IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Civil Action No. No. 1:12-cv-02039 (BAH) Consolidated with: Civil Action No. 1:12-cv-02071 (BAH) Honorable Beryl A. Howell
PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	**ORAL ARGUMENT REQUESTED**

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INTRODUCTION

This case is about the federal government's failure to follow the law in approving the casino development for the North Fork Rancheria of Mono Indians' ("North Fork Tribe" or "Tribe") in the heart of California's Central Valley. The Secretary of the Department of the Interior ("Secretary") arbitrarily and capriciously took 305 acres of land in Madera County into trust for the North Fork Tribe based upon a single fact that does not establish the Secretary's authority, with no supporting discussion, evidence, or citation to authority. The Secretary also failed to adhere to Congress's clear mandate that the proposed casino must not be detrimental to the surrounding community by conducting a balancing test that is contrary to the Indian Gaming Regulatory Act's ("IGRA") exception to the prohibition of gaming on newly acquired land and by failing to analyze or evaluate the mitigation measures on which she relied. The Secretary failed to take a hard look at the environmental impacts of the proposed casino and instead engaged in post hoc justifications of a decision that had already been made. The Secretary also failed to remedy an acknowledged violation of the Clean Air Act. Finally, even if any of the Secretary's determinations were properly made, the California voters rejected the Tribe's gaming compact by popular referendum, rendering the Secretary's determinations invalid. The two records of decision at issue in this case are based almost entirely on the gaming compact, which California voters rejected. Accordingly, plaintiffs request this court grant their motion for summary judgment and order that the fee-to-trust transfer at the heart of this dispute be unwound.

STATEMENT OF FACTS

I. Historical Background of North Fork Rancheria and the North Fork Tribe

Beginning in 1908, Congress recognized the need to help the scattered and landless Indians of California and passed a series of appropriations acts to acquire land for these Indians. *See, e.g.*, 34 Stat. 333; 35 Stat. 76-77. In 1916, under a 1913 appropriations act, Congress purchased the North Fork Rancheria near the town of North Fork for the "use of the North Fork

band of landless Indians." [NF_AR_0000776.] While the applicant North Fork Tribe claims to be the successors of this unidentified "band," nothing in the administrative record supports this claim, nor did the Secretary make any such findings in the records of decision. The 1916 purchase of the Rancheria appears to have been for the use of nearly 200 Indians in the North Fork vicinity, but a 1920 survey of the landless Indians in California found that "the tract is unoccupied." [NF_AR_0041092.] In 1933, seven individuals resided at the Rancheria. S. Rep. 85-1874 (1958) at 32.[1] There is no indication that the seven were connected to the original 200 for which the land was purchased.

On June 18, 1934, Congress passed the Indian Reorganization Act ("IRA") for the purpose of increasing Indian self-government and responsibility. 25 U.S.C. § 461 et seq. Under Section 18 of the IRA, the Secretary was required to hold elections on reservations across the county to allow the adult Indians residing on reservations to opt out of the IRA if they so desired. 25 U.S.C. § 478. On June 10, 1935, pursuant to Section 18 of the IRA, six adult Indians at the North Fork Rancheria were given ballots, and four of the six voted to reject the IRA at the North Fork Rancheria. [NF_AR_NEW_0002012 (Haas Report, Table A).]

In 1958, Congress decided to terminate the California Rancherias and passed the California Rancheria Act. Pub. L. 85-671, 72 Stat. 619. The purpose of the Act was to terminate "the trust relationship between the United States and the Indian people on forty-one enumerated rancherias and reservations in California" and to provide "a procedure for the termination of these rancherias and reservations and distribution of assets, including property, to eligible Indians in fee simple." *Smith v. United States*, 515 F. Supp. 56, 57-58 (N.D. Cal. 1978); *see also* 30 Fed. Reg. 2911 (1966) (notice of termination of the North Fork Rancheria and the Indian status of Susan Johnson).[2] Part of the procedure required that the distribution plan had to be approved by a vote of the majority of adult Indians living on the Rancheria. *Id.* at 58.

[1] A copy of this report is attached to this memorandum as Exhibit 1.

[2] A copy of this report is attached to this memorandum as Exhibit 2.

By the time of the Rancheria Act, only one adult Indian was residing at the North Fork Rancheria. According to the Congressional Report accompanying H.R. 2824, "the Susan Johnson family has an assignment to the entire 80 acres. There is no approved membership roll for this group." S. Rep. 85-1874 (1958) at 33. In 1966, pursuant to the Act, the Rancheria was distributed in fee simple to this single Indian, Susan Johnson. 30 Fed. Reg. 2911 (1966).

In 1983, through a stipulation reached in *Hardwick v. United States* (*Tillie Hardwick*), C-79-1910 SW (N.D. Cal. 1983), the distributees of seventeen California Rancherias had their Indian status "restored and confirmed." [NF_AR_0001065.] The stipulation further stated that the "Secretary of the Interior shall recognize the Indian Tribes, Bands, Communities or groups of the seventeen rancherias . . . as Indian entities *with the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria Act*. [*Id.* (emphasis added).] There was, however, no tribal roll at the Rancheria prior to the Act and the only "entity" recognized by the federal government at the time of the Act was the single individual Indian, Susan Johnson. S. Rep. 85-1874 (1958) at 33. Nevertheless the *Hardwick* stipulation went on to state: "said Tribes, Bands, Communities and groups shall be included on the [BIA's] list of recognized tribal entities . . . ." [*Id.*] Despite there being no recognized tribal entity at the Rancheria prior to the Rancheria Act and the Rancheria property's being held in trust for individual Indians rather than a tribal entity, the North Fork Rancheria of Mono Indians was, in fact, added to the list. 50 Fed. Reg. 6055, 6057 (1985).[3]

The North Fork Tribe, as it exists today, formed its tribal council in 1993 and first adopted a constitution in 1996. [NF_AR_0010855, 0004036.] The Tribe has never organized under the IRA [NF_AR_0004036.] While the Tribe claims that it is the successor to the "North Fork band of landless Indians" for which the Rancheria was purchased, it also claims to be comprised of individuals who are descendants of three groups of Indians: the Mono, the Yokuts, and the Miwoks. [NF_AR_0038116 .]

[3] A copy of this document is attached to this memorandum as Exhibit 3.

II. Dispute Over the Proposed Casino at the Madera Site

A. The proposed casino project

The North Fork Tribe with its partner, Las Vegas-based Station Casinos, intends to develop a casino, hotel, and parking facility on a 305.49 acre parcel in Madera County, California ("Madera site"). [NF_AR_0040445.] The Madera site is located just north of the City of Madera and immediately adjacent to State Route ("SR") 99, [NF_AR_0040450], approximately 36 miles from the North Fork Rancheria in North Fork, California. [NF_AR_0038502.] The proposed development will consist of a class III gaming facility, restaurant and retail facilities, and a 200-room hotel. [NF_AR_0040450-51.] The proposed development will also include 4,500 parking spaces. [*Id.*]

B. Application and administrative process

Prior to engaging in the federal approval process, the Tribe entered into three Memoranda of Understanding with Madera County, the City of Madera, and the Madera Irrigation District, pursuant to which the tribe agreed to make payments to mitigate the effects of the proposed casino. [NF_AR_0041144.] In March of 2005, the Tribe submitted a fee-to-trust application to the BIA requesting that the Madera site be placed in trust for the purpose of constructing a class III gaming facility. [NF_AR_NEW_0000132.] The proposed action was analyzed in an environmental impact statement, a draft of which was submitted for public comment. [*Id.*] The BIA issued the Final EIS ("FEIS") in February, 2009. Because the trust acquisition involved gaming, pursuant to IGRA, the Tribe also submitted a request for a secretarial determination that gaming at the Madera site would be in the Tribe's best interest and would not be detrimental to the surrounding community. [*Id*.]

In September 2011, the Secretary issued a record of decision pertaining to the two-part determination under IGRA ("IGRA ROD"). The IGRA ROD stated that the proposed project was in the best interest of the tribe and would not be detrimental to the surrounding community. [AR 0040445.] In November 2012, the Secretary issued the record of decision regarding the

acquisition of the Madera site into trust for the benefit of the Tribe ("IRA ROD"). [NF_AR_0041138.]

By letter dated September 1, 2011, Larry Echo Hawk, then-Assistant Secretary for Indian Affairs, informed California Governor Edmund G. Brown, Jr. that he had made a favorable "two-part determination" on behalf of the Secretary pursuant to authority delegated to him, as required by IGRA. [NF_AR_0040704-755.] Assistant Secretary Echo Hawk requested that Governor Brown approve, by his concurrence, the siting and development of the proposed casino at the Madera site. [NF_AR_0040705.] On August 30, 2012, Governor Brown concurred with the Secretary's determination. [NF_AR_0040988-89.] When Governor Brown issued his concurrence, he also announced that he had negotiated a class III tribal-gaming compact with the Tribe, which he intended to submit to the California Legislature for ratification. [NF_AR_0040994.] Governor Brown further noted that the compact was tied to a sister-compact negotiated with the Wiyot Tribe under which the Wiyot Tribe gave up the right to conduct gaming on its own land in exchange for revenue sharing contributions from the North Fork Tribe. [NF_AR_0040988.]

The California Legislature ratified the compact by California Assembly Bill No. 277 ("AB 277"), and the Governor signed AB 277 into law on July 3, 2013. [NF_AR_GC_000012.] Under California law, the ratification would not have been effective until January 1, 2014, Cal. Const., art IV, § 8(c), unless it was subjected to a popular referendum, Cal. Const. art II, § 9. The California Secretary of State forwarded the compact to the Secretary on July 16, 2013, and informed the Secretary that AB 277 would not go into effect until January 1, 2014, if at all, because it was subject to a referendum that could render the approval of the compact null and void. [NF_AR_GC_000005-6.] The Secretary took no action on the compact, and the compact was deemed approved by force of law after the expiration of 45 days; the approval was then published in the Federal Register on October 22, 2013. [NF_AR_GC_000100.] A referendum measure was successfully qualified for the California general election ballot to reject the Legislature's approval of the compact [NF_AR_GC_000101], and on November 4, 2014,

California voters rejected the California Legislature's ratification of the compact.[4]

ARGUMENT

I. The Secretary Lacked Authority Under the Indian Reorganization Act to Take Land Into Trust for the North Fork Tribe

The IRA ROD fails to adhere to any applicable standard for reasonable decision making. Under 25 C.F.R. Part 151, the Secretary must consider the existence of statutory authority for the trust acquisition and any limitations on such authority. 25 C.F.R. §§ 151.11(a), 151.10(a). Section 5 of the IRA authorizes the Secretary to acquire land and hold it in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. Section 19 of the IRA defines "Indians" as

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

25 U.S.C. § 479.

The Secretary relied on the first of these three definitions in Section 19 to acquire the Madera site in trust. [NF_AR_0041198.] Thus, to acquire land for "Indians" under this definition, the Secretary must show that the applicant tribe was under federal jurisdiction in 1934. *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

A. The Secretary's conclusion that the North Fork Tribe was under federal jurisdiction in 1934 was not the result of reasoned decision making

According to the Department of the Interior ("DOI"), determining whether a tribe was under federal jurisdiction in 1934 generally involves a two-part inquiry: (1) "whether there is sufficient showing in the tribe's history . . . that it was under federal jurisdiction before 1934"; and (2) whether the tribe's jurisdictional status remained intact in 1934. [NF_AR_0000777.] As the Secretary determined in another record of decision in a case involving the Cowlitz tribe,

[4] California Secretary of State Debra Bowen, Statement of Vote, November 4, 2014 General Election, p. 15, *available at* http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf.

however, "[f]or some tribes evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g., *tribes that voted to reorganize under the IRA in the years following the IRA's enactment*), thus obviating the need to examine the tribe's history prior to 1934. For such tribes, there is no need to proceed to the second step of the two-part inquiry." [NF_AR_0000778 (emphasis added).]

The Secretary determined that the North Fork Tribe was under federal jurisdiction in 1934 based on a solitary fact: "The calling of a Section 18 election at the Tribe's Reservation conclusively establishes that the Tribe was under Federal jurisdiction for *Carcieri* purposes." [NF_AR_0041198.] The Secretary offered no explanation, reasoning, or citation to authority in support of this conclusion in the IRA ROD, and has only defended it as part of this litigation. *See Williams Gas Processing-Gulf Coast, L.P. v. F.E.R.C.* 475 F.3d 319, 326 (D.C. Cir. 2006) ("Arbitrary and capricious review 'demands evidence of reasoned decisionmaking at the agency level; agency rationales developed for the first time during litigation do not serve as adequate substitutes." (quoting *Kansas City v. HUD*, 923 F.2d 188, 192 (D.C.Cir. 1991))).

The IRA authorized two types of elections: (1) a Section 18 election for Indians residing on a reservation to accept or reject application of the IRA to the reservation, 25 U.S.C. § 478; and (2) a Section 16 election for "tribes" that accepted application of the IRA and wished to organize under the IRA, 25 U.S.C. § 476. Section 18 states, "This Act shall not apply to any *reservation* wherein a majority of the adult *Indians*, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 478 (emphasis added). Section 18 does not contain the term "tribe." By contrast, Section 16 states, "Any *Indian tribe* shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on a reservation, as the case may be, at a special election authorized by the Secretary . . . ." 25 U.S.C. § 476. While "adult Indians" could vote under Section 16 to organize as a "tribe" under the IRA, a vote of "adult Indians" under Section 18 does not change their status to a tribe.

