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**UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF CALIFORNIA**

UNITED AUBURN INDIANCOMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff

v.

KENNETH LEE SALAZAR, 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 MEMORANDUM IN OPPOSITION TO THE MOTIONS FOR SUMMARY JUDGMENT BY CITIZENS FOR A BETTER WAY, UNITED AUBURN INDIAN COMMUNITY, AND THE CACHIL DEHE BAND OF WINTUN INDIANS, AND IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

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## BACKGROUND

**The Decisions at Issue**. By a final Record of Decision issued on November 21, 2012 ("ROD"), the Assistant Secretary-Indian Affairs approved the acquisition of land (the "Yuba Site") into trust for the benefit of the Yumeka Maidu Tribe of the Enterprise Rancheria ("Enterprise"), which plans to develop a gaming facility and related amenities. AR NEW 30166.[1] The Yuba Site is in Yuba County, California, near the intersection of Forty Mile Road and State Route 65 in an area zoned for sports and entertainment. AR NEW 30171, 30215. Under Section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(A), on September 1, 2011, the Assistant Secretary determined that gaming on the proposed site would be in the best interest of Enterprise and would not be detrimental to the surrounding community. The IGRA requires that the Governor of the State where the gaming facility would be located concur in the determination, which he did by letter dated August 30, 2012. AR NEW 29207. The land can, therefore, be taken in trust for the Tribe for gaming purposes under Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, as amended by the Indian Land Consolidation Act of 1983, 25 U.S.C. § 2202.

Notice of the ROD was published on December 3, 2012. 77 Fed. Reg. 71612, 71612. Because the legal description of the Yuba Site in the original Notice contained an error, a Revised Notice was published on January 2, 2013. *See* 78 Fed. Reg. 114.

[1] 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."

1 The process leading to the adoption of a Final Environmental Impact Statement (FEIS) is
2 summarized at AR NEW 0023218.
3 **The Instant Actions**. Plaintiff Cachil Dehe Band of Wintun Indians of the Colusa Indian
4 Community ("Colusa") filed its complaint in this Court on December 14, 2012 (ECF 1 in Case No.
5 12-1604). On December 12, 2012, Plaintiff United Auburn Indian Community of Auburn
6 Rancheria ("Auburn") filed suit in the District of Columbia (D.C. No. 1:12-cv-1988); on
7 December 20, 2012, three local advocacy groups, five local residents, and a local restaurant
8 (collectively "Citizens") did likewise (D.C. No. 1:12-cv-2052). The *Auburn* and *Citizens* cases
9 were consolidated and transferred to this Court. On January 23 *Citizens/Auburn* was consolidated
10 with *Colusa* as Case No. 2:12-cv-3021. ECF 40. Motions for temporary restraining orders (and, in
11 *Colusa*'s case, for mandamus) were all denied by order dated January 30, 2013. ECF 57. The Yuba
12 Site was taken into trust by the United States on May 15, 2013.
13 The parties proceeded under a stipulated scheduling order that was repeatedly amended.
14 The order currently in effect (ECF 95) allowed any plaintiff seven days to challenge the adequacy
15 of Defendants' administrative record, which was lodged with the Court on May 27, 2014.[2] No
16 such challenge being filed, Plaintiffs filed motions for summary judgment on June 24, 2014.
17 **STATUTORY BACKGROUND**
18 **A. The Indian Reorganization Act**
19 In 1934, Congress enacted the IRA to encourage tribes "to revitalize their self-
20 government," to take control of their "business and economic affairs," and to assure a solid
21 territorial base by "put[ting] a halt to the loss of tribal lands through allotment." *Mescalero*
22 *Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). Congress sought to "establish machinery

[2] *See* ACKNOWLEDGEMENT OF RECEIPT of Compact Disc of Revised Administrative Record from Defendants Secretary of the Interior, et al. (May 27, 2014).

1 whereby Indian tribes would be able to assume a greater degree of self-government, both
2 politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). Congress thus
3 authorized Indian tribes to adopt their own constitutions and bylaws, 25 U.S.C. § 476, and to
4 incorporate, 25 U.S.C. § 477.

5 Of particular relevance here, Section 5 of the IRA provides in pertinent part that:

6
7 [t]he Secretary of the Interior is hereby authorized, in his discretion, to acquire,
8 through purchase, relinquishment, gift, exchange, or assignment, any interest in
9 land, water rights, or surface rights to lands, within or without existing reservations,
10 including trust or otherwise restricted allotments, whether the allottee be living or
11 deceased, for the purpose of providing land for Indians.
12

13 25 U.S.C. § 465.

14 Section 19 of the IRA provides an inclusive definition of those who are eligible for its
15 benefits, including eligibility for land into trust acquisitions. That section provides, in pertinent
16 part, that "'Indian' . . . shall include all persons of Indian descent who are members of any
17 recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. Section 18 of the IRA
18 required the Secretary to call elections on Federal Indian reservations to allow the Indians residing
19 there to vote on whether to accept or reject application of the IRA to their reservation. 25 U.S.C. §
20 478. The United States has held land in trust for the benefit of Enterprise since 1915, and on June
21 12, 1935, in the wake of the IRA's enactment, the Secretary held an election for Enterprise
22 pursuant to Section 18. AR NEW 30214.

23 **B. The Indian Gaming Regulatory Act**

24 In 1988, Congress enacted IGRA to regulate gaming operations owned by Indian tribes.[3]
25 IGRA's purpose is to "provide a statutory basis for the operation of gaming by Indian tribes as a

[3] IGRA divides gaming into three classes. Tribes have exclusive authority over "Class I" social and traditional games with prizes of minimal value. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II gaming, which includes bingo and certain "non-banking" card games, *see id.* § 2703(7)(A)(i), can

1 means of promoting tribal economic development, self-sufficiency, and strong tribal
2 governments." 25 U.S.C. § 2702(1). IGRA provides that gaming shall not be conducted on lands
3 acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless
4 the land meets the requirements of one of three exceptions listed at 25 U.S.C. § 2719(a)-(b). The
5 relevant exception for purposes of this case is the exception commonly known as the "Two-Part
6 Determination," 25 U.S.C. § 2719(b)(1)(A), which states:

7 Subsection (a) of this section will not apply when—
8 (A) the Secretary, after consultation with the Indian tribe and appropriate State and
9 local officials, including officials of other nearby Indian tribes, determines that
10 a gaming establishment on newly acquired lands would be in the best interest of
11 the Indian tribe and its members, and would not be detrimental to the
12 surrounding community, but only if the Governor of the State in which the
13 gaming activity is to be conducted concurs in the Secretary's determination.
14
15 *Id.* The Department's IGRA regulations define "nearby Indian tribe" as "an Indian tribe with tribal
16 Indian lands located within a 25-mile radius of the location of the proposed gaming establishment,
17 or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters," and
18 "surrounding community" as "local governments and nearby Indian tribes located within a 25-mile
19 radius of the site of the proposed gaming establishment." 25 C.F.R. § 292.2.

20 **C. The National Environmental Policy Act**

21 The National Environmental Policy Act ("NEPA") serves the dual purpose of informing
22 agency decision-makers of the significant environmental effects of proposed major federal actions
23 and ensuring that relevant information is made available to the public so that they "may also play a
24 role in both the decisionmaking process and the implementation of that decision." *Robertson v.*
25 *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To meet these dual purposes, NEPA

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occur if the state allows such gaming for other groups. *See id.* §§ 2704, 2710(b). The tribes and NIGC share regulatory duties over Class II gaming. *Id.* § 2710(b). Class III gaming, which includes more traditional "casino" games, can occur lawfully only pursuant to a tribal-state "compact." *Id.* § 2710(d). Regulatory and enforcement oversight of Class III gaming activities is also provided under IGRA by NIGC. *Id.* §§ 2705(a), 2710(d).

1 requires that an agency prepare a comprehensive Environmental Impact Statement ("EIS") for
2 "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. §
3 4332(2)(C); 40 C.F.R. § 1501.3. In reviewing the sufficiency of an EIS, the courts evaluate
4 whether the agency has presented a "reasonably thorough discussion of the significant aspects of
5 the probable environmental consequences." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982)
6 (citation omitted). "'The reviewing court may not 'fly speck' an [EIS] and hold it insufficient on
7 the basis of inconsequential, technical deficiencies.'" *Ass'n of Pub. Agency Customers, Inc. v.*
8 *Bonneville Power Admin.*, 126 F.3d 1158, 1184 (9th Cir. 1997) (citations omitted).

9 **D. The Clean Air Act**

10 The Clean Air Act establishes a joint State and federal program to control air pollution, and
11 requires EPA to establish national ambient air quality standards ("NAAQS") for certain pollutants
12 to protect public health and welfare. 42 U.S.C. § 7409. Among the pollutants for which EPA has
13 established a NAAQS is fine particulate matter, generally referred to as "PM2.5." Each State is
14 divided into "air quality control regions," which are classified as "attainment," "nonattainment," or
15 "unclassifiable" with respect to each pollutant for which there exists an air quality standard. *Id.*
16 § 7407(d). Yuba County is designated as nonattainment for PM2.5. The Act requires each State to
17 adopt and submit to EPA for approval a state implementation plan ("SIP") that provides for the
18 implementation, maintenance and enforcement of the NAAQS in the designated regions. 42 U.S.C.
19 § 7410(a)(1).

20 **ARGUMENT**

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

## II. SCOPE OF REVIEW

### A. NEPA and IGRA and IRA

Agency compliance with NEPA, IGRA, and the IRA is reviewed under the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882-83 (1990); *ONRC Action v. BLM*, 150 F.3d 1132, 1135 (9th Cir. 1998) (NEPA); *Hein v. Capitan Grande Band of Diegueno Mission Indians*, 201 F.3d 1256, 1260 (9th Cir. 2000) (IGRA); *McAlpine v. United States*, 112 F.3d 1429, 1435 (10th Cir. 1997) (IRA). Under the APA, agency decisions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In accordance with that standard, an agency's decision will be overturned

> only if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

*McFarland v. Kempthorne,* 545 F.3d 1106, 1110 (9th Cir. 2008) (citations and quotation marks omitted). The standard of review is "'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation omitted). The APA "does not allow the court to overturn an agency decision because it disagrees with the decision or with the agency's conclusions . . . ." *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (citation omitted).

### B. Summary Judgment Standard

Because claims brought under the APA are decided on the basis of an existing record, without discovery or trial, it is customary to decide such claims on a motion for summary

judgment. "Summary judgment . . . is a particularly useful method of reviewing federal agency decisions[, as here,] because 'the sole question at issue [is] a question of law,' and the underlying material facts are contained in the administrative record." *Lone Tree Council v. U.S. Army Corps of Eng'rs*, No. 06–12042–BC, 2007 WL 1520904, at *11 (E.D. Mich. May 24, 2007) (second alteration in original and citation omitted). But as the Ninth Circuit explained in *Occidental Eng'g Co. v. INS,* 753 F.2d 766, 770 (9th Cir.1985), one traditional component of summary judgment procedures – determining whether genuine issues of fact are present – does not apply.

> [One must distinguish] the use of summary judgment in an original district court proceeding with the use of summary judgment where, as here, the district court is reviewing a decision of an administrative agency which is itself the finder of fact. In the former case, summary judgment is appropriate only when the court finds there are no factual issues requiring resolution by trial. In the latter case, summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did.

## III. DEFENDANTS COMPLIED WITH THE IRA

### A. BIA Properly And Correctly Considered Its Statutory Authority To Take Land In Trust Under The IRA And Found That Enterprise Was A "Recognized Indian Tribe Now Under Federal Jurisdiction."

The Secretary properly determined that she had authority to acquire land in trust for Enterprise under the IRA. *Carcieri* requires that a tribe have been under federal jurisdiction in 1934 to have land taken in trust under the first definition of "Indian" in the IRA, and the Secretary found that the holding of a vote at Enterprise's Reservation under Section 18 of the IRA in 1935 conclusively demonstrates as much. Citizens argues that the Secretary also had to find that Enterprise was a recognized tribe in 1934, but the IRA does not require that. Even if it did, the fact that Enterprise was residing on a federal reservation at the time of the enactment of the IRA establishes, under the terms of the IRA itself, that Enterprise was a recognized tribe in 1934.

