Department stationed *on a given reservation*, have a legitimate interest in the continuance or modification of the established system." *Id.* (emphasis added).

The Solicitor's interpretation of Sections 16 and 19 further illustrates the disjunction between a reservation and a tribe under the IRA. The opinion states that the IRA "contemplates two distinct and alternative forms of tribal organization. In the first place, Section 16 authorizes the members of a tribe (or of a group of tribes located upon the same reservation) to organize as a tribe without regard to any requirements of tribal residence." *Id.* at 487. "In the second place, [Section 16] authorizes the residents of a single reservation . . . to organize *without regard to past tribal affiliation*." *Id.* (emphasis added). Section 19 defines "tribe" as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation," 25 U.S.C. § 479, but that does not mean that every "organized band," every Indian tribe, and all of "the Indians residing on one reservation" were "recognized Indian tribes now under federal jurisdiction." To the contrary, Section 16 provides for organization as a "band," *or* as "a traditionally recognized tribe," Solicitor Op. at 488, *or* as Indians residing on a reservation "without regard to past tribal affiliation," *id*. at 487. But tribal organization is not automatic; it has to be chosen. Otherwise every Indian living on a reservation with 1) his band, 2) his "traditionally recognized tribe," and

3) other tribes, would necessarily belong to three IRA "tribes" at once (band, tribe, reservation). That has never been the law.

Federal Defendants recently argued to the same effect in a legal challenge to another trust decision. In defending the Secretary's decision to acquire land in trust for the Cowlitz Tribe, which did not vote under the IRA, Federal Defendants argued that "[n]owhere in [Section 18] is there a mention of a 'recognized tribe' voting on the IRA because the votes were conducted *by reservation*." Att. 9 to RJN (Fed. Defs. Br., Confederated Tribes of Grande Ronde v. Jewell, 13-cv-849, Dkt. No. 37 at 23 (D.D.C. Nov. 6, 2013)) (emphasis added). As the Federal Defendants correctly argued in that case, tribal membership or affiliation was not required to vote, and there is no reason to assume—certainly the BIA has offered none—that a Section 18 electorate was primarily composed of members of a certain tribe, or indeed that any tribe resided on a particular reservation where a Section 18 election was held. By its terms, Section 18 elections determined the application of the IRA within the boundaries of the reservation by vote of "adult Indians" residing there. The Secretary's assertion that a Section 18 election determines anything about a recognized tribe is simply wrong.[4]

[4] Several IBIA opinions discuss whether Section 18 election establishes that a tribe was "under federal jurisdiction" in 1934. *See Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, 57 IBIA 4 (May 9, 2013); *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62 (Feb. 18, 2011); *Robert F. Edwards v. Pacific Regional Director*, 45 IBIA 42 (May 17, 2007). IBIA does not clearly explain its view on whether a Section 18 election establishes a "recognized Indian tribe" but such a conclusion would lead to wholly illogical outcomes. For example, groups of Indians living on the same reservation, regardless of affiliation would, by virtue of a Section 18 election that rejected the IRA, have formed a permanent government-to-government relationship with the United States. Since eligibility to vote in a Section 18 referendum is based on residency on a reservation, all non-resident members of an existing tribe would be disenfranchised when the adult Indians on a reservation became recognized as a different entity than the existing tribe.

In addition, *Carcieri* held the term "Indian," which includes three definitions, controls the Secretary's authority to take land into trust. If, instead, the definition of "tribe"—meaning "Indians residing on one reservation"—is viewed as controlling, it would make the three definitions of "Indian" surplusage, if the tribe is not comprised of Indians who are "members of any recognized Indian tribe now under jurisdiction" or satisfy the blood quantum also in the definition. Moreover, even if a Section 18 election were deemed to constitute recognition of a tribe comprised of the adult Indians voting, it cannot satisfy *Carcieri*, which requires that a tribe be recognized and under federal jurisdiction at the time the IRA was passed. Obviously, any status that results from compliance with the IRA cannot satisfy *Carcieri*'s requirement, which applies to the time of enactment.

For the reasons set forth above, the Section 18 election proves only that Enterprise 1 and 2 were considered to be a single reservation for the purposes of that vote. It does not prove that the Indians living on that reservation constituted a recognized tribe, because those Indians would have been entitled to vote whether or not they formed such a tribe. And the Secretary has adduced no other evidence that Enterprise was a recognized Indian tribe in 1934.