Congress established separate and specific provisions for voting to reject the IRA versus voting to organize under the IRA. Under Section 18, Congress established that it would be the *Indians* residing on a *reservation* that would accept or reject the application of the IRA to that reservation. If the *Indians* voted to accept the IRA, Congress authorized them to organize as a *tribe*, either based upon past tribal membership or as a new tribe based solely on the fact that those Indians resided on the same reservation. *See U.S. v. Anderson*, 625 F.2d 910, 916 (9th Cir. 1980) (stating that Section 16 does not apply to Indians who voted not to organize under the IRA in the Section 18 election). Since the adult Indians at the North Fork Rancheria voted to reject the IRA under Section 18, they did not (could not) vote to organize as a tribe under Section 16, an option they abandoned when they rejected the IRA. Thus, a Section 18 vote does not establish that the Indians living on the reservation were a tribe. And the calling of a Section 18 election did not establish the existence of a tribe, but rather only the existence of a reservation with Indians living on it.

The vote identified in the Cowlitz ROD as dispositive for determining whether a tribe was under federal jurisdiction in 1934 unequivocally refers to a vote to organize under Section 16.[5] Because Section 16 elections are tribal elections, they are dispositive of the question of whether a tribe was a "recognized tribe now under Federal jurisdiction" as of the date of organization. But in the IRA ROD, the Secretary offered no explanation or citation to authority for why or how a Section 18 election can "obviate[] the need to examine the tribe's history prior

[5] The administrative record contains an earlier version of the IRA ROD ("Draft IRA ROD"). Relying on guidance from the Department's decision in *Cowlitz*, the Draft IRA ROD incorrectly stated, "The June 10, 1935, election [at the North Fork Rancheria] was conducted pursuant to Section 476 [Section 16] of the IRA." [NF_AR_0000778.] The Draft IRA ROD quoted the entire text of Section 16, relying on the provision's reference to "[a]ny Indian tribe" to conclude that the North Fork Tribe was such a tribe as described in *Cowlitz* and for which jurisdiction in 1934 was unambiguous. [*Id.*] But then the Secretary was forced to confront historical reality when John Maier, the Tribe's attorney, pointed out that "[t]he June 10 election . . . was conducted pursuant to Section 18 of the IRA . . . . (I mistakenly cited the authority as section 16 of the IRA)." [NF_AR_0041112.] After being so informed, the Secretary merely substituted the Section 18 election for the Section 16 election. The Secretary did not, however, quote the language of Section 18 as she had done when she mistakenly based her decision on the Section 16 election.

to 1934" in the same way as the Section 16 election does.[6] *See Williams Gas*, 475 F.3d at 326 ("[I]t is axiomatic that agency action must either be consistent with prior action or offer a reasoned basis for its departure from precedent."). Therefore, the Secretary's determination was arbitrary and capricious.

B. The 1935 election held at the North Fork Rancheria does not establish that the applicant Tribe was "under federal jurisdiction" in 1934

Apart from providing no evidence of reasoned decision making in the IRA ROD, the Secretary's determination based on the Section 18 election goes against the clear intent of Congress and is inconsistent with other DOI determinations.

To determine exactly who voted in the Section 18 election, the Secretary must consult Section 19's definition of terms used in the Act. "The term 'tribe' *wherever used in this Act* shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479 (emphasis added). While this is a broad definition of "tribe," Section 18 does not contain the term "tribe." It speaks more broadly of "Indians." The term "Indian" incorporates tribes but is not limited to tribes, having two other definitions unconnected to the term "tribe." 25 U.S.C. § 479. The definition of Indian, therefore, includes persons who were not "members of any recognized Indian tribe now under Federal jurisdiction." As the Court in *Carcieri* stated, "There simply is no legitimate way to circumvent the definition of 'Indian' in

[6] The four Indians that cast ballots at the North Fork Rancheria voted to reject application of the IRA to the Rancheria. [NF_AR_NEW_0002012.] The Secretary stated in the IRA ROD that the NO vote is irrelevant to the jurisdiction question because of a "later-enacted amendment to the IRA," 25 U.S.C. § 2202, that allows Section 5 to apply to tribes that rejected the IRA in 1935. [NF_AR_0041198.] But for the Section 16 vote to have been dispositive of federal jurisdiction in 1934, under the guidelines discussed in the Cowlitz ROD, the Indians must have "voted *to reorganize under the IRA*." [NF_AR_0000778 (emphasis added).] Thus, under Section 16, a NO vote would not be dispositive, because the Indians decided not to organize as a tribe. The Secretary ignored this in the IRA ROD and merely substituted Section 18 for Section 16. The "later-enacted amendment to the IRA" referred to by the Secretary that allows Section 5 to apply to tribes that rejected the IRA does not resolve the issue of jurisdiction in 1934. The amendment adds no further information. It merely provides that if a tribe can show it was under federal jurisdiction in 1934, then the rejection of the IRA in 1935 does not matter. *See Carcieri*, 555 U.S. at 394-95 (stating that section 2202 does not "alter the definition of 'Indian' in § 479, which is limited to members of tribes that were under federal jurisdiction in 1934. Rather, § 2202 by its terms simply ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478.").

delineating the Secretary's authority under §§ 465 and 479."[7] *Carcieri*, 555 U.S. at 393. Under Section 18, the only conclusion that can be drawn solely from the vote is that Indians voted. *See Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation and internal quotation marks omitted)); *United States v. Donovan*, 429 U.S. 413,445 (1977) (Brennan, J., concurring) ("Since Congress demonstrably knew how to use other language when it so chose, I would take Congress at its word and not try to 'improve' on its draftsmanship.")

The DOI has also expressly stated in recent briefing in *Cowlitz* that a Section 18 election cannot be determinative that a tribe was under jurisdiction because the IRA's voting requirements applied to reservations, not tribes: "Nowhere in [Section 18] is there a mention of a "recognized tribe" voting on the IRA because *the votes were conducted by reservation* . . . . Because voting was conducted *by reservation and not by tribe*, the lists of reservations that voted to accept or reject the IRA's provisions are not definitive." Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion in Support of Summary Judgment, *Clark County Wash. v. Jewell*, Case No. 13-cv-00849-BJR (D.D.C., filed November 6, 2013) at 22-23. [8] Indeed, just as plaintiffs have done here, the DOI quoted the language of Section 18, emphasizing that it applied to "'<u>any reservation</u> wherein a majority of adult <u>Indians</u>, voting in a special election duly called by the Secretary of the Interior, shall vote against its application.'" *Id.* at 23 (quoting 25 U.S.C. § 478). Here, the Secretary has taken a directly contrary position and has provided no explanation. *See Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172

[7] Indeed, Section 5, for example, authorizes the Secretary to take land into trust "for the purpose of providing lands to *Indians*." 25 U.S.C. § 465 (emphasis added); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 32 (D.C. Cir. 2008) ("Congress placed primary emphasis [in § 5] on the needs of *individuals and tribes* for land and the likelihood that the land would be beneficially used to increase Indian self-support." (internal quotation marks omitted) (emphasis added)). The Secretary is not limited to taking land into trust for tribes.

[8] A copy of this document is attached to this memorandum as Exhibit 4.

(D.C. Cir. 1994) ("We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently.").

C. The Secretary failed to determine that the applicant Tribe is the same tribe that was purportedly under jurisdiction in 1934

Even if the fact that four Indians at the Rancheria voted under Section 18 in 1935 could establish that those Indians were a "tribe" under federal jurisdiction in 1934, it cannot establish that *the applicant Tribe* was under federal jurisdiction in 1934.[9] This should be obvious. The Haas Report – Table A, which merely lists the voting statistics at reservations – contains no information about the applicant Tribe. It contains no history of a relationship between the federal government and any tribe at the Rancheria from the 1935 election to the application for a fee-to-trust acquisition. And yet, the Secretary relied solely on this document to conclude that the applicant Tribe was under federal jurisdiction in 1934. Such a decision was necessarily arbitrary and capricious.

To make up for the inherent problems with the Haas Report, the Secretary and the Tribe have created a narrative of recognition, termination, and restoration to establish the continuity of a tribal identity from the Rancheria's purchase in 1916 through the Secretary's determination. [NF_AR_NEW_0000133.] This narrative is based on additional facts included in the IRA ROD analysis under 25 C.F.R. §151.10(b) regarding the Tribe's need for additional land: the purchase of the Rancheria and the events surrounding the California Rancheria Act and the *Tillie Hardwick* stipulation. [NF_AR_0041198.] These facts demonstrate how the North Fork Rancheria came to be held in trust for individual Indians rather than for the Tribe, and were not relied on in the IRA ROD as relevant to the *Carcieri* determination. This narrative of

[9] The Court has denied the Stand Up! Plaintiffs' motion to supplement the record with evidence that more than one Indian group has claimed to be the "North Fork Band of landless Indians" for whom the Rancheria was purchased. The Stand Up! Plaintiffs respectfully disagree with that ruling and to preserve the issue for appeal, emphasize that because documents before the Secretary at the time of her decision suggest that the applicant Tribe is not necessarily the descendent of either the "North Fork Band of landless Indians" or the group of adult Indians who voted under Section 18 in 1935, the Secretary was obligated to address the question. *See Butte County, California v. Hogan*, 613 F.3d 190, 193, 195 (D.C. Cir. 2010).

recognition, termination, and restoration as evidence of federal jurisdiction in 1934 is a post hoc justification as part of a litigation strategy, which cannot survive arbitrary and capricious review. *See Williams Gas*, 475 F.3d at 326 (stating that agency rationales developed as part of a litigation strategy cannot substitute for reasoned decision making in the administrative process).[10]

1. Neither the IRA ROD nor the administrative record establishes that the North Fork Rancheria was purchased for the applicant North Fork Tribe

In this litigation, much has been made about the purchase of the Rancheria for the "North Fork band of landless Indians." Crucially, however, the IRA ROD does not mention this or identify any entity for which the Rancheria was purchased. [NF_AR_0041198.] Rather the import of the purchase is used in the IRA ROD to show that "[t]o this day, none of the lands within the North Fork Rancheria are owned by, or held in trust, for the Tribe." [NF_AR_0041199.] And yet, the position taken by the federal defendants and the Tribe is that land to which the Tribe – organized in 1996 – has no claim was, in fact, purchased for the Tribe. This requires some significant explanation, and as discussed below, *Tillie Hardwick* is not a magic bullet that can solve the problem. Furthermore, nothing in the Secretary's determination can reasonably be viewed as a finding that the purchase was for the applicant North Fork Tribe.[11]

But this is not for lack of effort on the Tribe's part. The Tribe sought to provide evidence in the administrative record that the North Fork band of landless Indians was ethnically Mono and the predecessors of the applicant Tribe. In a memo from the Tribe's attorney John Maier to the Office of the Solicitor of the Department of the Interior, Maier provided the DOI with excerpts of historical documents "that may be helpful to fortify any *Carcieri* analysis which may

[10] Plaintiffs respectfully submit that this applies equally to the court. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.").

[11] The issue before the court, therefore, is not whether the Secretary made a reasoned decision that the North Fork Rancheria was purchased for the applicant Tribe. The Secretary made no such finding. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (stating that an agency's action may be upheld only on the basis of grounds articulated by the agency in its order).

be included in the final agency determination and/or record of decision on the proposed trust acquisition."[12] [NF_AR_0041113.] More specifically, Maier offered excerpts to show the "purchase of the North Fork Rancheria was on behalf of 200+ *North Fork Mono*." [*Id.*] The excerpts, however, do not mention "Monos" or any other specific Indian group. Rather the excerpts speak of a group of Indians in geographical terms. The documents speak of "Indians in the North Fork vicinity," "Indians properly belonging to the North Fork vicinity band," and "Indians in the North Fork District." [NF_AR_0041113-14.] There is no evidence that the North Fork band of landless Indians was ethnically Mono or connected to any other tribal group, and further, the Secretary made no such determination in the IRA ROD. [NF_AR_0041198-99.] Apparently she did not accept the view that the purchase was indicative of jurisdiction.

Even if the purchase had been for a particular tribe, there were no restrictions on Rancheria deeds limiting use to the group for which it was purchased; any homeless Indian could take up residence on a Rancheria. Solicitor of the Department of the Interior, Opinion on "Rancheria Act" of August 18, 1958 (August 1, 1960) at 1883, 1884.[13] And "[i]n actual practice, Indians occasionally moved onto the property without any assignment, occupying a parcel abandoned or never assigned. Such possession was not disturbed since these occupants were also "Indians of California for whose use the land was acquired." [*Id.*] Four years after the purchase of the North Fork Rancheria, a government survey found the Rancheria had been abandoned, that the "tract is unoccupied." [NF_AR_0041092.] Thirteen years later, it appears that seven Indians lived at the Rancheria, but it is not clear that those Indians were connected to the 200 Indians for whom the land was purchased but who either never occupied it or subsequently abandoned it. S. Rep. 85-1874 (1958) at 33. There is simply no connection between the group for which the

[12] The Tribe sought to add these documents to the administrative record at the same time it informed the Secretary of the mistake regarding the Indians at the Rancheria having only participated in a Section 18 election and not a Section 16 election. [NF_AR_0041112.] As discussed above, upon learning this, the Secretary merely substituted the Section 16 for a Section 18 election but did not fortify the analysis with any discussion of the Rancheria's purchase for any specific tribal group.