1 In *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009), the Supreme Court was "asked to
2 interpret the statutory phrase 'now under Federal jurisdiction'" in the IRA's first definition of
3 Indian, 25 U.S.C. § 479.[4] The Court held that "[Section] 479 limits the Secretary's authority to
4 taking land into trust for the purpose of providing land to members of a tribe that was under federal
5 jurisdiction when the IRA was enacted in June 1934." *Id.*

6 The Secretary correctly determined that Enterprise was "under Federal jurisdiction" in
7 1934, based on the historical fact that, on June 12, 1935, the Secretary held a vote among the
8 residents of the Rancheria on whether to reject the application of the IRA's provisions to the
9 Rancheria pursuant to Section 18 of the Act: "The calling of a Section 18 election at the Tribe's
10 Reservation conclusively establishes that the Tribe was under federal jurisdiction for *Carcieri*
11 purposes."[5] AR NEW 30214. Section 5 of the IRA provides that the "Secretary of the Interior is
12 authorized, in his discretion, to acquire . . . any interest in lands . . . for the purpose of providing

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[4] Section 479 has three definitions of the term 'Indian':

> '[1] members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and ... [3] all other persons of one-half or more Indian blood.'

In *Carcieri*, the Supreme Court was only concerned with the first definition.

[5] Enterprise voted against application of the IRA to itself, but the result of the vote is irrelevant because the vote could not be called in the first place unless Enterprise met the IRA's definition of "Indian." Congress amended the IRA in the Indian Land Consolidation Act to allow the Secretary to acquire land in trust for tribes that had voted against the application of the IRA to their reservation in the 1930s. 25 U.S.C. § 2202; AR New 30214 ("Despite the vote to reject the IRA at such election, the later-enacted amendment to the IRA makes clear that Section 5 applies to Indian tribes whose members voted to reject the IRA."). As the Supreme Court explained, "§ 2202 provides additional protections 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*, 555 U.S. at 395. *See also Stand Up for California v. U.S. Dep't of the Interior*, 919 F. Supp.2d 51, 68 n.19 (D.D.C. 2013) (noting that outcome of Section 18 vote "does not affect the Secretary's authority to acquire land into trust").

1 lands for Indians." 25 U.S.C. § 465. In turn, Section 19 of the IRA defines Indians, in pertinent
2 part, as "all persons of Indian descent who are members of any recognized Indian tribe now under
3 Federal jurisdiction." 25 U.S.C. § 479. Section 18 of the IRA provides that it "shall not apply to
4 any reservation wherein a majority of the adult Indians, voting at a special election duly called by
5 the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 478. That provision
6 required the Secretary to conduct such votes on reservations "within one year after June 18, 1934,"
7 *id.*, although Congress subsequently extended the deadline until June 18, 1936. *See* Act of June 15,
8 1935, 49 Stat. 378. Thus, in the years immediately following enactment of the IRA, the Secretary
9 was obliged by the IRA to hold elections for all "Indians" (as that term was defined in Section 19)
10 living on Federal reservations.[6]

11 Interpreting the IRA contemporaneously with its passage, DOI concluded that the
12 Enterprise Rancheria was a reservation and was under federal jurisdiction. As a result, the
13 Secretary concluded that the IRA required holding an election on whether to reject the Act's
14 benefits. The "Department's contemporaneous construction [of a statute] carries persuasive
15 weight." *Watt v. Alaska*, 451 U.S. 259, 272-273 (1981). This election, as noted by the Secretary, is
16 documented in a 1947 report prepared by Theodore H. Haas, Chief Counsel, United States Indian
17 Service, entitled, "Ten Years of Tribal Government Under I.R.A." AR NEW 30214 (ROD); AR
18 NEW 29437, 29438 (excerpt of Haas report identifying Enterprise as voting June 12, 1935).
19 Table A of the Haas Report lists the tribes, by reservation, that voted on whether to accept or reject

[6]As courts have recognized, Rancherias of California are effectively Indian reservations if not expressly called that. *See Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp.2d 1174, 1176 n. 1 (E.D. Cal. 2003) (describing Rancherias as "small Indian reservations"); *Duncan v. United States*, 667 F.2d 36, 38 (Ct. Cl. 1981) ("Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with Congressional authorization) for Indian use from time to time in the early years of this century . . . ."); *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 657 (9th Cir. 1976) (equating California Rancherias with Indian reservations).

1 the IRA pursuant to Section 18, and Enterprise is listed in that table, as noted in the ROD. *Id*. The
2 fact that such a vote was held on the Enterprise Rancheria establishes that at the time of the
3 enactment of the IRA, the Secretary regarded the Tribe as "under Federal jurisdiction," and the
4 Department reasonably chose to rely on that finding here.[7]

5 The weight accorded Enterprise's Section 18 vote here is consistent with Interior's practice,
6 as explained in its recent M-Opinion addressed to the question of "The Meaning of 'Under Federal
7 Jurisdiction' for Purposes of the Indian Reorganization Act."[8] There the Department explained that

8 tribes that voted whether to opt out of the IRA in the years following enactment (regardless
9 of which way they voted) generally need not make any additional showing that they were
10 under federal jurisdiction in 1934. This is because such evidence unambiguously and
11 conclusively establishes that the United States understood that the particular tribe was
12 under federal jurisdiction in 1934.
13
14 M-37029 at 20. *See also Shawano County v. Acting Midwest Reg. Dir.*, 53 IBIA 62 (Feb. 28, 2011)
15 (IRA vote dispositive to question of federal jurisdiction); *Village of Hobart v. Midwest Reg. Dir.*,
16 57 IBIA 4 (May 9, 2013) (same).[9] Moreover, Interior's view of the significance of Section 18

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[7]In any event, the fact that in 1915 the United States established the Enterprise Rancheria, a type of reservation comprised of land held in trust for the Tribe by the United States, in itself demonstrates federal jurisdiction over the Tribe. *See Stand Up*, 919 F.Supp. 2d. at 68 (describing land acquisition for a band as evidence of the band's status as a *Tribe*) (emphasis in original). The residents of the Enterprise Rancheria also satisfy the second definition of Indians in Section 19 because they were "persons who are descendants of such members, who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." 25 U.S.C. § 479.

[8] *See* Department of the Interior Solicitor's Opinion, M-37029 (March 12, 2014) (http://www.doi.gov/solicitor/opinions/M-37029.pdf). An M-Opinion is a legal opinion issued by the Solicitor that formally institutionalizes Interior's position on a particular legal issue. *See* Department of the Interior 209 Departmental Manual 3.2A(11) (attached as Exhibit 2 to supporting Affirmation). An M-Opinion is binding precedent on the Department of the Interior that may only be overturned by the Solicitor, the Deputy Secretary, or the Secretary. *Id.* While the M-Opinion postdates the Record of Decision challenged here, it does show that the present decision is consistent with the Department's practice.

[9] This Court should apply *Chevron* deference to the Secretary's interpretation of the IRA. *Chevron* provides "the appropriate legal lens through which to view the legality of the Agency interpretation," *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), because of the "interstitial nature of the legal question" and the "related expertise of the Agency," id. In any event the lesser deference

1 votes has been affirmed by the U.S. District Court for the District of Columbia. *Stand Up,* 919 F.
2 Supp.2d at 67-68 ("it was perfectly reasonable for the Secretary to conclude that any persons
3 voting in an IRA election were . . . adult 'members of [a] recognized Indian tribe now under
4 Federal jurisdiction.'") (quoting 25 U.S.C. § 479) (brackets in original).

5 Citizens challenges the Department's reliance on the Section 18 vote here by arguing that
6 (1) the IRA requires a tribe have been "recognized" as well as "under federal jurisdiction" in 1934;
7 and (2) the Secretary's reliance on the Section 18 vote cannot tell us whether Enterprise was a
8 "recognized tribe" under the IRA because such votes were held by reservation, not by tribe. ECF
9 99-1 at 5-6. Although the merits of these arguments are addressed below, these arguments were
10 first developed in briefing before this Court rather than in comments submitted to the Department
11 and they are, accordingly, waived. "It is black-letter administrative law that absent special
12 circumstances, a party must initially present its comments to the agency . . . in order for the court
13 to consider the issue." *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001)
14 (internal quotations and brackets omitted); *see, e.g.*, *Otter Tail Power Co. v. Surface Transp.*
15 *Board*, 484 F.3d 959, 963 (8th Cir. 2007) ("two generalized and undeveloped statements" "provide
16 an insufficient record that the principal issue raised on appeal was adequately raised to the
17 administrative body below"); *Nat'l Mining Ass'n v. U.S. Dep't of Labor*, 292 F.3d 849, 874 (D.C.
18 Cir. 2002) (quoting *Nat'l Recycling Coal., Inc. v. Reilly*, 884 F.2d 1431, 1437 (D.C.Cir.1989)) (a
19 commenter's "general claim falls well short of providing the agency with the required 'adequate
20 notice' [of commenter's] specific claim").

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afforded by *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), is more than sufficient to uphold the Secretary's interpretation and determination in this case. Further, ambiguous statutes and statutory provisions enacted for the benefit of Indians are to be construed liberally in their favor. *See Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 467 U.S. 138, 149 (1984); *Bryan v. Itasca Cnty.*, 426 U.S. 373, 392 (1976); *Mont. v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

1 In *Carcieri*, the majority did not address the phrase, "any recognized Indian tribe," that
2 precedes the phrase "now under Federal jurisdiction" in Section 19, but Justice Breyer did in his
3 concurrence. He explained that the word "now" modifies "under federal jurisdiction," but does not
4 modify "recognized," and concluded that the IRA therefore "imposes no time limit upon
5 recognition." *Id.* at 397-98. Because the term "now" does not modify the term "recognized Indian
6 tribe," there is no requirement that a tribe prove that it was a "recognized" tribe in 1934. Indeed, as
7 Justice Breyer noted, "a tribe may have been 'under federal jurisdiction'" in 1934 even though the
8 Federal Government did not realize it "at the time." *Id.* at 397 (explaining that the Stillaguamish
9 Tribe, as a signatory to an 1855 Treaty, had fishing rights subject to federal protection even though
10 it was not formally recognized until 1976). As Justice Breyer explained, relying on common rules
11 of grammar, because "now" only modifies the words following it, there is no requirement under
12 the IRA for membership in a "recognized Tribe" as of the time the IRA was enacted.[10] There is no
13 doubt that the Enterprise Rancheria currently is a federally recognized tribe.[11] The Enterprise
14 Rancheria was on the first list required to be published in the Federal Register in 1979 listing tribal
15 entities with a government-to-government relationship with the United States and has been
16 included in every subsequent list. Indian Tribal Entities That Have a Government to Government
17 Relationship with the United States, 44 Fed. Reg. 7235 (Feb. 6, 1979); *see also* Indian Entities

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[10] For the same reason – that the IRA does not require it – the ROD does not address whether Enterprise was a "recognized tribe" in 1934 in addressing statutory authority for the trust transfer. However, in the IGRA ROD, the Secretary explains: "The Tribe has been recognized by the United States since at least April 20, 1915." AR NEW 29799. In any event, the Department's interpretation of the IRA is consistent with Justice Breyer's. *See* M-37029 at 23-25.

[11] As explained by the Department in M-37209, a "recognized Indian tribe" does not equate to federal recognition of an Indian tribe, since "federal recognition" in its modern legal sense post-dated the IRA. *Id*. at 24. Instead, the IRA uses the phrase "recognized Indian tribe" in a "cognitive or quasi-anthropological sense." *Id*. at 25. Nevertheless, presently, Enterprise is both recognized as a tribe in the cognitive sense and it is federally recognized in the sense of having a government-to-government relation with the United States.

