PERKINS COIE LLP
JOSHUA A. REITEN (Bar No. 238985)
JReiten@perkinscoie.com
Four Embarcadero Center, Suite 2400
San Francisco, CA 94111
Telephone: (415) 344-7000
Facsimile: (415) 344-7050

JENA A. MACLEAN (*admitted Pro Hac Vice*)
JMacLean@perkinscoie.com
BENJAMIN S. SHARP (*admitted Pro Hac Vice*)
BSharp@perkinscoie.com
JAMES O. BICKFORD (*admitted Pro Hac Vice*)
JBickford@perkinscoie.com
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Attorneys for Plaintiffs Citizens for a Better Way, Stand Up For California!, Grass Valley Neighbors, William F. Connelly, James M. Gallagher, Andy Vasquez, Dan Logue, Robert Edwards, and Roberto's Restaurant

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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

Plaintiff,

v.

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

Defendants.

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff,

v.

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

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

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

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

Defendants.

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

Plaintiffs,

v.

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

Defendants.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

I. NEITHER THE SPECIAL ELECTION HELD IN 1935 NOR THE SECRETARY'S UNPERSUASIVE POST-HOC JUSTIFICATIONS ESTABLISH HER AUTHORITY TO ACQUIRE LAND FOR THE TRIBE.

The Indian Reorganization Act ("IRA") authorizes the Secretary to acquire land in trust for recognized tribes that existed at its passage in June 1934 and were under federal jurisdiction at that time. *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009). There is no evidence in the administrative record that the Estom Yumeka Maidu Tribe of the Enterprise Rancheria existed in 1934, and it is not sufficient that the descendants of Indians living on federal property in 1934 later formed a tribe, as appears to be the case here. The Secretary's decision to acquire land in trust for the Tribe is therefore arbitrary and capricious, and must be vacated.[1]

The record facts establish that an agent of the U.S. Indian Service took a census in 1915 of "the Indians in and near Enterpri[s]e in Butte County, California." AR NEW 27015. He found fifty-one Indians living in the vicinity, but his census does not describe those individuals as a tribe. *Id.* In 1916, the United States purchased two forty-acre parcels of land near Enterprise; they became known as Enterprise No. 1 and Enterprise No. 2 or, collectively, the Enterprise Rancheria. The United States established Enterprise No. 1 as the "permanent home" of Emma Walters and her "relations," AR NEW 28121, and Enterprise No. 2 as the "permanent home" of Nancy Martin and her family, Att. 3 to 1st RJN (Letter from U.S. Indian Service to Nancy Martin (Sept. 23, 1916)) ("2d Martin Letter").[2] The record documents from this period do not mention the Estom Yumeka Maidu Tribe or any other tribe.

In 1935, the Secretary called a special election at Enterprise Rancheria, so that the "adult Indians" living there would have an opportunity to vote on the IRA. *See* 25 U.S.C. § 478. By a vote of 17 to 7, they rejected it. AR NEW 105.

---

[1] Citizens will refer to the present-day tribe as the "Estom Yumeka Maidu Tribe" or "the Tribe," the Indians who voted in 1935 as the "Indians of Enterprise Rancheria," and the land itself as "Enterprise Rancheria" to avoid confusion regarding which entity is involved at relevant periods.

[2] Special Indian Agent C.E. Kelsey investigated the California Indians pursuant to an Act of Congress of 1905. His investigation caused him "to object strongly to anything in the nature of reservations" for those California Indians not then on reservations. Att. 1 to 1st RJN (Report of C.E. Kelsey at 15 (Mar. 21, 1906)). Instead, Kelsey recommended "the purchase of land in the immediate localities where the Indians live to be allotted or assigned to them in small tracts." *Id.* The land assignments for the Martin and Walters families appear to further Kelsey's recommendation.

In 1964, Congress ordered the sale of Enterprise No. 2 to the State of California and distributed the proceeds to the four living children of George Martin, the son of Nancy Martin. 78 Stat. 534.[3] The legislative history does not mention the Estom Yumeka Maidu Tribe, and Congress did not distribute proceeds to any tribal entity.

The Tribe organized in 1994, 30 years after Enterprise No. 2 was sold and 59 years after the Indians of Enterprise Rancheria voted to reject the IRA. Att. 6 to 1st RJN (Letter of Michael R. Smith, Acting Area Director, BIA, to Art Angle, at 1 (Apr. 12, 1995)). The Tribe adopted its first constitution in 1996. The Department listed the "Enterprise Rancheria of Maidu Indians, California" as a recognized tribal entity in 1979, 44 Fed. Reg. 7235, 7235 (Feb. 6, 1979), but the record contains no evidence of any tribe related to the Enterprise Rancheria before that date.

Despite these facts (and the obvious evidentiary gaps) the Secretary concluded that the Estom Yumeka Maidu Tribe existed and was under federal jurisdiction in 1934. She based that conclusion solely on the fact that, in 1935, the Department held a special election under Section 18 of the IRA for the adult Indians of Enterprise Rancheria. The Secretary found that the special election "conclusively establishes" that the present-day Tribe was "under federal jurisdiction for *Carcieri* purposes." AR NEW 30214. The Secretary now claims that the Department would only have held such an election if the adult Indians of Enterprise Rancheria were members of a recognized tribe under federal jurisdiction, which is historically and legally inaccurate.

In this litigation, the Secretary has explained her reasoning for the first time: (1) only "adult Indians" were eligible to vote in the special election held at Enterprise Rancheria under Section 18 of the IRA, 25 U.S.C. § 478; (2) because one (of three) statutory definitions of "Indian" requires membership in a recognized tribe under federal jurisdiction, those "adult Indians" must have been members of such a tribe; and so (3) they must have belonged to the Estom Yumeka Maidu Tribe, which in turn must have been a recognized tribe under federal

[3] The Department told Congress that this distribution was "only just," because "the rancheria was purchased as a home for Nancy Martin and her son George . . . and has been used continuously by George Martin and certain members of his family since that date." Att. 5 to 1st RJN (S. Rep. No. 1857, *Act Authorizing the Secretary of the Interior to Sell Enterprise Rancheria No. 2 to the State of California*, at 83, 88th Cong. 2d Sess. (1964)).

jurisdiction.

But the IRA has three definitions of "Indian," and the Secretary ignores the two that do not require tribal membership. Under those statutory definitions, each "adult Indian" voting in the Section 18 election held at Enterprise Rancheria could have been (1) a member of a recognized tribe under federal jurisdiction, (2) a descendant of a member of such a tribe, or (3) a person of one-half or more Indian blood. *See* 25 U.S.C. § 479. The fact that "adult Indians" voted in a special election does not "conclusively establish[]" that any one of them satisfied the first definition of "Indian"—which requires tribal membership—rather than the second or the third, which do not. So a Section 18 election cannot, as the Secretary maintains, prove that the Indians who voted in it were members of a recognized tribe "under federal jurisdiction for *Carcieri* purposes." AR NEW 30214.

Perhaps recognizing the fallacy, the Secretary offers two other impermissible, post-hoc rationalizations. The Secretary suggests (apparently in the alternative) that either (1) the Indians of Enterprise Rancheria became a tribe upon passage of the IRA in 1934, or (2) the Estom Yumeka Maidu Tribe was recognized by virtue of the 1915 census of "Indians in and near Enterpri[s]e in Butte County, California." AR NEW 27015. The Court may not consider explanations of agency action that appear for the first time in litigation briefs, and the Secretary's post-hoc rationalizations are arbitrary and unsupported by the record.

