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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, *et al.*,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior, *et al.*,

Defendants.

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

OPPOSITION TO FEDERAL DEFENDANTS' AND ENTERPRISE'S CROSS-MOTIONS AND REPLY IN SUPPORT OF PLAINTIFF UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA'S MOTION FOR SUMMARY JUDGMENT

Date: Thursday, October 9, 2014
Time: 2:00 p.m.
Courtroom: 2, 15th Floor
Hon. Troy L. Nunley

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

By approving the gaming facility and hotel fee-to-trust acquisition project ("Proposed Action") without considering UAIC's historic and cultural connections to the Yuba Site, the Federal Defendants violated the fiduciary duty they owe to UAIC. *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 574 (9th Cir. 1998). The Federal Defendants failed to comply with the statutory requirements of the National Environmental Policy Act ("NEPA") and the Indian Gaming Regulatory Act ("IGRA") designed to protect UAIC's interests. The Federal Defendants and Enterprise fail to demonstrate otherwise and once again give short shrift to UAIC's concerns. This Court should grant the UAIC's Motion for Summary Judgment and deny the Federal Defendants' and Enterprise's Cross-Motions.[1]

II. PLAINTIFF UAIC HAS STANDING

UAIC has standing to challenge an action in its "ancestral homeland," which UAIC considers "sacred" and where UAIC "continue[s] to use numerous important spiritual and cultural sites" and alleges that the Proposed Action will, among other things, lessen the "aesthetic . . . values of the area." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 772, 779 (9th Cir. 2006). The Federal Defendants have not challenged UAIC's standing, nor has Enterprise challenged UAIC's Article III standing to bring suit. However, Enterprise attempts to recast UAIC's claimed injury to be solely of "commercial character" and "economic nature" to contend such injury does not come within NEPA's "zone of interests" and, as such, UAIC lacks prudential standing. Docket No. 119-1 at 10-12. Enterprise is incorrect for many reasons.

First, only a few months before Enterprise objected to UAIC's prudential standing, the Supreme Court revisited the so-called "prudential standing" doctrine and unanimously held that, even if the doctrine exists, the "zone of interests" test "does not belong there." *Lexmark Int'l,*

[1] Pursuant to Federal Rule of Civil Procedure 56 and Local Rule 260(a), UAIC submitted a Statement of Undisputed Material Facts in support of its Motion for Summary Judgment. *See* Docket No. 98-2. Where the Federal Defendants and Enterprise declined to respond to UAIC's Statement of Undisputed Material Facts (including where such denial was on the ground that UAIC relies on extra-record evidence), this Court should deem the facts admitted. *See Brown v. Kavanaugh*, No. 1:08-CV-01764-LJO, 2012 WL 4364120, at *7 (E.D. Cal. Sept. 21, 2012); *Burnell v. Gonzalez*, No. 1:10-CV-00049-LJO, 2012 WL 3276967, at *12 (E.D. Cal. Aug. 9, 2012). The Defendants' motions to strike the extra-record evidence should be denied for all the reasons UAIC gives in its opposition to those motions.

Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1387 (2014). The notion that a court may decline to adjudicate a case "that is properly within federal courts' Article III jurisdiction … is in some tension with … the principle that a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Id.* at 1386 (internal quotation marks omitted). The "zone of interests" test does not determine a federal court's jurisdiction, therefore, but instead determines whether a particular plaintiff "has a cause of action under the statute." *Id.* at 1387. And the test is simply a "straightforward question of statutory interpretation." *Id.* at 1388; *see also Mendoza v. Perez*, 754 F.3d 1002, 1016 (D.C. Cir. 2014) ("Recently . . . the Supreme Court has clarified that 'prudential standing' is a misnomer because the zone-of-interests analysis does not rest on prudential considerations, but rather asks the statutory question of whether 'a legislatively conferred cause of action encompasses a particular plaintiff's claim.'") (citing *Lexmark Int'l, Inc.*, 134 S. Ct. at 1386–88).