1 Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 79 Fed. Reg.
2 4,748 (Jan. 29, 2014). Citizens' argument therefore fails.
3 Even if Citizens were correct – which it is not – that a tribe must have been a "recognized
4 tribe" as of 1934 in order to be eligible for the benefits of the IRA, their argument still fails
5 because Enterprise was a recognized tribe under the IRA. The IRA defines tribe as "any Indian
6 tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479.
7 Therefore, while Citizens correctly notes that Section 18 obliged the Secretary to hold elections by
8 reservation, not by tribes, that does not help them because under the IRA, the residents of a
9 reservation, such as Enterprise, were considered a tribe.
10 In short, the Secretary did not need to make findings about whether Enterprise in 1934
11 constituted a recognizable tribe in the cognitive sense or even a federally recognized tribe in the
12 legal sense. Because the Enterprise Rancheria voted under Section 18, its residents were under
13 federal jurisdiction and, as a reservation under federal jurisdiction, its residents were a recognized
14 tribe under the IRA.
15 Citizens is correct that in *Confederated Tribes of Grand Ronde v. Jewell*, the United States
16 noted that Section 18 votes are conducted by reservation, not by "recognized tribes." ECF 99-1 at
17 9. That observation does not mean, however, that the definition of "tribe" in Section 19 excludes
18 the Indian residents of a reservation for purposes of the IRA. Rather, the point of that observation
19 was that the universe of tribes subject to the IRA was not limited to those with reservations and the
20 concomitant right to reject the IRA pursuant to a section 18 vote. Recognized tribes without
21 reservations were also subject to the IRA provided that they met the definition of Indian in Section
22 19. See ECF 100-9 (U.S. *Grand Ronde* brief) at 23 n. 23 ("Groups that fit within the definition of
23 Indian in Section 19 were still eligible to organize under the IRA, despite not being eligible to vote

1 to accept or reject the Act."). In other words, "all persons of Indian descent who are members of
2 any recognized Indian tribe now under Federal jurisdiction" fall within Section 19's definition of
3 Indian regardless of whether the tribe possesses a reservation, while the Indian residents of a
4 federal Indian reservation were entitled to vote to accept or reject the IRA as a tribe, regardless of
5 whether they were considered a tribe, band or pueblo outside the context of the IRA.

6 This point is made by the December 13, 1934 M-Opinion relied upon by Citizens, M-
7 27810 (ECF 100-8). There the Solicitor noted that two kinds of "recognized tribes" could
8 reorganize under the IRA: groups recognized as tribes independently of the IRA and newly
9 recognized tribes under Section 19's definition of tribe: "It may be noted that whether the
10 organization is effected by a *recognized tribe* or by the residents of the reservation, *first recognized*
11 *as a tribe* under the [IRA], the constitution so adopted may prescribe such qualifications of
12 membership or suffrage . . . as seem proper to the Indians concerned and the Secretary of the
13 Interior" *Id*. at 487 (emphasis added). Citizens complains that such a newly recognized tribe
14 would exist at the expense of tribal members living off-reservation who would be
15 "disenfranchised" in the newly recognized entity. ECF 99-1 at 9 n.4. But they would only be
16 disenfranchised for the limited purposes of the Section 18 vote. A recognized tribe occupying a
17 reservation could continue to govern itself as before although, of course, Section 16 of the IRA
18 (for tribes accepting application through a Section 18 vote) makes tribal reorganization possible.[12]

19 Citizens also argues that the IRA's definition of "tribe" threatens to make the three
20 definitions of Indian in Section 19 surplusage. ECF 99-1 at 9 n.4. This contention is misguided.

[12] Section 16 of the IRA allows Indians residing on a reservation to organize and adopt a constitution and bylaws when "ratified by a majority vote of the adult members of the tribe or tribes" and approved by the Secretary. 25 U.S.C. § 476. As noted by the Solicitor in the quote above, a tribe choosing to reorganize under Section 16 would be able to establish "qualifications of membership or suffrage."

1 First, some provisions of the IRA affect Indians, regardless of whether they are tribal members.
2 *See, e.g.,* Section 2 (extending the period of trust on "Indian lands"), 25 U.S.C. § 462; Section 5
3 (Secretary authorized to acquire lands "for the purpose of providing land for Indians" with such
4 lands to be held in trust for "the Indian tribe or individual Indian"), 25 U.S.C. § 465; Section 12
5 (Secretary to establish standards for appointment of Indians to serve in the Indian Office), 25
6 U.S.C. § 472.

7 Second, while meeting the first definition of Indian in Section 19 requires membership in a
8 "recognized Indian tribe," the other definitions of Indian do not require such membership. The
9 third definition of Indian in Section 19, "all other persons one-half or more Indian blood,"
10 establishes an individual as an Indian under the IRA without regard to whether that individual
11 belongs to a tribe or resides on a reservation. Simply put, applying the plain language of Section
12 19's definition of tribe to Enterprise creates none of the problems that Citizens seeks to conjure.

13 Finally, Citizens conflates being a "recognized Indian tribe" under the IRA with being a
14 federally recognized tribe. ECF 99-1 at 11. The two are not the same, although a federally
15 recognized tribe was certainly recognized in the cognitive sense, as well. As explained by the
16 Department in M-37209, a "recognized Indian tribe," as used in the IRA, does not equate to federal
17 recognition of an Indian tribe, since "federal recognition" in its modern legal sense post-dated the
18 IRA. *Id*. at 24. Instead, the IRA uses the phrase "recognized Indian tribe" in a "cognitive or quasi-
19 anthropological sense." *Id*. at 25. *See also Stand Up*, 919 F.Supp.2d at 70 ("Thus, both based on
20 the Secretary's interpretive discussion and the Court's own reading of the statutory language, the
21 Court concludes that the phrase 'recognized Indian tribe' in the IRA refers to recognition in the
22 cognitive or quasi-anthropological sense."). As noted above, however, Enterprise appeared on the
23 first compiled list of federally recognized tribes in 1979. *See* "Indian Tribal Entities that have a

1 Government-to-Government Relationship with the United States," 44 Fed. Reg. 7235, 7235 (Feb.
2 6, 1979) (listing "Enterprise Rancheria of Maidu Indians"). Moreover, the Secretary concluded that
3 Enterprise has been recognized as of at least April 20, 1915. AR NEW 29799. On that date, a
4 census conducted by a federal Indian agent listed a tribe of 51 members for whose benefit parcels
5 were to be purchased. AR NEW 23560-61. Enterprise, therefore, was federally recognized on or
6 before 1934.

7 **IV. DEFENDANTS COMPLIED WITH DOI'S FEE-TO-TRUST REGULATIONS**

8

9 Auburn and Colusa allege that DOI has failed to consider Enterprise's need for land and the
10 purpose for which the land will be used, in violation of the Interior's fee-to-trust regulations, 25
11 C.F.R. § 151.10(b). ECF 98-1 at 14; ECF 102-1 at 16-17. 25 C.F.R. § 151.10(b) requires the
12 Secretary to consider "[t]he need of the individual Indian or the tribe for additional land." 25
13 C.F.R. § 151.10(b), but does not require a justification for why a particular parcel was chosen over
14 against other possibilities. *See South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 801 (8th Cir.
15 2005) ("It was sufficient for the Department's analysis [of § 151.10(b)] to express the Tribe's
16 needs and conclude generally that IRA purposes were served."). The ROD explains that the Tribe
17 has limited landholdings and concludes that the "Tribe needs the subject parcel held in trust in
18 order to better exercise its sovereign responsibility to provide economic development to its tribal
19 citizens." AR NEW 30214. Auburn and Colusa contend that other lands, including the Tribe's
20 current 40 acres of trust land, could be used to meet the Tribe's need for economic development.
21 However, the Secretary explained that the Tribe's current 40 acres are "not sufficient for tribal
22 housing needs, tribal government or economic development purposes," AR NEW 30214, and
23 having reasonably found a need for additional trust land, the Secretary was not required to

1 determine whether the present parcel or another similarly situated one suggested by Plaintiffs is
2 best suited for meeting that need.[13]

3 Auburn also asserts that the Secretary failed to comply with 25 C.F.R. § 151.11(b) which
4 requires that the Secretary "give greater scrutiny to the tribe's justification of anticipated benefits
5 from the acquisition" where the proposed trust land is outside a tribe's reservation. *Id.*; ECF 98-1
6 at 14. The Secretary thoroughly considered the anticipated benefits from the acquisition, AR NEW
7 30218, and Auburn fails to suggest in what respect that consideration is wanting – which is its
8 burden under the APA. *George v. Bay Area Rapid Transit*, 577 F.3d 1005, 1011 (9th Cir. 2009).

9 **V. DEFENDANTS COMPLIED WITH IGRA**

10 **A. The Secretary Properly Determined Gaming Would Not Be Detrimental To**
11 **The Surrounding Community.**

12 Under IGRA DOI was required to "consult[] with . . . appropriate State and local officials,
13 including officials of other nearby Indian tribes" as part of the process to determine whether
14 gaming is appropriate on the subject parcel and to conclude that "a gaming establishment . . .
15 would be in the best interest of the Indian tribe and its members, and would not be detrimental to
16 the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The Secretary has promulgated
17 regulations implementing this provision via a formal rulemaking with notice and comment in

[13] Colusa also objects to the fact that the Secretary noted the Tribe's need of land for housing while deciding to take the land into trust for gaming purposes. ECF 102-1 at 17. With only 40 acres held in trust for the Tribe, it needs land for multiple purposes as the Secretary noted ("tribal housing needs, tribal government or economic development purposes," AR NEW 30214). That the current acquisition only meets one of these needs (as the Secretary acknowledged) does not render it arbitrary and capricious. Colusa also asserts that the Secretary's discussion of Enterprise's need for housing is deficient because Colusa believes many members of Enterprise may not benefit from funds earned from the gaming facility due to their membership status in the tribe. ECF 102-1 at 17-18. Colusa also appears to assert that other members of Enterprise actually belong to a terminated tribe and therefore must not share in the proceeds from the proposed gaming facility. *Id.* at 18. How Enterprise determines it members and how it chooses to use revenues from the gaming facility are internal tribal matters and not at issue here.

1988. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354, 29355 (May 20, 2008) (codified at 25 C.F.R. Part 292) ("Section 20 Regulations"). Pursuant to these regulations, the Secretary must consult with appropriate State and local officials and the officials of a nearby Indian tribe. 25 C.F.R. § 292.19. After consultation the Secretary considers all information provided and makes a "Secretarial Determination" about whether gaming at the proposed site is in the best interest of the tribe and whether it would be detrimental to the surrounding community. 25 C.F.R. § 292.21. If the Secretarial Determination is favorable, the Secretary then requests the concurrence of the Governor of the affected State, in accordance with IGRA. 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.22. The Secretary's determination that a gaming establishment on the subject lands is in accord with IGRA is memorialized in a September 2011 Record of Decision ("IGRA ROD"). AR NEW 29749-29820. The Governor of California concurred with the Secretary's determination. AR NEW 29207.

**B. The Secretary properly considered mitigation measures in the Secretarial Determination**

Citizens challenges the Secretarial Determination by asserting (without any supporting legal authority) that the Secretary is barred from making a "no detriment" finding if there is any risk that the planned mitigation of environmental impacts deriving from gaming on the parcel will not occur. ECF 99-1 at 14. Citizens cannot raise this claim under NEPA because the law is settled that the mitigation measures considered in an EIS need not be legally enforceable or assured of implementation, so long as mitigation of potential impacts has been adequately considered. *See Pacific Coast Federation of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1103-04 (9th Cir. 2012) (assurance of implementation "is not required by NEPA: a mitigation plan need not be

1 legally enforceable, funded or even in final form to comply with NEPA's procedural
2 requirements.") (internal quotations omitted).[14]
3 Because NEPA does not impose such mitigation enforcement requirements on a federal
4 agency, Citizens contends that IGRA does. Nothing in IGRA or the Department's implementing
5 regulations suggests that any harmful impact of gaming (Citizens points to potentially unmitigated
6 traffic impacts) requires a finding that gaming will be detrimental without regard to the other
7 beneficial effects gaming may have on the surrounding community. The Secretary solicits and
8 considers a wide array of information related to the gaming site, including environmental, social
9 and economic impacts, as well as the costs of impacts and their mitigation, 25 C.F.R. § 292.20, and
10 then considering all the circumstances makes her determination. *See Stand Up*, 919 F. Supp.2d at
11 72 (finding Secretarial Determination would likely be upheld where "the Secretary appears to have
12 considered all aspects of the problem that he was required to consider under IGRA, and this Court
13 must confer significant deference to the Secretary's expertise"). The court in *Stand Up* rejected the
14 all-or-nothing approach pushed by Plaintiffs here, explaining that "IGRA does not require that a
15 new gaming development be completely devoid of any negative impacts," and that because "[a]ll
16 new commercial enterprises are bound to entail *some* costs," such an approach would in effect
17 "preclude any new gaming establishments" and thereby "nullify the overarching intent of the
18 IGRA." *Id.* at 73-74 (emphasis in original; internal quotations omitted).

[14]Citizens relies upon the CEQ's "Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact," 76 FR 3843-01. ECF 99-1 at 14. This Guidance notes that "NEPA itself does not create a general substantive duty on Federal agencies to mitigate adverse environmental effects." *Id.* at 3846.Citizens also offers an unsigned review of NEPA documents by an agency employee which was part of the NEPA deliberative process carried out by the agency. ECF 99-1 at 14; AR NEW1557-59. However, the view expressed by that employee, that NEPA mitigation measures should be enforceable, is simply not the law, as noted above.

