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. 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

PLAINTIFF PICAYUNE RANCHERIA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

I. Introduction and Summary of Argument

Plaintiff Picayune Rancheria of the Chukchansi Indians ("Picayune" or "Plaintiff"), by and through counsel, hereby submits this Memorandum of Points and Authorities in support of its Motion for Summary Judgment.

The Picayune Tribe has played by the rules. All it asks of this Court is an Order requiring that the Defendants do the same. The Picayune Tribe respectfully requests this Court to grant its Motion for Summary Judgment, and enter an order vacating and remanding the agency decisions at issue in the case as arbitrary, capricious, and not in accordance with the law.

The Picayune Rancheria owns and operate a gaming facility on aboriginal tribal lands, consistent with the intent of Congress as expressed by the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.* (2014) ("IGRA") and consistent with the policies of the State of California. Through a pair of administrative actions, the Department of Interior has penalized the Picayune by seeking to authorize a new competitor that would not have to play by these rules. The Bureau of Indian Affairs ("BIA") would enable Station Casinos LLC to build a 247,180 square foot off-reservation casino and hotel complex near a desirable market in California's Central Valley, on land that has no legal historical connection to its Indian sponsor, the North Fork Rancheria of Mono Indians ("North Fork Rancheria"). In its steadfast pursuit of this goal, however, the Department has ignored the letter and spirit of IGRA and the Indian Reorganization Act, 25 U.S.C. §§ 461 *et seq.* ("IRA"), its own implementing regulations, the administrative record before it, and as most recently shown through the November 2014 elections, the will of the people of California.

As a review of the administrative record will show, the Secretary's September, 2011 "two-part determination" under IGRA that a Class III[1] casino on 305 acres near Madera, California would be in the best interests of the North Fork Rancheria and would not be detrimental to the surrounding community was arbitrary, capricious, and contrary to applicable law. That IGRA decision improperly overstated the benefits to the North Fork Rancheria, and unlawfully ignored unrefuted evidence of detriment to the surrounding community, in contradiction of legal requirements that favor on-reservation gaming. Moreover, the IGRA decision rests on a flawed finding that the North Fork Rancheria had historical connections to the proposed Madera casino site. The Secretary's decision to take that property into trust under IRA rested on the flawed IGRA decision, and ignored statutory requirements discouraging acquisition of property at such a distance from the North Fork Rancheria's existing reservation. Finally, these decisions were fatally flawed in that they rest entirely on the premise that Class III gaming would occur pursuant to a state compact and related memoranda of understanding, a premise that has been refuted by California voters.

II. Summary Judgment Standard

Under the Administrative Procedure Act, a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2) (2014). An agency acts arbitrarily or capriciously if it "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it

[1] The classes of gaming, including Class III, are defined at 25 U.S.C. § 2703 (2014).

could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983).

In an action under the APA, summary judgment is the appropriate mechanism for "deciding, as a matter of law, whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review." *Oceana, Inc. v. Locke*, 831 F. Supp. 2d 95, 106 (D.D.C. 2011). In these cases, "a federal district court 'sits as an appellate tribunal' to review the purely legal question of whether the agency acted in an arbitrary and capricious manner." *Franks v. Salazar*, 816 F. Supp. 2d 49, 55-56 (D.D.C. 2011) (quoting *Am. Bioscience, Inc., v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001).

III. Statement of Facts

1. The Picayune Rancheria of the Chukchansi Indians is a federally-recognized Indian Tribe with a historical home near Coarsegold, California. NF_AR_0000013. The Picayune continue to inhabit their traditional homeland on land held in trust for the benefit of the Picayune by the United States. NF_AR_0000013.

2. The Picayune Tribe owns and operates its Chukchansi Gold Resort and Casino, a Class III gaming facility, on its reservation lands. NF_AR_0039784.

3. The North Fork Rancheria of Mono Indians is a federally-recognized Indian Tribe. NF_AR_0004036. The North Fork Rancheria is not organized under the Indian Reorganization Act. NF_AR_0004036. The Tribe's constitution was ratified in May, 1996. NF_AR_0004036.

4. The North Fork Tribe's headquarters are located in the town of North Fork, California. Nearby is the North Fork Rancheria, an 80-acre parcel held in trust for individual Indians. NF_AR_0041023-24.

5. On December 8, 2003, the North Fork Rancheria signed a development agreement with SC Madera Development, LLC and a separate Management Agreement with SC Madera Management, LLC, through which that entity would operate a casino on behalf of the North Fork Rancheria. NF_AR_0001189, NF_AR_0001131. SC Madera Management, LLC and SC Madera Development, LLC are subsidiaries of Station Casinos, LLC ("Station Casinos" or "Developer"). NF_AR_0039785.

