NICHOLAS C. YOST (SBN 35297)
MATTHEW G. ADAMS (SBN 229021)
JESSICA LAUGHLIN (SBN 271703)
DENTONS US LLP
525 Market Street, 26th Floor
San Francisco, CA 94105-2708
Telephone: (415) 882-5000
Facsimile: (415) 882-0300
nicholas.yost@dentons.com
matthew.adams@dentons.com
jessica.laughlin@dentons.com

MICHAEL S. PFEFFER (State Bar No. 88068)
JOHN A. MAIER (State Bar No. 191416)
Maier Pfeffer Kim & Geary LLP
1440 Broadway, Suite 812
Oakland, CA 94612
ph: 510 835 3020
fax: 510 835 3040
jmaier@jmandmplaw.com
mpfeffer@jmandmplaw,com

Attorneys for Intervenor Defendant
THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA

Plaintiff.

vs.

KENNETH LEE SALAZAR, et al

Defendants, and

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

Intervenor Defendant.

CITIZENS FOR A BETTER WAY, et al.

Plaintiffs.

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

(Consolidated Cases)

INTERVENOR-DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

vs.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants, and

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

Intervenor Defendant.

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

Plaintiff,

vs.

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

Defendants, and

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

Intervenor Defendant.

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

TABLE OF CONTENTS

Page(s)

I. INTRODUCTION 1

II. FACTUAL AND PROCEDURAL BACKGROUND 2

A. The Tribe 2

B. The Project 5

C. The Department of the Interior's Review Process 6

III. STANDARD OF REVIEW 8

A. Administrative Procedure Act 8

B. Waiver 9

IV. ARGUMENT 10

A. Interior Complied With NEPA 10

1. Colusa and UAIC Lack Prudential Standing 10

2. Interior Reasonably Defined the Purpose and Need for the Project 12

3. BIA Properly Evaluated Reasonable Alternatives to the Project 14

4. Interior Took a "Hard Look" at Potential Environmental Impacts of the Project 17

5. Interior Complied with NEPA's Conflict-of-Interest Requirements 18

B. Interior Complied With The CAA 20

C. Interior Complied With The *Carcieri* Decision And The IRA 20

D. Interior Complied With 25 C.F.R. Part 151 24

E. Interior Complied With IGRA 24

V. CONCLUSION 25

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Alaska Survival v. Surface Transp. Bd.
705 F.3d 1073 (9th Cir. 2013) 13, 16

Andrus v. Sierra Club
442 U.S. 347 (1979) 20

Ashley Creek Phosphate Co. v. Norton
420 F.3d 934 (9th Cir. 2005) 10, 11

Bear Lake Watch, Inc. v. FERC
324 F.3d 1071 (9th Cir. 2003) 8, 9

Buckingham v. United States Dep't of Agric.
603 F.3d 1073 (9th Cir. 2010) 9, 22

Carcieri v. Salazar
555 U.S. 279 (2009) 20, 21, 22, 23

Chevron v. Natural Res. Def. Council
467 U.S. 837 (1984) 21, 22

Citizens Against Burlington v. Busey
938 F.2d 190 (D.C. Cir. 1991) 12, 13

Citizens for a Better Henderson v. Hodel
768 F.2d 1051 (9th Cir. 1985) 16

City of Angoon v. Hodel
803 F.2d 1016 (9th Cir. 1986) 13, 16

City of Carmel-By-The-Sea v. U.S. Dep't of Transp.
123 F.3d 1142 (9th Cir. 1996) 15

City of Roseville v. Norton
219 F. Supp. 2d 130 (D.D.C. 2002) 15

City of Yreka v. Salazar
2011 U.S. Dist. Lexis 62818 (E.D. Cal. June 13, 2011) 24

Cmtys. Against Runway Expansion v. Fed. Aviation Admin.
355 F.3d 678 (D.C. Cir. 2004) 18

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation
502 U.S. 251 (1992).....21, 22

Ctr. for Food Safety v. Vilsack
844 F.Supp. 2d 1006 (N.D. Cal. 2012).....19

Dep't of Transp. v. Public Citizen
541 U.S. 752 (2004).....9, 17, 18, 22

Envtl. Law & Policy Ctr. v. U. S. Nuclear Regulatory Comm'n
470 F.3d 676 (7th Cir. 2006).....13

Great Basin Mine Watch v. Hankins
465 F.3d 955 (9th Cir. 2006).....9, 10, 22

Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci
857 F.2d 505 (9th Cir. 1988).....10

Kleppe v. Sierra Club
427 U.S. 390 (1976).....15

League of Wilderness Defenders - Blue Mountains Biodiversity Project v. U.S. Forest Serv.
689 F.3d 1060 (9th Cir. 2012).....12

Marsh v. Or. Natural Res. Council
490 U.S. 360 (1989).....9

N. Alaska Envtl. Ctr. v. Kempthorne
457 F.3d 969 (9th Cir. 2006).....14

Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.
606 F.3d 1058 (9th Cir. 2009).....13

Nevada Land Action Ass'n v. United States Forest Serv.
8 F.3d 713 (9th Cir. 1993).....11, 12

Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.
460 F.3d 1125 (9th Cir. 2006).....17

Pacific Coast Federation of Fishermen's Ass'n's v. Blank
693 F.3d 1084 (9th Cir. 2012).....8, 14

Robertson v. Methow Valley Citizens Council
490 U.S. 332 (1989).....10

Santa Clara Pueblo v. Martinez
436 U.S. 49 (1978).....24

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

South Dakota v. U.S. Department of Interior
775 F. Supp. 2d 1129 (D.S.D. 2011) 24

Stand Up for California! v. United States Dep't of the Interior
919 F. Supp. 2d 51 (D.D.C. 2013) 23

Theodore Roosevelt Conservation P'ship v. Salazar
661 F.3d 66 (D.C. Cir. 2011) 10

Tyler v. Cisneros
136 F.3d 603 (9th Cir. 1998) 7

Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council
435 U.S. 519 ..... 8, 10, 22

Westlands Water Dist. v. United States
376 F.3d 853 (9th Cir. 2004) 10, 12, 14, 15

FEDERAL STATUTES

25 U.S.C. § 461, *et seq.* 4

25 U.S.C. § 465 20

25 U.S.C. §§ 465 ..... 20, 21

25 U.S.C. §§ 477 4

25 U.S.C. § 479 ..... 20, 21, 22, 23

25 U.S.C. § 2202 21

25 U.S.C. § 2702 ..... 5, 13

42 U.S.C. § 4321 11

42 U.S.C. § 4332(2) 10

42 U.S.C. § 4332(2)(C) 14

FEDERAL REGULATIONS

25 C.F.R. § 151.3(a)(3) 24

40 C.F.R. §§ 1501.6 ..... 19, 20

40 C.F.R. § 1502.4 7

40 C.F.R. § 1502.13 12

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

40 C.F.R. § 1502.14 14

40 C.F.R. § 1502.14(a) 14, 16

40 C.F.R. § 1505.2 7

40 C.F.R. § 1506.5(b) 19

40 C.F.R. § 1506.5(c) 18, 19

40 C.F.R. § 1508.5 19

40 C.F.R. § 1508.9 7

40 C.F.R. § 1508.13 7

40 C.F.R. § 1508.18 7

40 C.F.R. § 1508.27 7

44 Fed. Reg. 7235 (Jan. 31, 1979) 5

79 Fed. Reg. 4748, 4750 (Jan. 29, 2014) 5

STATE STATUTES

California Rancheria Act, Pub. L. No. 85-671 5

OTHER AUTHORITIES

Bruce Flushman & Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 Pac. L. J. 391, 397-415 (1986) 3

Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, 81 (2005 ed.) 4

United States Sen. Rep. 103-340 (1994) 3

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

I. INTRODUCTION

The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, a federally-recognized Indian tribe listed in the Federal Register as the Enterprise Rancheria of Maidu Indians of California (hereinafter, "Enterprise" or the "Tribe") seeks to correct a 49-year-old injustice that has left the Tribe without a viable land base and its members in poverty.

In 1965, the United States transferred the Tribe's only usable land to the State of California to be used in the State's construction of Oroville Dam. The United States provided a small reimbursement to 4 tribal members, but never offered compensation or replacement land to the Tribe or the remainder its membership.

For decades, this taking left the Tribe without the land base necessary for housing, economic development, or any real prospect for self-sufficiency. Today, the Tribe's 900 members have few educational opportunities, suffer extremely high rates of unemployment and poverty, and are disproportionately dependent on state and federal assistance programs.

Congress enacted the Indian Reorganization Act ("IRA") and the Indian Gaming Regulatory Act ("IGRA") to support tribal land acquisition and address the absence of economic opportunity in Indian Country. Consistent with those two statutes and their implementing regulations, the Bureau of Indian Affairs and the Secretary of the Interior (together, "Interior") have acquired in trust for the Tribe 40 acres of land previously zoned for "sports and entertainment" uses in Yuba County (the "Yuba Site") and approved the Tribe's proposal to develop a casino and hotel project (the "Project") on that property.

The Project would fund employment, education, and health programs for the Tribe's members, add more than $150 million in net benefits to the local economy each year, and create more than 1,900 jobs. With the implementation of required mitigation measures, the Project will have no significant impact on the environment. Not surprisingly, the Project is supported by a broad cross-section of the community, including Yuba County, the local businesses, labor unions, and non-profit groups, to name just a few.

The Tribe's effort to recover a land base and become self-sufficient is opposed by the United Auburn Indian Community ("UAIC") and the Cachil Dehe Wintun Nation ("Colusa"), Indian tribes with existing casinos who have cynically invoked federal environmental laws in an effort to protect their lucrative businesses from economic competition.

The Tribe's Project is also opposed by a collection of anti-gaming groups and individuals (collectively, "Stand Up for California!" or "Stand Up"), who challenge Interior's decision on the basis of a philosophical opposition to tribal gaming and tribal land acquisition.

Plaintiffs' claims do not withstand scrutiny. The administrative record demonstrates that Interior fully complied with the National Environmental Policy Act ("NEPA"), the Clean Air Act ("CAA"), the IRA, and IGRA during a careful, decade-long review process that featured numerous opportunities for public notice and comment. Interior's analyses and conclusions are amply supported by the administrative record. And the Secretary of the Interior and Governor of California have concurred that the Project will benefit both the Tribe and the surrounding community.

Accordingly, the Tribe respectfully requests that its Motion for Summary Judgment be granted and that the Motions filed by UAIC, Colusa, and Stand Up be denied.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. The Tribe

For thousands of years, the Tribe and its ancestors have lived in the Feather River basin, an area of California that includes modern-day Yuba County. AR 23464-66, 23561, 26445-46, 26457, 26580-82, 26599. The Tribe's ancestors moved throughout this region to take full advantage of different resources (elk, fish, waterfowl, acorns, etc.) as they became available. AR 23464-65, 26580-81. Land was not privately owned, and territory was "vaguely defined." AR 23464-65. The California Native American Heritage Commission has determined that the Tribe is the "most likely descendent" of Indians who previously inhabited the area. AR 49, 22978, 26783, 29798-99.

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

During the Gold Rush, the vast majority of the Tribe's ancestors were enslaved or killed. *See, e.g.,* AR 26851 (California law permitting enslavement, Maidu population reduced from 8,000 to 900); Bruce Flushman & Joe Barbieri, *Aboriginal Title: The Special Case of California*, 17 Pac. L. J. 391, 397-415 (1986) (total Indian population reduced from 300,000 to 17,000); Sen. Rep. 103-340 at 2 (1994) (hunting of Indians during Gold Rush).[1] The survivors were forced into hiding in the most remote and inhospitable corners of the Feather River basin. AR 26599-60.

In an effort to remedy this situation, the United States acquired two 40-acre parcels of land for the Tribe's benefit. AR 517-19, 22968, 23463-66, 30214. The two parcels became known as Enterprise 1 and Enterprise 2.

Enterprise 1, acquired in 1915, is located on a steep, remote hillside and is accessible only by a narrow dirt road. AR 22968-69. It is unsuitable for building due to access problems, steep terrain and the presence of significant cultural resources on the property. AR 22968, 30175, 30214. As a result of these constraints, the only structures on Enterprise 1 are two small homes. AR 30214.

It was immediately clear that Enterprise 1 would be insufficient for the Tribe's needs, and so, in 1916, the United States acquired Enterprise 2 on the Tribe's behalf. AR 518, 22968-69. Enterprise 2 was located in a more suitable area and many tribal members, including tribal Chairmen and members of the Tribal Council, were born and raised there. *See, e.g.,* AR 580, 22969.

---

[1] A Report of the United States Senate Committee on Indian Affairs, prepared in connection with legislation reversing the termination of UAIC's tribal status, described these widespread "hunting parties" in chilling fashion:

> "In the late 1840's the discovery of gold in California brought an onslaught of fortune-seekers with a rapacious appetite for gold, land, and other instant riches. During the 'Gold Rush' period which ensued, California Indian tribes were viewed as obstacles to settlement. California Indians were enslaved, starved and targeted for elimination. They were the objects of Sunday hunting parties, stalked and killed as big game roaming the forests of northern California."

Sen. Rep. 103-340 at 2 (1994).

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

In 1934, the United States enacted the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461, *et seq.* Among other things, the IRA allowed existing Indian tribes to "reorganize" their governments by adopting "charters" similar to those used by business corporations. *See* 25 U.S.C. §§ 477 (charters), 478 (acceptance optional); *see also* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, 81 (2005 ed.). But the IRA did not *require* reorganization; instead, it instructed the Secretary of the Interior to convene a series of elections that would allow existing tribes to decide for themselves whether to "reorganize." *Id.*

On June 12, 1935, the Sacramento Indian Agency, an administrative unit of the Department of the Interior, held an IRA election for the Tribe. AR 103-105; 30214. The Tribe voted not to "reorganize." *Id.* The United States memorialized the vote in a document titled "Revised Tabulation Of Election Returns On The Indian Reorganization Act, From The Rancherias Under The Jurisdiction Of The Sacramento Indian Agency, California." AR 103. That document identifies the Tribe as "under the jurisdiction of the Sacramento Indian Agency." AR 103, 105.