1 The Secretarial Determination thoroughly considered all relevant impacts of gaming on the
2 parcel in a 70 page ROD. EN NEW 29749-29820. In supporting its overall conclusions, the IGRA
3 ROD notes that "any financial burdens imposed upon Yuba County and local units of government
4 are sufficiently mitigated by provisions contained in separate MOUs executed between the Tribe
5 and Yuba County and between the Tribe and the City of Marysville." AR NEW 29815.
6 Moreover, relying on the FEIS, the ROD notes that "the Tribe has worked with the local
7 communities to identify and mitigate any environmental impacts of the proposed Resort." *Id.*
8 Citizens' main objection to the Secretarial Determination is that mitigation measures,
9 particularly traffic mitigation measures, are not legally enforceable and thus, Citizens speculates,
10 may never be implemented. ECF 99-1 at 13-15. However, IGRA does not require enforceable
11 mitigation measures and the APA only requires that the Secretary have "examined the relevant
12 data and articulated a satisfactory explanation for its action including a rational connection
13 between the facts found and the choice made." *Sierra Club v. U.S. E.P.A.*, 671 F.3d 955, 963 (9th
14 Cir. 2012). Citizens makes no attempt to show the Secretarial Determination fails to meet this
15 proper standard.
16 The IGRA ROD acknowledges that there will be traffic impacts resulting from
17 development of the gaming facility, but also explains that planned mitigation should reduce those
18 impacts to less than significant. AR NEW 29767; AR NEW 29770-71. Traffic mitigation measures
19 were considered and itemized by the Department. AR NEW 29787-88. As Yuba County pointed
20 out in its comments, its MOU with Enterprise guarantees it "$697,120 for road improvements,"
21 such that "[t]he MOU between the applicant and Yuba County, as well as requirements contained
22 in the EIS will mitigate identified impacts so that the placement of the 40 acres into trust and

development of the casino will not have a detrimental impact on Yuba County."[15] AR NEW 27959.

**C. The Secretary Properly Considered Public Opposition To The Proposed Gaming Facility In The Secretarial Determination**

Auburn also seeks to overturn the Secretary's finding of no detriment to the surrounding community because, in its view, the IGRA ROD does not adequately explain its conclusion that there is "strong local support" for the gaming facility. ECF 98-1 at 16. As an initial matter, nothing in IGRA or the Department's regulations require consideration of local support for a casino as part of the analysis of detriment because the popularity of a casino does not tell, of itself, whether it is beneficial or detrimental to a community. In this case, the Secretary acknowledged that a 2005 advisory vote of Yuba County voters opposed Enterprise's proposed facility by a narrow margin. AR NEW 29816. The Secretary explained that 25 C.F.R. § 292.18(g) provides the Secretary authority to consider other relevant information and concluded that the "Department must give weight to the democratically-expressed will of affected voters as one of many factors when considering a tribal application for off-reservation gaming." AR NEW 29817. However, as the Secretary explained, she must also give weight to the factors expressly mentioned by the regulations, which include "memoranda of understanding and inter-governmental agreements with

[15] Citizens complains that the Secretary failed to address Yuba County's comment that the sum guaranteed it for road improvement (a sum it negotiated and agreed upon with Enterprise beforehand) would not mitigate all traffic impacts, ECF 99-1 at 15, but as the quote above makes clear, Yuba County itself agrees that there will be no significant impacts provided mitigation specified in the EIS occurs. Citizens also says the IGRA ROD fails to explain how other local governmental entities will find their costs mitigated in the absence of enforceable MOUs. *Id.* But Yuba County and Marysville County are not the only beneficiaries of the FEIS's proposed mitigation measures. For example, as noted in the IGRA ROD, Enterprise has committed to "pay its fair share to the Wheatland by-pass" which would mitigate traffic impacts. AR NEW 29788. The City of Wheatland acknowledges as much in its comment (relied upon by Citizens) that the Tribe's "payment of fees for mitigation is only adequate when a program for the use of the fees has been established," and further in its urging that the Wheatland by-pass become operational before the gaming facility becomes operational. AR NEW 27918.

1 affected local governments." 25 C.F.R. § 292.18(g); AR NEW 29817. Those agreements,
2 negotiated by elected representatives for the benefit of their constituents, ensure that gaming will
3 occur on terms acceptable to the local governments, and were properly weighed against the 2005
4 advisory vote in assessing whether gaming would be detrimental. AR NEW 29817. Moreover, as
5 the Secretary noted, in the wake of that vote, "the governing bodies of both Yuba County and the
6 City of Marysville . . . . have continued to engage in a relationship with the Tribe." *Id*. In the end,
7 the Secretary's decision that there was no detriment rested upon an overall assessment of the
8 "weight of evidence in the record," in which local opposition to gaming was considered but not
9 found dispositive. AR NEW 29815-29818 (discussion of impacts on local government).

10 Auburn notes there were other letters in the record by individuals and groups expressing
11 the same disaffection with the proposed facility. Indeed, many of the letters Auburn cites do little
12 more than tout the Yuba County advisory vote. *See* AR NEW 29824-26 (Senator Feinstein letter);
13 AR NEW 22895 (State Assemblyman Logue letter); AR NEW 22897-98 (Yuba County Supervisor
14 Abe letter). The fact that the IGRA ROD does not provide a laundry list of all comments
15 expressing disaffection with the proposed gaming facility has no bearing on whether the
16 Department properly took account of popular opposition to the gaming facility, so long as the
17 Department reasonably addressed the fact of such opposition, which it did here. Because the
18 Department took account of opposition to the gaming facility, it did not act arbitrarily or
19 capriciously.[16]

[16] Moreover, the IGRA ROD provides a list of the State, local governments, and nearby tribes involved in the consultation process as well as the tenor of their response. AR NEW 29811. Instead of demonstrating overwhelming opposition, the majority of those involved in consultation did not respond at all. *Id.*

1 **D. The Secretary properly considered Auburn's cultural and historic interests in**
2 **the proposed gaming site in making the Secretarial Determination**

3 Auburn contends the Secretary did not "adequately consider the damage" to "Auburn's
4 cultural and historical practices" in the Secretarial Determination. ECF 98-1 at 16. Auburn
5 explains that its argument is not directed at the mitigation measures designed to protect the
6 "archaeological resources and tangible artifacts on the site," *id.*, but rather Auburn's claim boils
7 down to an objection that if the land is taken in trust, Enterprise's "exercise of sovereign authority
8 over the Yuba site will necessarily eviscerate the Auburn's cultural and historical ties to the site."
9 *Id.* at 15. This argument lacks merit. On its own terms, Auburn is really objecting to placing the
10 parcel in trust for Enterprise – that is what allows Enterprise to exercise sovereign authority over
11 the parcel – not gaming. Moreover, Auburn does not currently own or exercise sovereign authority
12 over the subject parcel, so Enterprise's exercise of sovereignty over land held in trust for its benefit
13 does not infringe Auburn's own non-existent sovereign authority over the land. If the Secretary's
14 decision is overturned and the land is removed from trust, it will still be in private ownership and
15 under the sovereign authority of State and local governments, not Auburn. The Secretary noted
16 Auburn's historic and cultural connection to the land and explained that Enterprise has committed
17 to mitigating impacts on cultural resources. AR NEW 29810. Nothing more is required.[17]

18 **E. The Secretary Provided The Governor Of California All Required Materials**
19 **On Which To Base His Concurrence**

20 Citizens also alleges procedural error on the part of the Secretary in seeking the
21 concurrence of the Governor of California with the Secretarial Determination. Specifically,
22 Citizens alleges that the Secretary was obliged – and failed – to send the Governor the entire

[17] Enterprise also has significant ties with the parcel, as the Secretary explained in the IGRA ROD. AR NEW 28486-87. Enterprise is "recognized by both State and Federal agencies as the Indian tribe or Native American group most closely connected with Yuba County, including the area surrounding the Site." AR NEW 29799.

administrative record including, specifically, the FEIS, the letters sent by the former Governor of California during the NEPA process, and various opposition comment letters. ECF 99-1 at 15-16. The Department's regulations do not require transmittal of the entire administrative record to the Governor; they only require transmittal of the "entire application record." 25 C.F.R. § 292.22(b). That record consists of the materials required in a tribe's application for a Secretarial Determination, 25 C.F.R. §§ 292.17-18, and the materials received as part of the consultation process with State and local officials and nearby Indian tribes, 25 C.F.R. § 292.19. Those are the only materials the Secretary is required to consider for purposes of the Secretarial Determination. 25 C.F.R. § 292.21(a) ("The Secretary will consider all the information submitted under §§ 292.16-292.19" in making the Secretarial Determination). *See also Stand Up*, 919 F.Supp.2d at 70-71 (finding unpersuasive that 25 C.F.R. § 292.22(b) requires transmittal of "*entire record*") (emphasis in original).

The Department's records do not indicate whether or not the FEIS was included among the materials provided to the Governor of California, and Citizens is correct that the FEIS should have been transmitted. 25 C.F.R. § 292.18(a). However, if the FEIS was omitted, the error was harmless and provides no cause for a remand. *See Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1090-91 (9th Cir. 2014) ("Relief is available under the APA only for 'prejudicial error'") (quoting 5 U.S.C. § 706). The existence of the FEIS was not a mystery. The Governor's Office provided comments on the Draft EIS ("DEIS"). AR NEW 26089 (FEIS Appendices Vol. III) at AR NEW 26433 (May 5, 2008 Governor's Office comments on EIS). AR NEW 22832, 22833, 22836, 22837. A January 30, 2009 letter from the Governor's Office providing comments on the Enterprise's trust application refers to the DEIS repeatedly, as well as to the Governor's Office's 2008 comments on it. On March 17, 2009, the Governor's Office again communicated with the BIA, this time in

response to the consultation letters sent out as part of the Secretarial Determination process, and again the Governor's Office referenced its comments on the DEIS. AR NEW 28025. The Secretary's request for the Governor's concurrence with the Secretarial Determination memorialized the basis of the Secretary's decision and, again, repeatedly references the FEIS, relies on it throughout, and often summarizes its findings. AR NEW 29992-30025. If the Governor wanted to look behind and challenge the Secretary's findings and conclusions, he could have requested the FEIS (assuming its omission). Instead, Governor Brown indicated that one reason for concurring in the Secretary's Determination was that the "federal administrative process giving rise to [the] determination was extremely thorough . . . . included numerous hearings, considered hundreds of comments, and generated thousands of pages of administrative records." AR NEW 29207. In short, the Governor's Office was aware of the painstaking administrative process leading to the Secretarial Determination, including the preparation of the FEIS, and found that as a basis for concurring with the Secretary. Whether or not the FEIS was included in the materials provided to the Governor as part of the request for his concurrence is simply immaterial to the outcome of the Governor's decision. *Cal. Comtys. Against Toxics v. E.P.A.*, 688 F.3d 989, 993 (9th Cir. 2012) (harmless error in spite of mistake when "a party has actual notice and was able to submit its views to the agency prior to the challenged action").

The remaining documents identified by Citizens are not application materials within the terms of the IGRA regulations and thus were not required to be transmitted. The "missing" documents were not part of the application record because they were not comments received as

1 part of the Secretarial Determination consultation process. Accordingly, there was no requirement
2 that they be added to the application record and transmitted to the Governor.[18]

3 **F. The Department Properly Consulted With Nearby Indian Tribes**

4 **1. The Department properly consulted with Auburn**

5 IGRA requires that in the course of making a Secretarial Determination the Secretary
6 consult with "nearby Indian tribes." 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.19(a)(2). The
7 Section 20 Regulations define "nearby Indian tribe" as "an Indian tribe with tribal Indian lands
8 located within a 25-mile radius of the location of the proposed gaming establishment, or, if the
9 tribe has no trust lands, within a 25-mile radius of its government headquarters." 25 C.F.R. §
10 292.2. Moreover, the Department provided a means for tribes outside the 25-mile radius to
11 participate in the consultation process if they can demonstrate that consultation is warranted: "A
12 local government or nearby Indian tribe located beyond the 25-mile radius may petition for
13 consultation if it can establish that its governmental functions, infrastructure or services will be
14 directly, immediately and significantly impacted by the proposed gaming establishment." *Id.*

15 Auburn complains that the Department initially failed to consult with it as a "nearby tribe,"
16 although it also concedes any such oversight was rectified when Auburn was granted the full 60
17 day period to submit comments required by the regulations. ECF 98-1 at 14-15. *See* 25 C.F.R. §
18 292.19(a) (60 day comment period); AR NEW 26813 (Auburn comment letter acknowledging
19 extension). Auburn claims that its comments received little attention. ECF 98-1 at 15. While all
20 comments submitted by consulted entities during the consultation period became part of the record

[18] This does not mean these comments were not considered in the course of determining whether to take the parcel into trust, which is why they appear in the Administrative Record. However, the Department's consultation process for Secretarial Determinations only requires consultation with States, local governments and nearby tribes, and these letters were not generated as part of that process and in fact pre-date it its commencement in 2009.