3. Although the Secretary did not—and therefore may not now—consider the other evidence in the record, that evidence does not support her conclusion.

The record evidence demonstrates that Enterprise 1 and 2 were established to provide homes for landless Indians. It was often the case that California rancherias housed individual Indians, but not any tribes. "[A]pproximately 58 small tracts of land . . . were purchased in central California by the Secretary of the Interior, who permitted Indians living nearby, generally in groups, to occupy such tracts." Att. 10 to RJN (2 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917–1974, at 1882 (1960)). "The Indians of Central California . . . were not members of a tribe having treaty relations with the United States, did not live on reservations, and held no restricted allotments." *Id.* at 1883. And, "[i]n the majority of cases . . . the . . . rancheria lands [we]re occupied by Indian people without regard to the tribal affiliation of their ancestors." Att. 11 to RJN (Memorandum from William E. Finale, Area Director, BIA to Commissioner of Indian Affairs at 3 (Aug. 18, 1978)). "Of the 76 reservation and rancheria areas still in trust status in the State of California" in 1978, "some 50 [we]re without formal organizational documents." *Id.* That is to say that, in 1978, two-thirds of the California reservations and rancherias housed Indians, but not Indian tribes.

It seems apparent that Enterprise 1 and 2 were acquired without regard to formal organization or tribal status. Record documents demonstrate that the Department acquired one of the two original rancheria parcels for Emma Walters, whose descendants occupy that parcel today, and the other for Nancy Martin, whose living children were compensated for the taking of the land in 1964. Historically, tribes were recognized by treaty or executive order of the President, Cohen's Handbook of Federal Indian Law, § 3.02[4], at 136 (Nell Jessup Newton ed. 2012), and it is clear that Enterprise is neither a treaty nor executive order tribe. Alternatively, a

tribe may benefit from a government-to-government relationship with the United States through recognition by an act of Congress or by the Secretary administratively. As the Secretary recently stated in this Court in another case, "federal recognition of [a tribe] cannot be had other than by legislation according such recognition or acknowledgment through the process established in 25 C.F.R. Part 83." Att. 12 to RJN (*Mishewal Wappo Tribe of Alexander Valley v. Jewell*, No. 5:09-cv-02502-EJD, Fed. Defs.' Rep. at 2 (N.D. Cal. July 5, 2013)). Whether Enterprise was a recognized Indian tribe in 1934 is a substantial question that the ROD fails to address.[5]

There is no evidence that Enterprise was a "recognized Indian tribe" under federal jurisdiction in 1934. And even if the other evidence in the record supported the conclusion that Enterprise was a recognized tribe under federal jurisdiction in 1934—which it does not—the Secretary's choice to rely only on the Section 18 election would prevent her from looking to any other evidence to save her trust decision now. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[I]n dealing with a determination or judgment which an administrative agency alone is authorized to make, [courts] must judge the propriety of such action solely by the grounds invoked by the agency.").

The Secretary has adduced one single fact to support her conclusion that Enterprise qualifies for trust land: the Section 18 vote to reject the IRA in 1935. The plain language of the IRA and contemporaneous interpretations of the Act demonstrate that there is no "rational connection" between the fact of a Section 18 election and the conclusion that Enterprise was a recognized tribe under federal jurisdiction in 1934. *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004) (noting that the APA requires a "rational connection between the facts found and the conclusions made") (internal quotation marks omitted). The Secretary's trust decision must therefore be vacated as arbitrary and capricious.

[5] If it is claimed that Enterprise was recognized under the IRA or at some time after 1934, it plainly was not a recognized tribe under federal jurisdiction when the IRA was enacted.

B. The Secretary violated substantive and procedural requirements in determining that the proposed casino will not be detrimental and in seeking gubernatorial concurrence.

Gaming is prohibited on the Yuba site, unless: 1) the Secretary "determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community" (the "no detriment" determination); and 2) the Governor of the affected state concurs in the Secretary's determination. 25 U.S.C. § 2719(b)(1)(A). This "two-part determination" requires the Secretary to "consult[] with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes," during the process. *Id.*

In this case, the Secretary arbitrarily and capriciously treated detrimental impacts as insignificant by relying on non-existent mitigation measures and failed to adequately explain her conclusions. Then, the Secretary arbitrarily and capriciously excluded documents from the application record, preventing the Governor from concurring on an informed basis. The "no detriment" determination, and therefore the trust decision, should be vacated.