In 1947, the United States Indian Service prepared a report examining "Ten Years of Tribal Government Under [The] IRA." AR 29437-38 (the "Haas Report"). The Haas Report includes a chart identifying "Action By Tribes On Indian Reorganization Act." AR 29438. That chart identifies Enterprise as one of the tribes that took action on the IRA. *Id.*

In 1965, the Department of the Interior transferred Enterprise 2 to the State of California for use in the construction of Oroville Dam. AR 22969. Members of the Tribe lost their homes, their community, and their land base, and they were dispersed throughout the Sacramento Valley. AR 518, 580, 22969. Enterprise 2 is now submerged beneath a reservoir known as Lake Oroville. AR 22969, 30214.

Upon taking Enterprise 2 from the Tribe, the United States provided a small reimbursement (a total of $12,196 for the entire 40-acre parcel) to four Tribal members. AR 518-519, 22969-70. Other members of the Tribe never received any compensation. *Id.*; *see also* 580-81. Nor did the Tribe or its members ever receive any land to replace Enterprise 2. *Id.*

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

During the 1960s, many small California tribes (including Plaintiff UAIC) had their tribal status "terminated" pursuant to the California Rancheria Act, Pub. L. No. 85-671. AR 519. The Tribe was never "terminated," and it continued to maintain a sovereign government-to-government relationship with the United States. *Id.*; *see also* 22969.

In 1979, the United States began memorializing its existing relations with Indian tribes by publishing in the Federal Register a list of "Indian Tribal Entities" with which it had maintained a sovereign, government-to-government relationship over the years. *See* 44 Fed. Reg. 7235 (Jan. 31, 1979) . The United States identified the Tribe on the first Federal Register list, and has continued to identify the Tribe on each and every subsequent version of the list. *Id.*; *see also* 79 Fed. Reg. 4748, 4750 (Jan. 29, 2014) (current version).

Since the loss of Enterprise 2, the Tribe has lacked a land base from which to pursue economic opportunities capable of funding necessary government services for its members. AR 22969, 22973. As a result, tribal members suffer from high unemployment and poverty: More than 50% of the Tribe's potential labor force is either unemployed or earning less than $9,048 per year, and tribal members are disproportionately reliant on social service programs. AR 22974, 29794.

B. The Project

Congress enacted the Indian Gaming Regulatory Act ("IGRA") to help tribes address these very problems. *See* 25 U.S.C. § 2702. One of the explicit purposes of IGRA is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.*

As authorized by IGRA, the Tribe sought land on which to develop a gaming project, establish a seat of tribal government, and seek economic self-sufficiency (hereinafter, the "Project"). *See* AR 516-750. In 2002, the Tribe acquired rights to a 40-acre property located in an unincorporated area of Yuba County (the "Yuba Site"). AR 524, 532-79. The Yuba Site is within the Tribe's aboriginal territory in the Feather River basin. AR 519, 22970, 22978, 23162, 23166, 26972-74, 26978, 29798-99, 29899.

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

The Yuba Site is well-suited for economic development. Among other things, it lies within a 900-acre "Sports and Entertainment Zone" approved by the voters of Yuba County and is located near a 20,000-seat concert venue known as the Sleep Train Amphitheater. AR 521, 22990. The County has confirmed that the Tribe's economic development plans are "consistent and compatible with the County's general plan and zoning of the property." AR 23352; *see also* AR 583, 521-23, 22990-92.

The Project would involve construction and operation of a casino and a 170-room resort hotel on the Yuba Site. AR 233346-51, 29759-61, 30176-78. Consistent with IGRA's strict requirements, revenues from the Project will be used to fund tribal government, tribal services, and employment for tribal members, thereby fostering economic self-sufficiency and governmental self-determination. AR 22973, 22975-76, 22979, 29755, 29794-95, 30172. The Project will allow the Tribe to generate jobs, educational opportunities, and a sense of community in its aboriginal territory. *Id.*

The Project requires that the Yuba Site be transferred from private fee ownership into federal trust for the Tribe. Recognizing that the fee-to-trust transfer will prevent Yuba County from collecting the taxes, development fees, and mitigation funds that would normally apply to a project on private land, the Tribe has agreed to a schedule of "in-lieu" tax and fee payments that will repay the County for the lost amounts. AR 520, 522, 22995-96, 23352-55. These payments are memorialized in a binding Memorandum of Understanding ("MOU") between the Tribe and the County. *Id.*; *see also* AR 23926-40.

C. The Department of the Interior's Review Process

Consistent with the Parties' February 8, 2013 Joint Status Report (Doc. 61) and the Court's subsequent Order (Doc. 64) mandating coordinated briefing, the Tribe refers to Federal Defendants' description of Interior's review process.[2] In addition, the Tribe submits the

[2] Pursuant to the Court's mandate, counsel for the Tribe conferred with counsel for the Federal Defendants on July 3, 21, and 22.

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

following 5 points:

(1) NEPA's implementing regulations authorize agencies to memorialize their compliance by preparing an Environmental Assessment ("EA") *or* an Environmental Impact Statement ("EIS"); the regulations do not require both. 40 C.F.R. §§ 1502.4, 1505.2, 1508.9, 1508.13, 1508.18, 1508.27. Here, the Project was fully evaluated in both an EA *and* an EIS. AR 1615-2236 (EA), 22601-26799 (EIS). Interior reviewed the scope and contents of the EA and made it available for public review and comment. AR 2976. Although the EA identified few environmental issues of significance (AR 1615-1788), Interior ultimately decided to prepare a more comprehensive EIS (AR 2704-05). Interior then undertook a public "scoping" process to identify the environmental issues that would be considered in the EIS (AR 2968-3328); oversaw the preparation of a Draft EIS (AR 11782-14195); circulated the Draft EIS for public comment and reviewed and responded to all comments received (AR 15274-77, 26411-26700); oversaw the preparation of a Final EIS (AR 22601-26799); made the Final EIS available for public review and comment and responded to all comments received (AR 27605-08, 28607-29); and issued two detailed Records of Decision ("RODs") approving the Project (AR 29749-29820, 30166-30220).

(2) The Final EIS included nearly 500 pages of environmental analysis (AR 22789-23885) and an additional 2,888 pages of expert technical reports (AR 23911-26799) addressing a full range of environmental issues. Those analyses revealed that the Project, with the implementation of recommended mitigation measures, will not have any significant impact on the environment. *See* AR 22617-724 (summary chart). The RODs reviewed the mitigation measures recommended in the Final EIS and explicitly adopted each of them as a binding condition on the Project's approval. AR 29772-29792, 30189-30209; *see also Tyler v. Cisneros*, 136 F.3d 603, 608-09 (9th Cir. 1998). The Tribe is committed to implementing the mitigation measures.