There can be no doubt that UAIC has a cause of action under the APA for violations of NEPA. 5 U.S.C. § 702. UAIC easily fits within the term "person," defined to include a "public or private organization other than an agency," which may maintain actions when "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. §§ 551, 702. While NEPA as a whole may be said to be environmentally focused, nothing in 42 U.S.C. §§ 4321-4370h limits plaintiffs to raising only environmental concerns. "[A] plaintiff falls outside the group to whom Congress granted a cause of action only when its interests 'are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.' The zone-of-interests test is not a demanding one" − and the test is easily met here. *Mendoza*, 754 F.3d at 1017 (citations omitted); *see also Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1158 (9th Cir. 1998) ("[T]he asserted interest need only be *arguably* within the zone of interests to be protected or regulated by the statute.") (citations omitted).

Second, the interests UAIC hopes to vindicate here are within NEPA's zone of interests. For example, UAIC has submitted evidence showing the proposed casino complex likely will

increase air pollution, which will negatively impact the UAIC's ability to gather natural resources for use in cultural practices. Docket No. 49-2 in Case No. 2:13-cv-00064 at ¶¶ 29-33. Additionally, the casino complex "would forever alter th[e] view and the myths and cultural practices" associated with the Sutter Buttes and would "cause irreparable harm to the religious and mythological practices of UAIC members." *Id.* at ¶¶ 40-41. Thus, the interests sought to be protected by UAIC include ecological, aesthetic, cultural, and social effects, which are all within NEPA's zone of interests. *See* 42 U.S.C. § 4331(b)(3) (noting congressional purpose to "preserve important historic, cultural, and natural aspects of our national heritage"); *see also Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 28-29 (1st Cir. 2007) (tribe members have prudential standing to bring NEPA claims based on their use of land for ceremonial and community purposes); *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, No. 11-00395, 2011 WL 5545473, at *5, *5 n.3 (C.D. Cal. Oct. 24, 2011) (finding that plaintiffs alleging "to attach religious and cultural significance to the affected land" had prudential standing for NEPA claims) (citation omitted).

Third, UAIC's economic interests are not *purely* economic interests that (supposedly) are outside NEPA's scope. UAIC has made clear from the beginning that its interest in its casino is inextricably linked with the tribe's social interests as well. UAIC's casino generates the revenues that UAIC's government uses to provide a wide range of services to members of the tribe. Such socioeconomic concerns are exactly the type of issues that must be considered as part of the "human environment" under NEPA. Bureau of Indian Affairs, *Indian Affairs National Environmental Policy Act (NEPA) Guidebook*, 59 IAM 3-H, at 20 (Aug. 2012), *available at* http://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf ("BIA NEPA Handbook") (defining the human environment to include "socioeconomic conditions" such as "employment and income," "lifestyle and cultural values," and "community infrastructure"). Indeed, the social and economic interests of Indian Tribes are afforded particular consideration as part of NEPA review. Council on Environmental Quality, *Environmental Justice: Guidance under the National Environmental Policy Act* 9 (Dec. 10, 1997), *available at*

http://ceq.hss.doe.gov/nepa/regs/ej/justice.pdf (requiring agencies to analyze under NEPA the "human health, economic, and social effects of Federal actions, including effects on … Indian tribes").

Fourth, Enterprise is incorrect that the "administrative record contains no specific evidence linking UAIC to any allegedly-affected environmental resources or cultural activities." Docket No. 119-1 at 11. It is well-established that UAIC may demonstrate standing on a motion for summary judgment "through affidavit or other competent evidence." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1352 n. 11 (9th Cir. 1994). *See also Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 970 (9th Cir. 2013).

Regardless, the record evidence is more than sufficient to show a connection between the Proposed Action and the harms claimed by UAIC. *See, e.g.*, AR NEW 26814 (Proposed Action "would be environmentally, socially, and economically detrimental to Auburn"); AR NEW 26815 (Proposed Action would be "to the detriment of Auburn, its members, its government, and its own economic development"); *id.* (Proposed Action would "infringe on the cultural heritage and sovereignty of Auburn"). Thus, UAIC does not assert "purely economic injuries," as Enterprise contends. *Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993). The Proposed Action likely will cause cultural, social, and health effects well within NEPA's zone of interests.