1. The Secretary's "no detriment" determination is invalid because it is based on an arbitrary and capricious assessment of impacts.

Concerned that relations between tribes and local communities would be further strained by gaming, Congress strictly limited off-reservation gaming to the rare cases where it was clearly demonstrated that proposed gaming would not be detrimental to the surrounding community. The common meaning of the word "detrimental," which is not defined in IGRA or the regulations, is "tending to cause harm." *See* Oxford English Dictionary (2012); *see Sandifer v. U.S. Steel Corp.*, 134 S. Ct. 870, 876 (2014) ("It is a 'fundamental canon of statutory construction' that, 'unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The "not detrimental" requirement is plainly demanding. There is no dispute that casino development "tends to cause harm" surrounding community, if unmitigated.

The EIS demonstrates that the proposed casino will have detrimental impacts on traffic, a major concern for the rural, agricultural community involved here. EN_AR_NEW_0029767

(stating that the project would cause certain roads and intersections to operate at unacceptable service levels); EN_AR_NEW_0029803 (detailing traffic mitigation measures needed); *see generally* EN_AR_0022667–68. Traffic impacts broadly include congestion, decreased safety, increased pollution (including noise and light), upgrade costs, and incompatibility with existing agricultural traffic activities. *See e.g.*, EN_AR_NEW_0028010 (comments from Sutter County); EN_AR_NEW_0027958 (comments from Yuba County); EN_AR_NEW _0027919–20 (comments from Wheatland).

The Secretary concluded that that traffic (and other impacts[6]) would *all* be mitigated to less than significant levels, EN_AR_NEW 0029770 (stating that mitigation in EIS would reduce traffic and road impacts to a less than significant level), and that Enterprise would pay its "fair share" of mitigation costs. EN_AR_NEW_0029787–88 (stating that Enterprise "shall" contribute its fair share for traffic mitigation); EN_AR_NEW_0029807 (stating that Enterprise "intends to pay Yuba County for any traffic impact fees and to contribute its fair share" for road, intersection, pedestrian and other improvements). Thus, she concluded, the casino "would not result in a significant cost increase for . . . adjacent local units of government." EN_AR_NEW_0029815. On this basis, the Secretary concluded that the casino would not be detrimental to the community.

Whether this mitigation will occur, however, is purely speculative. The EIS states that specified traffic mitigation measures are, "by necessity," only recommended measures. EN_AR_NEW_0023861. The EIS acknowledges that Enterprise has no jurisdiction over off-site roadways and intersections. *Id.* There is no enforcement mechanism to ensure that Enterprise will pay its fair share of mitigation costs, nor implement the mitigation described in the EIS. The Secretary cannot compel Enterprise to pay its "fair share" of traffic improvements, nor comply with particular mitigation measures. Impacted jurisdictions have no authority to enforce these measures. *See Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014) (holding that tribes enjoy sovereign immunity from suit for on- and off-reservation activities).

[6] *See, e.g.*, EN_AR_NEW_0029765 (air emissions); EN_AR_0022620 (flood control); EN_AR_0022627 (wastewater).

The Secretary cannot make a finding of "no detriment" unless she *knows* that impacts will be mitigated, and she cannot know that here because she cannot enforce the mitigation. The record establishes that BIA knew this to be a problem:

> [I]f the Federal Government were to take this land into trust who would monitor the situation subsequent to that time in order to provide to the Federal Government the assurance that there would be compliance with the dozens of mitigative measures which have been promised in Section 5 and Appendix B of this document; and what punitive and enforcement mechanisms would be available to deal with instances of non-compliance? While the Tribe waives its sovereign immunity in favor of Yuba County and the state courts . . . it does not do so with regard to any other person or entity.

EN_AR_NEW_0001558. BIA's own conclusion was that, "[i]f the mitigation measures are required to keep impacts below a significant level, *they must be made binding and enforceable*." EN_AR_NEW_0001598 (emphasis added); *see also* EN_AR_NEW_0028002 (United Auburn raising traffic mitigation concerns).