(3) One of the expert technical report in the EIS evaluated the socioeconomic impacts of the Project. Using economic models developed by two Nobel Prize winners, the technical

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

report demonstrates that the Project would have a net positive economic impact on the Yuba County and Sutter County of approximately $165 million per year and would create more than 1,900 new jobs. AR 24686, 24690-93, 24700-11. In addition, the technical report shows that (i) the Project's net impact on large, profitable casinos like UAIC's will be "nominal" and (ii) the Project's net impact on smaller casinos like Colusa's will be somewhat higher, but nonetheless "do not represent a substantial percent of revenue." AR 24810-12.

(4) The NEPA process included numerous opportunities for public review and comment, including multiple public hearings. *See, e.g.*, AR 2976, 2704-05, 3052-3111, 15274-77, 26551-26651, 27605-08. Plaintiffs UAIC and Colusa failed to participate in any of the public hearings. AR 3052-3111, 26551-26651. Plaintiffs UAIC and Colusa also failed to participate in the public comment period on the Draft EIS. AR 26412-15.

(5) Interior issued its final ROD more than ten years after the Tribe applied for approval of the Project. AR 516-527, 30166-30220. During that decade, the Tribe's population and needs grew, but its ability to meet them did not.

III. STANDARD OF REVIEW

A. Administrative Procedure Act

Plaintiffs have alleged violations of NEPA, the CAA, the IRA, 25 C.F.R. part 151, and IGRA. Those claims are reviewed under the Administrative Procedure Act ("APA"). Under the APA, agency action must be upheld unless it is "arbitrary and capricious."

Under the arbitrary and capricious standard, the role of the courts is to "insure a fully informed and well-considered decision, not necessarily a decision the…Court would have reached had [it] been…the decisionmaking unit of the agency." *Vt. Yankee Nuclear Power Corp. v. Nat'l Res. Def. Council*, 435 U.S. 519, 558. Thus, judicial review is "highly deferential, presuming the agency action to be valid and affirming the [] action if a reasonable basis exists." *Pacific Coast Federation of Fishermen's Ass'n's v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012). A reasonable basis for upholding agency action exists wherever the agency has relied on "relevant evidence a reasonable mind might accept as adequate to support a conclusion." *Bear*

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Lake Watch, Inc. v. FERC, 324 F.3d 1071, 1076 (9th Cir. 2003). "If the evidence is susceptible of more than one rational interpretation, [the courts] must uphold [agency] findings." *Id.*

Agencies are entitled to particular deference on issues involving scientific, technical, and other specialized expertise. *Lands Council*, 537 F.3d at 993. The Supreme Court has made it clear that "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989).

B. Waiver

The APA mandates that parties opposed to an agency's proposed action must structure their participation in the administrative process so that it "alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764 (2004). A party forfeits any arguments not raised during the administrative process. *Id.; see also Buckingham v. United States Dep't of Agric.*, 603 F.3d 1073, 1080-81 (9th Cir. 2010).

The purpose of the APA's waiver rule is straightforward and clear:

> to allow the administrative agency in question to exercise its expertise over the subject matter and to permit the agency an opportunity to correct any mistakes that may have occurred during the proceeding, thus avoiding unnecessary or premature judicial intervention into the administrative process.

Buckingham, 603 F.3d at 1080. Thus, to avoid waiver a party must raise objections "with sufficient clarity to allow the decision maker to understand and rule on the issue raised." *Id.*; *see also Great Basin Mine Watch v. Hankins*, 465 F.3d 955, 967 (9th Cir. 2006).

These requirements are strictly enforced. The Supreme Court has admonished that

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553-54 (1978); *see also Great Basin Mine Watch*, 465 F.3d at 967.

IV. ARGUMENT

A. Interior Complied With NEPA

NEPA is a procedural statute; it does not dictate the results of agency decision-making. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-51 (1989). Instead, it sets out a process whereby federal agencies, including Interior, must prepare an EIS identifying and evaluating environmental issues before approving a "major federal action." 42 U.S.C. § 4332(2).

Preparation of an EIS "necessarily calls for judgment and that judgment is the agency's." *Westlands Water Dist. v. United States*, 376 F.3d 853, 866 (9th Cir. 2004). Reviewing courts "may not flyspeck an EIS or substitute [their] judgment for that of the agency concerning the wisdom or prudence of a proposed action." *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) ("We have consistently declined to flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor").

Here, Interior properly exercised its judgment and fully complied with NEPA by undertaking a careful, public process that fully evaluated the Project and reasonable alternatives thereto. Plaintiffs' claims to the contrary are unsupported by the record or the law.

1. Colusa and UAIC Lack Prudential Standing

Prudential standing principles require that the interests a plaintiff seeks to protect must fall within "the zone of interests" of the statute at issue. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939-945 (9th Cir. 2005). When enacting NEPA, Congress made it clear that the Act is intended to protect and regulate environmental matters:

> The purposes of this Act are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

> the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 4321. The Ninth Circuit has confirmed that "[t]he purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions." *Nevada Land Action Ass'n v. United States Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). Thus, NEPA's "zone of interests" is limited to environmental concerns. *Id*.

Colusa has alleged that Interior failed to comply with NEPA. Colusa at 7-13. But it has not identified any environmental interest in this case. Colusa at 1-13. Nor has it alleged (much less demonstrated) that it will suffer environmental harm as a result of the Tribe's Project; on the contrary, Colusa has alleged that it will suffer "severe adverse impacts" that are purely economic in nature. Colusa Complaint (Doc. 1) at ¶ 1-19; *see also* Colusa Motion for Preliminary Injunction (Doc. 8-1) at 15-20. Therefore, Colusa is not within NEPA's zone of interests and its claims must be rejected for lack of prudential standing. *See Ashley Creek*, 420 F.3d at 939-945; *Nevada Land*, 8 F.3d at 716.

Like Colusa, UAIC is pursuing this case for economic reasons. Unlike Colusa, UAIC has tried to disguise the commercial character of its interests by alleging that the Project will "likely affect" UAIC's environmental and cultural concerns. UAIC at 12. But the administrative record contains no specific evidence linking UAIC to any allegedly-affected environmental resources or cultural activities. UAIC has tried to obscure this absence of evidence by weaving a complex web of internal citations and cross-references. Its vague claims of environmental injury do not refer to the administrative record, but to its own Separate Statement. UAIC at 12. The cited sections of the Separate Statement refer to footnotes. UAIC Separate Statement (Doc. 98-2) at ¶¶ 2, 39. The footnotes cite a string of documents, only one of which actually contains concrete information about the extent of UAIC's claimed environmental connection to the Yuba Site. *Id*. at n.2, 39 n.39. And that document, an extra-record *post hoc* declaration from Marcos Guerrero, fails to present any concrete evidence that UAIC has an environmental interest in the Yuba Site.

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

See Affidavit of Marcos Guerrero (Case No. 13-cv-00064, Doc. 49-2) at ¶¶ 29-33 (general descriptions of gathering activities).