III. FEDERAL DEFENDANTS VIOLATED NEPA

The Federal Defendants followed Enterprise's lead directly to its preordained result: the development of a casino complex on the Yuba Site. In so doing, they violated NEPA.

A. A narrow purpose and need led to a preordained "alternative."

The Federal Defendants defined the "stated goal" for the project "in unreasonably narrow terms." *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). The Final EIS states that the project's "paramount objective" is to "enhance [Enterprise's] economic development potential" and lists, as one of the objectives for the project,

permitting Enterprise to conduct Class III gaming. AR NEW 23339.[2] The only way for Enterprise to do all that would be to "tak[e] the Yuba site into federal trust for gaming purposes," such that Enterprise "would be allowed to conduct Class III gaming."[3] *Id.* The Federal Defendants concede that Alternative A is the "plainly superior" choice among those considered for accomplishing the narrow stated purpose and need. Docket No. 116-1 at 34. The outcome was preordained. *See League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012).

Enterprise mischaracterizes UAIC as faulting the statement of purpose and need "because it gave too much attention to the Tribe's needs." Docket No. 119-1 at 13. The statement of purpose and need is too narrow to permit the agency to consider a reasonable range of alternatives. UAIC is not required to identify any "specific element" of the statement of purpose and need "that is unreasonable," as Enterprise contends. *Id.* Rather, the statement of purpose and need, taken as a whole, violates NEPA because it led the agency to a preordained result.

The narrow purpose and need foreclosed alternatives, so the Federal Defendants simply failed to consider a reasonable range of alternatives. Federal Defendants assert that the alternatives considered here are "virtually identical" to those addressed *Stand Up for California v. U.S. Dep't of the Interior*, 919 F. Supp. 2d 51, 77 (D.D.C. 2013). Maybe; maybe not—any similarity is irrelevant. The court in *Stand Up* did not consider the adequacy of the stated purpose and need or whether the purpose and need led the agency to a preordained outcome.

Enterprise references the "screening" process used to identify alternatives, Docket No. 119-1 at 14, but that process was bound by the narrow purpose and need—*i.e.* taking land into trust for Enterprise on which it could conduct Class III gaming. AR NEW 29757. The Highway 65, 99, and 162 sites were preliminarily eliminated on the purported ground that Enterprise could

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[2] It is immaterial that Class III gaming is not explicitly mentioned in the EIS's "purpose" language, contrary to the Federal Defendants' contention. Docket No. 116-1 at 33. The Proposed Action's objectives include both the stated purposes *and the stated needs*.

[3] The Final EIS focuses on the objective of "maximiz[ing] long term tribal revenues," without adequately explaining how increased revenues from an off-reservation casino will best improve the "socioeconomic status of the Tribe," as compared to an on-reservation option that could provide additional employment opportunities to tribal members, rather than to the "non-tribal community." AR NEW 23333, 23393.

not secure investors for those properties. The Federal Defendants assert that this reason "seem[s] compelling" and that "[i]f financing is unavailable for a site, that site is not viable." Docket No. 116-1 at 35-36. The Federal Defendants cite no authority for these assertions, and the Ninth Circuit authority is to the contrary. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (rejecting argument that "because it was not clear that funds would be available" for a preliminarily eliminated project, an agency "had no obligation to consider it"). The Federal Defendants' argument puts the cart before the horse: instead of letting outside financiers dictate the range of alternatives, the Federal Defendants should consider a truly reasonable range of alternatives and channel the financiers to the best option.[4]

The Federal Defendants concede that they "accept[ed]" Enterprise's "conclusion" that "potential investors [were] uninterested in certain sites," and eliminated the Highway 65, 99, and 162 sites on the basis of Enterprise's "report[]." Docket No. 116-1 at 37. In so doing, the Federal Defendants violated NEPA by "fail[ing] to verify the [financial information] supplied by the Applicant." *Utahns for Better Transp. v. U.S. Dep't of Transp.*, 305 F.3d 1152, 1165 (10th Cir. 2002). "This is more than a technical requirement when it comes to the cost of the project and alternatives." *Id.*; *see* 40 C.F.R. § 1506.5. The rule of reason and purposes of NEPA and IGRA are not met when the project applicant is allowed to eliminate alternatives, and the record does not support its unsubstantiated claims.