1 considered by the Department in making its determination, Auburn, as a nearby Indian tribe,
2 received specific consideration in the IGRA ROD. AR NEW 29817-18 (considering impact on
3 Auburn's gaming facility, Auburn's historical ties to the parcel to be taken in trust, and potential
4 negative environmental impacts); AR NEW 29810, AR NEW 29818 (addressing Auburn historical
5 connection with trust parcel); AR NEW 29812 (characterizing Auburn's comments). Auburn must
6 do more than generally complain about the Department's response; it must show that the response
7 is so wanting as to make the decision arbitrary and capricious. *San Luis Obispo Mothers for Peace*
8 *v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 37 (D.C. Cir. 1986) (plaintiffs shoulder the
9 burden of proof in an APA challenge to agency action).

10 Finally, Auburn complains that the Department should have initiated a new consultation
11 process when Enterprise amended its application for a Secretarial Determination to comport with
12 the Department's newly issued IGRA regulations, AR NEW 22965-23040, and again when
13 Enterprise supplemented its application, AR NEW 23159-68. Auburn points to nothing in the
14 IGRA regulations requiring the consultation process to begin anew each time a tribe updates or
15 supplements the material in its application because there is no such requirement.[19]

16 **2. The Department's definition of "nearby Indian tribes" as those within**
17 **25 miles is not arbitrary and capricious**

18 The Department's IGRA Regulations define "nearby Indian tribe" as "an Indian tribe with
19 tribal Indian lands located within a 25-mile radius of the location of the proposed gaming
20 establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government
21 headquarters" and "surrounding community" as "local governments and nearby Indian tribes

[19] In fact, the regulations do not even require that State, local governments, and Indian tribes be provided with the application. Consulted entities only are to be provided (1) the location of the proposed gaming establishment; (2) information on the proposed scope of gaming; and (3) "other information that may be relevant to a specific proposal." 25 C.F.R. § 292.20(a)(1-3).

1 located within a 25-mile radius of the site of the proposed gaming establishment." 25 C.F.R. §
2 292.2. The Department also allows that "[a] local government or nearby Indian tribe located
3 beyond the 25-mile radius may petition for consultation if it can establish that its governmental
4 functions, infrastructure or services will be directly, immediately and significantly impacted by the
5 proposed gaming establishment." *Id.*

6 As discussed in the final publication of the regulations, Interior established the 25-
7 mile radius because:

8 > Based on our experience, a 25-mile radius best reflects those communities whose
9 > governmental functions, infrastructure or services may be affected by the
10 > potential impacts of a gaming establishment. The 25-mile radius provides a
11 > uniform standard that is necessary for the term 'surrounding community' to be
12 > defined in a consistent manner. We have, however, included a rebuttable
13 > presumption to the 25-mile radius. A local government or nearby Indian tribe
14 > located beyond the 25-mile radius may petition for consultation if it can establish
15 > that its governmental functions, infrastructure or services will be directly,
16 > immediately and significantly impacted by the proposed gaming establishment.
17
18 73 Fed. Reg. 29354, 29357 (May 20, 2008).
19
20 Colusa, by letter dated June 23, 2009, acknowledged that it was located "over 25 miles
21 from the Yuba Parcel" but nevertheless insisted that DOI consult with it rather than exhibiting "a
22 slavish adherence" to its regulations. AR NEW 26979, 26981. DOI's response reiterated the
23 regulatory standard but also invited Plaintiff to petition for consultation by submitting "documents
24 that establish" tribal eligibility in accord with the regulatory definition of "surrounding
25 community." AR NEW 30289.[20] Colusa declined to do so, opting instead to wait for
26 administrative proceedings to close before raising a legal claim that it was entitled to consult in
27 spite of concededly not meeting the regulatory standard for "nearby Indian tribe."

[20] This letter was erroneously omitted from the Administrative Record, but is included and attached contemporaneously with this filing, along with the appropriate certification. ECF 113.

Colusa's claim accordingly should be barred for failing to exhaust administrative remedies. It is a "long-settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). Because IGRA does not mandate exhaustion of administrative remedies, this Court must weigh "the litigant's need for judicial resolution against the agency's interests in having an opportunity to make a factual record and exercise its discretion without threat of litigious interruption, in discouraging frequent flouting of the administrative process, and in correcting its own mistakes to obviate unnecessary judicial proceedings." *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 500 (9th Cir. 1980). Here, had Colusa properly petitioned and in its petition showed the Department that "its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment," the Department could have treated it as a "nearby Indian tribe" for consultation purposes. 25 C.F.R. § 292.2. And if the Department denied Colusa that status, there would at least be a record on the issue for this Court to review. The Court should not permit plaintiffs to ignore agency procedures and then complain that they were denied the benefits those procedures were designed to afford.

In any event, Colusa's argument is meritless. Colusa challenges Interior's rule as arbitrary and capricious under the APA. ECF 102-1 at 13-15. Colusa's main argument on this point is that the Department arbitrarily chose a twenty-five mile radius when it should have concluded that the "meaning of 'nearby Indian tribes' must be understood in light of the effects of a proposed acquisition, not mere arbitrary distance." *Id.* at 14. But the Department did precisely that by providing a means for tribes outside the twenty-five mile radius to petition to be treated as "nearby Indian tribes" based on the effect of gaming at the proposed site on the tribe in question. The

1 petition process prevents the twenty-five mile radius limit from arbitrarily excluding tribes (and
2 local governments) that have a real need to participate in consultation.
3 Colusa may contend for a wider radius, as did commenters during the original rulemaking.
4 73 Fed. Reg. 29354, 29357. The Department chose a limit "[b]ased on [DOI's] experience" in
5 implementing IGRA which indicated that "a 25-mile radius best reflects those communities whose
6 governmental functions, infrastructure or services may be affected by the potential impacts of a
7 gaming establishment."[21] *Id.* While, as Colusa points out, an overly narrow radius may exclude
8 affected local governments and nearby tribes, it is also true that an overly broad radius encumbers
9 the consultation process. But, in the end, as Colusa also points out, any geographic radius cannot
10 be guaranteed to include all affected local governments and tribes, and that is why the Department
11 included the petition process that Colusa declined to use.[22]

12 **VI. ANY ERRORS IN THE LEGAL DESCRIPTION OF THE SUBJECT PARCEL**
13 **WERE HARMLESS**
14
15 The subject parcel consists of a 40-acre portion of Assessor Parcel Number ("APN") 014-
16 280-095 which in total comprises 82.64 acres. 78 Fed. Reg. 114 (correcting land description and
17 noting that the 40 acres are a "portion" of the tax parcel). Auburn notes that in some documents in
18 the Administrative Record, the legal description of the entire 82 parcel was incorrectly used to
19 describe the 40 acres at issue and asserts that this mistake undermines the Department's analyses

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[21] Prior to the 2008 rulemaking, DOI was guided by an informal "Checklist" that defined "nearby Indian tribes" as those within 100 miles and then, subsequently, revised to only include those within 50 miles based on Interior's experience with the 100 mile limit. 73 FR 29354 at 29357.

[22] Colusa also complains that the Department failed to consult with it in the years prior to the 2008 rulemaking that established the twenty-five mile limit. ECF 102-1 at 15. Since the consultation process for the Secretarial Determination did not begin for anybody until 2009, AR NEW 29811, Colusa is really arguing that the Secretary should have started the process earlier. No regulation specifies when the Department should undertake the consultation process in any given case, so whether the Department consulted before or after the present regulations were instituted is legally immaterial.

1 and suggests the outcome of the trust decision was pre-decided. ECF 98-1 at 17. This claim is
2 implausible. The ROD refers to the "40-acre" site no less than eighteen times, AR NEW 30166-
3 30220; the IGRA ROD, nineteen times. AR NEW 29749-820; the Secretary's Determination
4 Letter seven times. AR NEW 29992-30025. The DEIS and FEIS refer to the 40-acre tract scores of
5 times. The error was nothing more than that – simple error – and its effect on the administrative
6 process was harmless. *See California v. U.S. Dep't of the Interior*, 751 F.3d 1113, 1125 (9th Cir.
7 2014) (statement in EIS that it improperly tiered to other documents was plainly accidental and
8 therefore harmless).

9 **VII. DEFENDANTS COMPLIED WITH NEPA**

10 **A. Governing Legal Standard**

11 "Other statutes may impose substantive environmental obligations on federal agencies,
12 but NEPA merely prohibits uninformed – rather than unwise – agency action." *Robertson*, 490
13 U.S. at 351. A reviewing court is not to "substitute its judgment for that of the agency." *Block*,
14 690 F.2d at 761. Rather, "[o]nce satisfied that a proposing agency has taken a 'hard look' at a
15 decision's environmental consequences, the review is at an end." *Id.* (citing *Kleppe v. Sierra Club*,
16 427 U.S. 390, 410 n. 21 (1976)).

17 **B. Plaintiffs Have Waived Several of Their NEPA Arguments**

18 Persons challenging an agency's compliance with NEPA must "'structure their
19 participation so that it ... alerts the agency to the [parties'] position and contentions,'" in order to
20 allow the agency to give the issues meaningful consideration. *Dep't of Transp. v. Pub. Citizen*, 541
21 U.S. 752, 764, (2004) (*quoting Vermont Yankee Nuclear Power Corp. v. Natural Res. Def.*
22 *Council, Inc.*, 435 U.S. 519, 553 (1978)). Failure to raise an issue with an agency during the NEPA
23 process waives that issue and precludes judicial review. *Idaho Sporting Congress, Inc. v.*

1 *Rittenhouse*, 305 F. 3d 957, 965 (9th Cir. 2002) ("Since the Forest Service was not given notice of
2 this claim sufficient to allow it to resolve the claim, the claim was not properly exhausted and is
3 not subject to judicial review.")

4 Colusa did not submit any comments on the Draft EIS. *See* AR NEW 26412-25809
5 (Appendix T to Final EIS) (list of commenters); AR NEW 26416-26549 (list of comment letters);
6 AR NEW 26979 (6/23/09 letter from Colusa opposing the Enterprise casino, with no mention of
7 NEPA). As noted in context below, Auburn and Citizens also seek to challenge the Secretary's
8 decisions on grounds not presented to the agency. But any NEPA objections not presented to the
9 agency have been waived. *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp.2d
10 1015, 1030 (D. Ariz. 2009) ("Failure to raise an objection in response to a draft NEPA document
11 forfeits that objection for purposes of later litigation") (*citing Dep't of Transp. v. Public Citizen*,
12 541 U.S. 752, 764-65 (2004)); *High Sierra Hikers Ass'n v. U.S. Forest Service*, 436 F.Supp.2d
13 1117, 1147-48 (E.D. Cal. 2006).

14 **C. Defendants Properly Analyzed Alternatives**

15 **1. Defendants properly defined the purpose and need for the project**

16 Colusa and Auburn both assert that Defendants defined the purpose and need for the
17 project so narrowly as to preclude reasonable alternatives. ECF 102-1 at 7-10; ECF 98-1 at 5-7. It
18 should be noted at the outset that "[c]ourts review purpose and need statements for reasonableness
19 giving the agency considerable discretion to define a project's purpose and need." *Alaska Survival*
20 *v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013) (citation omitted).

21 The FEIS defines BIA's purpose for acquiring the land in trust as follows:

22 ■ Restoring trust land to the Tribe in an amount equal to the amount of land
23 previously lost as a result of federal action.
24 ■ Provide employment opportunities for tribal members.

1 ■ Improve the socioeconomic status of the Tribe by providing a new revenue
2 source that could be utilized to build a strong tribal government, improve existing
3 tribal housing, provide new tribal housing, fund a variety of social, governmental,
4 administrative, educational, health, and welfare services to improve the quality of
5 life of tribal members, and to provide capital for other economic development and
6 investment opportunities.