This thin environmental veneer cannot obscure the fundamentally economic nature of UAIC's interest. There is little question that UAIC, like Colusa, has filed suit in an effort to protect the privileged economic position of its existing casino. Therefore UAIC's NEPA claims, like Colusa's, must be rejected for lack of prudential standing. *See Nevada Land*, 8 F.3d at 716 (rejecting plaintiff's attempt to re-characterize an economic interest in environmental terms).

2. Interior Reasonably Defined the Purpose and Need for the Project

An EIS must "briefly specify the purpose and need" for a proposed project. 40 C.F.R. § 1502.13. The courts provide agencies with "considerable discretion to define [ ] purpose and need." *League of Wilderness Defenders - Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012). A statement of purpose and need must be upheld "so long as the objectives the agency chooses are reasonable." *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (Thomas, J.). Where, as here, a project is proposed pursuant to a specific statute, the statutory objectives of the project help determine the reasonableness of the agency's purpose and need. *Westlands*, 376 F.3d at 867-68.

Interior's statement of purpose and need for the Project easily meets these standards. It explicitly recognizes and responds to the poverty, unemployment, and absence of economic opportunity currently facing the Tribe and its members (AR 23333-39); the fact that the Tribe lacks trust land suitable for economic development due to the loss of Enterprise 2 (AR 23333, 23558-61); IGRA's statutory findings, objectives and requirements regarding tribal economic development (AR 23339-40); and Interior's broader policies, regulations, and mission (AR 30172). It was perfectly reasonable for Interior to consider taking land into trust for economic development purposes, pursuant to Congressional authorization, on behalf of a poor Tribe that had lost the land base necessary to provide employment and government services for its members.

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

UAIC argues that Interior's statement of purpose and need was flawed because it gave too much attention to the Tribe's needs. UAIC at 5-6. The argument fails for several reasons. First of all, it was permissible for Interior to consider the Tribe's goals and objectives; in fact, it would have been improper for Interior to do otherwise. *See, e.g., Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084-85 (9th Cir. 2013) (agency must consider permit applicant's objectives); *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (improper to ignore applicant's economic goals).[3] Second, Interior's purpose and need was not confined to the Tribe's goals and objectives; the statement also addressed the statutory mandates of IGRA and the Department's own regulations, policies, and mission. AR 23339-40, 30172.[4] Third, Interior's purpose and need was broad enough to permit detailed consideration of a range of alternatives in the EIS. *See* AR 23345-94, 23593-23835; *see also* part IV.A.3, *infra*.[5] Fourth, UAIC has failed to identify any specific element of Interior's purpose and need statement that is unreasonable. *See Citizens Against Burlington*, 938 F.2d at 196 (statement must be upheld "so long as the objectives the agency chooses are reasonable").

Colusa argues that Interior's statement of purpose and need is inconsistent with IGRA. Colusa at 8. It is badly mistaken. IGRA's purposes are explicitly codified at 25 U.S.C. § 2702:

> "The purpose of this Act is [ ] to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments…"

Interior's statement of purpose and need clearly explains that the Tribe seeks to develop a gaming facility for those very same purposes. AR 23333-40; *see also* AR 29755, 30172. In

---

[3] Indeed, ***case law cited by UAIC*** confirms that federal agencies "may accord substantial weight to the preferences of the applicant." *See Envtl. Law & Policy Ctr. v. U. S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 683 (7th Cir. 2006) (cited by UAIC at 5).

[4] For that reason, this case is distinguishable from *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070-72 (9th Cir. 2009), cited by UAIC at 5, in which a statement of purpose and need failed to address relevant statutory and regulatory frameworks.

[5] For that reason, this case is distinguishable from *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 App'x 440 (9th Cir. 2007), cited by UAIC at 5, an unpublished decision involving an EA which considered just one alternative. *Id.* at 441-42.

fact, the purpose and need statement explicitly cites and incorporates "the Congressional purposes set out in [IGRA]." AR 23339-40. It is difficult to imagine a purpose and need more consistent with IGRA.

3. BIA Properly Evaluated Reasonable Alternatives to the Project

An EIS must evaluate reasonable alternatives to a proposed project. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.14. A deferential "rule of reason" governs both the choice of alternatives and the extent to which the EIS must discuss each one. *Westlands*, 376 F.3d at 868. The "rule of reason" standard provides that an EIS must evaluate sufficient alternatives to permit a reasoned choice, but need not complete a detailed analysis of alternatives that are infeasible, ineffective, remote, speculative, or inconsistent with project purposes. *Id*.; *see also Pac. Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1099 (9th Cir. 2012). For alternatives eliminated from detailed study, the EIS need only provide a "brief[] discuss[ion] of the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a).

Here, Interior's analysis of alternatives went well beyond the requirements of the rule of reason. The evaluation began with consideration of a variety of projects and sites within the Tribe's aboriginal territory. AR 233391-92, 29757, 30174-75. Ultimately, Interior carried forward five alternatives for detailed analysis in the EIS. AR 23346-94 (describing alternatives), 23593-23835 (evaluation of environmental consequences), 29757-58 (screening process). Those five alternatives included different sites, different types of development (including both gaming and non-gaming development options), different development intensities, and the alternative of taking no action at all. *Id*. In addition, BIA considered 3 other options which ultimately proved infeasible. *See* AR 23391-92, 30174-75, 301757-78.

The range of five alternatives evaluated in detail in the EIS provided BIA with a reasonable set of options: approve the Tribe's proposed Project, approve the Project with modifications (either by modifying the proposed development or by modifying its location), or deny the Project altogether. *See* AR 23346-94 (describing alternatives). Ninth Circuit case law confirms that this approach satisfies NEPA's "rule of reason." *See, e.g., N. Alaska Envtl. Ctr. v.*

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

Kempthorne, 457 F.3d 969, 978 (9th Cir. 2006) ("Under NEPA, an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative"); *Westlands*, 376 F.3d at 872 ("the touchstone of our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decisionmaking").

In a lengthy series of arguments, UAIC and Colusa vigorously dispute BIA's decision to approve EIS alternative A (the Project), contending that the agency improperly "discarded" and "disfavored" alternative B (a smaller casino at the Yuba Site), alternative C (a water park at the Yuba Site), alternative D (a casino at the Butte Site), and alternative E (no action). Colusa at 9; UAIC at 6. Plaintiffs' premise is inaccurate: alternatives B, C, D, and E were not "discarded" or eliminated from the EIS; rather, those alternatives were included and fully evaluated in the document. AR 23365-91, 23593-23835. And, more fundamentally, their objection to Interior's selection of Alternative A is precisely the sort of substantive challenge *not* permitted by NEPA. *See, e.g., Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976) (a court "cannot interject itself …as to the choice of the action to be taken"); *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1159 (9th Cir. 1996) ("ultimately, plaintiff's disagreement appears to be a substantive one"). UAIC and Colusa may have preferred that Interior approve alternative B, C, D, or E, but such preferences are "simply not grounds for finding that the agency failed to meet its obligations…or that the agency's decision was arbitrary and capricious." *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 170 (D.D.C. 2002), *aff'd* 348 F.3d 1020 (D.C. Cir. 2003) and *cert denied* 541 U.S. 974 (2004) (rejecting a similar claim in litigation challenging UAIC's own casino).