After elimination of the Highway 65, 99, and 162 sites, five alternatives remained, and each directed the Federal Defendants to develop the Yuba Site. Although the Federal Defendants argue that it is "utterly implausible" to suggest that Alternatives B and C failed to expand the range of true alternatives, Docket No. 116-1 at 38, both Alternatives B and C were for lower revenue developments of the Yuba Site. Given that part of the narrow purpose and need for the project was to enhance Enterprise's revenue, Alternatives B and C were destined to be rejected in favor of a higher revenue project—*i.e.*, Alternative A. The Federal Defendants

[4] If the Federal Defendants' argument is right, then it gives the lie to Enterprise's assertion that economic considerations are so alien to NEPA and may not form the basis of any challenge to an agency's analysis.

reemphasize this point, stating that Alternative B would have resulted in "half the total development of Alternative A" and would have employed less than half as many people. *Id.* And Alternatives A-C were all proposals for the exact same tract of land. Those "alternatives" were not meaningfully different.

Furthermore, Alternative D, the only action alternative for a non-Yuba Site project, was for a smaller project on a portion of Enterprise's land that "would result in minimal to no profits" and "would be very difficult for the Tribe to finance." AR NEW 23393; SOF ¶¶ 33-34. The Federal Defendants also concede that this project "would not accomplish the objective of restoring" land to Enterprise. Docket. 116-1 at 38. The Federal Defendants do not explain why it was reasonable to only consider a reduced project on this site, or why a site elsewhere or closer to the existing reservation would not be more appropriate. In addition to the reduced impacts on the surrounding community, there are numerous benefits to the tribe that can stem from having the casino or other business venture on the existing reservation. But, given the narrow purpose and need, the only viable alternative was to call for taking land into trust for Enterprise and increasing Enterprise's revenues through Class III gaming, making this "alternative" doomed from the start. The Federal Defendants' are out of line in suggesting that UAIC does not make this argument in good faith: the Final EIS and the Federal Defendants' own brief demonstrate that UAIC's position is correct. AR NEW 0023393; Docket No. 116-1 at 38-39.

Finally, Enterprise mischaracterizes UAIC's claims a substantive challenge. Docket No. 119-1 at 15. UAIC is not arguing a substantive preference for any alternative, and thus is under no duty to demonstrate the viability of any such alternative. Although UAIC believes the selection of Alternative A itself was arbitrary and capricious under the APA and IGRA, UAIC's NEPA claim is not for the selection of another preferred alternative. Rather, UAIC argues that the purported "alternatives," coupled with the narrow purpose and need, left the Federal Defendants with no option but Alternative A. This flies in the face of NEPA's requirements to ensure reasoned and informed decision-making.

B. The Final EIS was prepared in violation of conflict-of-interest provisions.

By allowing Enterprise to select AES as the consultant, and then allowing AES virtually to write the EIS, the Federal Defendants violated NEPA's conflict of interest provisions. AES's obvious bias, which permeates the EIS, renders the EIS arbitrary.

The Federal Defendants argue that this argument has been waived because UAIC's comments did not raise AES's conflict. But UAIC could not have done so. UAIC discovered important information regarding AES's conflict only after reviewing documents received in response to a Freedom of Information Act (FOIA) request, in preparation for briefing before this Court. *See* Docket No. 49-5 in Case No. 2:13-cv-00064. The mere fact that AES is listed as a preparer did not put UAIC on notice of the potential conflict because that fact alone does not even suggest that the agency deferred too greatly to AES or that the agency failed to ensure against bias. Moreover, procedural violations like this one are so "obvious that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006) (citation omitted); *see also Save Strawberry Canyon v. U.S. Dept. of Energy*, 830 F.Supp.2d 737, 746 (N.D. Cal. 2011). The Federal Defendants should have had independent knowledge of the potential conflict of interest and their corresponding obligations without UAIC bringing it up. In such a case, the claim is not waived.