A. The "adult Indians" who voted in Section 18 elections were not necessarily members of any tribe.

The Government concedes that "Section 18 obliged the Secretary to hold elections *by reservation*, not by tribes." Govt. Br. at 13 (emphasis added). The Government's concession means that the Secretary's single-sentence analysis of her authority—"[t]he calling of a Section 18 election" at Enterprise Rancheria "conclusively establishes" that the Tribe was "under federal jurisdiction for *Carcieri* purposes"—is wrong. AR NEW 30214. That the Secretary held an election under Section 18 of the IRA for "adult Indians" says nothing about whether those "adult Indians" constituted a tribe.

The "adult Indians" living on reservations were entitled to vote under Section 18,

regardless of whether they belonged to any tribe. 25 U.S.C. § 478. Tribes did not vote on the IRA. Att. 9 to 1st RJN (Fed. Defs.' Br., Confederated Tribes of Grand Ronde v. Jewell, 13-cv-849, Dkt. No. 37 at 23 (D.D.C. Nov. 6, 1979)) ("Nowhere in [Section 18] is there a mention of a 'recognized tribe' voting on the IRA because votes were conducted by reservation."). By holding a Section 18 election for the adult Indians of Enterprise Rancheria, the Secretary did not determine that they were a recognized tribe under federal jurisdiction. The Secretary only determined that they were "adult Indians," and that the Rancheria was, for Section 18 purposes, a reservation. Att. 8 to RJN (1 Dept. of Interior, Opinions of the Solicitor Relating to Indian Affairs, 1917–1974, at 485 (1934)) ("1934 Solicitor Op.") ("Section 18 . . . provides simply that the [IRA] shall not apply to a reservation wherein a majority of the adult Indians shall vote against the application of the act.").[4]

Contemporary documents confirm this textual analysis. In April 1935, a field representative repeatedly asked the Commissioner of Indian Affairs whether Section 18 elections would be held for the California rancherias. *See* Atts. 1–3 to 2d RJN (Letters from Roy Nash to Commissioner (April 1, 15, and 29, 1935)). He was ultimately advised "that said tracts should be regarded as separate reservations and elections held." Att. 4 to 2d RJN (Memorandum to Fred H. Daiker, Assistant to the Commissioner). This correspondence does not discuss whether the residents of rancherias constituted tribes, because the decision to hold a Section 18 election did not implicate that question. In fact, O.H. Lipps—the Superintendent of the Sacramento Indian Agency who approved the list of voters in the Enterprise Rancheria special election, *see* AR NEW 102—had informed the Commissioner of Indian Affairs that the residents of rancherias generally were *not* recognized tribes. Shortly after the passage of the IRA, the Commissioner's office distributed a questionnaire on tribal organization. The Sacramento Superintendent responded that there was "only one reservation" in his jurisdiction—Tule River—but there were

[4] The Government regularly uses the term "tribe" in lieu of "adult Indians" in its discussion of Section 18 elections, wrongly suggesting that Section 18 elections were actually held by "tribe," even though the IRA clearly provides that the voters were "adult Indians" living on a reservation, and the Government has conceded as much. *See, e.g.*, Govt. Br. at 10 (discussing "tribes that voted whether to opt out of the IRA"); *id.* at 14 (suggesting that "the Indian residents of a federal Indian reservation were entitled to vote to accept or reject the IRA as a tribe").

"about 60 small Government owned Indian rancherias, consisting of from 20 to 400 acres . . . . On these rancherias there are living part of the time from four to twenty families. They have no tribal or business organization of any sort." Att. 5 to 2d RJN (Letter from O.H. Lipps to Commissioner, at 1 (July 24, 1934)).[5]

The Secretary nonetheless argues that the "adult Indians" living on a reservation must have been tribal members, selectively citing only one of three possible definitions of "Indian" from Section 19 of the IRA. Govt. Br. at 9. The Secretary argues that because the first definition requires membership in a "recognized tribe . . . under federal jurisdiction," it therefore follows that all "adult Indians"—including the adult Indians of Enterprise Rancheria—were members of recognized tribes under federal jurisdiction. *Id.* (quoting 25 U.S.C. § 479).

But the Secretary ignores the second and third IRA definitions of "Indian"—"all persons who are descendants of [members of recognized tribes under federal jurisdiction] who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." 25 U.S.C. § 479. As the Secretary acknowledges elsewhere, "the other [two] definitions of Indian do not require . . . membership" in any tribe. Govt. Br. at 15. One can therefore be an "adult Indian" eligible to vote under Section 18 without belonging to a "recognized Indian tribe." And so the fact that adult Indians voted in a Section 18 election cannot prove anything about their membership in a tribe, much less anything about any tribe's status for *Carcieri* purposes. A Section 18 election would have been held for the adult Indians of Enterprise Rancheria whether or not they were members of a recognized tribe under federal jurisdiction. The election that was held therefore proves nothing about their tribal membership, much less anything about the *Carcieri* status of the Estom Yumeka Maidu Tribe.[6]

---

[5] In the 1970s, the Sacramento office of the Bureau of Indian Affairs reaffirmed that, "[i]n the majority of cases, . . . rancheria lands are occupied by Indian people without regard to the tribal affiliation of their ancestors." Att. 11 to 1st RJN (Memo from William E. Finale, Area Director, BIA, to Commissioner of Indian Affairs at 3 (Aug. 18, 1978)). Some 60 years earlier, the California Supreme Court had similarly concluded that the residents of a Lake County rancheria were not a recognized tribe, because they had "no tribal laws or regulations, and no organization or means of enforcing any such laws or regulations." *Anderson v. Mathews*, 174 Cal. 537, 543, 163 P. 902, 905 (Cal. 1917).

[6] The Solicitor of the Interior and a district court judge each arrived at the conclusion that "adult Indians" were necessarily members of a tribe under federal jurisdiction by way of the same flawed logic employed by the Secretary, ignoring the second and third definitions of "Indian" to focus exclusively on the first.

The record includes the "Approved List of Voters for Indian Reorganization Act on Enterprise Rancheria" in 1935, but it says nothing about how that list was compiled, or about the tribal membership of those voters. *See* AR NEW 102. Two years before the election was held, however, the Department completed the first census of the Indians of California—commonly known as the "1933 Roll"—which identified the "Tribe or Band" to which each enrolled Indian belonged. *See* Act of May 18, 1928, § 7, 45 Stat. 602, 603. Sixteen of the 25 Indians approved to vote "on Enterprise Rancheria" in 1935 appear on the 1933 Roll. Atts. 6–7 to 2d RJN (Census Roll of the Indians of California Under the Act of May 18, 1928 (45 Stat. 602)). All of them identified their tribe or band as "Concow," *id.*, one of the three subgroups of Maidu Indians. Not one of the voters on the 1933 Roll self-identified as a member of the "Estom Yumeka Maidu Tribe" or listed "Enterprise Rancheria" as their band or tribe.