In a footnote, UAIC objects to the EIS's treatment of alternative casino sites along Highway 65, Highway 99, and Highway 162. UAIC at 6-7 n.2. As noted above, alternatives found to be infeasible, ineffective, remote, or speculative need not be fully evaluated in an EIS; they can be eliminated from detailed consideration so long as the EIS contains a brief discussion

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

of the reasons for their elimination. 40 C.F.R. § 1502.14(a). Consistent with that rule, the EIS briefly discusses the reasons for Interior's rejection of the three sites:

- The Highway 65 site was eliminated due to land use conflicts, absence of infrastructure, and the Tribe's inability to secure investment.
- The Highway 99 alternative was eliminated due to the presence of numerous sensitive biological resources (including wetlands and vernal pools), absence of water and wastewater infrastructure, and the Tribe's inability to secure investment.
- The Highway 162 alternative was eliminated due to the presence of numerous wetlands and the absence of necessary infrastructure.

See AR 23391-92. In contrast to these problems, the Yuba Site is located in an area designated for sports and entertainment land uses (AR 23491-92), is immediately adjacent to necessary infrastructure that can readily be adapted to the Project (AR 23359-60, 24125-41), and has few sensitive biological resources (AR 23446-53, 23461-62). Under these circumstances, Interior's treatment of the Highway 65, Highway 99, and Highway 162 sites was entirely appropriate.

UAIC also argues that Interior improperly relied on the Tribe's representation that investors could not be secured for the Highway 65 site or the Highway 99 site. UAIC at 6-7. The argument fails for two reasons. First, controlling Ninth Circuit precedent allows agencies to rely on information submitted by a permit applicant. *See, e.g., Alaska Survival*, 705 F.3d at 1087 ("no error" where agency relied on applicant's assessment of feasibility).[6] Second, "[t]hose challenging the failure to consider an alternative have a duty to show that the alternative is viable." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1087 (9th Cir. 2013); *see also City of Angoon*, 803 F.2d at 1022 (plaintiff must offer "specific evidentiary facts" demonstrating viability). UAIC has neither alleged nor demonstrated the viability of any of the sites eliminated from detailed consideration in the EIS. *See* UAIC at 5-7.

[6] The only Ninth Circuit case cited by UAIC is *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051 (9th Cir. 1985). There, the appellate panel held that the District Court (not the agency) failed to make a required finding of fact. *Id.* at 1058. That issue is not relevant here.

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

For its part, Colusa argues that the EIS should have evaluated the alternative of developing a casino on 63 acres of land adjacent to the City of Oroville. Colusa at 9. Colusa waived this argument by failing to raise it during the NEPA process. AR 3114 (failure to comment during scoping process); AR 26412-15 (failure to comment on Draft EIS); AR 28551 (brief mention of 63-acre site fails to mention alternatives analysis); *Public Citizen*, 541 U.S. at 764-65 (waiver).[7]

4. Interior Took a "Hard Look" at Potential Environmental Impacts of the Project

Consistent with the Parties' February 8, 2013 Joint Status Report (Doc. 61) and the Court's subsequent Order (Doc. 64) mandating coordinated briefing, the Tribe refers to Federal Defendants' arguments regarding Interior's "hard look" at environmental impacts. In addition, the Tribe submits the following three points:

(1) Colusa contends that the EIS fails to provide a "hard look" at potential socioeconomic impacts. Colusa at 10-11. The argument relies on a declaration from Alan Meister. *Id*. The Meister Declaration is not in the administrative record and is not properly before the Court. *See* Motion to Strike Declaration of Alan Meister (filed herewith). Therefore, the portions of Colusa's argument relying on the Meister Declaration must be stricken. *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144-45, 1151 (9th Cir. 2006).

(2) UAIC contends that the EIS fails to provide a "hard look" at the Project's potential to interfere with "UAIC members who gather resources on and near the Yuba Site for important cultural practices." UAIC at 12. UAIC waived that argument by failing to raise it during the NEPA process. AR 28533-34 (UAIC comments); *Public Citizen*, 541 U.S. 752, 764-65 (waiver). In addition, the argument relies on an extra-record affidavit from Marcos Guerrero that is not properly before the Court. *See* Motion to Strike Affidavit of Marcos Guerrero (filed

[7] Colusa's argument with respect to the 63-acre site would fail even if it were not waived. The administrative record contains little information about the site (largely because there were no comments about the site during the NEPA process), but it does show that the property is dedicated for future use as low- and moderate-income housing (AR 22969, 28620) and is entirely unsuitable for a casino-hotel development because it is "landlocked" (*i.e.*, lacks access to the public road system), surrounded by residences, and near a school (AR 26484).

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

herewith). Moreover, even if the Guerrero Affidavit were properly before the Court it would not demonstrate that UAIC uses the Yuba Site (which it has no legal right to access) for cultural activities or that the Project will have a concrete adverse impact on such activities. Affidavit of Marcos Guerrero (Case No. 13-cv-00064, Doc. 49-1) at ¶¶ 29-33.

(3) UAIC argues that the EIS fails to provide a "hard look" at potential impacts on views of the Sutter Buttes. UAIC waived that argument by failing to raise it during the NEPA process. AR 28539 (general comments about "nearby residences" and "public vantage points," no reference to Sutter Buttes); *Public Citizen*, 541 U.S. 752, 764-65 (waiver of claims). In addition, the argument relies on the Guerrero Affidavit, which, as explained above, is not properly before the Court. *See* Motion to Strike Declaration of Marcos Guerrero (filed herewith).

5. Interior Complied with NEPA's Conflict-of-Interest Requirements

UAIC and Colusa allege that Interior violated NEPA's conflict-of-interest requirements. UAIC at 7-9; Colusa at 12-13. They are mistaken. NEPA's implementing regulations impose three conflict-of-interest requirements, and Interior satisfied each of them. *See* 40 C.F.R. § 1506.5(c) (requirements); *Cmtys. Against Runway Expansion v. Fed. Aviation Admin.*, 355 F.3d 678, 686-87 (D.C. Cir. 2004) (identifying and discussing requirements).

First, the regulations provide that an EIS must be prepared either by the lead federal agency or by a consultant selected by the lead federal agency. 40 C.F.R. § 1506.5(c). The record demonstrates that Interior, the lead federal agency, selected the contractor that prepared the EIS. *See* AR 2396 ("AES is the consulting firm that BIA selected in accordance with 40 C.F.R. Section 1506.5(c)" and "[t]his Agreement constitutes…BIA's selection of AES as the primary EIS contractor").