The EIS was compromised by Enterprise's close working relationship with AES. The Federal Defendants assert that BIA "oversaw AES's work," but nothing they cite supports that assertion. They cite the fact that BIA received public comments and letters, Docket No. 116-1 at 58, but that does not demonstrate oversight of AES. Furthermore, the language in the AES contract stating that BIA *proposed* to "provide AES the technical direction, review, and quality control," *id.*, is not evidence that BIA *actually* did so. Besides an initial scoping meeting, there is no evidence in the record that BIA oversaw AES.

In contrast, UAIC relies on evidence that *Enterprise* reviewed AES's work, held monthly strategy meetings with AES, and privately commented on the Draft EIS. SOF ¶¶17-18, 19-20,

25-28, 30, 32, 35. The Federal Defendants and Enterprise do not take issue with these citations, nor do they even try to minimize Enterprise's involvement. Enterprise points out that it was a *cooperating agency* that should be involved, Docket No. 119-1 at 20, but because Enterprise also was the *project proponent*, Enterprise should have been much less involved. It was Enterprise's dual—and leading—role as the project proponent that caused the conflict.

Additionally, AES failed to execute its disclosure statement under oath, as the BIA's NEPA Handbook provides. The Federal Defendants are incorrect in asserting that the "relevant section" of the Handbook "says nothing about an oath requirement." Docket No. 116-1 at 45 n.33. On the contrary, the disclosure statement form included in the Handbook provides for its execution under oath. *See* BIA NEPA Handbook at App'x 11 (providing for disclosure "under oath"). It is well-established that agency guidelines and handbooks constitute persuasive authority and are entitled to deference. *See Newton v. F.A.A.*, 457 F.3d 1133, 1137 (10th Cir. 2006); *Kennedy v. World Alliance Fin. Corp.*, 792 F. Supp. 2d 1103, 1109 (E.D. Cal. 2011).

C. The Federal Defendants failed to take a "hard look."

There is no merit to the argument that UAIC has waived one or more of its "hard look" arguments. UAIC "structure[d] [its] participation so that it ... alert[ed] the agency to [its] position and contentions." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006) (citation omitted). UAIC tried to raise its concerns before the Federal Defendants, but they ignored or discounted those concerns without sufficient analysis. *See* SOF ¶ 41. UAIC was not required to "raise an issue using precise legal formulations." *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (citation omitted). Instead, it was sufficient for UAIC to "alert the agency in general terms" to its concerns. *Id.*[5]

[5] Unlike in *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002), where the court was "unable to locate any reference to th[e] claim in the administrative record," and in *High Sierra Hikers Ass'n v. U.S. Forest Serv.*, 436 F. Supp. 2d 1117, 1148 (E.D. Cal. 2006), where the plaintiff "did not raise the issue . . . at all during the comment period," UAIC raised its concerns in the submitted comments. *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1030 (D. Ariz. 2009) is distinguishable because the plaintiff failed to "assert that the assessment was flawed" as to the challenged issue, whereas UAIC challenged the Federal Defendants procedural compliance with the regulatory requirements, factual evidence, and failure adequately to consider the impact it. *See, e.g.*, AR NEW 22904-22905; AR NEW 26814-26815. *Buckingham v. Sec'y of U.S. Dep't of Agr.*, 603 F.3d 1073, 1081 (9th Cir. 2010) is similarly distinguishable because UAIC addressed its concerns

There is no basis for the Federal Defendants' argument that "BIA cannot be faulted for relying on its consultant's conclusions" because UAIC "did not proffer an economic analysis that undercut the conclusions reached by BIA's analysis." Docket. 116-1 at 42 n. 30. UAIC had no such burden. The burden to take a "hard look" is on the Federal Defendants, not on plaintiffs. *See Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011); *see City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975).