The Secretary arbitrarily ignored the issue. The Secretary can no more rely on unenforceable mitigation to reach a "no detriment" determination under IGRA, than she could rely on unenforceable mitigation to issue a finding of no significant impact ("FONSI"), under NEPA, *see* 76 Fed. Reg. 3843-01, 3847 (Jan. 21, 2011).[7] Federal agencies are not to commit to mitigation "unless they have sufficient legal authorities and expect there will be necessary resources available to perform or ensure the performance of the mitigation," or " the authority for the mitigation [derives] from legal requirements that are enforced by other Federal, state, or local government entities." *Id.* The problem is easy to remedy. The Secretary should have waited until Enterprise had negotiated enforceable agreements with impacted jurisdictions before approving the project, rather than directing Enterprise to negotiate agreements later, when she will have no power to require it.

The Secretary's error is potentially the difference between a "detriment" and "no detriment" finding, or between gubernatorial concurrence and rejection. Indeed, Yuba County—

[7] Under NEPA, mitigation must be enforceable—*i.e.*, subject to sufficient legal authority to ensure that the mitigation will be performed. A "no detriment" determination under IGRA is substantially similar to a FONSI, in that a FONSI is a determination that a proposed action will not have a significant impact on the environment. 40 C.F.R. § 1508.14.

the biggest supporter of the proposed casino (apart from Enterprise)—stated in its Part 292 comments that "if agreed upon mitigation measures identified in the MOU or the EIS are not implemented, locating a gaming establishment on newly acquired land *will have a detrimental impact on Yuba County*." EN_AR_NEW_0027959 (emphasis added). The Secretary's error regarding mitigation fundamentally compromised the no-detriment determination.

Not only did the Secretary err by treating all impacts as mitigated, she did not adequately explain her conclusions. Yuba County commented that the payment for road improvements contained in its decade-old MOU would only partially mitigate traffic impacts. EN_AR_NEW_0027959. Other governmental entities raised cost concerns, as well. *See* EN_AR_NEW_0028010 (Sutter County); EN_AR_NEW _0027919-20 (Wheatland). Yet the Secretary concluded, without explanation, that "any financial burdens imposed upon Yuba County and local units of government are sufficiently mitigated by provisions contained in separate MOUs . . . ." EN_AR_NEW_0029815. How do payments to Marysville and Yuba County, which Yuba County indicates will not be sufficient for its own purposes, mitigate financial impacts to Wheatland and Sutter County? The 2012 ROD provides no explanation.

The Secretary must objectively reflect the impacts of the proposed casino and cannot rely on unenforceable mitigation in order to conclude that all impacts will be mitigated to less than significant levels. The Secretary acted arbitrarily and capriciously.

2. The Secretary violated 25 C.F.R. Part 292 in seeking gubernatorial concurrence by omitting a substantial portion of the record application.

IGRA gives the Governor the ability to permit otherwise prohibited off-reservation gaming through the two-part determination process. For the Governor's review to be informed, he must have the benefit of the record that the Secretary had—in its entirety. IGRA regulations require "the Secretary [to] send to the Governor of the State … [a] copy of the *entire application record*." 25 C.F.R. § 292.22(b) (emphasis added). The "entire application record" is not simply the application, which itself has a number of components. *See id.* § 292.16(b). It also includes an assortment of other information, including environmental documentation, comment letters, and any other information that may provide a basis for a no-detriment determination. *See generally id.*

§§ 292.16–18. The Secretary must provide the Governor with the materials that were before her when she made her decision—that is, she must provide the administrative record.

The record that the Secretary sent to Governor Brown, however, fell far short of that requirement by excluding scores of relevant material.[8] The Secretary failed to include the EIS itself. The EIS is necessary for the Governor to have the information needed to evaluate impacts and assess the Secretary's finding of no detriment. The EIS not only contains environmental analysis, it also contains public comment letters, including those filed on both the draft and final EIS. The Secretary did not provide these materials, and it is not the Governor's obligation to collect them.

The Secretary also arbitrarily excluded many other documents, including, importantly, letters that the Governor's Office sent during Governor Schwarzenegger's administration. The Secretary omitted Governor Schwarzenegger's January 30, 2009 letter, which expressed concerns regarding the referendum results in Yuba County (which opposed the proposal) and whether Enterprise actually needed the proposed site, and questioned the unemployment rate on the reservation, the number of tribal members likely to leave the reservation, the effects of the relocation on tribal identification, and the identified on-reservation benefits. EN_AR_NEW_0022832. The Governor's 2008 comments on the draft EIS, which found the document "inadequate under NEPA," EN_AR_NEW_0021322, were also excluded. That letter raises concerns regarding wastewater, flooding and potential contamination of surface and groundwater; air quality; traffic congestion; potential impacts on emergency evacuation routes; and the degradation of the visual quality of the largely undeveloped surrounding environment. EN_AR_NEW_0021324–26.