6. Under the terms of the Development Agreement, the North Fork Rancheria and Station Casinos would "mutually agree upon parcel of land in Madera County that the Tribe wishes to be made Tribal Lands" for purposes of erecting a casino. NF_AR_0001199.

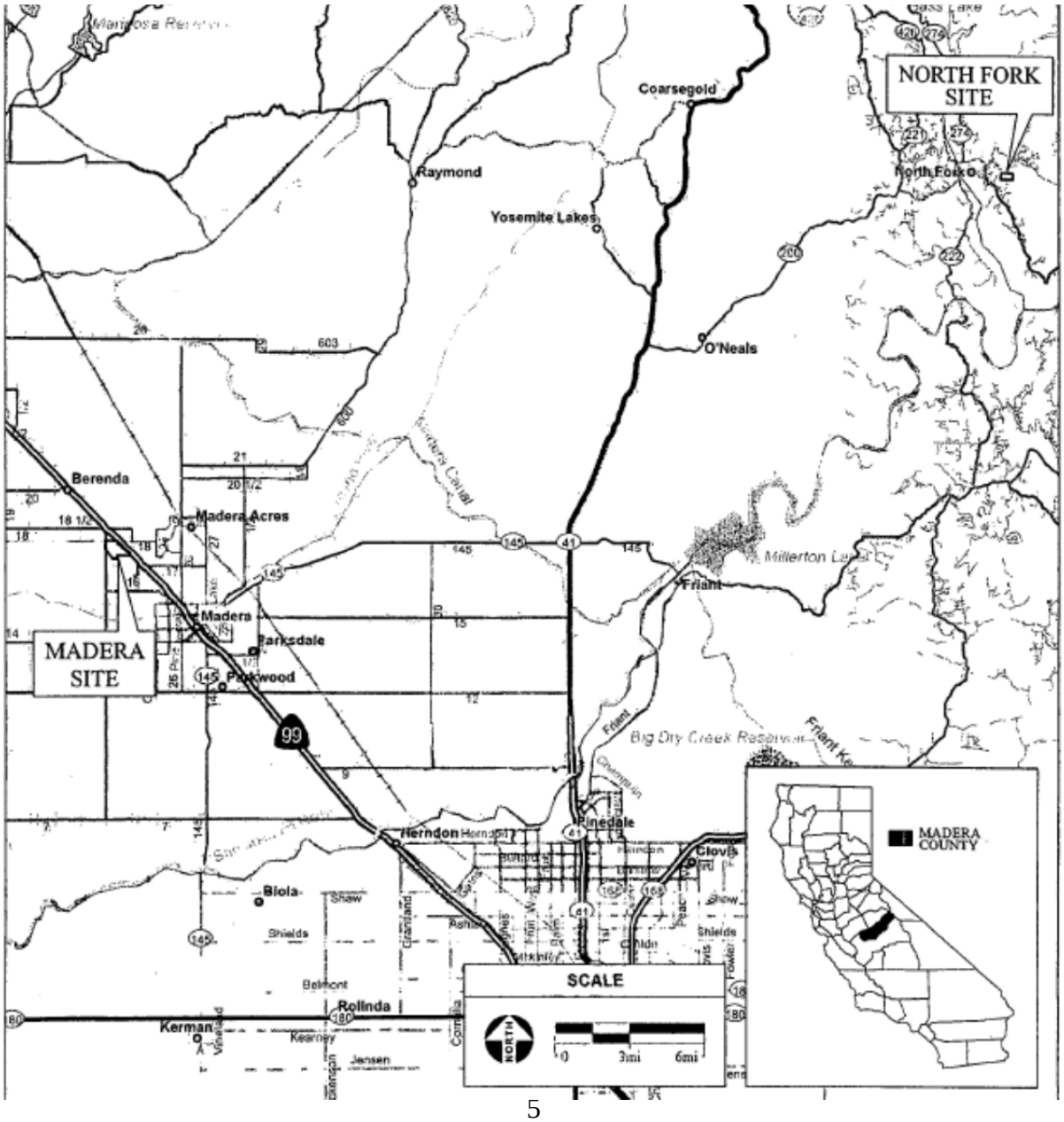
7. The Development Agreement also stated that Station Casinos "shall retain such engineers, lawyers, consultants, lobbyists and other parties as are necessary to develop the Project and/or obtain all approvals from Governmental Authorities necessary for the development of the Project." NF_AR_00011200-11201.

8. On June 7, 2004, the North Fork Rancheria adopted a Tribal Resolution calling for the Department of Interior to take 305.49 acres into trust in Madera County, California, for gaming purposes. NF_AR_0001292. The specific legal description of the property was:
Parcel No 1APN 033-030-010 through 015 and 017
Parcels 123456 and of Parcel Map 3426 in the unincorporated area of the County of Madera, State of California as per map recorded September 7, 1995 in Book 44 Pages 15

and 16 of, Parcel Maps in the office of the County Recorder of said county." NF_AR_0001292-93. (Hereinafter "the Madera Site.")