The Secretary would have held a Section 18 election at Enterprise Rancheria whether the "adult Indians" living there were simply "persons of one-half or more Indian blood," or the descendants of members of any recognized tribe, or members of a tribe that was not the Estom Yumeka Maidu Tribe, or any combination of the above. The fact that a Section 18 election was held on Enterprise Rancheria in 1935 does not establish that the adult Indians who voted were members of the present-day Tribe, nor that that tribe existed and was under federal jurisdiction in 1934. The Secretary's decision that she had authority to take land into trust for the Tribe relied exclusively on the Section 18 election. It was therefore arbitrary and must be vacated.[7]

Stand Up for California! v. Dep't of Interior, 919 F. Supp. 2d 51, 68 (D.D.C. 2013); Department of the Interior Solicitor's Opinion, M-37029, at 21 (Mar. 12, 2014) ("2014 Solicitor Op."), *available at* http://www.doi.gov/solicitor/opinions/M-37029.pdf.

[7] Both Citizens and Stand Up presented these issues to the Secretary in the course of the administrative process. Stand Up suggested that the Estom Yumeka Maidu Tribe was not a recognized tribe under federal jurisdiction for *Carcieri* purposes, AR NEW 22882, while Citizens questioned whether the Tribe was in fact a recognized tribe with a government-to-government relationship with the United States, AR NEW 22948. The Secretary complains that the plaintiffs did not specifically contest her interpretations of the statutory term "recognized" and the meaning of Section 18 elections, but "a claimant need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue raised." *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010). "[A]lerting the agency in general terms will be enough if the agency has been given 'a chance to bring its expertise to bear to resolve [the] claim." *Id.* (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 900 (9th Cir. 2002)).

B. The Secretary did not determine that the Tribe was recognized in 1934.

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that the word "now" in the phrase "recognized Indian tribe now under Federal jurisdiction," 25 U.S.C. § 479, "refers solely to events contemporaneous with the statute's enactment." *Id.* at 389. It follows that the Secretary's authority to take land into trust extends only to tribes that were recognized in 1934.

The Secretary takes the position that the word "now" modifies only the phrase "under federal jurisdiction"; it does not modify the phrase "recognized tribe." Govt. Br. at 12. As a consequence, the Secretary reasons, so long as a tribe was under federal jurisdiction in 1934, it does not matter whether it was a recognized tribe at that time; the tribe need only be recognized at the time the Secretary acquires the land into trust. *Id.*; *see also* 2014 Solicitor Op., at 23–25. That interpretation is contrary to the statutory text and judicial precedent, and the Secretary's efforts to defend it are unavailing. Because the application of "traditional tools of statutory construction" resolves the interpretation of the statute, this Court should not defer to the Secretary's contrary interpretation. *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984).

As a matter of ordinary usage, the phrase "recognized Indian tribe now under Federal jurisdiction" refers to an Indian tribe that is both recognized and under Federal jurisdiction "now"—that is, at the time of the statute's enactment. Put simply, if a tribe was not a "recognized Indian tribe" in 1934, then it cannot have been a "recognized Indian tribe now under Federal jurisdiction" at that time. Although the Secretary does not articulate any textual basis for her contrary reading, it appears to rest on the idea that the prepositional phrase "under Federal jurisdiction" modifies only "tribe," and not "recognized Indian tribe." In other words, the Secretary reads the statute as if it said, "any Indian tribe that is recognized and is now under Federal jurisdiction." In some settings, the nearest-reasonable-referent canon might make such a

---

The Secretary was aware that her statutory authority to take land into trust was at issue. No party could be expected to anticipate and refute the erroneous justifications that the Secretary would ultimately develop. A failure to predict the Secretary's analysis in that document is not a basis for a finding of waiver. Courts in this circuit generally "will not invoke the waiver rule . . . if an agency has had an opportunity to consider the issue . . . . even if the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party." *Portland General Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007). The Secretary had the opportunity to consider her statutory authority to take land into trust, and did in fact do so.

reading appropriate, but here, the statutory context forecloses it. In the context of Section 19, neither "Indian" nor "recognized" is an ordinary adjective that can be separated from the noun it modifies ("tribe"). Instead, the phrase "recognized Indian tribe" is a well-established term of art in Indian law; it is therefore properly regarded as a unit, and "now under Federal jurisdiction" applies to all of it.

The Secretary relies heavily on Justice Breyer's concurring opinion in *Carcieri*, which the majority opinion pointedly did not endorse. *Carcieri*, 555 U.S. at 396. The concurring opinion contains no analysis—Justice Breyer simply asserted, without explanation, that "[t]he statute . . . imposes no time limit on recognition." *Id.* Moreover, the Secretary misreads Justice Breyer's opinion. The opinion posits that a tribe might be recognized by the Secretary after 1934 based on facts or circumstances that were overlooked in 1934, none of which occurred here.[8]

The only time that the Supreme Court addressed the question whether the IRA requires recognition in 1934, it rejected the Secretary's position. In *United States v. John*, 437 U.S. 634 (1978), the Court concluded that the Choctaw Indians' Mississippi reservation satisfied the federal statutory definition of "Indian country" because the Choctaws possessed one-half or more Indian blood. *Id.* at 650. In so holding, the Court explained that "[t]he 1934 Act defined 'Indians' not only as 'all persons of Indian descent who are members of any recognized [*in 1934*] tribe now under Federal jurisdiction,' and their descendants who then were residing on any Indian reservation, but also as 'all other persons of one-half or more Indian blood.'" *Id.* (quoting 25 U.S.C. § 479) (brackets in original; emphasis added). The bracketed phrase "in 1934" that the Court inserted into the language of Section 19 reflects the Court's understanding that the word "now" restricts the operation of the IRA to tribes that were both federally recognized and under federal jurisdiction at the time of enactment.

The Secretary goes on to assert that, even if the IRA requires that a tribe have been

[8] Justice Breyer discussed the possibility of an oversight or error in which the Department "wrongly left tribes off the list," or the "Department later recognized some of the tribes on grounds that showed it should have recognized them in 1934 even though it did not." *Carcieri*, 555 U.S. at 398 (Breyer, J., concurring). Justice Breyer's reasoning requires the Secretary to show the existence of an error made in 1934—that is, newly discovered facts that were overlooked in 1934, like the existence of a treaty between the tribe and the United States.

recognized in 1934, it did not require formal recognition in 1934, and so a tribe could be "recognized" even in the absence of any formal government-to-government relationship between it and the United States. Govt. Br. at 12 n.11. That interpretation is contrary to the plain meaning of the statutory language. At the time the IRA was enacted, as today, the word "recognized" described not just knowledge or awareness, but formal acknowledgement.[9] The Secretary does not explain why Congress would have wanted to use the term in the vague and informal sense that she now posits. The government could hardly be expected to acquire land on behalf of a tribe that it did not know existed, so if "recognized" simply required knowledge or awareness, that word would serve no purpose whatsoever. The most natural reading of "recognized," and the only one that gives the word meaningful effect, is that it refers to formal, jurisdictional recognition. Because the Secretary did not determine that the Estom Yumeka Maidu Tribe was recognized in 1934, her decision was arbitrary and must be vacated on that independent ground.

C. The Secretary's other arguments in support of her decision are impermissible post-hoc rationalizations and unsupported by record facts.