7 ■ Allow Tribal members to become economically self-sufficient, thereby
8 eventually removing Tribal members from public-assistance programs.

9 ■ Fund local governmental agencies, programs, and services.

10 ■ Make donations to charitable organizations and governmental operations.

11 ■ Effectuate the Congressional purposes set out in the Indian Gaming Regulatory
12 Act (IGRA).
13
14 AR NEW 23219 (FEIS); *see also* AR NEW 30167-30168, 30172 (ROD). The last item is of
15 course central. *League of Wilderness Defenders-Blue Mountains Biodiversity*, 689 F.3d 1060, 1070
16 (9th Cir. 2012) ("In assessing the reasonableness of a purpose and need specified in an EIS, we
17 must consider the statutory context of the federal action") (citation omitted). BIA's purposes fit
18 squarely within the statutory context: as Colusa concedes, "a principal goal of Federal Indian
19 policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal
20 government" (quoting 25 USC § 2701(4)).

21 Auburn incorrectly states that BIA's stated purpose was "restoring trust land to Enterprise,
22 *permitting Enterprise to conduct Class III gaming*, and increasing Enterprise's economic
23 development potential" (emphasis added). ECF 98-1 at 5. The italicized words are of course *not*
24 part of BIA's purpose (quoted above), and "increasing Enterprise's development potential" is
25 *precisely* what Congress directed BIA to do.

26 Similarly, Colusa baldly asserts that BIA's statement of purpose and need not only
27 "required building a casino" but also "require[d] the construction of as large a casino as possible."
28 ECF 102-1 at 8. But that is demonstrably untrue. *See* AR NEW 23220 (FEIS) ("Alternative C
29 consists of an amusement park and hotel development. The amusement park would include a water
30 park, two-18 hole miniature golf courses, a restaurant, an arcade, office space, a 10-stall batting

1 cage, a go-cart racetrack and a seven-story, 150-room hotel. The footprint of Alternative C's
2 developed area would be similar to Alternative A. Land would be taken into Federal trust but no
3 casino or gaming facilities would be associated with this alternative.")
4 The FEIS studied the likely benefits of the water park alternative in detail. AR NEW
5 24792-24794. Colusa gives the Court no reason to doubt that Alternatives A (casino complex) and
6 C (water park complex) represent the two best options for achieving the goals of "promot[ing]
7 tribal economic development, tribal self-sufficiency, and strong tribal government." 25 USC §
8 2701(4). As between the two, Alternative A is plainly superior: it will produce three times the
9 revenue, almost twice the additional employment, and twice the "indirect" and "induced"
10 economic benefit. AR NEW 23649-23650, 23664-23666. The reduction in local unemployment
11 would be greater, AR NEW 23652-23653, and for the Enterprise Tribe itself, Alternative C would
12 yield "lower revenues and fewer employment opportunities." AR NEW 23674.
13 BIA's statement of purpose and need easily withstands scrutiny. *See HonoluluTraffic.com*
14 *v. Federal Transit Admin.*, 742 F.3d 1222, 1231 (9th Cir. 2014) ("Because the statement of
15 purpose and need did not foreclose all alternatives, and because it was shaped by federal legislative
16 purposes, it was reasonable") (citation and internal quotation marks omitted).
17 **2. Defendants properly analyzed a reasonable range of alternatives**
18 All three plaintiffs challenge BIA's alternatives analysis. At the outset we note that the
19 D.C. District Court upheld a virtually identical range of alternatives (denying a preliminary
20 injunction) in a highly similar case. *Stand Up*, 919 F.Supp.2d at 77.
21 Both Auburn and Colusa complain that BIA only studied, in depth, one alternative that
22 would accomplish the stated goal of "[r]estoring trust land to the Tribe" (AR NEW 23219). ECF
23 98-1 at 5; ECF 102-1 at 8. This argument ignores the fact that numerous other sites were in fact

1 considered. First, before narrowing down potential alternative sites for detailed analysis, "the Tribe
2 evaluated a number of other potential sites throughout its aboriginal territory." AR NEW 23391.
3 Second, after eliminating most of these sites ("for a variety of reasons, environmental and
4 otherwise," *id*.) there remained four sites that would have to be taken into trust – the Yuba site and
5 sites on Highways 65, 99, and 162. All four were given "serious consideration." AR NEW 23392.
6 These three alternatives were rejected for reasons that, on their face, seem compelling. The
7 Highway 65 site was rejected because it "is zoned for agriculture, it has no infrastructure for
8 development, and the Tribe was unable to secure investors for development on this site." *Id*. The
9 Highway 99 site was rejected because it "contains numerous biologically sensitive resources,
10 including wetlands and vernal pools," because the "site also has no existing water or wastewater
11 infrastructure," and because "the Tribe was unable to secure investors for development on this
12 site." *Id*. The Highway 162 site was rejected because it "has no infrastructure for development
13 and contains numerous biologically sensitive resources, including numerous wetlands and vernal
14 pools." *Id*. BIA certainly satisfied its obligation to "briefly discuss" the reasons why it eliminated
15 these alternatives from detailed study. 40 C.F.R. § 1502.14(a).
16 Citizens and Auburn take issue with BIA's rejection of these three alternatives. ECF 99-1
17 at 19; ECF 98-1 at 6-7 & n. 2. Citizens faults BIA for basing its rejection of the Highway 65 and
18 Highway 99 sites, in part, on Enterprise's inability to secure investors. Citing *dicta* in *Van*
19 *Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986), Citizens claim that "the fact that an applicant
20 does not own a parcel of land has been considered 'only marginally relevant' to defining
21 reasonable alternatives.'" ECF 99-1 at 19, *quoting Van Abbema*, 807 F.2d at 638. The relevance of
22 these *dicta* is obscure. The purpose of the project is to provide Enterprise an "opportunity for
23 attracting and maintaining a significant, stable, long-term source of governmental revenue." AR

1 NEW 30167-30168 (ROD). Enterprise itself is quite poor. *See* AR NEW 30000 (fifty percent
2 unemployment; another eight percent living below the poverty line). A substantial development
3 will not be possible absent external investment. The government need not consider alternatives that
4 "are unrealistic," *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1180-81 (9th Cir.
5 2000), nor need it consider alternatives "that would not serve [its] reasonable purpose." *Akiak*
6 *Native Comty v. U.S. Postal Serv.*, 213 F.3d 1140, 1148 (9th Cir. 2000). *N. Alaska Envtl. Ctr. v.*
7 *Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) ("An agency need not [] discuss . . . alternatives
8 which are 'infeasible, ineffective, or inconsistent with the basic policy objectives for the
9 management of the area'") (*quoting Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174,
10 1180-81 (9th Cir.1990)).

11 Colusa (ECF 102-1 at 9) decries the absence of proof that "other investors were actually
12 approached" and Auburn faults BIA for accepting Enterprise's conclusion that the other sites
13 would not attract investors. ECF 98-1 at 6-7 (citing 40 C.F.R. § 1506.5 and *Citizens for a Better*
14 *Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985).[23] The case Colusa cites (ECF 102-1 at
15 9) reveals the flaw in plaintiffs' arguments. *See Alaska Wilderness Recreation & Tourism v.*
16 *Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) ("[t]he existence of a *viable* but unexamined
17 alternative renders an environmental impact statement inadequate") (citation omitted) (emphasis
18 added). If financing is unavailable for a site, that site is not viable.[24] Enterprise, the entity that has

[23] The cited authorities are unhelpful. 40 C.F.R. § 1506.5 deals with "environmental information" submitted by an applicant, not information as to economic viability, and the *dicta* in *Citizens for a Better Henderson* did not involve an agency's reliance on an applicant's information regarding economic viability.

[24] The actual holding in *Alaska Wilderness Recreation* has no bearing on this case. The court there found that the Forest Service needed to revisit its alternatives analysis because that analysis had been firmly focused on fulfilling the needs of a particular lumber contract that had since been cancelled. 67 F.3d at 730 ("[T]he cancellation of the APC contract, which opened for consideration alternatives which could not be freely reviewed when the APC contract was in force, is an event

1 been exploring development possibilities in the area for many years, reported that potential
2 investors are uninterested in certain sites. Plaintiffs offer no basis for the Court's concluding that
3 BIA acted arbitrarily in accepting that conclusion. Plaintiffs have therefore failed to carry their
4 burden to establish a violation of the APA. *Preston v. Heckler*, 734 F.2d 1359, 1372 (9th Cir.1984)
5 (Because agency action is presumed to be valid, the challenging party bears the burden of proving
6 that the action violates § 706(2)(A)).
7 Citizens complains that "BIA also rejected the Highway 65 site because it is zoned for
8 agriculture," ECF 99-1 at 19, but the government "must, of course, consider zoning and land-use
9 issues." *Van Abbema*, 807 F.2d at 638. Zoning and local governmental land use planning actually
10 shows how appropriate the Yuba Site is. AR NEW 30010 ("The Sports and Entertainment Zone is
11 a 900 acre area zoned for purposes of sports and entertainment, including a NASCAR racetrack,
12 outdoor amphitheater, hotels, and other compatible uses. The proposed Resort is compatible with
13 the other contemplated uses, and will cover only 40 acres of the 900 acre Zone.")[25]
14 Citizens also faults BIA for noting that rejected alternatives contain "numerous biologically
15 sensitive resources," – a finding with which Citizens does not quarrel -- asserting that the Yuba
16 Site "has the very same resources." ECF 99-1 at 19. The assertion flies in the face of BIA's
17 specific determination that "[n]o USFWS designated critical habitat occurs within the Yuba Site or
18 wastewater treatment plant (WWTP) expansion area", and that "[a]ll wetland habitats would be
19 avoided by project design." AR NEW 23638. Mitigation measures, moreover, would reduce any
20 potential impacts to wetlands to a "less than significant level." *Id.* Citizens nowhere offers any

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requiring serious and detailed evaluation by the Forest Service.") Plaintiffs do not here allege any comparable change of circumstance that opened up alternatives not present when the EIS was prepared.

[25] The zoning and contemplated use of the 900-acre tract also undermines Auburn's suggestion (ECF 98-1 at 12) that the Enterprise facility will compromise an environmentally pristine area.

1 basis for questioning these determinations, let alone concluding that they are arbitrary or
2 capricious.
3 Auburn attacks the alternatives studied in detail for various reasons, none of which has
4 weight. Auburn argues that alternatives B and C – a much smaller casino operation,[26] and the
5 water park discussed above – were "not varied enough" to present meaningful alternatives. ECF
6 98-1 at 6. Given that Auburn's (and Colusa's) main concern in this case is the potential
7 competition threatened by a new, rival casino, it is ironic, as well as utterly implausible, to suggest
8 that a water park – a *non gaming* alternative – is not meaningfully different. Precisely the same can
9 be said of a dramatically scaled down gaming operation.
10 Auburn also attacks Alternative D, the one alternative that would have relied on
11 Enterprise's existing land, as not being a "real" alternative because it was obviously not
12 economically feasible. ECF 98-1 at 6. While use of the Butte site would not accomplish the
13 objective of restoring to Enterprise the forty acres inundated by the Oroville reservoir (*see* AR
14 NEW 23561), it is perfectly logical for BIA to explore the possibility that Enterprise could develop
15 its existing real estate. In fact, Auburn itself argued, during the administrative process, "that
16 Enterprise use [its] existing land" for its casino. AR NEW 22905, 26814, 26815 ("Enterprise
17 already has existing ancestral lands in another part of California in trust on which gaming can
18 occur"), 26836 ("Enterprise already has land on which it can conduct gaming."). The suggestion
19 that the Butte alternative was "doomed . . . from the start" (ECF 98-1 at 6) appears not to be made

[26] Alternative B was in fact a dramatically smaller development. The total development under Alternative B would be 148,515 square feet (AR NEW 23368); Alternative A would include a 207,760 square foot casino and a 107,125 square foot hotel. AR NEW 23347. Alternative B was thus less than half the total development of Alternative A. Alternative A is expected to employ 1,900 people; Alternative B, 850 people. AR NEW 26560-61.