The only financial data the Federal Defendants relied upon was obviously stale. Reliance on stale economic data "does not constitute a 'hard look' under NEPA." *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085-87 (9th Cir. 2011). The Federal Defendants concede that "[a]n agency's use of inaccurate financial data can give rise to a NEPA violation," but argue that Plaintiffs do not suggest that the use of stale data impaired or skewed the agency's evaluation of adverse *environmental* effects. Docket. 116-1 at 40 n. 28. This argument lacks merit. UAIC argues that it will experience significant socioeconomic and cultural repercussions from lost revenue and that the Federal Defendants failed to evaluate those effects with accurate data. Docket No. 98-1 at 11. UAIC expressly referenced its own current economic difficulties. AR NEW 22905; AR NEW 26815. Contrary to the Federal Defendants' assertion that "environmental concerns" are "wholly lacking" here, Docket No. 116-1 at 41, the likely significant socioeconomic impact on the tribal resources and the provision of tribal services constitute relevant "environmental concerns." *See Pit River Tribe*, 469 F.3d at 775 ("cultural resources" are "environmental concerns"); *Friends of Canyon Lake v. Brownlee*, No. SA-03-CA-0993-RF, 2004 WL 2239243, at *9 (W.D. Tex. 2004) ("aesthetics" and "socioeconomic conditions" are "environmental concerns"). It should be "obvious," in all events, that removing the 40 acres into trust and building a casino and resort of this size will directly impact UAIC's connection with and cultural uses of the Yuba Site. SOF ¶¶ 39-42. Nothing in NEPA requires UAIC to prove such impacts before the agency is required to even consider them.

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with "sufficient clarity." Finally, *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 554 (1978) is distinguishable because the plaintiff "virtually declined to participate" before the agency, whereas UAIC submitted multiple rounds of comments.

Once again, the Federal Defendants fail to respond to UAIC's concerns. They mischaracterize UAIC's argument that they failed adequately to consider and mitigate the harm to UAIC's historical interests with the belittling suggestion that UAIC is somehow seeking to preserve its "sovereignty" over the Yuba Site. Docket No. 116-1 at 44-45. UAIC is well aware of the limitations on its sovereign territory as circumscribed to its reservation. The Federal Defendants also write off nearly all of UAIC's non-economic concerns—concerns for its environmental, aesthetic, and historic interests—without analysis, asserting that those concerns "require[] no response." Docket No. 116-1 at 44. Apparently, the Federal Defendants believe there is a hard cap on the number of errors an agency must respond to in court, *id.* at 55 n.31, as if NEPA forbids only the first dozen or so errors an agency commits (and excuses the rest). At every turn, the Federal Defendants have derided UAIC's concerns and insufficiently responded. That repeated silence basically proves UAIC's point. The more things change, the more they stay the same.

IV. FEDERAL DEFENDANTS VIOLATED IGRA, 25 C.F.R. PART 151 AND 292

There is no denying that the Federal Defendants owe a fiduciary duty to UAIC as a recognized Indian tribe and that this duty is a "moral obligation[] of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). IGRA's requirements reflect these duties in requiring consultation with nearby tribes. And there is no denying UAIC's historic and cultural connections to the Yuba Site; the Yuba Site "is geographically closer to Auburn's reservation" than Enterprise's. Docket No. 117 ¶ 3. For these reasons, the Federal Defendants should have paid attention to UAIC's concerns about Enterprise's proposal. Instead, they essentially ignored them. The BIA's insufficient process violated IGRA's clear requirements, and the BIA's conclusions lack factual support, rendering its decisions arbitrary and capricious.

A. Defendants violated 25 C.F.R. Part 151.

The Federal Defendants' findings do not meet the heightened scrutiny required by Part 151. The Federal Defendants contend that the BIA "thoroughly considered" the benefits of the

transfer—but the record citation provided demonstrates the opposite. Docket No. 116-1 at 17 (citing AR NEW 30218). The cited page notes the marked distance between the Yuba Site and Enterprise's reservation. AR NEW 30218. The Federal Defendants also rely on the Secretary's statement that Enterprise's reservation is "not sufficient for tribal housing needs, tribal government or economic development purposes." Docket No. 116-1 at 16 (citing AR NEW 30214). But that conclusory statement simply parrots the text of the regulation. 25 C.F.R. Part 151.3(1)(3). The Record of Decision does not substantiate the Secretary's statement, for it notes only that "[t]he property *as a whole* is not appropriate for housing or other buildings, because *some of the land contains steep slopes.*" AR NEW 30214 (emphasis added). There is, in short, no record evidence that the Federal Defendants gave "heightened scrutiny" to Enterprise's request for off-reservation gaming.[6]