Second, the regulations require that a contractor preparing an EIS execute "a disclosure statement prepared by the lead agency...specifying that they have no financial or other interest in

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

the outcome of the project." 40 C.F.R. § 1506.5(c). The record clearly shows that the contractor executed the required statement. *See* AR 2396 (statement), 2400 (signature page).

Third, the regulations mandate that the lead federal agency participate in the preparation of the EIS, independently evaluate the EIS prior to approval, and take responsibility for the EIS' scope and contents. 40 C.F.R. § 1506.5(c). The record establishes that Interior properly discharged each of these responsibilities. *See, e.g.*, AR 2976 (decision to prepare EIS); AR 2397 (responsibility for scope and contents); AR 3052-56 (scoping process); AR 15274-77 (notice of availability of the Draft EIS); 26553-55 (hearing on Draft EIS); AR 26652-26700 (responses to comments on the Draft EIS); AR 23890-92 (preparation of Final EIS). The officials directly responsible for overseeing preparation of the EIS are clearly identified in the "list of preparers" in chapter 7 of the document. AR 23890-92; *see also Ctr. for Food Safety v. Vilsack*, 844 F.Supp. 2d 1006, 1022-23 (N.D. Cal. 2012) (relying on "list of preparers" to reject conflict-of-interest claim).

UAIC alleges that Interior failed to disclose or evaluate "AES's prior work and dealings with Enterprise." UAIC at 8-9. It is true that Enterprise originally retained AES to prepare the EA. But there is nothing wrong with that. Unlike an EIS, an EA can be prepared by a project applicant. *Compare* 40 C.F.R. § 1506.5(b) *with* 40 C.F.R. § 1506.5(c). Moreover, Interior participated in the preparation of the EA, provided UAIC with notice of the EA, provided UAIC with a hard copy of the EA, and invited UAIC to comment on the EA. AR 2309, 2778; *see also* 17797-98 (EA explicitly identifies preparers). Thus, AES's "prior work and dealings" were both evaluated by Interior and fully disclosed to UAIC.

UAIC also insinuates that there was something unusual and improper about the Tribe's role as a "cooperating agency" during the EIS process. UAIC at 7 ("the potential to manipulate the process was high"). But it fails to disclose that the Tribe was just one of four cooperating agencies in the preparation of the EIS; cooperating agency status did not provide any unusual or unique privileges. *See* AR 22601, 29756, 30173 (four cooperating agencies); 40 C.F.R. § 1508.5 (defining "cooperating agency" to include any federal, state, local or tribal agency with

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

jurisdiction or expertise). Moreover, the Tribe clearly qualified as a cooperating agency. *See* 40 C.F.R. §§ 1501.6, 1508.5. Indeed, the Council on Environmental Quality, the entity charged with overseeing NEPA compliance across all federal agencies,[8] has issued multiple guidance documents recommending that Tribes serve as cooperating agencies in situations like this one. *See* Memorandum for Tribal Leaders (Feb. 4, 2002); Memorandum For Heads Of Federal Agencies (July 28, 1999).[9] The Tribe's role as cooperating agency in the preparation of the EIS was neither unusual nor improper, and UAIC's vague suggestions to the contrary are purely speculative.

B. Interior Complied With The CAA

Consistent with the Parties' February 8, 2013 Joint Status Report (Doc. 61) and the Court's subsequent Order mandating coordinated briefing (Doc. 64), the Tribe refers to the Federal Defendants' arguments regarding the CAA.

C. Interior Complied With The *Carcieri* Decision And The IRA

The IRA authorizes the Secretary of the Interior to take land in trust "for the purpose of providing land to Indians." 25 U.S.C. § 465. The statute defines "Indian" as members or descendants of "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. The term "tribe" is broadly defined to include "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id*. Thus, the IRA broadly authorizes the Secretary of the Interior to take land in trust for "any recognized Indian tribe, organized band, pueblo, or Indians residing on one reservation" that is "now under Federal jurisdiction." 25 U.S.C. §§ 465, 479.

In *Carcieri v. Salazar*, 555 U.S. 279 (2009), the Supreme Court held that the phrase "now under Federal jurisdiction" refers to June 18, 1934, the date the IRA was enacted. *Id*. at 391. In

---

[8] CEQ is entitled to "substantial deference" in the interpretation of NEPA. *See Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979).

[9] Both guidance documents are publicly available at the following website: http://ceq.hss.doe.gov/ceq_regulations/guidance.html . For the Court's convenience, copies are also attached hereto as Exhibits 1 and 2.

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

other words, *Carcieri* imposes a temporal limit on the IRA's land acquisition authorization: Interior is only authorized to acquire land for tribes that were "under Federal jurisdiction" when the statute was enacted. *Id*. *Carcieri* did not define what it means to have been "under federal jurisdiction" at the time of the IRA's enactment. *Id*. at

Interior carefully evaluated and faithfully applied both the statutory provisions of the IRA and the *Carcieri* decision. *See* AR 30213-14. In doing so, it noted that shortly after June 18, 1934 the United States convened the Tribe for a special vote on IRA reorganization. AR 30214. Interior found that the special election was "conclusive evidence" that Enterprise was a recognized Indian tribe "under Federal jurisdiction" at the time of the IRA's enactment, and, on that basis, concluded that the statute authorizes land acquisition on the Tribe's behalf. *Id*.[10]

Interior's reasoning and conclusions are clear and consistent with the IRA's unambiguous definitions of "Indian" and "Tribe." *See* 25 U.S.C. § 479. They are also well-supported by the evidence in the administrative record. For example, the final tabulation of votes in the special IRA election identifies the Tribe as "*under the jurisdiction* of the Sacramento Indian Agency." AR 103, 105 (emphasis added). And the Haas Report explicitly states that Enterprise was one of the "*Tribes* that acted on the IRA." AR 29438 (emphasis added). It was neither arbitrary nor capricious for Interior to conclude that Enterprise was a "recognized Indian tribe" that was "under Federal jurisdiction" at the time of the IRA. 25 U.S.C. §§ 465, 479; AR 103-105, 29434, 30213-14.

Even if there were ambiguity concerning the IRA, the administrative record, or the Tribe's status, Interior's decision must be upheld. Under *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984), Interior's interpretation of the IRA is entitled to "considerable weight" and deference, and must be upheld so long as it represents a "permissible construction" of the statute. *Id*. at 843-45 and n.11. Moreover, well-established Indian law canons of construction require

---

[10] As noted above, the Tribe ultimately voted not to "reorganize" under the IRA. The fact that the Tribe voted not to reorganize does not affect the Secretary of the Interior's authority to acquire land in trust on the Tribe's behalf. *See* 25 U.S.C. § 2202.

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

that the IRA be "construed liberally" in the Tribe's favor and "ambiguous provisions interpreted to [the Tribe's] benefit." *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992). Stand Up has not presented any fact or argument that overcomes its heavy burden under *Chevron* and the Indian law canons of construction.