The excluded documents are voluminous. They include: EN_AR_NEW_000754 (letter from Stand Up opposing project); EN_AR_NEW_0015285 (letter from Rep. Kevin McCarthy expressing concerns regarding the project); EN_AR_NEW_0022683 (opposition letters);

[8] The record sent to the Governor is set forth at EN_AR_NEW_0029749–820 [2011 ROD]; and EN_AR_NEW_0027040–8178 [Pacific Regional Office February 9, 2009 Memorandum and Exhibits 1–7].

EN_AR_NEW_0022694 (same); EN_AR_NEW_0022693 (letter requesting that Yuba County rescind the MOU); EN_AR_NEW_0022677 (school district opposed to project).

The "entire record requirement" is designed to ensure that the Governor has the benefit of all relevant documents and that comments provided early in the process are not disregarded. If the Secretary is not compelled to strict compliance with the "entire application record" requirement, the Governor cannot know whether the information before him fully and accurately represents the impacts on the community and he cannot make an independent judgment regarding detriment. The Secretary's failure to follow the regulations was arbitrary and capricious.[9]

C. The Secretary violated the CAA by failing to conduct a conformity review.

Section 176(c)(1) of the CAA requires Federal agencies to ensure that their actions "conform" to applicable state implementation plans ("SIPs") for achieving and maintaining the National Ambient Air Quality Standards ("NAAQS") for criteria pollutants. 42 U.S.C. § 7506(c). Federal agencies cannot approve an activity that will cause or contribute to any new NAAQS violations, exacerbate any existing violation, or delay the time at which any NAAQS will be achieved. *Id.* § 7506 (c)(1)(B). If a proposed activity will cause emissions of criteria pollutants or their precursors, and those emissions would occur in a "nonattainment" or "maintenance area" for that pollutant, the Federal agency must conduct a "conformity review." 40 C.F.R. § 93.153(b)(1).

Yuba County is designated "nonattainment" for the EPA's 24-hour air quality standard for fine particulate matter (PM2.5). *See* 40 C.F.R. § 81.305; 74 Fed. Reg. 58,688 (Nov. 13, 2009). The de minimus threshold for PM2.5 is 100 tons per year, 40 C.F.R. § 93.153(b),[10] which the

[9] Under 25 C.F.R. Part 151, an applicant must specify the purpose for the trust acquisition, 25 C.F.R. § 151.11, which in this case is gaming. Absent a valid no-detriment finding and concurrence under IGRA, the Secretary cannot take land into trust for gaming without violating Part 151 and the APA. It would be arbitrary and capricious to take land into trust for an illegal purpose. *Compare* 25 C.F.R. § 292.23(b) (requiring the Secretary to withdraw a notice of intent to acquire land in trust pending a revised application for a non-gaming purpose). At the time of the concurrence, the land was not in trust and no notice of intent had been filed. In their opposition to Plaintiffs' motions for a preliminary injunction, Federal Defendants claimed that no irreparable harm would be caused by the trust transfer itself, Fed. Defs. Br. at 7 [Dkt. No. 57], and that the land could readily be removed from trust status, *id.* at 8. The Court accepted that argument, and stated that "federal district courts . . . have the power to strip the federal government of title to land taken into trust for an Indian tribe." Order of Jan. 30, 2013. Accordingly, the trust decision must be vacated as well.

[10] The regulatory citation in the EIS, 40 C.F.R. § 51.853(b)(1) and (2), is incorrect.

proposed casino is not projected to exceed. EN_AR_NEW_0023621. EPA has concluded, however, that nitrogen oxides are precursors to the formation of PM2.5. Att. 13 to RJN (Letter from Wayne Nastri, Regional Administrator, U.S. EPA, to Gov. Arnold Schwarzenegger at 5–6 (Aug. 18, 2008)) (checking record). In this case, the EIS projects that the proposed casino will exceed the de minimus threshold for nitrogen oxides by 500%, EN_AR_NEW_0023621, triggering conformity review, *see* 40 C.F.R. § 93.153(b).