B. Defendants violated 25 C.F.R. Part 292

First, the record does not support the Federal Defendants' finding that the Proposed Action had "strong local support." AR NEW 29817. The majority of Yuba County's electorate opposed Enterprise's proposal, as did local governmental bodies and elected officials. As Senator Feinstein wrote in her opposition letter, the Federal Defendants' decision to approve the Proposed Action "in the face of strong local *opposition*," where "county residents in 2005 voted against the proposed casino 52 percent to 48 percent," was "fundamentally flawed." AR NEW 29824-29825. A member of the Sutter County Board of Supervisors protested that the "project will have an overall negative impact on the community." AR NEW 22951. And a Member of the California Assembly objected that the "proposal has been opposed by a broad coalition of Yuba County residents and groups including the Yuba-Sutter Farm Bureau, the Yuba County Board of Education, the Wheatland School districts, the City of Wheatland, former Sheriff

[6] The case law the Federal Defendants cite does not support their contention that the applicable regulations do "not require a justification for why a particular parcel was chosen against other possibilities," Docket No. 116-1 at 16. The court in that case concluded only that the Secretary need not "detail specifically why trust status is more beneficial than fee status"; the court did not hold that the Secretary need not justify why a particular parcel was selected for conversion. *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 801 (8th Cir. 2005). Additionally, the land at issue in *South Dakota* was located a mere "seven to eight miles south of the Tribe's reservation" and was not to be used for gaming. *Id.* at 802.

Virginia Black, and many others." AR NEW 22895. These letters did more than "tout the Yuba County advisory vote," as the Federal Defendants' contend. Docket No. 116-1 at 22. The letters express their authors' own opposition to the project and thus add to the strong community opposition.

The Federal Defendants try to characterize their mischaracterization of the community's position as, essentially, harmless error, for they argue that they were not required to consider local support in the first place. Docket No. 116-1 at 21. This argument misses the mark. Regulations require consideration of "[a]ny other information" that may provide a basis for finding that the proposed gaming establishment would or would not be detrimental to the surrounding community. 25 C.F.R. § 292.18(g). Here, the agency correctly treated the community's position as "other information" and, indeed, found that it "must give weight" to the will of affected voters. AR NEW 29817. Against the breadth of evidence that substantiated the agency's original finding of "considerable *opposition*," SOF ¶ 53 (citing AR NEW 2403),[7] the agency later found "strong local support" for the project in light of just two memoranda of agreement that only addressed local taxes for certain jurisdictions. AR NEW 29817. It was arbitrary and capricious for the Federal Defendants to find that there was "strong local support" for the proposal.

Second, even though the Federal Defendants were statutorily required to consult with UAIC regarding the proposed conversion of the Yuba Site, the Federal Defendants initially failed to do so and then gave short shrift to UAIC's concerns. The Federal Defendants mischaracterize UAIC as "conced[ing] that any such oversight was rectified" when UAIC was permitted to submit comments. Docket No. 116-1 at 26. UAIC makes no such concession. UAIC had to request consultation and made clear to the Federal Defendants that it sought to provide additional comments. SOF ¶ 16. UAIC provided comments on March 12, 2009 and May 11, 2009. It also requested additional information and then submitted additional comments on November 3, 2010,

[7] The agency did not dispute this fact, nor did it dispute the fact that other government entities not part of the memoranda opposed the project.

responding to the key concern that the Proposed Action would be "to the detriment of [UAIC's] sovereign authority and cultural identity." *Id.* n. 16(c) The Federal Defendants refused to consider these crucial comments. *Id.* ¶ 16.