1. The Secretary may not rely upon post-hoc rationalizations.

"'It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself,' not post-hoc rationalizations." *Greater Yellowstone Coalition, Inc. v. Servheen*, 665 F.3d 1015, 1027 n.4 (9th Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983)).[10] The Court may not consider explanations the Secretary offers for the first time in litigation. The only explanation that

[9] For example, the first-listed definition of "recognize" in the second edition of *Webster's New International Dictionary* (after the obviously inapt "[t]o know again; to perceive to be a person or thing previously known") was "[t]o avow knowledge of; to consent to admit, hold, or the like; to admit with a formal acknowledgement." *Webster's New International Dictionary of the English Language* 2079 (2d ed. 1957).

[10] Because judicial review of agency action "is limited to '[t]he grounds upon which . . . the record discloses that [the agency's] action was based,'" *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1099 (9th Cir. 2011) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)) (alterations in original), this Court "cannot gloss over the absence of a cogent explanation by the agency by relying on the post hoc rationalizations offered by defendants in their briefs," *Human Soc. of U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010). Such "post hoc explanations serve only to underscore the absence of an adequate explanation in the administrative record itself." *Id.* at 1050. Explanations of an agency action that "are raised for the first time in defendants' briefs and were not mentioned by [the agency] in the decision under review . . . . are therefore not part of [the Court's] review." *Id.* at 1049–50.

the Secretary offered in the administrative record is that the Section 18 election held for the Indians of Enterprise Rancheria "conclusively establishes" that the Tribe was "under federal jurisdiction for *Carcieri* purposes" in 1934, AR NEW 30214, which as explained above, proves nothing about tribal status. Although the Court must reject the Secretary's newly crafted theories, Citizens addresses them below because they are wrong on their own terms.

2. The residents of a reservation did not automatically become a recognized tribe under federal jurisdiction upon passage of the IRA.

The Secretary suggests that "under the IRA, the residents of a reservation . . . were considered a tribe," and therefore the Indians of Enterprise Rancheria were "a recognized tribe under the IRA," because the rancheria was "a reservation under federal jurisdiction." Govt. Br. at 13. The logical consequence of the Secretary's argument is that all Indians living on reservations in 1934 automatically became "tribes" upon passage of the Act.[11]

Yet the Secretary has never understood the IRA's definition of "tribe" to mean that "the Indians residing on [each] reservation" were automatically transformed into a recognized tribe under federal jurisdiction upon passage of the IRA. *See* Citizens Br. at 8–9. The IRA "*authorizes* the residents of a single reservation . . . to organize [as a tribe] without regard to past tribal affiliation." 1934 Solicitor Op. at 487 (emphasis added). But it does not force them to do so without their consent, nor automatically do so by operation of law. To suggest otherwise produces a ridiculous result and undermines the very purpose of the IRA, which was to provide for Indian *self-determination*. *See Cohen's Handbook of Federal Indian Law* § 1.05, at 86 (2005 ed.). "Authorize" means to "allow," "sanction," or "permit," not to "force" or "require." The Act also "*authorizes* the members of a [pre-existing] tribe . . . to organize as a tribe without regard to any requirements of tribal residence." 1934 Solicitor Op. at 487 (emphasis added). These forms of organization are "distinct and alternative." *Id.* The creation of a tribe of "the Indians residing on one reservation" was an option under the IRA, but it was only one option for self-determination. Moreover, the adult Indians of Enterprise Rancheria rejected the IRA, AR NEW 105, which

[11] The IRA defines "tribe" as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479.

necessarily means they rejected the right to organize under Section 16 of the Act, as a tribe of "the Indians residing on one reservation."[12]

The Secretary's new view of "the Indians residing on one reservation" conflicts with Interior's contemporaneous interpretation of the IRA, which is entitled to "great weight." *Pazcoguin v. Radcliffe*, 229 F.3d 1209, 1220 (9th Cir. 2002). In the same opinion discussed above, the Solicitor of the Interior described three classes of Indians eligible to vote in a Section 18 election. Any Indian residing on a reservation was eligible to vote if (1) he "own[ed] restricted property within the reservation," or (2) was "entitled to participate in tribal elections or other tribal affairs on [the] reservation," or (3) "receive[d] benefits of any sort, *e.g.* rations, from the representatives of the Interior Department stationed on [the] reservation." 1934 Solicitor Op. at 486. The first and third eligible classes do not require tribal affiliation. If the IRA automatically transformed "the Indians residing on one reservation" into a tribe, 25 U.S.C. § 479, then every reservation resident would be "entitled to participate in tribal elections or other tribal affairs on [the] reservation" as part of the second identified class, 1934 Solicitor Op. at 486, rendering the Solicitor's first and third classes superfluous. That he employed them demonstrates that, at the time of the IRA's enactment, the Department did not believe that the residents of each reservation had automatically become a tribe by operation of the Act.

A tribe created by the IRA could not be a "recognized tribe now under Federal jurisdiction" at the moment that the Act became law. The Secretary nonetheless argues that the Estom Yumeka Maidu Tribe satisfied the definition of "tribe" independently of the definition of "Indian." *Carcieri* rejected this argument. Under *Carcieri*, eligibility for trust land must be

[12] If, as the Secretary says, the Indians residing on one reservation automatically became a tribe upon passage of the IRA, then that tribe was dissolved when the reservation rejected the IRA—because the Act in its entirety, including the definitions of Section 19, no longer applied to that reservation. *See United States v. Consol. Mines & Smelting Co.*, 455 F.2d 432, 444 (9th Cir. 1971); *but cf. United States v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980). The purpose of Section 18, after all, was to allow the adult Indians of any reservation to preserve the pre-IRA status quo. 78 Cong. Rec. 11732 (June 15, 1934) (statement of Rep. Howard) (explaining that the drafting committee "thought it unwise to force even home rule and appropriations" on those "unwilling to accept them, and for that reason" what would become Section 18 "provides for a popular referendum"). If the IRA transformed the Indians of Enterprise Rancheria into a tribe in 1934, they untransformed themselves the following year. Or else the Secretary is suggesting that the IRA made the Indians of Enterprise Rancheria into a tribe against their will, and left them powerless to do anything about it. Neither possibility is plausible.

determined by a tribe's status as of the passage of the IRA. 555 U.S. at 393 ("[T]he Secretary and several amici argue that the definition of 'Indian' in § 479 is rendered irrelevant by the broader definition of 'tribe' . . . ."). The *Carcieri* Court found that, as a simple matter of grammar, the restrictions in the definition of "Indian" apply to an Indian tribe, stating that "[t]here is simply no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §§ 465 and 479." *Id.* Because the Secretary's argument would make the "Indians living on one reservation" eligible to receive trust land regardless of their status at the passage of the IRA, it cannot be correct under *Carcieri*.

3. The record contains no evidence that the Indians listed on the 1915 census were members of a recognized tribe under federal jurisdiction.

Finally, the Secretary's brief suggests—again for the first time—that her land-into-trust decision was justified because the Estom Yumeka Maidu Tribe was recognized and under federal jurisdiction as early as 1915. The Secretary bases this conclusion on the Tribe's three-paragraph summary of its history, which was included in the EIS and repeated by the Secretary in the IGRA ROD, but not the IRA ROD. Govt. Br. at 16 (citing AR NEW 23560–61); *compare* AR NEW 517–19, 22968; *see also* AR NEW 29799–80. The limited historical material in the administrative record, however, does not support the Tribe's account.