[13] A copy of this document is attached to this memorandum as Exhibit 5.

land was purchased in 1916 and the six Indians who received ballots in 1935 and the amalgamation of Indian groups organized in 1996 as the applicant North Fork Tribe.

2. The Rancheria Act and *Tillie Hardwick* stipulation do not establish that the North Fork Tribe was under federal jurisdiction in 1934

The federal defendants have argued in this litigation that "[t]he *Tillie Hardwick* litigation conclusively establishes that the North Fork Rancheria was under federal jurisdiction in 1934."[14] [Docket 89, p. 7.] But this is precisely the type of post hoc litigation position that the court should reject. As was the Rancheria's purchase, the *Tillie Hardwick* litigation was analyzed in the IRA ROD to show why the Tribe needs more land. [NF_AR_0041198.] There is no hint in the IRA ROD that the Secretary considered that *Tillie Hardwick* conclusively established that the Tribe was under federal jurisdiction in 1934. In fact, the Secretary had already concluded that the Haas Report solely and conclusively demonstrated that fact. [*Id.*] After-the-fact claims about *Tillie Hardwick* cannot survive arbitrary and capricious review. *See Williams Gas*, 475 F.3d at 326.

Not only is it inappropriate to consider the impact of the California Rancheria Act and the *Tillie Hardwick* stipulation on the Secretary's determination under 25 C.F.R. § 151.10(a), but also, as a matter of law, they cannot carry the weight accorded them. The California Rancheria Act did not terminate tribes but rather terminated the trust relationship between the government and the Indians residing on the Rancheria and distributed the Rancheria assets to individual

[14] In and of itself, this is an odd claim – that an occurrence in 1983 can establish conclusively a condition in 1934. This claim is premised on the termination and restoration part of the narrative – that the tribe was recognized prior to 1934, terminated in 1958, and restored to recognition in 1983. But an inescapable consequence of this narrative is that it presumes that the tribe was formally recognized prior to 1958. Despite this Court's conclusion that cognitive recognition satisfies *Carcieri*, [Docket 42, p. 25], the restoration narrative only works if that recognition was in a formal and legal sense. It is illogical to claim that cognitive recognition was terminated by an act of Congress. Thus the narrative relied on by the Secretary and the Tribe to argue that the applicant Tribe is the same as the tribe purportedly under jurisdiction in 1934 is that there was a formally recognized Tribe at the Rancheria in 1958, which was terminated, and that formally recognized status was restored in 1983. Without that formal recognition, the continuity of identity narrative collapses, and there is absolutely no evidence in the administrative record of a formally recognized tribe at the Rancheria in or prior to 1958. There is certainly no attempt to demonstrate any "rational connection between the facts found and choice made" in the IRA ROD. *Foster v. Mabus*, 895 F. Supp. 2d 135, 147 (D.D.C. 2012).

Indians. S. Rep. 85-1874 (1958) at 2. Thus, the *Tillie Hardwick* litigation did not restore tribes. Rather, as discussed below, *Tillie Hardwick* laid the groundwork for a recognition event, an event unconnected by history or law to the purchase of the Rancheria or the 1935 Section 18 election.

Approximately twenty years after the enactment of the IRA, Congress was uncertain whether tribes existed at all on California Rancherias and assumed they did not. The legislative history of the Rancheria Act reveals this uncertainty in addressing why tribal rolls were not prepared as part of the Act: "The preparation of such rolls would be impracticable because the *groups are not well defined*. Moreover, *the lands were for the most part acquired or set aside by the United States for Indians in California generally*, rather than for a specific group of Indians, and the consistent practice has been to select by administrative action the individual Indians who may use the land." S. Rep. 85-1874 (1958) at 6-7. Thus, Congress did not view the Act as terminating tribes. *See Williams v. Gover*, 490 F.3d 785, 787 (9th Cir. 2007) ("Congress adopted the California Rancheria Termination Act in 1958 in order to distribute lands to individual Indians."). Under the Rancheria Act, the Indian status of the individual Indians residing at Rancherias was terminated, and the Rancheria property lost its status as Indian County and was distributed in fee to individuals, without regard for their tribal identity or for whatever group the Rancheria was originally purchased. *See id.*

At the North Fork Rancheria, by the time of the Rancheria Act, there was a single adult Indian residing at the Rancheria; there was no tribal roll of any group associated with the Rancheria; and under the Act the entire Rancheria was distributed to this single individual, Susan Johnson.[15] S. Rep. 85-1874 (1958) at 33; 30 Fed. Reg. 2911 (1966). Now, the North Fork Rancheria itself is currently held in trust for the "individual family members and heirs of Susan

[15] In the IRA ROD the Secretary refers to land occupied by this single individual as "tribal land." [AR 0041198.] But this is inaccurate. As the both the Secretary and the Tribe concede, this land is held in trust for Individual Indians, not the Tribe. [NF_AR_0029899.]

Johnson." [NF_AR_0035597, 0029899.] Nowhere in this history is there mention of a tribe that was terminated.

Tillie Hardwick stipulated, under the first clause of the so-called "restoration" provision, that the "Secretary of the Interior shall recognize the Indian Tribes, bands, Communities or groups . . . as Indian entities *with the same status they possessed prior to the distribution* of the assets of these Rancherias under the California Rancheria Act . . . ." [NF_AR_0001065 (emphasis added).] The only thing that could have been "restored" is that which was terminated. Prior to the Act, there was no "Tribe, band, Communit[y] or group[]" at the Rancheria. In fact, the Federal Register Notice terminating the Rancheria and the individual Indian status of Susan Johnson expressly stated that "this notice affects only Indians who are not members of any tribe or band of Indians . . . ." 30 Fed. Reg. 2911 (1966). Thus, what was restored at the Rancheria was the Indian status of the sole distributee, Susan Johnson, and the Rancheria land itself.

The federal defendants and the Tribe, however, focus on the second clause of the "restoration provision": "[S]aid Tribes, bands, Communities and groups shall be included on the Bureau Indian Affairs' Federal Register list of recognized tribal entities pursuant to 25 CFR, Section 83.6(b)." [NF_AR_0001065.] According to the BIA, the entities on this list "are acknowledged to have immunities and privileges available to federally recognized Indian tribes by virtue of their government-to-government relationship with the United States . . . ." *See, e.g.*, 79 Fed. Reg. 4749 (Jan. 29, 2014). At the time of *Tillie Hardwick*, there was no government-to-government relationship between any tribal entity at the Rancheria and the United States. The Tribe, in fact, did not officially organize until the 1990s. While it is true that the BIA has the authority to recognize tribes, it is also true that the Secretary cannot create tribes where none had existed before. *See U.S. v. State Tax Commission of State of Miss.*, 535 F.2d 300, 306 (5th Cir. 1976) ("We see nothing in the Acts of Congress conferring authority upon the Secretary of the Interior to create Indian tribes where none had theretofore existed."). *Tillie Hardwick*, therefore, provided for tribal creation. *See Williams v. Gover*, 490 F.3d at 789-90 (discussing process following *Tillie Hardwick* of creating first tribal roll at the Mooretown Rancheria).

The North Fork Tribe's "restored" status was not based on any connection between the Indians for whom the land was purchased or who voted in the 1935 election and a federally recognized tribe that emerged in the aftermath of *Tillie Hardwick*. As the DOI stated in the recent *Alexander Valley* litigation: "[R]estoration of [of a tribe] would need to *begin* with the descendants of those individuals whose Indian status was terminated under the [California Rancheria Act], not any larger group." Federal Defendants' Opposition to Plaintiffs' Motion For Summary Judgment, EFC No. 186, *Mishewal Wappo Tribe of Alexander Valley v. S.M.R. Jewell, et al.*, Case No. 5:09-cv-02502-EJD, (N.D. Cal., filed June 5, 2009) at 4 n.8.[16] Thus at the most, *Tillie Hardwick* restored the protected status of the sole distribute of the North Fork Rancheria – Susan Johnson – and the trust or reservation status of the Rancheria land. But this restoration says nothing about whether the applicant Tribe was under federal jurisdiction in 1934.

The North Fork Tribe need not be related to the original Indians for which the land was purchased or that voted in 1935. These issues are independent of each other. As discussed above, while Rancherias may have been purchased for particular groups, there was no requirement that the lands be used solely by those groups. In *Williams v. Gover*, 490 F.3d 785, members of a group claiming to be the original Mooretown Rancheria Tribe, for which the land was purchased and who voted in 1935, sued the BIA for its alleged role in depriving this group of membership status in the federally recognized Mooretown Rancheria Tribe. The district court dismissed the case, and the Ninth Circuit affirmed. Plaintiffs in *Williams* "claimed that they are descended from people who were named as members of the Mooretown Rancheria Indian tribe in either a 1915 census or a 1935 tribal voter list." *Id.* at 787. At the time of the Rancheria Act, however, two families that were not part of this original band were living on the Rancheria and voted for its termination. *Id.* at 788. In 1979, the Mooretown Rancheria became a plaintiff in the *Tillie Hardwick* case, and like the North Fork Rancheria, the Mooretown Rancheria was subsequently restored as part of the *Tillie Hardwick* stipulation. In 1987, the Mooretown Rancheria decided to

[16] A copy of this document is attached to this memorandum as Exhibit 6.

form a tribal government, which "consisted of the four people to whom Mooretown Rancheria was distributed upon termination in 1959, their dependents, and lineal descendants of those distributees and their dependents." *Id.* at 788. This decision "locked out" the plaintiffs from tribal membership. *Id.* "[A]lthough plaintiffs are descended from people who have lived at Mooretown Rancheria for a very long time, they lack the rights of full members of the Mooretown Rancheria tribe." *Id.*

The nature of the "restoration" under *Tillie Hardwick* shows that there is no inevitable connection between a tribe "restored" and federally recognized as a result of *Tillie Hardwick* and the group of Indians that voted on the IRA in 1935 or for whom a Rancheria was originally purchased. The former and the latter need not be related at all. *Tillie Hardwick* can in no way serve as evidence *on its own* that the North Fork Tribe, as it exists now, has any relation whatsoever to the North Fork band of landless Indians, even if that group could in any way be viewed as a tribe. Therefore, without explanation and analysis, it would not only be illogical but also arbitrary and capricious to conclude that because Susan Johnson's Indian status was restored, and the North Fork Tribe organized as a Tribe in the 1990s, it was under federal jurisdiction in 1934. There is simply no basis for such a conclusion without fact intensive analysis, and the IRA ROD does not contain that analysis.

II. The Referendum on AB 277 Renders the Secretary's Decision to Take the Madera Site into Trust for the Purpose of Class III Gaming Invalid

The referendum of AB 277 that rejected the approval of the North Fork Tribe's compact constitutes a change in circumstances that requires remand to agency to reconsider the approval of gaming at the Madera site and the determinations in the FEIS. The magnitude of this change in circumstances created by the referendum further requires that the fee-to-trust transfer be vacated and set aside until such a time as new decisions are made.

The Madera site was taken into trust for the purpose of developing a class III gaming facility pursuant to a compact between the Tribe and the State of California. *See Match-E-Be-Nas-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2211 (2012) ("[W]hen

the Secretary obtains land for Indians under § 465, she does not do so in a vacuum. Rather she takes title to properties with at least one eye toward how tribes will use those lands to support economic development."); 25 C.F.R. § 151.10(c) (requiring the Secretary to consider "[t]he purposes for which the land will be use"). The fee-to-trust transfer for the purpose of class III gaming under the compact was analyzed in two separate records of decision that are at the heart of this case: the 2011 IGRA ROD and the 2012 IRA ROD. Though separate agency actions, these two RODs are interconnected and based upon the assumption that the State of California would validly enter into the tribal-state gaming compact that had already been negotiated.[17]

California voters, however, rejected the compact by exercising their constitutional right of referendum.[18] This rejection completely destroys the bases of the IGRA ROD's determination that gaming should be authorized at the Madera site. The economic projections supporting the determination that gaming at the Madera site was in the Tribe's best interest were solely based on the compact [NF_AR_0038495; NF_AR_NEW_0000141-42] as was the Secretary's determination that gaming at the Madera site would not be detrimental to the surrounding community because any detrimental impacts would be mitigated. [NF_AR_0038539, 0040534.] Moreover, the Governor granted his concurrence specifically and only for a class III facility under the compact, which contained an agreement with the Wiyot Tribe to forego gaming on its land. [NF_AR_0040988-89.]

Not only was the IGRA ROD based on the rejected compact, but the Secretary also extensively relied on three Memoranda of Understanding ("MOU") between the Tribe, Madera County, the City of Madera, and the Madera Irrigation District to determine that the proposed

[17] The administrative record relies on the 2008 compact negotiated and executed between Governor Schwarzenegger and the Tribe. At that time, the Tribe and the State agreed not to submit the compact to the Legislature until the Secretary had completed the two-part determination and made the trust acquisition. [NF_AR_GC_000118.] The economic projections and impacts upon which the Secretary's IRA and IGRA decisions were made were based on this compact. The 2012 compact that was actually submitted to the Legislature did not become part of the administrative record until November 2014, as part of Secretary's decision to publish the compact in the Federal Register. [Docket 98-2.]