1 in good faith, and only reinforces BIA's conclusion that taking new land into trust was necessary
2 in order to accomplish its statutory goals.
3 Apart from their unsupported advocacy for the Highway 65, 99, and 162 sites, no plaintiff
4 identifies alternatives that should have been, but were not, considered.[27] As a result their
5 challenge to the breadth of the pool of alternatives studied cannot succeed. *Morongo Band of*
6 *Mission Indians v. F.A.A.*, 161 F.3d 569, 576-77 (9th Cir. 1998) ("[T]o succeed on its claim
7 [Plaintiff] must make some showing that feasible alternatives exist. Absent such a showing
8 [Plaintiff] asks this court to presume that an adequate alternate site exists somewhere and that the
9 government did not try hard enough to find this site") (*quoting Olmsted Citizens for a Better*
10 *Community v. United States*, 793 F.2d 201, 209 (8th Cir.1986)).
11 **D. Defendants Properly Analyzed Economic Impacts**
12 Colusa (ECF 102-1 at 10-11) and Auburn (ECF 98-1 at 10-11) argue that operation of
13 Enterprise's facility will reduce revenues at their own casinos. But no law gives Plaintiffs
14 immunity from economic competition, and Plaintiffs' protests are overblown.
15 First, NEPA does not protect purely economic interests. In *Ashley Creek Phosphate Co. v.*
16 *Norton*, 420 F.3d 934 (9th Cir. 2005) the plaintiff, an owner of phosphate reserves, brought a
17 NEPA challenge to the government's permitting of a new phosphate mine. The Ninth Circuit
18 squarely held that because "NEPA . . . is directed at environmental concerns, not at business
19 interests," the plaintiff lacked prudential standing to press its NEPA/APA challenge. The court first
20 noted that "[t]he Supreme Court has interpreted [Section 702] of the APA as imposing a prudential
21 standing requirement that 'the interest sought to be protected by the complainant [must be]

[27] Colusa (ECF 102-1 at 17) mentions a 63-acre parcel acquired by Enterprise in 2006 (*see* AR NEW 22969) but neither Colusa, nor any of those who actually commented on the DEIS, proposed that this tract be evaluated as an alternative to the Yuba site. The issue has therefore been waived.

1 arguably within the zone of interests to be protected or regulated by the statute ... in question.'"
2 *Id.*, 420 F.3d at 939-40 ((*quoting Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S.
3 150, 153 (1970)). The court went on to observe that "[w]e have long described the zone of interests
4 that NEPA protects as being environmental," and that, "[a]ccordingly, we have consistently held
5 that purely economic interests do not fall within NEPA's zone of interests. " *Id.* (citations omitted).
6 Because NEPA does not protect purely economic interests, Colusa's claim that it will lose gaming
7 revenues cannot succeed.[28] *See also Ass'ns of Pub. Agency Customers, Inc. v. Bonneville Power*
8 *Admin.*, 126 F.3d 1158, 1186 (9th Cir. 1997) ("NEPA does not require [the government] to
9 examine the economic consequences of its actions") (citation omitted); *Ranchers Cattlemen Action*
10 *Legal Fund v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1103–04 (9th Cir.2005).
11 Alleging impacts on its casino revenues Auburn also invokes IGRA, asserting (in passing)
12 that Auburn's lost casino revenues will constitute a "detrimental impact on the surrounding
13 community" under 25 U.S.C. § 2719(b)(1)(A). ECF 98-1 at 15. As the Secretary explained,
14 "competition . . . is not sufficient, in and of itself, to conclude [there would be] a detrimental
15 impact on Auburn." AR NEW 29817; see also *id.* ("IGRA does not guarantee that tribes operating
16 existing facilities will continue to conduct gaming free from both tribal and non-tribal
17 competition"); *Stand Up*, 919 F. Supp.2d at 76 (finding that where a proposed gaming facility
18 "would result in the [competing tribe] having a smaller slice of a larger gaming pie," but the
19 competition would not jeopardize the competing casino's viability, "the Secretary was likely

[28] An agency's use of inaccurate financial data can give rise to a NEPA violation, but only where it "impair[s] the agency's consideration of the adverse environmental effects " and "skew[s] the public's evaluation." *Border Power Plant Working Group v. Dept. of Energy*, 467 F. Supp. 2d 1040, 1063-64 (S.D. Cal. 2006) (internal quotation marks and citations omitted). Plaintiffs do not suggest any such impairment or "skewing." *See also Hammond v. Norton*, 370 F. Supp. 2d 226, 243 (D.D.C. 2005) ("Only when socioeconomic effects somehow result from a project's environmental impact must they be considered.")

1 rational in concluding that such competition would not be significantly detrimental" to the
2 competing tribe); *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000)
3 ("Although IGRA requires the Secretary to consider the economic impact of proposed gaming
4 facilities on the surrounding communities, it is hard to find anything in that provision that suggests
5 an affirmative right for nearby tribes to be free from economic competition.").
6 The argument that BIA inadequately evaluated economic impacts is also factually
7 unsupported. AES commissioned a thorough analysis of the likely impact of the project on existing
8 casinos. AR NEW 24680-24897. Both Colusa and Auburn complain that BIA's analysis is stale,
9 because it did not factor in the 2008 recession. But supplemental NEPA analysis is only required
10 where there "are significant new circumstances or information *relevant to environmental concerns*
11 and bearing on the proposed action or its impacts." *Marsh*, 490 U.S. at 372, quoting 40 CFR §
12 1502.9(c) (1987) (emphasis supplied). The tie to environmental concerns is wholly lacking. Also,
13 because the recession is largely over, plaintiffs' argument is factually undermined as well. A
14 recession, after all, is a deviation from normal economic conditions; resting analysis on
15 recessionary conditions will, by definition, skew the results.
16 Auburn takes issue with the study's observation, quoted out of context, that the competitive
17 impact on Thunder Valley (Auburn's casino) will "arguably" be "negligible."[29] The relevant
18 context is the fact that, without additional competition, Thunder Valley's "base case" revenue is
19 $220,781,228. AR NEW 24810. Auburn cites $30.6 million as the projected revenue loss from
20 new competition. The $30.6 million shortfall represents a projected revenue reduction of 13.8%.

[29] What the study pointed out is as follows: "Given the casino's proximity to Thunder Valley and Cache Creek, the region's leading casinos, these two casinos are expected to experience the greatest levels of decline in revenue. However, given the substantial levels of gaming win each of these casinos generates, the projected decline will have only a nominal impact on the operation. After payments to partners and debt owed, the difference in revenue distributed to the tribe is arguably negligible." AR NEW 24812.

1 AR NEW 24812. The bottom line is that Auburn's casino will remain handsomely profitable
2 regardless of whether Enterprise is allowed to enter the market, and that BIA analyzed the issue.[30]
3 Colusa relies upon a recently-minted income analysis of its own, which is not properly part
4 of the record, as discussed in our Motion to Strike filed concurrently herewith.

5 **E. Defendants Complied With Executive Order 11988 (Floodplains)**

6 Citizens accuses DOI of failing to comply with Executive Order ("EO") 11988, 42 Fed.
7 Reg. 26951 (1977), which requires the government to "think twice" before approving
8 developments in floodplains. *City of Carmel–by–the–Sea v. U.S. Dep't of Transp*., 123 F.3d 1142,
9 1166 (9th Cir. 1997). ECF 99-1 at 19-20. This argument has been waived because neither Citizens,
10 nor any other participant, invoked EO 11988 in response to either the draft, or final, EIS. *Idaho*
11 *Sporting Cong., Inc. v. Rittenhouse*, 305 F3d 957, 965 (9th Cir. 2002); *Havasupai*, 943 F.2d at 34.
12 The Ninth Circuit applies the exhaustion requirement to EO 11988 claims. *Great Old Broads for*
13 *Wilderness v. Kimbell*, 709 F.3d 836, 849 (9th Cir. 2013).
14 Citizens' claim that DOI failed to determine that no practicable alternative (to siting in a
15 floodplain) exists is also incorrect. DOI did in fact find that each of the alternatives proposed was
16 impractical. AR NEW 23219-23220, 23345-23394. Thus, while EO 11988 may not have been

[30] Auburn does not deny that, during the administrative process, it "did not provide an economic analysis to support its claim of negative economic impact." AR NEW 29812. Instead, Auburn stated that "[t]he EIS should evaluate the economic impacts to existing Tribal gaming operation including Thunder Valley." AR NEW 22906. That is precisely what happened. Given that Auburn did not proffer an economic analysis that undercut the conclusions reached by BIA's analysis, BIA cannot be faulted for relying on its consultant's conclusions. And Auburn's suggestion that it was BIA's duty to ascertain how a 14% drop in gaming revenues would impact Auburn's tribal operations ignores the fact that the information is uniquely in Auburn's possession. The Ninth Circuit does not, in any event, appear to agree with Auburn that the duty to exhaust remedies is suspended in the case of Indian Tribes. *See*, *e.g*., *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir.1991) ("The Tribe had some obligation to raise these issues during the comment process. Its views were solicited. Absent exceptional circumstances, such belatedly raised issues may not form a basis for reversal of an agency decision.")

1 invoked, its requirements were satisfied, making any alleged error harmless. *See Coal. For Canyon*
2 *Pres., Inc. v. Hazen*, 788 F. Supp. 1522, 1530 (D. Mont. 1990).
3 Citizens also overlooks the fact that DOI extensively considered floodplain issues and
4 required that floodplain impacts be avoided, consistent with an existing inundation easement. AR
5 NEW 22619 ("The northeast corner of the Yuba site is within a Federal Emergency Management
6 Agency (FEMA) defined 100-year flood plain. The Sacramento and San Joaquin Drainage District
7 currently holds an inundation easement on the site. The project buildings would be located outside
8 of the 100-year flood zone at least 3.5 feet above the 100-year flood zone elevation."). *See also* AR
9 NEW 23360, 23362, 23364, 23408-23411 (FEIS), 24142-24273 (FEIS Appendix F (Grading and
10 Drainage)).
11 **F. Defendants Properly Analyzed Environmental Impacts**
12 Colusa suggests that water from agricultural canals and drainage ditches (the only water
13 bodies present on the study site) might drain into area rivers that provide critical habitat for
14 federally listed fish species. ECF 102-1 at 11-12. The suggestion is: (1) that it is *possible* that
15 development of the site *might* reduce water quality in these ditches and canals; (2) that water from
16 these ditches and canals *might* drain into area rivers; and (3) that, *if* (1) and (2) occur, and *if* the
17 rivers receiving the water are home to endangered fishes, there *might* be adverse impacts on those
18 fishes. Colusa provides no reason to believe that its hypothetical speculations are grounded in fact,
19 which drains them of any force in a NEPA challenge. *Ground Zero Ctr. for Non-Violent Action v.*
20 *U.S. Dep't of Navy*, 383 F.3d 1082, 1090 (9th Cir. 2004). Colusa's argument is also belied by the
21 fact that BIA formally consulted under the Endangered Species Act with the U.S. Fish & Wildlife
22 Service, which voiced no concern about any fish species. AR NEW 24419, 24454-24459.

1 Auburn alleges that its traditions will be upset by the casino, but because Auburn did not
2 "provide[] any information indicating that development of the Resort would have a negative
3 impact on its asserted cultural connection to the Site" (AR NEW 29810), the argument is not
4 preserved. *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764, (2004). In any event, as noted by
5 BIA, the Corps of Engineers and the State of California have determined that Enterprise is "the
6 Indian tribe or Native American group most closely connected with Yuba County, including the
7 area surrounding the Site." AR NEW 29798-29799.[31]
8 Auburn also argues that its sovereignty will be infringed if Enterprise is allowed to exercise
9 jurisdiction over the Yuba site. ECF 98-1 at 15-16. Auburn preserved this argument before BIA,
10 but grounded it entirely upon the Auburn Indian Restoration Act and the fact that this land falls
11 within Auburn's "service area." AR NEW 26814, 28453. But the "service area" recognized by the
12 Act extends to the entirely of "Placer, Nevada, Yuba, Sutter, El Dorado, and Sacramento" counties
13 (25 U.S.C.A. § 1300l-6(7)) and the function of designating this service area was to identify the
14 broader area within which the Secretary is *authorized* to take land into trust for Auburn's benefit.
15 25 U.S.C.A. § 1300l-2(a). Nothing in the Act suggests that Auburn was given rights to this *six*
16 *thousand* square miles[32] to the exclusion of other tribes' sovereign rights in and historical

[31] Auburn's Gatling gun allegations of environmental harms (ECF 98-1 at 12) requires no response. *U.S. v. Western Radio Services Co*., 869 F. Supp.2d 1282, 1288 n. 4 (D. Or. 2012). The record shows, moreover, that the issues raised were thoroughly considered by BIA. AR NEW 23357-23362, 23411-23414, 23603-23604, 23715, 23763-23764, 23772-23773, 23839-23843 23962-24124 (groundwater impacts); 23503-23508, 25195-25847 (noise); 23453-23462, 23548-23557, 24399-24468, (threatened species); 23612-23636 (air pollution); 23392-23393, 23480-23488, 23676-23687, 24901-25780 (traffic); 23351, 23743-23744, 23796, 23884-23885 (light pollution).