First, there is no evidence that the 1915 census was a tribal census. Rather, the census identified Indian individuals living "in and near Enterpri[s]e in Butte County, California" in July 1915. AR NEW 27015. Enterprise was the name of a construction camp built during the gold rush; fifty-one Indians were living in the vicinity at the time of the census. *Id.* The census identified fourteen family units, but did not indicate what, if any, relationship those families had to one another. *Id.* The census did not identify the fifty-one individuals as a tribe.

The 1916 letters granting forty acres each to the Martin family and the Walters family indicate that the Government did *not* purchase Enterprise Nos. 1 and 2 for the Estom Yumeka Maidu Tribe or any other tribe or band. *See* Citizens Br. at 1–2 (discussing history of land grants). The letters state that Enterprise No. 2 was purchased for Nancy Martin, her "son, George, and his entire family," 2d Martin Letter, while Enterprise No. 1 was purchased for Emma Walters and

"other Indians related to" her, AR NEW 28121.[13]

The Tribe may claim that "[t]he Enterprise Tribe, as a whole, was the intended beneficiary" of the two parcels acquired for the Martin family and the Walters family, AR NEW 517–18, and that "in 1915 . . . there were . . . 51 tribal members according to the Department of Interior census," AR NEW 518, but the plain language of the letters and the census belie those claims. The record contains facts that are inconsistent with the Secretary's conclusion that she had authority to make a trust acquisition and, at a minimum, her decision had to address these facts. It did not do so.

Although the Estom Yumeka Maidu Tribe claims to have existed in 1915, and employs the 1915 census as its base roll, it did not organize until the 1990s. *See* Att. 6 to 1st RJN (Letter of Michael R. Smith, Acting Area Director, BIA, to Art Angle, at 1 (Apr. 12, 1995)). Their assertions are repeated in various documents, but there is no analysis of their claims anywhere in the record.[14] The Secretary now defends her trust decision by reference to these materials, but she provides neither evidence nor explanation in her brief (let alone the ROD). *See* Govt. Br. at 10 n.7, 12 n.10, 16; *see also id.* at 3.

The Court cannot rely on these post-hoc rationalizations, first, because the law does not permit it to do so, and second, because facts in the record directly contradict these assertions. If the Secretary intends to rely on a 1915 census of individual Indians and land grants to two families as evidence of the existence of a tribe, she must do so as part of her decision, and she

---

[13] It is apparent from the census that eight of the Indians were members of the Martin family—Nancy, her son George, his wife Sadie, and their five children—while twelve Indians were "related to" Emma Walters, who had five children with John Parker. Three of those children appear on the census, along with their spouses and children. AR NEW 27015 ("Lizzie Spencer, nee Parker," "Maggie [Maxson], nee Parker," and "Louis Parker"). There is no indication that any of the other thirty Indians were related to either family, nor that either of the two properties were purchased with their needs in mind. *See id.*

[14] The Tribe represented in its application that "[t]he Enterprise Tribe, as a whole, was the intended beneficiary" of the two parcels acquired for the Martin family and the Walters family, AR NEW 517–18, and that "in 1915 . . . there were . . . 51 tribal members according to the Department of Interior census," AR NEW 518. The Tribe repeated the same story in its request for a two-part determination under IGRA. AR NEW 22968. The FEIS incorporates the Tribe's assertions, with no analysis. AR NEW 23560–61. The IGRA ROD incorporates an abbreviated version of the tribe's official history, beginning with the assertion that "[t]he Tribe has been recognized by the United States since at least April 20, 1915," but provides no analysis of the Tribe's assertions. AR NEW 29799. In addition, the Secretary ignored the Tribe's version of history in determining whether she had authority to acquire land in trust in the 2012 IRA ROD, relying only on the Section 18 election to support her decision.

must develop a cogent explanation as to how her interpretation is not flatly refuted by record facts. The decision must be vacated.

II. THE SECRETARY RELIED ON UNCERTAIN AND NONEXISTENT MITIGATION AND FAILED TO PROVIDE THE GOVERNOR THE INFORMATION THE REGULATIONS REQUIRE, VIOLATING IGRA AND THE APA.

The Secretary failed in three key respects in carrying out her duties under Part 292. First, the Secretary improperly relied on inherently unreliable mitigation. Second, in seeking the concurrence of the Governor of the State of California, she failed to provide the Governor with the "entire record application," as the Part 292 regulations require. Third, the Secretary now admits that she did not consider a large number of comments provided by the community in making her determination of no detriment. The Secretary argues that her failure to comply with Part 292 regulations was "harmless error" or that she was free to ignore opposing comments and to keep them from the record she provided the Governor. The Secretary is incorrect and the harmless error doctrine cannot rescue her failure to comply with Part 292.

A. It was arbitrary and capricious for the Secretary, after concluding that mitigation is *necessary* to avoid detriment, to rely on mitigation she knew to be inherently unreliable.

For gaming to be permissible in this case, the Secretary must determine that a casino project will "not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The Secretary concluded that the casino *will* be detrimental to the surrounding community, *unless* project impacts are mitigated.[15] Because the Secretary determined that impacts must be mitigated to avoid detriment, her determination necessarily requires that the cited mitigation exist and be implemented. The only way to be reasonably sure that the mitigation will be implemented is if it is capable of being enforced. The mitigation the Secretary relied on—apart from the mitigation in

[15] The Secretary chose the casino as the preferred alternative to implement "based upon the environmental impacts identified in the FEIS and *corresponding mitigation*…" AR NEW 29818 (emphasis added). *See also* AR NEW 29772 ("[T]he environmental impacts of the Preferred Alternative [i.e., the casino] are adequately addressed by the mitigation measures adopted in this ROD."); *see also* AR NEW 30168, 30189 (stating "potentially significant effects will be adequately addressed by these mitigation measures" and "the environmental impacts of the Preferred Alternative are adequately addressed by the mitigation measures adopted in this ROD"). Even Yuba County stated that the casino will have a detrimental impact on it if the mitigation measures in the EIS are not implemented. AR NEW 27959.

the MOU—is not. In fact, some of the mitigation has not even been negotiated. Without extant and enforceable mitigation, the Secretary could not rationally conclude that the casino will not be detrimental to the surrounding community. *See Sierra Club v. EPA*, 671 F.3d 955, 963 (9th Cir. 2012) (requiring "a rational connection between the facts found and the choice made").

The Secretary's argument that neither NEPA nor IGRA requires enforceable mitigation misses the point. *See* Govt. Br. at 18–20. What is relevant here is that *the Secretary herself* required the mitigation to be enforceable, but it is not. The Secretary selected the casino as the preferred alternative "*subject to implementation of the mitigation measures* identified in Chapter 2 [of the EIS]." AR NEW 29818 (emphasis added). Her approval is contingent on implementation of the mitigation, which she deemed necessary to avoid detriment. *See* AR NEW 29816 (stating that because "the Tribe has worked with the local communities to identify and mitigate any environmental impacts of the [casino,] . . . I find that the development of the [casino] would not result in a detrimental impact to the environment in the area").