[18] California Secretary of State Debra Bowen, Statement of Vote, November 4, 2014 General Election, p. 15, *available at* http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf.

project will not be detrimental to the surrounding community. The Secretary, for example, states that "the Tribe agrees to provide [payments] to mitigate potential and perceived impacts of the proposed project . . . ." [NF_AR_0041144 (IRA ROD); NF_AR_0040450 (IGRA ROD).] The MOUs are also crucial to the environmental impact statement ("EIS") because the money provided the City, County, and Irrigation District under the MOUs was incorporated into the environmental considerations in the Final EIS ("FEIS"). [NF_AR_0029848, 0030198, 0030560.] Indeed, in a memo analyzing the secretarial determination, the BIA recommended secretarial approval because, although "there appears to be some concerns from the local community . . . , they are all being mitigated either through the MOUs or the Final EIS." [NF_AR_0038542.] These MOUs are therefore critical to the Secretary's approvals in the RODs and determinations in the FEIS.

The MOUs are no longer valid. Both the City and County MOUs contain the following limitation:

> The Parties acknowledge and agree that the Project and the Tribe's contribution and other obligations as set forth in this MOU are, and shall be, *contingent upon* (i) the Secretary's accepting title to the Trust Property, (ii) the occurrence of the Construction date, (iii) *the Tribe and the State entering into a Tribal State Compact . . . .*

[NF_AR_0001313 (County MOU); NF_AR_0003701-02 (City MOU) (emphasis added).]

Because the compact upon which these MOUs are contingent no longer exists, the MOUs are invalid and cannot carry the weight put on them in the RODs or the FEIS. Without a compact, the mitigation crucial to the Secretary's determination to take the land into trust and to authorize gaming under 25 U.S.C. § 2719(b)(1)(A) no longer exists, and therefore these decisions must be invalidated.

Finally, the referendum has created circumstances under which gaming can occur at the Madera site that were not analyzed at all in the RODs or the FEIS. Because class II gaming does not require a compact, and the land has already been taken into trust, albeit improperly, no additional approvals are required by either federal or state law for such gaming to occur. *See* 25

U.S.C. §§ 2719(b)(1)(A), 2710(a), (b), & (c). In other words, because the land is in trust and no compact is required for class II gaming, no federal or state law prohibits the Tribe from developing a class II casino.[19] The Secretary never evaluated class II gaming in making the decision to take the land into trust, however.[20]

This Circuit follows the doctrine that remand is appropriate "'where there has been a change in circumstances subsequent to administrative decision and prior to court decision, that is not merely 'material' but rises to the level of a change in 'core' circumstances, the kind of change that goes to the very heart of the case.'" *American Optometric Society v. F.T.C.*, 626 F.2d 896, 907 (D.C. Cir. 1980) (quoting *Greater Boston Legal corp. v. F.C.C.*, 463 F.2d 268, 283 (D.C. Cir. 1971)). The referendum rises to the level of a change in core circumstances. The provisions of the compact permeate nearly every aspect of the RODs and the MOUs upon which the RODs rely are now invalid. The referendum has also created the possibility of a class II gaming facility, which the RODs did not consider. The referendum created more than just a "material" change involving the Secretary's determinations. The court should, therefore, remand the Secretary's trust decision for renewed consideration in light of the changed circumstances.

[19] Indeed, in the aftermath of the referendum, North Fork tribal leaders have intimated that they believe the Madera site is now Indian land to do with as they will and intend to proceed with the development of the casino. "The 305 acres of land near Madera is Indian land, and we will proceed with our plans to build our casino there." Voters statewide say NO to Prop. 48, *Sierra Star*, November 5, 2014, available at http://www.sierrastar.com/2014/11/05/70801/voters-statewide-say-no-to-prop.html?rh=1. But this land became Indian land for reasons that no longer exist, and any gaming at the Madera site at this point will necessarily be gaming that was not considered in the RODs.

[20] Nor was class II gaming considered in the FEIS. All of the alternatives in FEIS are analyzed under the assumption that gaming will be conducted subject to the compact. The analyzed alternatives do not include a class II-gaming alterative. This decision not to include a class II alternative was patently unreasonable because the State was not required to enter into the compact with the Tribe. Nevertheless, with no compact and the land still in trust, there exists the possibility that class II gaming could occur at the site. The environmental consequences of a facility developed for the purpose of class II gaming, developed without the mitigation provided for in the MOUs, have not been analyzed at all in the FEIS. *See* 40 C.F.R. § 1502; *Nat'l Comm. for the New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004) (stating that a supplemental EIS is required where new information provides a "seriously different picture of the environmental consequences").

III. The Secretary's Finding Under the Indian Gaming Regulatory Act Is Arbitrary, Capricious, and in Violation of the Law

Subject to limited exceptions, IGRA generally prohibits gaming on trust land acquired after 1988. 25 U.S.C. § 2719(a). The exception applicable to this case provides that gaming may only occur on such land if (1) the Secretary determines that gaming is in the best interest of the tribe, and (2) gaming would not be detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A) ("two-part determination" or "secretarial determination"). Furthermore, the Secretary has no authority to take land into trust for the purpose of gaming unless and until the governor of the state concurs in the Secretary's two-part determination. *Id.*; *Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650, 656 (7th Circ. 2004).

In implementing 25 U.S.C. § 2719(b)(1)(A), the Secretary formally defined "surrounding community," 25 C.F.R. § 292.2, but did not address the basis upon which the Secretary should determine that gaming will "not be detrimental to the surrounding community." Nor does the Secretary address this in the IGRA ROD. Rather, the Secretary merely concludes, "The *weight of evidence* in the record *strongly indicates* that the Tribe's proposed gaming facility would not result in detrimental impact to the surrounding community." [NF_AR_0040534 (emphasis added).] The Secretary arrived at this conclusion by weighing the benefits of the casino to the surrounding community against significant detrimental impacts that were found. Section 2719(b)(1)(A), however says nothing about weighing benefits to the surrounding community against detriments. The provision says nothing about mitigating detrimental impacts to the surrounding community. Without explanation and analysis as to how the Secretary reached the conclusion about the weight of the evidence or how specific mitigation measures will result in no detriment to the surrounding community, the Secretary's conclusion is contrary to Congress's clear intent.

A. Section 2719(b)(1)(A) must be construed narrowly in accordance with Congress' clear mandate that the proposed gaming facility cannot be detrimental to the surrounding community

While a primary purpose of IGRA is to promote economic development, self-sufficiency, and strong tribal governments, a particular provision of IGRA can have an independent purpose. For example, "the exceptions in IGRA § [2719](b)(1)(B) serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003). Another important purpose of IGRA is to "shield [Indian gaming] from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation . . . ." 25 U.S.C. § 2702. By contrast, providing economic benefits to the surrounding community is not a purpose of IGRA; nor is it consonant with any of the articulated purposes.

IGRA does not require that all interpretations and actions serve to promote tribal economic development and self-sufficiency, and actions may serve the purpose of limiting a tribe's ability to improve its economic condition through casino gaming. *See Redding Rancheria v. Salazar*, 881 F. Supp. 2d 1104, 1120-21 (N.D. Cal. 2012) ("[T]he questions before Interior in applying § 2719 were how to limit the definition of "restoration of land" (not whether to do so) and how to balance the concerns of restored and other tribes (not whether to promote tribal economic development."). Section 2719(b)(1)(A), for example, does not serve IGRA's purpose of promoting economic development, self-sufficiency, and strong tribal governments, but rather focuses on protections for state and local governments. "The meaning of § 2719(b)(1)(A) is unmistakably clear: Congress made the state's interests paramount by granting the Governor veto power over the DOI's determination." *Confederated Tribes of Siletz Indians v. U.S.*, 841 F. Supp. 1479, 1491-92 (D. Or. 1994), *aff'd on other grounds*, 110 F.3d 688 (9th Cir. 1097). Even if the Secretary finds off-reservation gaming would be in the tribe's best interest and would not be detrimental to the surrounding community, the Governor can decline to concur, and that is the end of the matter; the tribe has no further recourse to gaming off-reservation. *Lac Courte*, 367 F.3d at 656. Moreover, where Congress wished to ensure tribes could pursue gaming to

promote their economic development over the objections of a state, it provided tribes with a right of action to compel states to negotiate compacts in good faith. 25 U.S.C. § 2710(d)(7)(A)(i); S. Rep. 100-446, 14 (1988). Congress provided tribes no corresponding right of action to challenge a governor's decision not to concur.

To interpret Section 2719(b)(1)(A) broadly – based on IGRA's purpose to promote economic development, self-sufficiency, and strong tribal governments – would ignore the limits Congress set on gaming on post-1988 lands and expands the exception so as to swallow the general prohibition of gaming on lands acquired after 1988.[21] *Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989) (stating that is a fundamental principle of statutory construction that an exception to a general rule must be construed narrowly so as not to overwhelm the general rule).

1. The Secretary failed to apply "heavy scrutiny" and impermissibly broadened the exception contrary to congressional intent

Noting that IGRA "favors on-reservation gaming to off-reservation gaming," the Secretary stated in the IGRA ROD that to be "[c]onsistent with the scheme established by IGRA, the Department will apply 'heavy scrutiny' to off-reservation gaming applications." [NF_AR_0040531.] Such "heavy scrutiny" is necessary to "ensure that [off-reservation applications] do not result in a detrimental impact to communities surrounding the proposed gaming site." [NF_AR_0040532.] While the Secretary is unclear about what "heavy scrutiny" exactly is, the Secretary jumbles together payments by the Tribe, mitigation efforts proposed by the Tribe, and benefits to the surrounding community from the casino – without careful analysis

[21] Some courts have stated that section 2719's "presumptive bar against casino-style gaming on Indian lands acquired after the enactment of the IGRA . . . should be construed narrowly (and the exceptions to the bar broadly) in order to be consistent with the purpose of the IGRA, which is to encourage gaming." *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for Western Div. of Michigan* 369 F.3d 960, 971(6th Cir. 2004); *see also City of Roseville v. Norton*, 219 F. Supp. 2d 130, 157 (D. D.C. 2002). These cases, however, do not address the two-part determination, but rather the meaning of "restored" in the "restored lands exception." The restored lands exception to section 2719(a) does not have a clear congressional mandate that the Secretary determine that the casino will not result in detriment to the surrounding community. Therefore, the Court should not read the two-part determination exception broadly.

– to find no detriment. The Secretary sidestepped her duty to find no detriment and conducted a balancing test, concluding that the benefits outweigh any detriments. While the casino may offer benefits to the surrounding community, the Secretary is not charged with determining that gaming will be in the best interest of the surrounding community. Under IGRA, benefits to the surrounding community are irrelevant to the Secretary's task except to the extent that such benefits eliminate detriments. [22]

The FEIS concluded that the proposed project will have significant adverse environmental and socioeconomic impacts on the surrounding community. It will, for example, create approximately 531 new problem gamblers. [NF_AR_0030197.] It will cause significant traffic and transportation impacts [NF_AR_0029849.] It will result in loss of habitat for the Swainson's hawk. [NF_AR_0030175.] The Secretary acknowledges these detrimental impacts, but ultimately dismisses them in the IGRA ROD, concluding, with no discussion or analysis, that they will be mitigated. [NF_AR_0040534.] The only detailed analysis in the IGRA ROD is reserved for the litany of payments from the Tribe to the community.

For example, under a heading confusingly labeled "Local Opposition" and in response to 25 C.F.R. § 292.18(g), "other information pertinent to a finding of no detriment," the Secretary stated that the Tribe agreed to contribute over a million dollars to various foundations, "which are not directly associated with the Resort," and to pay Madera over four million dollars for purposes, "not associated with costs of direct impacts of the Project. . . ." [NF_AR_0040527.] All these contributions "would provide substantial benefits to the County and the surrounding community." [*Id.*] Nowhere does this section speak to or offer "other information *pertinent to a finding of no detriment*." And as part of the decision to implement the preferred alternative, the Secretary lists the "[k]ey beneficial effects" the Casino is "reasonably expected to result in . . . for Madera County, City of Madera, and the Tribe." [AR 0040536.] Significant among these

[22] The Secretary's approach in the IGRA ROD is to suggest that the benefits to the surrounding community will compensate the community for any detriments. This approach is inconsistent with the clear language of the statute. Moreover, the Secretary offers no reasoning or analysis to suggest that such an interpretation of the statute is reasonable.

effects, "Madera County would collect increased revenues of approximately $1,008,683 over accrued costs," and "City of Madera would collect increased revenues of approximately $856,771 over accrued costs . . . ." [NF_AR_0040537.]

The IGRA ROD does not analyze the acknowledged detrimental effects of the project, but instead focuses on payments to the surrounding community that are not necessarily connected with mitigation. This is hardly heavy scrutiny consistent with the clear language of section 2719(b)(1)(A).