The ignored comments address a key concern in this case—Enterprise's lack of connection to the Yuba Site. In the comments, UAIC explained that Enterprise lacks a "significant historical connection to Yuba County." Docket No. 54-3. UAIC explained the traditional territory of the Nisenan Indians, as opposed to the Konkow Maidu tribe. *Id.* at 2-3. Additionally, UAIC explained that "[m]ost members of the Enterprise Rancheria live in Butte County, consistent with their historical roots well to the north of the proposed casino site." *Id.* at 3. And, importantly, UAIC explained that the "Native American Heritage Commission puts tribes on the 'most likely descendant' [list] at a tribe's request and does not make a judgment as to the tribe's cultural affiliation to the area," and therefore, "the NAHC listing is not evidence of a connection." *Id.* at 3-4. Moreover, the NAHC listing certainly is not evidence that Enterprise has a closer connection to the Yuba Site than UAIC because, as UAIC explained, it "is *also on NAHC's list* of most likely descendants for Yuba County." *Id.* at 3-4 (emphasis added). The NAHC Most Likely Descendant list does not afford exclusivity or superior rights to one listed tribe over another.

Given the intent and purpose of the statutory consultation requirement, it was arbitrary and capricious for the Federal Defendants to ignore these comments and then conclude that UAIC "has not presented specific evidence that is sufficient to demonstrate that it has an exclusive significant historical connection to the Site." AR NEW 29818. The failure to comply with the consultation requirements was not "rectified."

The Federal Defendants now defend Enterprise's connection to the Yuba Site in a footnote, and the record citations they offer are flimsy, at best. Docket No. 116-1 at 23 n.17. Beyond citing to the NAHC designation, the Federal Defendants cite an assertion in the 2011 ROD that Enterprise has been "recognized by both State and Federal agencies as the Indian tribe or Native American group most closely connected with Yuba County." The 2011 ROD failed to

support that assertion. The referenced "Federal agency" appears to be the U.S. Army Corps of Engineers, which merely "identified" Enterprise as "attach[ing] cultural significance" to an area some part of which is located "several miles" from the Yuba Site. AR NEW 29798 (citation omitted). Tellingly, even Enterprise avoids asserting that it is the tribe most closely connected to the Yuba Site, relying instead on the NAHC and asserting generally that its ancestors "moved throughout" the "Feather River basin, an area of California that includes modern-day Yuba County." Docket No. 119-1 at 2.

Third, the Federal Defendants' actions were arbitrary and capricious because they ignored the impacts on UAIC. UAIC sufficiently alerted the Federal Defendants to its concerns. UAIC explained that it had been forced to lay off employees, postpone modifications to its facility, and scale back any expansion. AR NEW 26815. As UAIC stated in its comments, the Proposed Action "would be grossly unfair and would have a significant negative economic impact on Auburn." *Id.* *See also* AR NEW 22906 (requesting that the EIS "evaluate the economic impacts to existing Tribal gaming operation including Thunder Valley"); AR NEW 26815 ("The current economic environment is not conducive to the operation of another gaming facility so close to Auburn's casino."). It is illogical and inconsistent for the Federal Defendants to defend the Proposed Action on the ground that it will increase the economic development of one tribe, when the Federal Defendants failed to account for the likely detrimental impact that the Proposed Action will have on another tribe.

Finally, and as noted above, UAIC's concerns do *not* relate to claims of "non-existent sovereign authority." Docket No. 116-1 at 23. While the lands are not currently held in trust for UAIC, its members use the land for cultural purposes. The Federal Defendants' only response is that "Enterprise has committed to mitigating impacts on cultural resources." *Id.* This vague defense epitomizes the Federal Defendants' continued disregard of UAIC. As UAIC explained in its motion, the mitigation measures are limited, and the Federal Defendants do not explain how they address UAIC's cultural and historical practices—interests that the Federal Defendants arbitrarily and capriciously failed adequately to consider. SOF ¶ 12.

V. CONCLUSION

For the foregoing reasons, UAIC respectfully requests that this Court grant its motion for summary judgment and deny the cross-motions.

DATED: August 25, 2014

Respectfully submitted,

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I HEREBY CERTIFY that, on this 25th day of August, 2014, copies of the above and foregoing Opposition to Federal Defendants' and Enterprise's Cross-Motions and Reply in Support of Plaintiff United Auburn Indian Community of the Auburn Rancheria's Motion for Summary Judgment were served electronically on all parties for which attorneys to be noticed have been designated, via the CM/ECF system for the U.S. District Court for the Eastern District of California.

DATED: August 25, 2014

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