Perhaps recognizing that the law, the record, and the proper standard of review all favor Interior, Stand Up attempts to confuse the issue with a series of convoluted arguments about the administration of IRA voting. Stand Up at 5-11. Stand Up's fundamental point seems to be that the Tribe is not a "tribe" within the meaning of *Carcieri* because IRA elections were administered on a reservation-by-reservation basis, not a tribe-by-tribe basis. Stand Up at 5-7.

Stand Up waived this argument by failing to raise it during the administrative process. During that process, Stand Up appears to have mentioned *Carcieri* on just two occasions:

- A March 6, 2009 letter stating "[i]n the view of many, the Pacific Regional Office of the [Bureau of Indian Affairs] misconstrued the List Act Statute of 1994" and "[a]s a result the Enterprise Tribe and several others are vulnerable to the recent Carcieri v. Salazar ruling" (AR 22882)

- A March 13, 2009 letter stating "On February 24, 2009 the Supreme Court Carcieri decision put even further concern over the validity of Enterprise Rancheria attempt for a casino" (AR 22948)

Neither comment identifies Stand Up's IRA/*Carcieri* arguments about reservation-by-reservation voting "with sufficient clarity to allow the decision maker to understand and rule on the issue raised." *Buckingham*, 603 F.3d at 1080; *see also Public Citizen*, 541 U.S. at 764, *Vt. Yankee*, 435 U.S. at 553-54, *Great Basin Mine Watch*, 465 F.3d at 967. Therefore, the arguments have been waived. *Id*.

Even if Stand Up's IRA/*Carcieri* arguments were before the Court, they would fail as a matter of law. Stand Up attaches great weight to the notion that IRA elections were administered on a reservation-by-reservation basis. Stand Up at 5-7. But it ignores the IRA's broad definition of "tribe." *Id*. That definition confirms that "the Indians residing on one reservation" are a "tribe" for purposes of the IRA. 25 U.S.C. § 479. Thus, even if IRA elections were organized on a reservation-by-reservation basis, the fact that the United States convened a

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

special IRA election at the Enterprise reservation supports Interior's determination that Enterprise was a recognized "tribe" that was "under federal supervision" during the relevant time period. *Id.*[11]

Stand Up also devotes substantial attention to a 1934 Opinion of the Solicitor of the Department of the Interior. Stand Up at 7-8. But nothing in that Opinion casts doubt on Interior's IRA analysis instant case. *Id.* Indeed, the Solicitor's Office recently gave its full and explicit endorsement of the reasoning Interior used when approving the Tribe's Project:

> tribes that voted whether to opt out of the IRA in the years following enactment (regardless of which way they voted) generally need not make any additional showing that they were under federal jurisdiction…because such evidence *unambiguously and conclusively* establishes that the United States understood that the particular tribe was under federal jurisdiction

The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act, 2014 WL 988828, *20 (March 12, 2014) (emphasis added).

Finally, the Tribe notes that the United States District Court for the District of Columbia recently considered, and rejected, many of legal arguments Stand Up advances here. *See Stand Up for California! v. United States Dep't of the Interior*, 919 F. Supp. 2d 51, 66-70 (D.D.C. 2013). In that case, the court concluded that

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

Stand Up, 919 F. Supp. 2d at 67. Although both Stand Up and its counsel were involved in the proceedings before the District Court for the District of Columbia, they have failed to distinguish, address, or even disclose the existence of that court's ruling.

---

[11] Contrary to Stand Up's suggestion (Stand Up at 5, 10-11), the IRA does not impose a separate requirement that tribes be formally "recognized" at the time of the IRA's enactment. *See Carcieri*, 555 U.S. at 397-400 (Breyer, J, concurring). In any event, the administrative record clearly demonstrates that the Tribe was, in fact, recognized during the relevant time period. *See, e.g.*, AR 26793, 29438 (Enterprise identified as a "Tribe" that acted on the IRA), 29799-29800 ("The Tribe has been recognized by the United States since at least April 20, 1915").

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

D. Interior Complied With 25 C.F.R. Part 151

Consistent with the Parties' February 8, 2013 Joint Status Report (Doc. 61) and the Court's subsequent Order mandating coordinated briefing (Doc. 64), the Tribe refers to the Federal Defendants' arguments regarding 25 C.F.R. part 151. In addition, the Tribe submits the following two points:

(1) Colusa argues that the Secretary's decision should be overturned because the Tribe can develop housing on its existing land. Colusa at 16-17. But the Tribe's need for trust land is not limited to housing. *See, e.g.*, AR 517-19, 23333-40, 29755, 29794, 29814-15, 30214. The Tribe also lacks suitable land for tribal government and for economic development. *Id*. The Tribe's existing trust land (*i.e.*, Enterprise 1) consists of a single remote, steeply-sloped property that is accessible only by a dirt road and is not appropriate for those purposes. *Id*.; *see also* AR 22968. These facts are more than enough to support BIA's finding that the Tribe needs additional trust land. 25 C.F.R. § 151.3(a)(3) (trust land may be acquired to facilitate "tribal self-determination, economic development, or Indian housing") (emphasis added); *see also City of Yreka v. Salazar*, 2011 U.S. Dist. Lexis 62818, *20-27 (E.D. Cal. June 13, 2011); *South Dakota v. U.S. Department of Interior*, 775 F. Supp. 2d 1129, (D.S.D. 2011).

(2) Colusa also argues that the Secretary should have undertaken a detailed evaluation of the Tribe's membership rules. Colusa at 17-18. There is no provision of 25 C.F.R. part 151 requiring such an evaluation (and, in any event, Colusa has cited none). Moreover, it is well-settled that a Tribe's membership policies are an internal matter not subject to broad judicial review. *See, e.g., Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978) ("[a] tribe's right to define its own membership…has long been recognized as central to its existence as an independent political community").

E. Interior Complied With IGRA

Consistent with the Parties' February 8, 2013 Joint Status Report (Doc. 61) and the Court's subsequent Order (Doc. 64) mandating coordinated briefing, The Tribe refers to the Federal Defendants' arguments regarding IGRA.

V. CONCLUSION

For the reasons set forth above, the Tribe respectfully requests that its Motion for Summary Judgment be granted and that Plaintiffs' Motions for Summary Judgment be denied.

Dated: July 24, 2014

Respectfully Submitted,

DENTONS US LLP

By */s/ Matthew G. Adams*
NICHOLAS C. YOST
MATTHEW G. ADAMS
JESSICA LAUGHLIN

Attorneys for Intervenor-Defendant
THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA

27404101\V-1

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2014, true and correct copies of **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT** were served electronically on all parties for which attorneys to be noticed have been designated, via the CM/ECF system for the U.S. District Court for the Eastern District of California.

Respectfully submitted,

Dated: July 24, 2014

DENTONS US LLP

By: /s/ Matthew Adams

NICHOLAS C. YOST
MATTHEW G. ADAMS
JESSICA LAUGHLIN

Attorneys for Intervenor-Defendant
THE ESTOM YUMEKA MAIDU
TRIBE OF THE ENTERPRISE
RANCHERIA, CALIFORNIA

DENTONS US LLP
525 MARKET STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94105-2708
(415) 882-5000

82543329\V-5