2. The Secretary's finding of no detrimental impact to the surrounding community impermissibly relies on unanalyzed mitigation

Simply accepting the findings of the FEIS regarding mitigation without analysis or discussion is inconsistent with substantive mandate of section 2719(b)(1)(A). First, the NEPA analysis in the FEIS and the required analysis under section 2719(b)(1)(A) are at cross purposes. The FEIS, including its mitigation discussion, is governed by the statement of "purpose and need," 40 C.F.R. § 1502.13, which relies on IGRA's purpose of promoting "tribal economic development, tribal self-sufficiency, and strong tribal government." [NF_AR_0029823 (quoting 25 U.S.C. § 2701).] The mandate that the casino will not be detrimental to the surrounding community, as discussed above, is not consonant with this purpose of IGRA. Second, and more fundamentally, NEPA allows projects to proceed despite a finding of detrimental impact. IGRA does not.

"NEPA . . . does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989); *see also Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 (1980) (holding that the agency merely had to "consider[] the environmental consequences of its decision" but that NEPA requires no more). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 444 U.S. at 350.

Section 20 of IGRA, by contrast, provides a clear, substantive mandate that the Secretary determine the casino will result in no detrimental impact to the surrounding community. 25 U.S.C. § 2719(b)(1)(A). Section 20 provides no allowance based on the benefits of the proposed project outweighing any detriment to the surrounding community. Nor does it simply require that decision makers be informed of potential impacts to decide whether to continue a project in the face of potential detriment the surrounding community.

Mitigation is not the same as elimination. "Mitigation" is defined under NEPA to include "minimizing impacts" and "reducing" the impact over time. 40 C.F.R. §1508.20(b), (d). The FEIS itself clearly comprehends mitigation as reduction rather than elimination. But without discussion of the effectiveness of the mitigation measures, where, how, and when, the measures will be used, or a discussion of the relationship between reduction and a finding of no detriment, there is no substantial evidence indicating the Secretary made a reasoned rather than an arbitrary and capricious decision.

3. The mitigation relied upon by the Secretary is inadequate

Even if mitigation were clearly a component of a finding of no detriment, the mitigation discussion in the FEIS cannot support any finding pursuant to IGRA. Under NEPA, "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required . . . ." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). Under IGRA's substantive mandate, a mere listing of mitigation measure falls far short. Yet for the potentially significant impact associated with problem gamblers, which the FEIS claims the proposed mitigation measures "would mitigate . . . to a less than significant level," [NF_AR_0030198], the FEIS merely lists the mitigation measures. [NF_AR_0030509.] It provides absolutely no discussion of how effective the measures will be. *See South Fork Band Council of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) ("A mitigation discussion without at least *some* evaluation of effectiveness is useless in making that determination."); *Neighbors of Cuddy Mountain*, 137 F.3d at 1381 (stating that

mitigation measures are inadequate where it is "impossible to determine where, how, and when they would be used and how effective they would be."). The IGRA ROD provides neither further discussion of how the proposed measures will mitigate the effect nor any discussion of how such mitigation is sufficient to sustain a finding of no detriment. It merely states that "the FEIS concludes that mitigation will result in no significant impact." [NF_AR_0040534; *see also* discussion in Part IV(C), discussing inadequacy of mitigation under NEPA for problem gambling and social services.]

B. The California Governor's concurrence is invalid[23]

The Secretary's approval of off-reservation gaming at the Madera site is invalid under IGRA because the Governor of California lacked the authority under California state law to concur in the Secretary's two-part determination. Though the Secretary was not bound at the time to inquire to the legality of the concurrence in authorizing gaming at the Madera site, the Secretary's approval of gaming at the Madera site under section 2719(b)(1)(A) did not cure a concurrence that was invalid *ab initio* – it "cannot, under [IGRA], vivify that which was never alive." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997). Moreover, even if the Governor had authority to concur, the grounds upon which he concurred are no longer valid because of the referendum rejecting the compact. Therefore, the fee-to-trust transfer should be unwound.[24]

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[23] The issue of whether the Governor's concurrence was authorized under California law is currently before two different California courts of appeal. *United Auburn Indian Community of the Auburn Rancheria v. Edmund G. Brown Jr.*, Case No. C075126 (Cal. App. 3d Dist.); *Stand Up for California and Barbara Leach v. State of California, et al.*, Case No. F069302 (Cal. App. Dist. 5). In both cases, the lower courts found that the Governor was authorized to concur under the California Constitution. As of January 22, 2015, arguments will have been fully briefed in both cases. This discussion is an overview of the main points raised against the Governor's concurrence in this action in *Stand Up for California and Barbara Leach v. State of California, et al.* On appeal, *Stand Up* is challenging the trial court's ruling that the Governor had the authority to concur because issuing the concurrence was necessary for him to negotiate and conclude a compact with the Tribe.

[24] While the Governor's authority to concur is an issue of California state law, this court's resolution of this state law issue is necessary for the relief plaintiffs seek under the APA. If the concurrence was never valid or has been invalidated by the referendum, see Part II(C)(3), the Secretary's two-part determination must be vacated and set aside. 25 U.S.C. 2719(b)(1)(A); *see also Pueblo of Santa Ana*, 104 F.3d at 1548.

1. The Governor's concurrence required state authorization

In enacting section 2719(b)(1)(A), "Congress recognized [both] federal and state concerns and required that both had to be satisfied by requiring action by the appropriate federal and state officials." *Confederated Tribes of Siletz Indians of Oregon v. U.S.*, 110 F.3d 688, 693 (9th Cir. 1997); *see also Lac Courte* , 367 F.3d at 663 ("Section 2719(b)(1)(A) preserves state sovereignty by merely encouraging the States to decide whether to endorse a federal policy. . . .") (emphasis added)). While the Governor's concurrence is required for the Secretary to approve off-reservation gaming and is thus "given effect under federal law, . . . [t]he [Governor's] authority to act is provided by state law." *Confederated Tribes of Siletz*, 110 F.3d at 696 ("If the Governor concurs, or refuses to concur, it is as a State executive, under the authority of state law."). California law nowhere expressly authorizes the Governor to issue concurrences.

2. The concurrence power is not inherent in the Governor's executive authority

In California, the powers of the Legislature are plenary. *Howard Jarvis Taxpayers' Assn. v. Fresno Metro. Projects Auth.*, 40 Cal. App. 4th 1359, 1374 (1995). The core functions of the Legislature include passing laws, levying taxes, making appropriations, and determining and formulating legislative policy. *Carmel Valley Fire Prot. Dist. v. State*, 25 Cal.4th 287, 299 (2001); *see also* Cal. Const., art IV, § 8 (charging the Legislature with "mak[ing] law . . . by statute")

The Governor's authority, by contrast, is limited to those powers conferred by statute or the Constitution. *See, e.g., Prof'l Eng'rs in Cal. Gov't v. Schwarzenegger* 50 Cal.4th 989, 1041(2010); 62 Ops. Cal. Atty. Gen. 781, 784 (1979) ("[T]he Governor has powers derived both from the state Constitution and from statutes enacted by the Legislature."). Particularly where the Governor's actions "are legislative in nature, '[a]s an executive officer, [he] is forbidden to exercise any legislative power or function except as . . . the Constitution expressly provide[s].'" *St. John's Well Child & Family Ctr. v. Schwarzenegger*, 50 Cal.4th 960, 986 (2010) (quoting

Lukens v. Nye 156 Cal. 498, 501 (1909)); *see also Harbor v. Deukmejian*, 43 Cal.3d 1078, 1087 (1987).

The power to concur, which authorizes the creation of new Indian land for the purposes of gaming and effectively cedes the state's jurisdiction over that land, is a legislative power not an executive power that the Governor may exercise by fiat. *See* 25 U.S.C. § 465 (exempting trust land from state and local taxes); *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 39 (D.C. Cir. 2008) (Brown, J., dissenting) ("By taking land in trust for Indians, the Secretary removes it from the jurisdiction of the State in which it sits and places it under the authority of a tribe." (citing *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 529-531 (1998))); *Arnel Development Co. v. City of Costa Mesa*, 28 Cal.3d 511, 523 (1980) (describing "the making of land-use policy" as "a legislative act"). There can be no legitimate dispute that "[t]he power to place public lands in trust for Native Americans for the purpose of gaming is not an Executive power." *Confederated Tribes of Siletz*, 110 F.3d at 694. Rather, as the Ninth Circuit has held, "[t]he power delegated to the Secretary to acquire Indian trust lands for gaming purposes is a legislative power." *Id.* at 696. If the power to place land in trust for Indian tribes for purposes of gaming is a legislative power – and it is – then so too must be the state's decision to allow the governor to concur in the creation of that very same Indian land for those same purposes. Indeed, as the California Attorney General has recognized, "the decision of the State of California to participate in a federal program is basically a legislative act and the Legislature has the exclusive power to determine whether and the manner in which the state shall participate." 62 Ops. Cal. Atty. Gen. 781, 784 (1979).

Most importantly, the Governor's concurrence set California public policy regarding off-reservation gaming that previously did not exist in California, and setting public policy is a legislative, not executive, function. *Carmel Valley Fire Prot. Dist.*, 25 Cal.4th at 299 (the Legislature "is charged with the formulation of policy"). Those policy decisions involve balancing the interests of nearby tribes and local communities, and implicate broader statewide policy regarding whether and under what circumstances off-reservation gaming should be

allowed. The Governor engaged in precisely this type of fundamental policy making by conditioning his concurrence on the Tribe's agreeing to share revenue with the Wiyot Tribe in exchange for that tribe's agreement to forego gaming on its own land. This decision went far beyond the Governor merely agreeing with the Secretary that gaming is in the best interest of the North Fork Tribe and not detrimental to the surrounding community.

These policy determinations belong to the Legislature in the first instance. In order for the Governor to make these policy decisions for the state by concurring in the two-part determination, therefore, the Legislature must have conferred that authority on the Governor by statute or through the Constitution. *See, e.g., Prof'l Eng'rs* 50 Cal.4th at 1041.

3. The Governor's authority to negotiate compacts does not include the authority to concur in a two-part determination

The California Constitution specifically and only authorizes the Governor "*to negotiate and conclude compacts*, subject to the ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking percentage games by federally recognized Indian tribes on Indian lands in California in accordance with federal law." Cal. Const., art. IV, § 19(f) (emphasis added). This provision does not expressly authorize the concurrence; nor can the authority to concur be implied as an ancillary power that is necessary for the Governor to negotiate compacts.[25] The distinctions between the power to negotiate compacts and the power to concur in a two-part determination show that the extraordinarily broad and binding concurrence power cannot reside within the narrow and non-binding negotiation power.

[25] Indeed, the most recent and thorough treatment of the Governor's power by the California Supreme Court specifically rejected the idea that the Governor has such implied or ancillary powers, as well as the idea that the Governor has inherent executive power over decisions that are historically legislative. *Prof'l Eng'rs* 50 Cal.4th at 1015 ("[T]he governor fails to cite any judicial decision or other supporting authority holding or suggesting that the power under the California Constitution to establish or revise the terms and conditions of state employment, even in a fiscal emergency, resides in the Governor . . . (1) Under the California Constitution it is the Legislature, rather than the Governor, that generally possess the ultimate authority to establish or revise the terms and conditions of state employment . . . , and (2) any authority that the Governor . . . is entitled to exercise in this area emanates from the Legislature's delegation of a portion of its legislative authority . . . .")

The Governor's authority to negotiate compacts granted by section 19(f) is narrowly defined and nonbinding on the state. First, compacts must be negotiated "in accordance with federal law." Cal. Const. art. IV, § 19(f). Under IGRA, the state is required to negotiate in good faith with a tribe that has jurisdiction over Indian land within the state and that requests a compact allowing gaming on that land. 25 U.S.C. § 2710(d)(3)(A). If the state refuses, the tribe has a right of action in federal court to compel negotiation. 25 U.S.C. § 2710(d)(7)(A). IGRA also specifically enumerates the permissible subjects of negotiation. 25 U.S.C. § 2710(d)(3)(C) (listing permissible subjects of negotiation); see also 25 U.S.C. § 2710(d)(4) (forbidding state from imposing any type of tax or fee as part of negotiations). Thus, in exercising his authority under section 19(f), the Governor has no discretion in deciding whether to negotiate and is expressly guided by IGRA through his exercise of the negotiation power.

Second, negotiated compacts are "subject to ratification by the Legislature" Cal. Const. art. IV, § 19(f). Thus, the California Constitution expressly precludes the Governor from legally binding the state to a compact. This ratification requirement gives the Legislature the right to reject any compact negotiated by the Governor.

The contrast between this limited authority and the authority necessary to concur in the Secretary's creation of new land for gaming purposes is sharp. The state is granted unlimited discretion in deciding whether or not to concur in the Secretary's two-part determination, unconstrained by any particular federal law. Congress has not enacted any statute outlining or limiting permissible subjects a governor can or must consider in deciding whether to concur. And, in contrast to the compacting process, Congress did not grant tribes any right of action against a state if the governor declines to concur in a two-part determination. *Lac Courte*, 367 F.3d at 656. When it comes to granting a concurrence, the state has no obligation whatsoever to the requesting tribe. *Id.* Thus, the state has the absolute discretion to reject or approve the Secretary's two-part determination to create new Indian land for gaming, provided the Governor is empowered to do so under state law.