[32] These counties put together total 6272 square miles. *See* http://www.digital-topo-maps.com/county-map/california.shtml. The State of Connecticut, by comparison, is 5006 square miles. *See* http://www.theus50.com/area.php.

connection to the same service area, and nothing in the Act purports to preclude the Secretary from taking service area land into trust for the benefit of other tribes.

### G. BIA Did Not Fail To Exercise Sufficient Independent Oversight Over Preparation Of The FEIS.

#### 1. AES did not suffer from a conflict of interest

Auburn and Colusa argue that the contractor who assisted with preparation of the EIS had a conflict of interest, and that BIA did not adequately participate in or oversee the EIS process. ECF 98-1 at 7-9, ECF 102-1 at 12-13. These arguments have been waived. Colusa did not present BIA with *any* comments on the DEIS, and Auburn's comments say not one word about the participation of AES (the contractor), AES's alleged conflict of interest, or BIA's allegedly inadequate participation in the process. AR NEW 22903-22907, 26813-26870. These issues have not been preserved. *Idaho Sporting Congress,* 305 F.3d at 965.

Auburn argues that BIA violated its own regulations by not obtaining from AES a statement disavowing any financial interest in the project, *under oath*. But the relevant regulation, 40 C.F.R. § 1506.5(c), says no such thing. The regulation contains three requirements in situations where an EIS is prepared by a contractor. First, the contractor must be "selected by the lead agency;" second, the contractor must "execute a disclosure statement . . . specifying that they have no financial or other interest in the outcome of the project;" third, "the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents." As to the first requirement, the contract specifically recites that "AES is the environmental consulting firm that BIA selected in accordance with 40 C.F.R. Section 1506.5(c)."[33]

[33] Auburn's only authority for an oath requirement is BIA's Fee-to-Trust Guidebook, but the relevant section of the guidebook (§8.7.4) says nothing about an oath requirement:

1 As to the second requirement, AES executed the required certification. AR NEW 2396
2 ("AES represents that AES has no financial interest in the results of the environmental analysis or
3 the BIA's decision regarding the approvals for the project.") This satisfies the specification
4 requirement of 40 C.F.R. § 1506.5(c). *Muckleshoot Indian Tribe v. Hall*, 698 F.Supp. 1504, 1521
5 n. 1 (W.D.Wash. 1988).

6 As to the third requirement of 40 C.F.R. § 1506.5(c), inadequate supervision of a contractor
7 only invalidates an EIS where plaintiff can also show that the EIS is substantively flawed, which
8 Plaintiffs here have not done. *Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d
9 678, 686-87 (D.C. Cir. 2004).

10 Colusa argues that the fact that AES also agreed to "assist with obtaining permit approvals
11 necessary to construct the project" gave AES a conflict of interest (ECF 102-1 at 12). The prospect
12 of providing the referenced "assistance" does not rise to the level of a conflict of interest; it should
13 come as no surprise that the same consultants who assist with federal regulatory matters would
14 also assist with parallel permitting matters. *Valley Cmty. Pres. Comm'n v. Mineta*, 246 F. Supp. 2d
15 1163, 1176 (D. N.M. 2002) *aff'd*, 373 F.3d 1078 (10th Cir. 2004). The CEQ has interpreted
16 "financial or other interest" to include "a promise of future construction or design work on the

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> Any consulting firm chosen to prepare an EIS for the BIA must prepare a statement disclosing that it has "no financial or other interests in the outcome of the project." (40 CFR1506.5(c)). An example is in Appendix 11. The disclosure statement may be included as part of the documentation in the EIS, but it must be part of the administrative record.

http://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf at p. 40. In addition, the Guidebook does not have the force of law. In the Ninth Circuit, it is well established that agency guidelines and handbooks are not binding unless (1) they are "legislative in nature, affecting individual rights and obligations" and (2) they "have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *W. Radio Serv.s Co., Inc. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996), *quoting United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir.1982). The BIA Guidebook meets neither of these standards.

project;" it does *not* refer to consulting or permitting. 40 Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 F.R. 18031, March 23, 1981.[34]

**2. BIA properly oversaw the EIS**

Even if there were some sort of conflict, a plaintiff must show that BIA failed adequately to oversee the NEPA process and that the contractor's alleged bias actually tainted the objectivity of the NEPA analysis. *See Ass'ns Working for Aurora's Residential Envt. v. Colo. Dep't of Transp.*, 153 F.3d 1122, 1129 (10th Cir.1998). The record shows, in fact, that BIA extensively managed and oversaw AES's work. BIA worked with AES to prepare the original Environmental Assessment, and on that basis BIA determined that an EIS would be required. AR NEW 1014, AR NEW 1027, AR NEW 1563, AR NEW 1597, AR NEW (ROD) 30217. BIA conducted the initial NEPA scoping meeting, and BIA received written scoping comments. AR NEW 30173. During the Notice of Intent Comment Period, it was BIA that secured acceptance letters from cooperating agencies. *Id*. According to the AES contract, BIA would "provide AES the technical direction, review, and quality control for the preparation of the Scoping Report, EIS, technical studies, and other NEPA related documents" (AR NEW 2397), and Plaintiff offers no reason to believe that this is not what happened. BIA received the 94 comment letters on the Draft EIS, AR NEW 30174, and BIA conducted the public hearing at which additional comments were invited and received. AR NEW 30173-30174; *see also* AR NEW 26411-26700 (FEIS Appendix T). BIA determined the preferred alternative. AR NEW 30188-30198, 30218-30220.

Plaintiff's "oversight" argument therefore fails. *See Lange v. Brinegar*, 625 F.2d 812, 818-19 (9th Cir. 1980) (NEPA challenge to agency oversight of EIS rejected where "[t]he record

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[34] Colusa and Auburn also claim that there was something improper about Chad Broussard's working on the EIS both as an AES employee and, later, as a BIA employee. But they do not and cannot suggest that Mr. Broussard has any *financial* interest in the project, and the fact that he brought to his BIA duties familiarity with the issues explored in the EIS cannot be disqualifying.

1 contains substantial evidence of the participation of the responsible federal officials in the
2 preparation and evaluation of the E.I.S.").

3 **VIII. DEFENDANTS COMPLIED WITH THE CLEAN AIR ACT**

4 Plaintiffs assert that the Secretary failed to comply with the conformity requirement of the
5 Clean Air Act. ECF No. 99-1 at 17-18, ECF No. 102-1 at 11. This claim lacks merit because the
6 applicable emissions from the project fall below the *de minimis* levels established by the
7 conformity regulations. Clean Air Act Section 176(c)(1), the general conformity requirement,[35]
8 provides that no federal agency shall "engage in, support in any way or provide financial
9 assistance for, license or permit, or approve, any activity which does not conform to [a SIP]." 42
10 U.S.C. § 7506(c)(1). The Act requires EPA to "promulgate criteria and procedures for determining
11 conformity." *Id.* § 7506(c)(4). These regulations provide that "a conformity determination is
12 required for each criteria pollutant or precursor where the total of direct and indirect emissions of
13 the criteria pollutant or precursor in a nonattainment or maintenance area caused by a Federal
14 action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section." 40
15 C.F.R. § 93.153(b). Of relevance here, the *de minimis* value specified in paragraph (b)(1) for
16 emissions of nitrogen oxides ("NOx"), a precursor to fine particulate matter ( PM2.5), is 100 tons
17 per year. *Id.* § 93.153(b)(1).

18 In this case, BIA determined that total unmitigated 2010 NOx emissions associated with
19 the project would be 662.97 pounds per summer day, which is equal to 118.84 tons per year, of
20 which 660.73 pounds per summer day (118.19 tons per year) is from mobile sources, *i.e.*, from

[35] For transportation plans and projects, the Act imposes additional requirements for "transportation conformity." *Id.* § 7506(c)(2).

1 vehicles traveling to and from the property. AR NEW 23621.[36] Emissions from operation of the
2 Enterprise facility are "indirect emissions." "Indirect emissions" are defined in pertinent part as
3 emissions "that are caused or initiated by the Federal action and originate in the same
4 nonattainment or maintenance area but occur at a different time or place as the action." 40 C.F.R.
5 § 93.152. The "Federal action" is the land acquisition, which in itself created no emissions. The
6 subsequent NOx emissions take place at a different time, and thus are indirect emissions.
7 Importantly, the definition of "indirect emissions" is limited to emissions that occur in the
8 "same nonattainment or maintenance area" as the federal action. *Id.* The property is located in the
9 Yuba County-Marysville nonattainment area. *See* 74 Fed. Reg. 58,688, 58,712 (Nov. 13, 2009).
10 Thus, for purposes of determining whether emissions associated with the Enterprise facility exceed
11 the *de minimis* threshold for the conformity requirement, only emissions that occur in Yuba
12 County are considered. The record demonstrates that only a portion of the estimated emissions will
13 occur in Yuba County. The proposed facility is approximately 14 miles from the borders of Yuba
14 County in all directions but north, and 20 miles to the north. *See* AR NEW 23334. Table 4.4-1 in
15 the FEIS demonstrates that only a small percentage of the trips to the facility (less than 15.2
16 percent) will lie entirely within Yuba County. AR New 23613. For the remaining trips only a
17 percentage of the emissions will be within Yuba County. Thus, for 66.3 percent of the trips, less
18 than two-thirds will be in Yuba County (20 miles out of 37.5), for 8.3 percent of the trips, less than
19 one-third will be in Yuba County (20 miles out of 67.5) and for the remaining 10.3 percent, less
20 than one-sixth will be in Yuba County (20 miles out of 120). *See id*. Even with this fairly
21 conservative analysis, only slightly more than half of the total projected emissions (which are

[36] Citizens' claim that NOx emissions would exceed *de minimis* levels by 500%, ECF No. 99-1 at 18, is based on an erroneous comparison of the emission estimates expressed as *pounds per summer day* (662.97) in the FEIS, AR NEW 23621, with the regulatory *de minimis* level, which is expressed as *tons per year* (100), 40 C.F.R. § 93.153(b).

1 118.19 tons per year) occur in Yuba County, which is far below the *de minimis* level of 100 tons
2 per year. Similarly, in response to comments on the FEIS that had suggested a conformity analysis
3 would be required for emissions in the San Francisco area, BIA determined that emissions
4 associated with the project in the entire 9-county Sacramento Valley Air Basin ("SVAB") would
5 be 87 percent of the total (*i.e.*, 102.8 tons per year). AR NEW 28613. Since many of the SVAB
6 trips originate outside Yuba County, it is also clear from this analysis that emissions in Yuba
7 County are far less than 100 tons per year.

8 Furthermore, total emissions from actual project operation will be lower than those
9 calculated in the FEIS. First, the project includes a number of mitigation measures that the FEIS
10 estimates will reduce emissions associated with the project to 25 pounds per day (4.56 tons per
11 year). AR NEW 23849. Furthermore, the FEIS estimated emission values for 2010. However, due
12 to regulatory changes and fleet turnover NOx emissions from mobile sources have decreased, and
13 modeling using more current values would project total unmitigated NOx emissions from the
14 project to be below the *de minimis* threshold for a conformity determination. AR NEW 23774, In
15 the cumulative effects analysis in the FEIS, BIA modeled NOx emissions from the project for
16 2025 as 156.10 pounds per summer day, or 28.5 tons per year. *Id.* at 23774-75. Thus, emissions for
17 2015 would be significantly less than the *de minimis* threshold of 100 tons per year. Accordingly,
18 no conformity determination was or is required for the project.

19 **CONCLUSION**

20 Federal Defendants respectfully request that the Court enter judgment for defendants on all
21 counts in all three cases.

22

23 Respectfully submitted this 24th day of July, 2014.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 24, 2014, I electronically filed the foregoing DEFENDANTS' CONSOLIDATED MEMORANDUM IN OPPOSITION TO THE MOTIONS FOR SUMMARY JUDGMENT BY CITIZENS FOR A BETTER WAY, UNITED AUBURN INDIAN COMMUNITY, AND THE CACHIL DEHE BAND OF WINTUN INDIANS, AND IN SUPPORT OF DEFENDANTS' 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.

/s/*Peter Kryn Dykema*
PETER KRYN DYKEMA