Because EPA has determined that nitrogen oxides contribute significantly to PM2.5 levels, the Secretary was required to make a conformity determination based on nitrogen oxide emissions through precisely described notice and comment procedures, *see* 40 C.F.R. § 93.156, which must be conducted *before* the Secretary makes her decision, *id.* § 93.150. Here, however, the Secretary did not make a conformity determination, but rather relied on mitigation measures that—like the traffic mitigation measures—are not enforceable. EN_AR_0022628–31. A conformity determination, by contrast, would have established enforceable mechanisms to ensure that emissions did not exceed permissible levels. 40 C.F.R. §§ 93.158, 93.160. Because the Secretary did not perform a full conformity review, including a comprehensive review and formalization of mitigation measures, there is no method to ensure that the project's NOx emissions do not adversely affect the timely attainment and maintenance of the NAAQS. This risk is precisely what the conformity process is designed to avoid.

D. The Secretary violated NEPA.

NEPA requires federal agencies to take a "hard look" at the environmental consequences of their actions before taking action. 42 U.S.C. § 4332(C); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). That "hard look" must be taken "objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

First, BIA's analysis of alternatives violates NEPA. The alternatives analysis is "the heart of the environmental impact statement." *See* 40 C.F.R. § 1502.14. Agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). Failure to

include a viable alternative renders an EIS inadequate. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999). Here, BIA arbitrarily dismissed reasonable alternatives from consideration, considering only two locations in detail. EN_AR_NEW_0023346–65, 23383–91; EN_AR_NEW_0023333, 23339.

For example, BIA eliminated Highway 65 and Highway 99 from consideration because Enterprise "was unable to secure investors for development." EN_AR_NEW_0023392. But the fact that an applicant does not own a parcel of land is "only marginally relevant" to defining reasonable alternatives. *Van Abbema v. Fornell*, 807 F.2d 633, 639 (7th Cir. 1986). BIA also rejected Highway 65, Highway 99, and Highway 162 as alternatives because they lacked infrastructure (i.e., wastewater and water). EN_AR_NEW_0023392. Yet BIA considered the Butte County alternative, which also lacks infrastructure. EN_AR_NEW_0023387. Moreover, the Yuba site lacks on-site water and would require a nearby wastewater facility to be doubled in size to accommodate the development, yet it was considered viable. EN_AR_NEW_0023357–59. BIA also rejected the Highway 65 site because it is zoned for agriculture, EN_AR_NEW_0023387, but trust status negates the application of state and local laws. Finally, BIA refused to consider in detail the Highway 99 and 162 sites due to "numerous biologically sensitive resources" including wetlands and vernal pools, EN_AR_NEW_0023387, despite the fact that the Yuba site has the very same resources, including emergent wetlands, intermittent channels, and a riparian corridor, EN_AR_NEW_0023442, 23638, 23854. Where, as here, the range of alternatives considered consists only of variations of a single alternative based on "levels and intensity of use" the range of alternatives considered is not "truly meaningful." *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 746 F. Supp. 2d 1055, 1089 (N.D. Cal. 2009), *vacated in part*, 2011 WL 337364 (N.D. Cal. Jan. 29, 2011).

The Secretary also failed to address a very significant negative impact that is not present at the alternative sites and should have been addressed in the EIS—a portion of the Yuba Site is located in a floodplain. EN_AR_NEW_0023600. Because part of the site is in a flood plain, Executive Order ("EO") 11988 applies, which requires a detailed evaluation of impacts to such areas, the consideration of alternatives where floodplains would not be affected, and an

affirmative conclusion that no practicable alternative exists. *See* 42 Fed. Reg. 26951 (1977). Compliance with this EO is subject to judicial review under the APA. *City of Carmel by the Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997) (stating that an agency "must consider the project effects on the floodplains and possible alternatives and may proceed only if it finds that the 'only practicable alternative' requires 'sitting in' the floodplain"). The EIS does not even mention the EO, let alone make the "no practicable alternative" finding, thus violating NEPA, the EO, and the APA.

CONCLUSION

For the reasons set forth above, Citizens respectfully requests that the Court grant its Motion for Summary Judgment.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2014 I electronically filed the foregoing PLAINTIFFS CITIZENS FOR A BETTER WAY, STAND UP FOR CALIFORNIA!, GRASS VALLEY NEIGHBORS, WILLIAM F. CONNELLY, JAMES M. GALLAGHER, ANDY VASQUEZ, DAN LOGUE, ROBERT EDWARDS, AND ROBERTO'S RESTAURANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system which will send notification of such to counsel of record.

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