Here, by concurring with the Secretary's determination to take the Madera site into trust, not only did the Governor purport to bind the state to the creation of new Indian land for gaming, but he also effectively locked the Legislature out from weighing in on the decision. True, the Legislature could have refused to ratify a compact with the North Fork Tribe for class III gaming on the Madera site, but the land would still exist in trust for the Tribe for the purposes of gaming. Since no compact is required for class II gaming, the Governor's concurrence – all by itself – has authorized the creation new Indian land for gaming purposes without any legislative input. 25 U.S.C. §§ 2719(b)(1)(A), 2710(a), (b), & (c). That is a power the Governor simply does not have when negotiating compacts that are subject to legislative ratification.

Apart from the distinctions in the scopes of the two powers, the negotiation power and the concurrence power also involve independent requirements derived from separate IGRA sections that serve entirely different purposes. The purpose of a tribal-state compact is to develop a cooperative regulatory scheme between a tribe and the state for class III gaming on Indian land. *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003). Without a tribal-state compact, the state has no authority to regulate Indian gaming. *Cheyenne River Sioux Tribe v. State of S.D.*, 830 F.Supp. 523, 526 (D.S.D. 1993 , *aff'd*, 3 F.3d 273 (8th Cir. 1993). Thus, for a state to have any regulatory authority, all class III gaming, whether on land acquired before 1988 or after, must be conducted pursuant to a tribal-state compact. 25 U.S.C. § 2710(d)(1)(C).

While compacts give the state limited regulatory authority over gaming, they also offer the tribe the ability to take advantage of the state's existing gaming policies and its regulatory agencies. *Pueblo of Santa Ana*, 104 F.3d at 1549. Compacts allow both the state and tribe to protect their interests and to "shield [gaming] from organized crime and other corrupting influences." 25 U.S.C. § 2702(2); *see also In re Indian Gaming Related Cases*, 331 F.3d at 1097 (stating that states have more serious and legitimate public policy concerns with class III gaming than class II gaming and therefore Congress limited class III Indian gaming to only those states that already allow some measure of class III gaming).

California gaming laws and policies regarding the conduct and regulation of class III gaming on Indian land are well-developed to serve the above-stated purposes. For example, California state gaming agencies, such as the Gambling Control Commission and the Bureau of Gambling Control, have prescribed regulatory duties under tribal-state compacts to assist tribes in regulating gaming for the protection of both tribal and non-tribal citizens. [NF_AR_GC_000173-74 ("The Tribe may request the assistance of the State Gaming Agency whenever it reasonably appears that such assistance is necessary to . . . protect public health, safety, or welfare.").] California has also protected its citizens from corrupt elements of gaming by specifically banning certain games. The Penal Code has long prohibited roulette and games incorporating the physical use of dice. Cal. Pen. Code § 330. Section 19(f) of the Constitution, while legalizing most forms of gaming under tribal-state compacts, did not legalize roulette or dice games, which tribes may not engage in under California tribal-state compacts. [NF_AR_GC_000127.] Thus, when the Governor negotiates and concludes compacts, he acts within the state's existing law and policy in protection of the state's interests, fulfilling the very purpose of compacts as defined by IGRA.

By contrast, the purpose of the concurrence provision is to provide the state the opportunity to reject the Secretary's decision to create new Indian land for the purpose of gaming, even if the Secretary determines the creation of such land is in the best interest of the tribe and would not be detrimental to the surrounding community. *Confederated Tribes of Siletz,* 110 F.3d at 693 (stating that in the two-part determination exception "Congress recognized the federal and state concerns and provided that *both had to be satisfied* by requiring action by the appropriate federal and state officials" (emphasis added)). The state may have other broader, statewide interests to protect, and it is free to do so by rejecting the Secretary's determination.

Importantly, unlike the well-developed policy governing the Governor's use of the compact power, California has not addressed the legal and policy issues implicated by concurring in the creation of new Indian land for gaming. Neither the Constitution nor the Legislature, for example, has spoken on any of the potential, broader statewide policy concerns

Congress allowed for in providing states with the power to veto a two-part determination. And no California law explicitly authorizes the concurrence.

In fact, after the Legislature reluctantly ratified the compact here, California State Senator De Leon, Chair of the Senate Appropriations Committee, informed the Governor that the California Senate was creating a working group "to examine the policy and procedural implications associated with off-reservation gaming agreements in light of the concerns raised during the June 27th Senate vote on AB 277 . . . ." [NF_AR_GC_000096.] Senator De Leon's letter explicitly asked the Governor *not to grant* any more concurrences until the Legislature addressed the policy concerns related to them. [*Id.*] In the letter, Senator De Leon explained that the concurrence effects a material change in California policy: "The Agreement between your Administration and the [North Fork Tribe] represents a significant policy departure from previous agreements in California by allowing the [Tribe] to build a casino off reservation property." [*Id.*] As Senator De Leon's letter makes clear, the Legislature has not yet made the fundamental policy determinations regarding off-reservation gaming that are implicated by the Governor's concurrence.

Because the purpose and policy determinations related to the compact do not overlap with the purpose and policy determinations of the concurrence, and because the Legislature has yet to make the fundamental policy decisions implicated by off-reservation gaming, the concurrence power cannot live within the power to negotiate and conclude compacts.

C. Publication of the compact's approval in the Federal Register violated IGRA, and the approval is invalid

IGRA imposes two separate requirements for compact approval: (1) "the compact must be validly entered into by the state and the tribe," and (2) "it must be in effect pursuant to Secretarial approval." *Pueblo of Santa Ana,* 104 F.3d at 1557. "[T]he 'entered into' language imposes an independent requirement that the compact must be validly entered into by a state *before it can go into effect, via Secretarial approval,* under IGRA." *Id.* at 1555 (emphasis added). To satisfy the "entered into" requirement, "the state and the tribe must be validly bound

under state law." *Id.* at 1558. California enters into a binding compact with an Indian tribe by enacting a statute ratifying a compact that has been negotiated by the Governor. Cal. Gov. Code § 12012.25(c).

After a state or tribe submits a tribal-state gaming compact to the Secretary, the Secretary may affirmatively approve or disapprove the compact, 25 U.S.C. § 2710(d)(8)(A)-(B), or the Secretary may take no action, and after the expiration of 45 days, the compact is considered to have been approved. 25 U.S.C. § 2710(d)(8)(C). The compact cannot take effect under IGRA until "notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(d)(3)(B).

"The Secretary may disapprove a compact . . . only if such compact violates – (i) any provision of this Act, (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or (iii) the trust obligation of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B). This Circuit has interpreted Section 2710(d)(8)(B) as imposing a mandatory duty on the Secretary to affirmatively disapprove compacts that violate subsections (i)-(iii). *Amador County v. Salazar*, 640 F.3d 373, 381 (D.C. Cir. 2011) ("The Secretary must disapprove of a compact if it would violate any of the three limitations in [Section 2710(d)(8)(B)]." (emphasis added)).

In California, compacts are not "entered into" until the ratifying statute enacted by the Legislature takes effect. Cal. Const., art IV, § 19(f); Cal. Gov. Code § 12012.25(c); *see also Hersh v. State Bar of California*, 7 Cal.3d 241, 245 (1972) ("[A] statute has no force whatever until it goes into effect pursuant to the law relating to legislative enactment."). Statutes enacted by the Legislature go into effect on January 1 next following a 90-day period from the date of the enactment. Cal. Const., art IV, § 8(c). The California Constitution, however, reserves to the people the right to reject or approve statutes enacted by the Legislature. Cal. Const., art II, § 9. If the electorate rejects the statute, it is of no legal effect. *Id.* Where a proponent successfully qualifies a referendum for the ballot, the statute will be effective, if at all, on the day following the election. *Id.*, art II, § 10(a).

When California Secretary of State Debra Bowen forwarded the compact to the Secretary for approval, she made clear to the Secretary that the compact had not been entered into under California law and would not be until January 1, 2014, if at all. [NF_AR_GC_000015.] Further, she informed the Secretary that proponents of a referendum had begun the process of qualifying a referendum for the ballot. [NF_AR_GC_000016.] After proponents successfully qualified the referendum, Secretary of State Bowen informed the Secretary that the referendum would go before the voters on November 4, 2014. [NF_AR_GC_000101.]

Under no scenario could the compact have been entered into under California law before the expiration of the 45-day period for the Secretary to act. Because IGRA requires a compact to be validly entered into under state law, the approval of the compact by publication in the Federal Register violated IGRA. In this case, the Secretary had an affirmative obligation to disapprove the compact pursuant to 25 U.S.C § 2710(d)(8)(B)(i). Also as discussed above, the referendum invalidated the compact, and it will not go into effect at all. Thus the Secretary's publication of the compact's approval in the Federal Register is invalid and must be undone. *Pueblo of Santa Ana*, 104 F.3d at 1548.

IV. Defendants Failed to Comply With NEPA

NEPA prohibits agencies from preparing an EIS simply to "justify[ ] decisions already made." 40 C.F.R. § 1502.2(g); *see also National Audubon Society v. Department of the Navy*, 422 F.3d 174, 199 (4th Cir. 2005) (stating that where an EIS shows evidence of post hoc rationalization of a decision already made, the court should find the EIS inadequate under NEPA.). Rather, an agency preparing an EIS must take a "hard look" at a proposed action's environmental impacts. *Id.* at 185. "What constitutes a 'hard look' cannot be outlined with rule-like precision. At the least, however, it encompasses a thorough investigation into the environmental impacts of an agency's action and a candid acknowledgement of the risks that those impacts entail." *Id.* Reviewing courts must independently evaluate the record to confirm

that the agency made a reasoned decision based on its analysis of the evidence before it." *Environmental Defense v. U.S. Army Corps of Engineers*, 515 F. Supp. 2d 69, 78 (D.D.C. 2007).

No evaluation of the FEIS should proceed without acknowledgment of one incontrovertible fact: Station Casinos, a casino development corporation, purchased the Madera site for the sole purpose of building and managing a casino, an activity it wishes to engage in purely for profit, irrespective of the Tribe's need for economic development and self-sufficiency, and cannot engage in without the Tribe's assistance. [NF_AR_0038559.] Contrary to NEPA's requirements, the Secretary failed to take a hard look at the environmental consequences of the proposed action and instead used the FEIS to justify a decision that had already been made in favor of the preferred alternative – a large class III casino at the Madera site.

A. The Secretary eliminated alternatives from consideration based upon flawed findings

While the large profits to be gained from gaming at the Madera site make the site obviously preferable to the Tribe and Station Casinos, "[r]easonable alternatives include those that are *practical or feasible from the technical and economic standpoint* . . . rather than simply desirable from the standpoint of the applicant." 46 Fed. Reg. 180206 (March 23, 1981), CEQ Forty Questions, 2a (emphasis added)). An environmental impact statement that fails to include a viable alternative must be found inadequate. *Muckleshoot Indian Tribe*, 177 F.3d 800, 814 (9th Cir. 1999); *Surfrider Found. v. Dalton*, 989 F. Supp. 1309, 1326 (S.D. Cal. 1998), *aff'd sub nom.* 196 F.3d 1057 (9th Cir. 1999).The FEIS, however, ignores this and is dominated by self-serving justifications that result in eliminating reasonable alternatives in favor of the Tribe's and its partner's most desired alternative.

The FEIS makes much of the Tribe's purported concern that "development along the SR-41 corridor [as well as alternative sites, such as Avenue 7, along the SR-99 corridor] would potentially have a very detrimental competitive effect on the gaming operations of the neighboring Tribes." [NF_AR_0029901-03.] The Tribe particularly expressed concern for the potential unfair competitive impact on the "Picayune Rancheria (whose Chukchansi Gold facility

is located along SR-41 near Coarsegold)." [NF_AR_ 0029901.] Yet, the Madera site unquestionably would have at the least an identical competitive impact on nearby tribes as the rejected sites and at most a devastating competitive impact on nearby tribes due to its prime location along SR-99. Using this clearly trumped-up concern as a reason for rejecting sites makes no logical sense.

In contrast to the FEIS, however, the IGRA ROD dismisses any concerns raised by the Picayune Rancheria regarding the economic detriments it would suffer as a result of the proposed casino. Rejecting Picayune's claim that it would suffer detrimental economic impacts, the Secretary stated that "IGRA does not guarantee existing tribal gaming operations protection from competition." [NF_AR_0040531 (citing *Sokagon Chippewa Community v. Babbitt*, 214 F.3d 941(7th Cir. 2000).] Ignoring, for the moment, that IGRA also does not guarantee new tribal gaming operations protection from competition, this argument sidesteps the real issue. Nearby tribes, and everyone else, must respect other tribes' rights to conduct gaming on their existing lands or lands acquired through the so called "equal-footing" exceptions to Section 2719(a).[26] Picayune, for example, could not complain about gaming at the Rancheria or gaming on lands closer to the Tribe's historical area acquired under another exception.[27] In regard to economic competition, the Secretary uses IGRA to dismiss Picayune's concerns about unfair competition and then uses the FEIS in the same breath to reject sites for the fear of harming Picayune's interests. This reasoning is exactly backwards. Section 2719(b)(1)(A) expressly provides nearby tribes with protections from detrimental impacts. Other exceptions do not. NEPA does not. This selective, self-serving use of economic competition is grounded neither in NEPA nor IGRA but is used, as needed, to justify a foregone conclusion.