But there is substantial doubt that the mitigation identified in the 2011 ROD will ever be negotiated, let alone implemented.[16] The Secretary required the Tribe to negotiate mitigation agreements with third parties, including agreements addressing fire safety and traffic, but those agreements have not been negotiated. *See* AR NEW 29804 (requiring agreement with Plumas-Brophy Fire District or another fire protection district); AR NEW 29807 (requiring agreement Wheatland Fire Authority or another fire protection district); AR NEW 29805 (requiring the Tribe to "enter into agreements with Yuba County relating to investigation, jurisdictional or other similar issues"). The Tribe is also supposed "to enter into MOUs or other agreements with various additional governmental entities, such as the California Department of Transportation and other nearby towns that would be impacted by the development," to cover "the cost of impacts on such government entities not covered by the MOU."[17] Yet no such agreements exist. The

[16] The Government makes a straw man argument in claiming that Citizens argued that the casino must be devoid of all impacts. *See* Govt. Br. at 19. Rather, Citizens argued that the impacts the Secretary required to be mitigated may never be. Citizens Br. at 14–15.

[17] The Secretary also states that "the Tribe and such government entities will estimate the cost of impacts on such government entities not covered by the MOU." AR NEW 29809. Apart from there being no extant agreements on which the Secretary could reasonably rely, this statement directly contradicts her later

Secretary has no authority to compel the Tribe or third parties to negotiate agreements, nor any ability to predict the terms the parties would negotiate or whether those terms would be sufficient to mitigate impacts. Basing a "no detriment" determination on agreements that do not exist when the Secretary has no ability to compel such agreements—or to enforce them, if they did exist—is arbitrary and capricious.

The Secretary also argues that the questions agency officials asked regarding mitigation enforceability—"who would monitor the situation subsequent to [trust acquisition] in order to provide the Federal Government the assurance that there would be compliance with the dozens of mitigative measures . . . and what punitive and enforcement mechanisms would be available to deal with instances of non-compliance?"—were nothing more than an "agency employee" misstating the law, which she claims, does not require mitigation to be enforceable. Govt. Br. at 19 n.14. Aside from the fact that the Acting Assistant Deputy Secretary asked the same questions, the Secretary ignores the fact that she based her determination on what she incorrectly treats as enforceable mitigation. AR NEW 1598. The FEIS states, without explanation, that "[m]itigation measures are enforceable because: they are incorporated into the project plan; they are required under the terms of a Memorandum of Understanding (MOU); and through various provisions of federal and state laws, and/or city, county, or tribal ordinances." AR NEW 22262; *see* AR NEW 30189 (adopting the same conclusion in the 2011 ROD).

But incorporating mitigation in the project plan is meaningless. The Tribe can change its project plan without recourse.[18] The Secretary has no authority to stop the Tribe from changing the project plan, once the land is in trust. Apparently, the Secretary does not believe that she can remove the land from trust if the Tribe fails to comply with the mitigation requirements. AR NEW 1559 (stating that it takes an act of Congress to remove land from trust). Moreover, the Tribe has not waived its immunity from suit in favor of any party to enforce the mitigation

---

conclusion that "any financial burdens imposed on Yuba County and local units of government are sufficiently mitigated" by the MOUs with Maryville and the County. *See* AR NEW 29815.

[18] The Tribe could, for example, elect to conduct class II gaming instead of class III, which would—according to the Secretary—make the Yuba County MOU and all of the mitigation contained therein, inapplicable.

measures identified in the 2011 ROD, project plan or otherwise. Enterprise is a sovereign entity with broad immunity from suit.[19] *See e.g.*, *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 (2014). The only entity against whom the Tribe could not assert immunity is the United States, which has a trust obligation to the Tribe. Even if the trust obligation did not prevent the United States from trying to enforce the mitigation, "[w]ho will monitor the situation" and "[w]hat enforcement mechanisms would be available?" AR NEW 1598. The answers are: no one, and none.

The Secretary ignored an important aspect of the problem by failing to address these questions. *See State Farm*, 463 U.S. at 43; *see also McFarland v. Kempthorne*, 545 F.3d 1106, 1110 (9th Cir. 2008). The Secretary's finding that impacts shall be mitigated is impermissibly based on unsubstantiated assumptions. The Secretary's argument that IGRA does not require enforceable mitigation not only ignores the Secretary's findings in this case, but makes a no detriment determination meaningless. *See* Gov. Br. at 14. If the Secretary can find that a casino will not be detrimental to the surrounding community merely by citing a long list of mitigation measures that may never occur, then the "no detriment" determination guarantees nothing.[20]

B. The Secretary admits that she excluded documents from the "entire record application" submitted to the Governor and ignored comments in making the "no detriment" determination, violating 25 C.F.R. Part 292 and the APA.

The Secretary concedes that she did not send the Governor a number of documents that are directly relevant to her no detriment determination, in violation of 25 C.F.R. § 292.22(b). First, the Secretary acknowledges that she did not send the Governor the EIS. Govt. Br. at 24. Second, the Secretary admits that she excluded a large number of comments submitted throughout the process that identify a wide range of detrimental impacts. Govt. Br. at 25–26. Both errors require her trust and "no detriment" decisions to be vacated.

The Secretary tries to defend her failure to provide the Governor the EIS as "harmless error." *Id.* The "harmless error" doctrine, however, "may be employed only when a mistake of the

[19] The MOU may grant the County the right to enforce the MOU, but the mitigation identified in the 2011 ROD is not limited to the measures spelled out in the MOU.

[20] As noted in Citizens' opening brief, a finding of no significant impact must be based on enforceable mitigation because it is a substantive determination.

administrative body is one that *clearly* had *no bearing* on the procedure used or the substance of decision reached." *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.*, 378 F.3d 1059, 1071 (9th Cir. 2004) (internal citation and quotation marks omitted) (emphasis in original). When there is an impropriety in the process, such as an incomplete record or failure to consult, "that impropriety creates an appearance of irregularity which the agency must then show to be harmless." *Id.* (citing *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1548 (9th Cir. 1993)).

The Secretary cannot show that her error is harmless. The EIS provides the detailed analysis of the benefits and harms of the casino on the surrounding community—the very information the Governor was supposed to evaluate. The Secretary argues that "[t]he existence of the FEIS was not a mystery," and the Governor's Office commented on or referred to the EIS multiple times. Govt. Br. at 24-25. Thus, she concludes, her failure to comply with the regulations "is simply immaterial to the outcome of the Governor's decision." *Id.* at 25.[21]

The Secretary ignores the fact that the EIS the Governor reviewed was not complete. The Governor did not have any of the comments filed on the FEIS.[22] Many of those comments were critical of the FEIS and identified unresolved issues of concern to the community, including traffic hazards, flood control and other fundamental safety issues. *See e.g.*, AR NEW 28259 (comments from landowners and farmers regarding traffic hazards created by mixing agricultural and casino traffic not adequately address in FEIS); AR NEW 28265 (Citizens comments); *see generally* AR NEW 28288–385; AR NEW 28390 (Wheatland comments). The Governor received

[21] The Government also cites the Governor's concurrence letter, which states that "federal administrative process giving rise to [the] determination was extremely thorough . . . . included numerous hearings, considered hundreds of comments, and generated thousands of pages of administrative records." Gov. Br. at 15 (citing AR NEW 29207). The less than two-page concurrence letter says nothing about the environmental analysis and provides no information at all regarding the role (or lack thereof) the FEIS played in the Governor's determination.