[26] The exceptions under 25 U.S.C. § 2719(b)(1)(B) do not require the Secretary to determine that gaming would not be detrimental to the surrounding community. *City of Roseville* , 219 F. Supp. 2d at 157. The so-called restored-lands exception, for example, was provided for tribes that had no reservation or trust land after having their federal recognition restored. *Id.* at 159.

[27] Picayune commented in the administrative record that the Old Mill Site near North Fork was potentially eligible under the restored-lands exception. [NF_AR_0011045 (Letter to Dale Morris, dated July 16, 2008, p. 4).] Picayune, thus, concedes to the Tribe's right to compete on an equal footing.

Perhaps the most self-serving rationalizations for rejecting alternatives involve political and community opposition to a casino in the North Fork Area. The Rancheria and the Old Mill Site were rejected for these reasons. [NF_AR_0029899, 0029910.] Yet community opposition is not mentioned in the FEIS's decision to adopt Alternative A. This irony is obscured by the FEIS's focus on profit maximization devoid of IGRA's constraints. Under IGRA, the Rancheria qualifies for gaming.[28] The Supreme Court has spoken clearly that tribes can operate gaming facilities on their lands. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Yet a mere whiff of opposition is sufficient to make existing tribal land, or closer alternatives potentially acquired through another exception, subject to rejection. Effectively the Secretary states in the FEIS that community opposition, where the community has been granted no protection by Congress, can keep gaming out of the Tribe's historic lands and send it seeking alternatives on lands clearly disfavored by IGRA. This directly contradicts Congress' general prohibition of gaming on lands acquired after 1988.[29]

The rejection of the Old Mill site reveals self-serving rationalizations and abuse under both NEPA and IGRA. Following publication of the DEIS, Assistant Secretary of Indian Affairs, Carl Artman, informed Regional Director Dale Morris that "[t]he Old Mill Site is very likely a reasonable alternative site that must be considered in the draft and final EIS" and requested the current EIS be amended to "include the Old Mill as an additional alternative." [NF_AR_0009396.] The Secretary, however, rejected the Old Mill Site.

Despite presenting a litany of possible contaminants, the FEIS states that "[i]t is believed the removal of affected soils would allow for unrestricted use of the site." [NF_AR_0029909.] Nevertheless, the Secretary concluded that there is still a potential for liability based on undiscovered contamination. The Secretary offered no basis for this speculative assertion. A

[28] The Tribe would first have to acquire the interest in the Rancheria from the individual beneficiaries. [NF_AR_0029899.] Nevertheless, if acquired, the land would qualify for gaming under IGRA. [*Id*.]

[29] The FEIS treats the community opposition issue exactly backwards. Community opposition should weigh heavily in the analysis of off-reservation sites far from the Rancheria and should not weigh at all or weigh significantly less in the analysis of sites already under the Tribe's control or closer to such lands.

convenient way to reject any site would be to state without analysis that there could be potential liability if unknown contamination is discovered.

The main reason used to justify the rejection of the Old Mill was that the owner would not sell for gaming purposes because such purposes had been discussed and rejected in developing the master plan and there would be considerable community opposition. [NF_AR_0029910.] While the inability of the Tribe to acquire the property would seriously detract from the feasibility of the site, the North Fork Tribe wanted the casino in the Valley, and the Tribe is represented on the CDC, the entity that owns the Old Mill site.[30] [NF_AR_0009399.] The Tribe made clear, in its May 23 Memorandum to Dale Morris, "the community clearly wanted the gaming facility to be developed on the valley floor where the infrastructure exists to support a large facility that would generate jobs and economic development for both the Tribe and the larger community." [NF_AR_0009402.] But under NEPA "[r]easonable alternatives include those that are *practical or feasible from the technical and economic standpoint* . . . rather than simply desirable from the standpoint of the applicant." 46 Fed. Reg. 180206 (March 23, 1981), CEQ Forty Questions, 2a (emphasis added)). Moreover, as discussed above, providing benefits to the surrounding community through off-reservation gaming is not a purpose of IGRA.

On May 20, 2008, the president of the CDC, Steve Christianson, stated, "Redevelopment of the site for a tribal casino is not part of our master plan." [NF_AR_0009399.] The plan, however, contains not a single reference to casino gaming. [NF_AR_NEW_0001963.] It is unlikely that it would since it was developed prior to the passing of Proposition 1A, which allowed for class III tribal gaming in California. Most importantly the master plan shows not only what uses were intended, but also the uses that were rejected. Casino gaming is not on the list of rejected choices. [NF_AR_NEW_0001972-73, 0001975-80.]

[30] The import of this fact cannot be overemphasized in relation to IGRA. The Tribe, which has an ownership interest in land within its historical range on which gaming could potentially occur, actively seeks to distance itself from this land in favor of acquiring land nearly 40 miles away because it could generate more income.

The Secretary relied on Christianson's letter for the unexamined proposition that "[t]he idea of a casino being located at the site was considered. This concept gained no public support to speak of (including from the Rancheria), and actually received widespread community disapproval. The CDC Board feels confident that there is a strong community disposition against there being a casino at the mill site." [NF_AR_0029909-0029910; NF_AR_0009413 (Christianson letter).]

Under NEPA, none of these reasons are relevant to whether the Old Mill is a reasonable alternative. The Secretary failed to take a "hard look" at the issues and merely used any means convenient to justify a decision that had already been made – essentially by Station Casinos.

B. The analysis of impacts is fatally flawed

Defendants' analysis of the casino's impact on crime is particularly egregious. [NF_AR_0030195-0030197.] The FEIS notes that local law enforcement offices having jurisdiction over other California Indian casinos were contacted to inquire about the impacts of the casinos and whether the facilities induced a higher incidence of crime. [NF_AR_0030196.] Not surprisingly, **"[e]ach local law enforcement agency contacted reported an increase in law enforcement service demand as a direct result of the opening of a casino within its jurisdiction."** [NF_AR_0030196 (emphasis added).] Typical crimes reported were **"driving under the influence, personal robbery, credit card fraud, auto thefts, disorderly conduct, and assault."** [NF_AR_0030196 (emphasis added).] To address this anticipated increase in criminal activity, the Sheriff estimates that he will need to hire five new deputies, and one half sergeant. [NF_AR_0030202.] But then the FEIS engages in blatant deception in an effort to dismiss the indisputable impact that a casino will have on crime.

First, the FEIS advances a skewed analysis of crime statistics in other counties, by comparing the number of police service calls to specific casinos with the number of calls throughout the entire host county, and by attributing the crime rates in the unincorporated areas of the host counties to the Indian casinos in those counties. [NF_AR_0030197.] So, for example,

the FEIS observes that Chumash Casino Resort is located in an unincorporated area of Santa Barbara County, and crime rates in unincorporated Santa Barbara County are slightly below the County average. [NF_AR_0030197.] But Santa Barbara County is huge – 2,735 square miles.[31] The FEIS offers no basis – and there can be none – for conflating the crime rate in the entire unincorporated area of a county with that generated by a single facility within the county.

Second, the FEIS asserts that the amount of crime associated with the opening of a new casino would not be "much different than from the opening of any other type of tourist attraction." [NF_AR_0030197.] Here, the FEIS, with no support, suggests that opening an attraction such as Lego Land or a museum of natural history would correspond to a spike in driving under the influence, robbery, disorderly conduct, and assault. The attempt in the FEIS to equate casinos with "any other type of tourist attraction" misses the point. The opening of this casino will generate more crime, and that crime will be in the nature of that experienced in other jurisdictions serving Indian casinos – driving under the influence, personal robbery, credit card fraud, auto thefts, disorderly conduct, and assault.

On balance, the FEIS's discussion of crime impacts is so patently and fundamentally lacking in support and flawed in its reasoning as to demonstrate a less than fair, impartial, and good faith discussion of the issue, as well as an intent to mislead the public and the decision makers. *National Audubon Society*, 422 F.3d at 194 ("An agency's hard look should include neither researching in a cursory manner nor sweeping negative evidence under the rug."). Accordingly, the FEIS's conclusion that the casino's impact on crime would be less than significant is arbitrary and capricious.

C. The consideration of mitigation measures is fatally flawed

The agency must include in the EIS "appropriate mitigation measures not already included in the proposal or alternatives." 40 C.F.R. § 1501.14. While NEPA does not require a

[31] U.S. Census Bureau, Santa Barbara County Quick Facts, *available at* http://quickfacts.census.gov (last visited December 30, 2014). The District of Columbia, by comparison, is only 61.05 square miles (about 46 times smaller than Santa Barbara County). U.S. Census Bureau, District of Columbia Quick Facts, *available at* http://quickfacts.census.gov (last visited December 30, 2014).

complete mitigation plan in an EIS, *see Robertson*, 490 U.S. at 352, "[m]itigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated.'" *Neighbors of Cuddy Mountain*, 137 F.3d at 1380 (quoting *Robertson*, 490 U.S. at 353). "An essential component of a reasonably complete mitigation discussion is an assessment of whether the proposed mitigation measures can be effective. A mitigation discussion without at least *some* evaluation of effectiveness is useless in making that determination." *South Fork Band Council of Western Shoshone of Nevada*, 588 F.3d at 727. "A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA." *Neighbors of Cuddy Mountain*, 137 F.3d at 1380.

The FEIS acknowledges significant adverse impacts on problem gamblers and public health services. The FEIS's analysis of mitigation measures for this significant impact is fatally flawed, however.

"Problem gambling disorders can result in a host of social ills and destructive behaviors to those afflicted by the disorder, including increased likelihood of bankruptcy, suicide, and divorce." [NF_AR_0030197.] After examining the increase in problem gamblers associated with Indian casinos in other jurisdictions, the FEIS estimated that the casino will create approximately 531 new problem gamblers. [NF_AR_0030198.] The Tribe has agreed in its Memorandum of Understanding ("MOU") with the County of Madera "to contribute $50,000 per annum to the County for purposes of redistribution to Madera County Behavioral Health Services ("MCBHS") to be used to supplement the budget for alcohol education and the treatment and prevention of problem gambling and gambling disorders."[32] [*Id.*] This payment, however, will fall short by $13,606 per year of the amount needed to fully fund the treatment programs. [*Id.*] The shortfall "would result in a potentially significant impact." [*Id.*]

This assessment of the potential impact of problem gamblers is significantly underestimated in the FEIS, which only speaks of the impact associated with the $13,606

[32] As discussed above, this mitigation measure is no longer valid at all because it relies upon the MOU which was contingent upon the State and the Tribe entering into the compact.

shortfall in funding under the MOU. Only 20 percent of the newly created problem gamblers will seek treatment, and of that 20 percent, 80 percent will seek treatment from an underfunded MCBHS. [*Id.*] The indisputable result of the casino will be to create approximately 400 new problem gamblers who will not seek help from MCBHS, and approximately 100 new problem gamblers who will seek help from an under-funded MCBHS. But according to the FEIS, the underfunding of treatment for the 100 who seek help would cause the only potentially significant impact.

After determining there will be a potentially significant impact, the FEIS states, "Mitigation measures in Section 5.2.6 would mitigate this effect to a less than significant level." [NF_AR_0030198.] This conclusion, however, is unsupported by Section 5.2.6 which merely lists the recommended mitigation measures. [NF_AR_0030509.] The FEIS fails to discuss or present any data or evidence regarding whether such measures have proven effective, and if so, to what degree, when employed in other Indian casinos. There is no discussion about how these measures will reduce the funding shortfall for the 100 problem gamblers who seek help from MCBHS or how they will provide help for the 400 who will not seek it.

Under NEPA, the FEIS must explain the effectiveness of the recommended mitigation measures. *Pacific Coast Federation of Fishermans' Associations v. Blau*, 693 F.3d 1084, 1103 (9th Cir. 2012); Merely listing mitigation measures, without supporting analytical data, as defendants have done here, is insufficient. *Westlands Water District v. United States Department of the Interior*, 376 F.3d 853, 872 (9th Cir. 2004); *Neighbors of Cudy Mountain*, 137 F.3d 1380. Thus, the FEIS's conclusion that socioeconomic impacts on problem gamblers will be mitigated to an insignificant level is unsupported by substantial evidence, and the FEIS is deficient under NEPA.

V. Defendants Violated the Clean Air Act

Section 176 of the Clean Air Act, 42 U.S.C. §7506(c), provides as follows:

> No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. . . . The assurance of conformity to such an implementation plan shall be an *affirmative responsibility* of the head of such department, agency, or instrumentality. (Emphasis added.)

The United States Environmental Protection Agency ("US EPA") has promulgated regulations to implement this mandate. 40 C.F.R. §§93.150-93.165; 42 U.S.C. §7506(c)(4)(A). In this case, the federal defendants performed a conformity determination, but their determination violates the CAA and US EPA's regulations in a number of respects.

A. Defendants failed to comply with required procedures

When they initially adopted the conformity determination in 2011, defendants failed to comply with the notice requirements at 40 C.F.R. §93.155. [Doc. 63-1, at p. 2; Doc. 63-2 at pp. 3-4.] Upon defendants' motion, this Court stayed this action and remanded the matter to defendants to allow them to undertake the notice process. [Doc. 77, at p. 8.] Defendants sent the notices under 40 C.F.R. §93.155 on January 23, 2014. [NF_AR_NEW_0001178-1221.] But defendants consciously chose not to re-publish the public notices required under 40 C.F.R. §93.156. [NF_AR_NEW_0001176.] Thus, the only public notices published under 40 C.F.R. §93.156 were published in 2011. [NF_AR_NEW_0001109, 0001113.]