[22] The Governor's Office that reviewed and provided comments on the EIS and the Part 292 questions in 2008 and 2009 is not the same Governor's Office that concurred in 2012, more than three years later. When Governor Schwarzenegger left office in January of 2011, Governor Brown succeeded him, and with that transition, institutional knowledge regarding the EIS and general casino opposition was lost. The materials submitted to the Governor's Office do not include the 2008 and 2009 letters from the Governor's Office, which were highly critical of the EIS and the casino, and the 2011 ROD does not accurately describe the Governor's position. *See* Citizen's Br. at 16 (discussing excluded documents).

none of these comments.

The Governor did not receive the Department's 2011 decision package, which not only included comments on the FEIS, *see* AR NEW 28514–606, but also included the Secretary's response to those comments, *see* AR NEW 28607–30. Nor did the Secretary provide the Governor with her detailed mitigation and enforcement plan (which appears to consist of a checklist, but no enforcement). AR NEW 28631–62. The Governor had no idea these materials existed for the simple reason that the Secretary did not comply with her regulations and provide them. Access to only part of the NEPA document does not satisfy the Secretary's legal obligation to provide the Governor "all the information submitted under §§ 292.16–292.19," including "[i]nformation regarding environmental impacts and *plans for mitigating adverse impacts*, including an . . . EIS." 25 C.F.R. §§ 292.21(a), 292.18(a) (emphasis added). Without a *complete* EIS, the Governor could not evaluate whether the Secretary addressed all of the concerns raised, nor consider the mitigation identified or evaluate the efficacy of the enforcement plan. In other words, he could not possibly concur with the Secretary on an informed basis.

The Government does not and cannot know whether inclusion of these pertinent documents would have affected the Governor's review and cannot prove harmless error in this case. "It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking." *Bennett v. Spear*, 520 U.S. 154, 172 (1997) (citing *Chenery*, 318 U.S. at 94–95).

The Secretary also asserts that she did not have to send the Governor scores of opposition comments because the documents "were not comments received as part of the Secretarial Determination consultation process [in 25 C.F.R. § 292.19]." Govt. Br. at 25–26.[23] But Section 292.19 does not limit the universe of comments the Secretary must consider; it merely establishes a formal consultation process that is designed to solicit information from specific governmental entities. *See* 25 C.F.R. § 292.19 (describing the procedure used and substantive requirements of

[23] In assuring the Court that the Secretary considered the "missing" comments during the trust process under Part 151 two years *after* making the "no detriment" determination, *see* Govt. Br. at 26 n.18, the Government conceded that the Secretary ignored comments that she was required to consider during the Part 292 process, as part of her no detriment analysis.

formal consultation). Moreover, the regulations do not restrict the "entire application record" to only those comments the Secretary considered or those submitted under 25 C.F.R. § 292.19. The regulations require the Secretary to provide the Governor "the entire application record" without limitation. 25 C.F.R. § 292.22(b).[24]

Because of the Secretary's improper exclusion of documents, there is no indication that the Governor was aware of the scope and depth of the opposition to the casino. Perhaps he would still have concurred in the Secretary's decision, but there is no way of knowing that because the Secretary impermissibly kept those materials from the Governor.

Finally, the Secretary admits that *she* did not review the materials she excluded from the "entire application record" in making her no detriment determination. Govt. Br. at 25–26. The regulations, however, require the Secretary to consider "*all of the information*" submitted under Sections 292.16 *through* 292.19 in evaluating detriment, not just the information collected through consultation under § 292.19. *See* 25 C.F.R. § 292.21. That includes "information regarding environmental impacts and plans for mitigating adverse impacts, including," (but not limited to) the EIS, and "[*a*]*ny other information that may provide a basis for a Secretarial Determination* whether the proposed gaming establishment would or would not be detrimental to the surrounding community." *Id.* § 292.18(a), (g) (emphasis added). The regulations are broad, designed to capture as much information as possible about the impacts an off-reservation casino will have on a community. The "heavy scrutiny" that the Secretary admits is required "to avoid upsetting the intent of Congress," which disfavored off-reservation gaming, cannot be reconciled with the Secretary's dismissal of numerous comments from the community itself. AR NEW 29813. By not considering the scores of comments in making her "no detriment" determination, the Secretary cannot know whether any of them—or some combination of them—"may" have affected her conclusion.[25]

---

[24] The Government's reliance on *Stand Up*, 919 F. Supp. 2d at 70-71 is unpersuasive. In *Stand Up*, the court concluded that the trust decision is not part of the "entire application record" because of "the simple fact that, in a case like this one, the Secretary's decision under the IGRA must logically be finalized before the Secretary's decision under the IRA can be made." *Id.* at 71.

[25] The Secretary offers no principled reason for considering the comments under Part 151, instead of Part 292. Both Parts require consultation with specific parties. *Compare* 25 C.F.R. § 292.19 *with* 25 C.F.R.

The regulations require the Secretary to consider the comments she excluded and to provide them to the Governor. She did neither, violating IGRA and the APA.

III. THE SECRETARY ILLEGALLY CONSTRAINED THE NEPA ANALYSIS AND DID NOT ADDRESS FLOODPLAIN ISSUES.

Executive Order 11988 ("EO 11988") requires federal agencies "to avoid to the extent possible the long and short term adverse impacts associated with the occupancy and modification of floodplains and to avoid the extent possible the long and short term adverse impacts associated with the occupancy and modification of floodplains and to avoid direct or indirect support of floodplain development wherever there is a practicable alternative." 42 Fed. Reg. 26951, 26951 (May 25, 1977). Agencies must avoid siting actions in floodplains unless the head of the agency finds there is no practicable alternative, *see id.* at 26952, § 2(a)(2), which alone should preclude a finding of no detriment. The Secretary concedes that she did not comply with EO 11988, but she argues that Citizens cannot raise issues related to that Executive Order because Citizens did not raise them during administrative proceedings. Govt. Br. at 42–43.[26] Multiple parties raised the floodplain issue throughout the proceedings. EPA raised it in its comments on the DEIS, objecting that "[t]he project will be located in a floodplain." AR NEW 0021317.[27] MHM Engineers & Surveyors raised concerns regarding developing in the flood plains as early as 2002, noting that "[m]itigation for a loss [of flood storage caused by filling a portion of the inundation area] amounts to excavating by filling a portion of the inundation area." AR NEW 888.[28] Other parties raised concerns regarding building in the midst of the floodplain. *See, e.g.*, AR NEW 22905, 26820–22, 28292–93.

A party "need not raise an issue using precise legal formulations, so long as enough clarity is provided that the decision maker understands the issue raised." *Lands Council v. McNair*, 629

---

§ 151.10 (requiring the Secretary to seek comments from jurisdictional governments). If the consultation provision serves as the basis for excluding comments submitted by other parties from consideration, that theory would appear to apply equally to both Parts. In addition, there is nothing in the IGRA ROD to demonstrate that the Secretary actually did consider those comments.

[26] *See* Govt. Br. at 42–43 (noting that "EO 11988 may not have been invoked").

[27] There is no exhaustion requirement for EO 11198, which was issued pursuant to the President's authority under substantive statutes, not just NEPA. 42 Fed. Reg. 26951.

[28] The record does not contain the entire document.

F.3d 1070, 1076 (9th Cir. 2010) (citing *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002). An agency is presumed to know the laws it is required to comply with and enforce. Accordingly, "plaintiffs need not cite the relevant statute or regulation to exhaust a legal issue." *Oregon Natural Desert Ass'n v. McDaniel*, 751 F. Supp. 2d 1151 (D. Or. 2011).[29] The Secretary had a "fair opportunity" to address all of the flood plain questions, but did not. *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1290 (D.C. Cir. 2004). Her failure to do so violates both NEPA and EO 11988.

Finally, the Secretary again claims harmless error in failing to consider EO 11988 because she "did in fact find that each of the alternatives proposed was impractical." Govt. Br. 42-43. The Secretary's failure to take into account EO 11988 is not harmless, because her analysis of alternatives is itself arbitrary and capricious. The Secretary excluded from review alternatives that had sensitive biological resources, even though the casino site does, as well. AR NEW 23387. She also excluded alternatives because they lack infrastructure, even though the casino site also suffers from the same deficiency. AR NEW 23392. The Secretary cannot exclude alternatives as unreasonable using criteria that apply equally to the preferred alternative. *See* Citizens Br. at 19. Such an approach epitomizes arbitrary and capricious treatment under NEPA, and clearly shows the error the Secretary made by failing to comply with EO 11988 was not harmless.

IV. THE SECRETARY FAILED TO CONDUCT THE CONFORMITY REVIEW THE CLEAN AIR ACT REQUIRES.

The Secretary was required to make a conformity determination based on nitrogen oxide (NOx) emissions through precisely described notice and comment procedures, which must be conducted before the Secretary makes her decision. The Secretary appears to run away from the record, which plainly states that the proposed project will emit nitrogen oxide in levels exceeding the de minimus value. AR NEW 23621.[30] The Secretary now attempts to construe the record to

[29] The purpose of the issue exhaustion requirement was to "avoid[ ] premature claims and ensur[e] that the agency be given a chance to bring its expertise to bear to resolve a claim." *Native Ecosystems Council*, 304 F.3d at 900. "Requiring more [than general objections] might unduly burden those who pursue administrative appeals unrepresented by counsel, who may frame their claims in non-legal terms rather than precise legal formulations." *Id.*

[30] The Government claims there are no "direct emissions" associated with the project. *See* Govt. Br. at 48. This is not accurate. The FEIS clearly states that there will be emissions associated with construction of

give the appearance that NOx emissions will be less than projected *in the FEIS*. This attempt is without merit.

The Secretary first asserts that only emissions within Yuba County may be considered. This is not correct. Indirect emissions include those emissions that occur in the "same nonattainment or maintenance area" as the federal action. 40 C.F.R § 93.152. The Yuba County-Marysville nonattainment area is comprised of more than just Yuba County; it consists of the southwestern two-thirds of Yuba County and all of Sutter County. 74 Fed. Reg. 58,688, 58,712 (Nov. 13, 2009). Second, the Secretary, in reliance on this error, references Table 4.4.1 in the FEIS and proffers several calculations as evidence that the project will emit minimal NOx emissions in Yuba County. Govt. Br. at 49. The data summarized in Table 4.4.1 simply does not prove the Government's claim. Not only is the Government's attempt to extract Yuba County "only" mileage in contravention of the regulations, but the Secretary is underestimating project emissions because Table 4.4.1 assesses one-way trips only. AR NEW 23613. Not only is the Government's proffered formula not an accurate measure of NOx emissions, the Secretary has not—until now—claimed that the modeled emissions projected by the URBEMIS program are in anyway unreliable or overestimating emissions. It cannot do so now.

Further, the Secretary relies on "a number of mitigation measures" described in the FEIS as a reason why "total emissions from actual project operation will be lower than those calculated in the FEIS." Govt. Br. at 50. As explained above, the Secretary cannot rely on inchoate and unenforceable mitigation to circumvent the conformity process. The described "mitigation" measures are largely unspecified, unenforceable, and unquantified, and therefore are wholly insufficient to satisfy the requirements of the CAA.

The FEIS contains only a brief discussion of potential measures to mitigate air quality impacts, suggesting, for example, that the Tribe may help repave old roads, buy low emission school buses, purchase some form of renewable energy, contribute a "fair share" to traffic signal

---

the project. AR NEW 22047–48. Short-term emissions associated with the construction of a project are not exempt from the conformity analysis and must be accounted for during the construction phase—in this case two years.

improvement, or purchase emission credits if they are "available." AR NEW 22273–74.These aspirational statements do not come close to meeting the standards in the regulations. Mitigation measures must be identified in detail before a conformity determination is made, be coupled with an enforceable commitment to implement them (to which all persons and agencies responsible must consent in writing), include a precise implementation schedule, and be analyzed for efficacy in accordance with stringent informational requirements. 40 C.F.R. §§ 93.158(d), 93.159, 93.160; 5 U.S.C. § 7506(c)(1).

Even if the Secretary were permitted to forgo a conformity determination based on mitigation measures, such reduction measures would need to be in place at the time emissions result from the project so that the action is in fact de minimis at all times. The FEIS fails to meet this standard, as there is no indication that Enterprise has taken a single step towards implementing any of its claimed emission reduction strategies. By not undergoing a full conformity review, including a comprehensive review and formalization of mitigation measures, there is no method to ensure that the project's NOx emissions do not adversely affect the timely attainment and maintenance of the NAAQS. This risk is precisely what the conformity process is designed to avoid. The Secretary violated the CAA by failing to conduct a conformity review.

Dated: August 25, 2014

Respectfully submitted,

/s/ Joshua A. Reiten
JOSHUA A. REITEN (Bar No. 238985)
PERKINS COIE LLP
JReiten@perkinscoie.com
Four Embarcadero Center, Suite 2400
San Francisco, CA 94111
Telephone: (415) 344-7000
Facsimile: (415) 344-7050

JENA A. MACLEAN
(*admitted Pro Hac Vice*)
JMacLean@perkinscoie.com
BENJAMIN S. SHARP
(*admitted Pro Hac Vice*)
BSharp@perkinscoie.com
JAMES O. BICKFORD
(*admitted Pro Hac Vice*)
JBickford@perkinscoie.com
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

Attorneys for Plaintiffs Citizens for a Better Way, Stand Up For California!, Grass Valley Neighbors, William F. Connelly, James M. Gallagher, Andy Vasquez, Dan Logue, Robert Edwards, and Roberto's Restaurant

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2014 I electronically filed the foregoing PLAINTIFFS CITIZENS FOR A BETTER WAY, STAND UP FOR CALIFORNIA!, GRASS VALLEY NEIGHBORS, WILLIAM F. CONNELLY, JAMES M. GALLAGHER, ANDY VASQUEZ, DAN LOGUE, ROBERT EDWARDS, AND ROBERTO'S RESTAURANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT with the Clerk of the Court using the CM/ECF system which will send notification of such to counsel of record.

/s/ Joshua A. Reiten
JOSHUA A. REITEN