In response to the January 23, 2014, notice, defendants received comments from plaintiffs in these consolidated actions, plus the Table Mountain Rancheria Tribe. [NF_AR_NEW_0001422-26, 1427-1572, 1573-85.] Defendants' consultant prepared a memorandum responding to the comments. [NF_AR_NEW_0001945-55.] On April 9, 2014, defendants issued a "Reissued Notice of Final Conformity Determination," stating that no changes were made to the Final Conformity Determination as a result of the comments.

[NF_AR_NEW_0001768-69.] Defendants appear to have mailed notices of this reissued Final Conformity Determination under 40 C.F.R. §93.155 [NF_AR_NEW_0001957-61], but they did not publish any public notice of the Final Conformity Determination under 40 C.F.R. §93.156.

By issuing the notices under 40 C.F.R. §93.155 nearly three years after they published the notices under 40 C.F.R. §93.156 and adopted the Final Conformity Determination, defendants failed to comply with the letter and the spirit of the Clean Air Act regulations. Under the US EPA regulations, defendants were required to make the conformity determination "*in accordance with the requirements of this subpart* ***before*** the action is taken." 40 C.F.R. §93.150(b) (emphasis added). The regulations are clear that defendants "must follow the requirements in §§93.155 through 93.160... and must consider comments from any interested parties." 40 C.F.R. §93.154. In this case, defendants issued their Record of Decision to take the land into trust on November 26, 2012, and took the land into trust on February 5, 2013. [NF_AR_0041206; Docket 105, p. 8, ¶28] Yet they did not comply with the notice requirements under 40 C.F.R. §93.155 until *after* those actions were taken. Moreover, defendants must publish a notice of draft conformity determination "*prior to* taking any formal action on the draft determination." 40 C.F.R. §93.156(b). Rather than set aside the actions, and go back to comply with the procedures before making their decision, defendants treated the notice requirements as a perfunctory exercise that they could perform after the decision was made.

B. The conformity determination is not based upon the latest emission estimation methods

The US EPA regulations require that the conformity analysis be based upon "the latest and most accurate emission estimation techniques available." 40 C.F.R. §93.159(b). For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by the US EPA and available for use in preparation or revision of SIPs in that State must be used for the conformity analysis. 40 C.F.R. §93.159(b)(1). The most current version of the motor vehicle emissions model specified by the US EPA and available for use in preparation or revision of SIPs in California is EMFAC2011, which was approved by the US EPA in March, 2013. *See* 78

Fed. Reg. 14533 (March 6, 2013). The DCD is based upon an earlier version of EMFAC, EMFAC2007, which was approved by the US EPA on January 18, 2008. *See* 73 Fed. Reg. 3464. In response to defendants' notice of the draft conformity determination under 40 C.F.R. §93.155(a) (which was served on or about January 23, 2014), plaintiffs and the Table Mountain Tribe brought this issue to defendants' attention. [NF_AR_NEW_0001422, 0001427, 0001573-74]. In their response to the comments, defendants acknowledged that the emissions estimation technique used in the DCD is not the latest and most accurate available. [NF_AR_NEW_0001946.]

Defendants appear to take the position, however, that because the initial conformity determination approved in 2011 used the then-current emissions model, defendants need not use the latest model to estimate emissions when re-approving the Final Conformity Determination in 2014. [*Id.*] Their position is not only contrary to the regulations, but is at odds with a recent Ninth Circuit Court of Appeals decision. In *Sierra Club v. U.S. Environmental Protection Agency*, 762 F.3d 971 (9th Cir. 2014), an applicant applied to the U.S. EPA for a permit under the Clean Air Act. Although EPA had a statutory duty to either grant or deny the application within one year, it failed to do so. After the deadline passed, but before the EPA took final action on the permit, the EPA tightened the applicable air quality standards. As a result of litigation between the applicant and the EPA, the EPA decided to grandfather the application under the prior air quality standards, and it issued the permit subject to the outdated standards. Petitioners filed petitions for review to challenge the EPA's issuance of the permit under the outdated standards, and the Ninth Circuit Court of Appeals vacated the EPA's decision to issue the permit, and remanded to the EPA. *Id*. at 984. The Court of Appeals cited *General Motors Corp. v. United States*, 496 U.S. 530, 540 (1990) as "support for the same basic principle that EPA is bound to enforce administrative guidelines in effect when it takes final action." *Id*. at 980. Likewise, in this case, the Secretary was obligated under the Clean Air Act and the U.S. EPA's implementing regulations to base its conformity determination upon "the latest and most accurate emission estimation techniques available." 40 C.F.R. §93.159(b). Its refusal to do so was

arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. §706(2)(A).

C. Defendants based emissions estimates upon an improper trip length, resulting in inadequate mitigation

The first step in a conformity determination is an "applicability analysis" to determine whether the project's estimated air pollutant emissions will exceed the minimum thresholds necessary to require a conformity determination. 40 C.F.R. §§93.152, 93.153(b), 93.153(c)(1). At the time federal defendants first conducted their applicability analysis, the San Joaquin Valley Air Basin was a "Serious" ozone non-attainment area. [NF_AR_0030161.] Under the US EPA regulations, the emission thresholds for ozone precursors – volatile organic compounds ("VOC") and nitrogen oxides ("NOx") – in "Serious" ozone non-attainment areas are 50 tons per year. [*Id.*] *See also* 40 C.F.R. §93.153(b)(1). When federal defendants conducted the applicability analysis, they estimated the project's emissions to be 22.99 tons per year of reactive organic gases ("ROG"), and 46.64 tons per year of NOx – suspiciously close to the 50 ton per year threshold. [NF_AR_0030161, 0034282.] Examination of the emissions model output files reveals that the results are based on an assumption that the average trip length by patrons to and from the casino will be only 12.6 miles. [NF_AR_0030148-49, 0034299, 0000717.] No basis for this 12.6-mile assumption appears in the record. In the FEIS, defendants assert that the trip length was estimated using data from the Madera County Transportation Commission ("MCTC") traffic model. [NF_AR_0030148.] That model and those data are not in the record despite federal defendants' assurances that they would be added. [Docket 69, p. 1; Docket 58-2, p. 1; Docket 58-4, p. 3; Docket 58-5, p. 3; Docket 58-6, p.2.] Nor does the record offer any explanation as to how the County's traffic model could contain data from which the trip length to and from a non-existent casino can be estimated. Moreover, the 12.6 mile trip length is at odds with defendants' description of the project. In the ROD, the Secretary describes the project as a "destination resort," which will increase visitors to the County, stimulate the local tourist industry, and create an influx of non-resident consumers. [NF_AR_0040656, 0038498.] The Tribe itself has

repeatedly pitched this project to the government and the public as a destination resort. [NF_AR_0016092, 0016095, 0016099, 0038092.] Thus, it appears that the 12.6 mile trip length assumption was selected merely to get the emissions estimates underneath the applicability analysis thresholds.

Subsequent to defendants' initial applicability analysis, the US EPA reclassified the San Joaquin Valley Air Basin as an "Extreme" ozone nonattainment area. [NF_AR_0039196.] Under the US EPA regulations, the emission thresholds for VOC and NOx in "Extreme" ozone non-attainment areas are only 10 tons per year. [*Id.*] *See also* 40 C.F.R. §93.153(b)(1). Thus, because the federal defendants previously estimated the project's emissions at 22.99 tons per year of ROG and 46.64 tons per year NOx, they concluded that they were required to conduct a conformity determination. [NF_AR_0039196.] To demonstrate conformity, federal defendants gave the Tribe the choice of either agreeing to purchase Emission Reduction Credits ("ERCs") in the amount of 42 tons of NOx and 21 tons of ROG prior to operation of the project, or entering into a Voluntary Emission Reduction Agreement ("VERA") with the San Joaquin Valley Air Pollution Control District ("SJVAPCD"). [NF_AR_0039197.] The Tribe adopted a resolution "that the Tribe hereby agrees to implement the Emissions Reduction Mitigation Measures in the Final General Conformity Determination prior to the operation of the project." [NF_AR_NEW_0001111.]

This conformity determination fails to comply with the US EPA's regulations in a number of respects. *First*, the Tribe's resolution fails to identify precisely what the Tribe will be doing, and when, to ensure the conformity requirements are met. *See* 40 C.F.R. §93.160(a) (measures intended to mitigate air quality impacts must be identified and the *process for implementation and enforcement of such measures must be described*, including an implementation schedule containing *explicit timelines* for implementation). *Second*, the record contains no evidence that the approval of the fee-to-trust transfer was *conditioned upon* the Tribe meeting the mitigation measures. *See* 40 C.F.R. §93.160(d). *Third*, the conformity determination fails to require the Tribe to offset emissions either in the same calendar year, or by a factor of

1.5:1, as required in Extreme nonattainment areas. 40 C.F.R. §93.163(a), (b)(1)(i). *Fourth*, the amounts of emissions to be offset are based upon the unsupported 12.6-mile trip length.

D. Defendants' failure to comply with CAA §176 requires their decision be vacated and set aside

An agency's failure to comply with US EPA's regulations necessitates that the agency's action be held unlawful and set aside. 5 U.S.C. § 706(2)(A, D); *see e.g.*, *Sierra Club v. Johnson*, 436 F.3d 1269, 1280 (11th Cir. 2006) (vacating the EPA's decision refusing to object to state's issuance of Title V permit when state failed to comply with notice requirement under the CAA); *Anchustegui v. Department of Agriculture*, 257 F.3d 1124 (9th Cir. 2001) (Forest Service's cancellation of grazing permit invalid due to government's failure to follow notice procedure).

Importantly, the D.C. Circuit Court of Appeals has made clear that when a reviewing court finds that agency regulations have been adopted in violation of the law, the "ordinary result is that the rules are vacated," with "no separate need to show irreparable injury." *Nat'l Min. Ass'n v. U.S. Army Corps of Engineers*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C. Cir. 1989)); s*ee also*, *Advocates for Highway Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005) ("[U]nsupported agency action normally warrants vacatur."); *Am. Bioscience*, 269 F.3d at 1084 ("whether or not appellant has suffered irreparable injury, if it makes out its case under the APA, it is entitled to a remedy," which "normally will be a vacatur of the agency's order").

Moreover, under the APA, procedural defects are treated no differently than substantive errors. As noted by this this district:

> [T]here is no distinction between procedural and substantive deficiencies under the APA. See 5 U.S.C. § 706. Regardless of whether or not an agency action is declared substantively unlawfully, 5 U.S.C. § 706(2)(A), or procedurally flawed, 5 U.S.C. § 706(2)(D), the APA provides for the same remedy: "The reviewing court shall ... hold unlawful and set aside [the] agency action," 5 U.S.C. § 706.

Hawaii Longline Ass'n. v. National Marine Fisheries Service, 281 F. Supp. 2d 1, 26 (D.D.C., 2003); *see also, Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978) ("we cannot be sure that further and ultimately convincing public criticism of those changes would not have been forthcoming had it been invited by the Agency.").

In *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978), plaintiffs filed petitions in the Court of Appeals for review of an order by the US EPA which established numerous waste water discharge limitations under the Clean Water Act. The court upheld all but one of the effluent limitations. *Id*. at 1019. As to that sole exception, the court found that it must be remanded to the agency because the agency failed to follow the proper notice and comment procedures. *Id*. at 1028-1031. The court remanded the effluent limitation despite observing "that in general the Agency appears to have bent over backwards to accommodate public participation in, and understanding of, the promulgation of the effluent limitations before us. . . . The one procedural inadequacy attributed to EPA in this case is of very limited scope. It concerns EPA's derivation of one effluent limitation (out of three in all) for one subdivision of the industry (out of 66 in all) . . ." *Id*. at 1028-1029. Yet, because the agency changed one of the bases for a single effluent limitation without giving the industry a further opportunity to comment upon the change the court found the agency's decision procedurally improper and remanded it to the agency. *Id.* at 1029-1031. Notably, the court rejected the agency's attempt to demonstrate harmless error, holding that where there is a failure to give notice "we cannot be sure that further and ultimately convincing public criticism of those changes would not have been forthcoming had it be invited by the Agency." *Id.* at 1030-1031. Thus, contrary to defendants' arguments in this case, when an agency fails to provide notice required by law the courts do not put plaintiff to the burden of demonstrating prejudice resulting from the lack of notice. By failing to provide notice the agency denies the court knowledge of what additional criticisms or challenges may have been raised and whether or how the agency would have changed its decision, and thus, whether the failure is prejudicial. Any suggestion by the federal defendants or Tribe in this case that the failure to give notice under the conformity regulations was merely harmless error, or non-prejudicial rests on

pure speculation and an unjustified assumption that the agency's decision was unaffected by the notice and comment process.

CONCLUSION

For the reasons stated above, this Court should vacate the two Records of Decision, and enter judgment in plaintiffs' favor ordering the Federal Defendants' decisions to be set aside and the land taken out of trust.

Dated: January 9, 2015

By: /s/ *Benjamin S. Sharp*
/s/ *Sean M. Sherlock*

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