9. The Madera Site sits 38.21 miles from the North Fork Rancheria, south and west of the North Fork Rancheria reservation. NF_AR_0039782.

10. The Madera Site is actually closer to the Picayune than it is to the North Fork Rancheria; the Madera Site sits 26.4 miles from the Picayune Rancheria. NF_AR_0039782.



11. The map above shows the location of the North Fork Rancheria reservation (labeled "North Fork Site"), the city of Coarsegold (where the Picayune Rancheria's existing casino is located) the Madera Site, and the City of Madera. NF_AR_0000638.

12. The June 7, 2004 Resolution noted that Station Casinos had already acquired the rights to purchase the Madera Site. NF_AR_0001292.

13. Station Casinos and the North Fork Rancheria employed technical experts to conduct an Environmental Impact Study on behalf of the Bureau of Indian Affairs in July 2004. NF_AR_0001295.

14. In March of 2005, the North Fork Rancheria submitted a fee-to-trust application to the Bureau of Indian Affairs, requesting that the Department of Interior accept the Madera Site for purposes of operating a Class III gaming casino. NF_AR_0000292. In March of 2006, the Tribe confirmed that it was seeking a Secretarial determination that the proposed Class III gaming casino at the Madera Site would be in the best interests of the Tribe and not detrimental to the surrounding community. NF_AR_NEW_0000132.

15. The North Fork Rancheria's consultant conducted an environmental impact review for the project, and the BIA issued a Notice of Adoption of the Final Environmental Impact Statement ("FEIS") on August 6, 2010. NF_AR_0040453.

16. Relying in significant part on the FEIS, the Secretary issued a two-part decision under IGRA on September 1, 2011, finding that the Madera Site Class III gaming casino would be in the interest of the North Fork Rancheria and that there would not be detrimental to the surrounding community. NF_AR_0040538.

17. On that same date, the Secretary requested the concurrence of the Governor of California in the Secretary's two-part finding pursuant to 25 U.S.C. § 2719(b)(1)(A). NF_AR_0040392.

18. On August 30, 2012, Governor Brown indicated that he concurred in the Secretary's decision, based on benefits to the Wiyot Tribe and other communities through a Class III tribal gaming compact negotiated between the State of California and the North Fork Rancheria. NF_AR_0040988-9.

19. In Assembly Bill 277 of the 2013 Session of the California State Assembly, the state legislature voted to ratify the Class III gaming compact. NF_AR_GC_000012. That legislation, however, was petitioned to referendum. NF_AR_GC_000101.

20. The state-tribal compact appeared on the November 2014 general election ballot as Proposition 48. The voters of California voted not to ratify the tribal-state compact, with 61% of ballots cast "no," and 39% of ballots cast for "yes" on the question.[2]

IV. Argument

A. The IGRA and IRA Decisions wrongfully rested on expectations of Class III gaming pursuant to a state compact, which has been rejected under California law.

The voters of California have proven the two decisions at issue in this case to be baseless. The tribal-state gaming compact between the North Fork Rancheria and the State of California, submitted to the California State Assembly as A.B. 277, was petitioned to referendum pursuant to Article II of the State Constitution, giving the voters of California the power to decide whether

[2] The California Secretary of State has submitted a Statement of Vote reporting the results of the 2014 general election. That statement is available at http://elections.cdn.sos.ca.gov/sov/2014-general/pdf/2014-complete-sov.pdf.

to allow Class III gaming at the Madera Site. NF_AR_GC_00101, SOF ¶ 19. On election day, November 4, 2014, the voters of California chose to reject the compact, which appeared as Proposition 48 on the general election ballot, by a 61-39 margin. SOF ¶ 20. The expectation that Class III gaming would be conducted at the Madera Site underlies every element of the Secretary's two-part IGRA determination and his related decision to take the Madera Site into trust under IRA. The rejection of the compact between California and the North Fork Rancheria, and thereby the rejection of Class III gaming at the Madera Site, demonstrates these two decisions to be baseless and indefensible.

As required by IGRA, Secretary Echo Hawk reviewed the North Fork Rancheria's fee-to-trust application and made findings that the proposed Madera Site casino was in the best interests of the North Fork Rancheria and would not result in a detrimental impact to the surrounding community. 25 U.S.C. § 2719(b)(1)(A) (2014), NF_AR_040444 *et seq*. Both of these findings are premised on the notion that the Madera Site casino would provide Class III gaming. The Secretary's first finding, that the casino would be in the best interest of the North Fork Rancheria, rests entirely on the revenue and employment expected to come from the Class III casino, and tribal services expected to be financed from such revenues. NF_AR_0040532. His second finding, that there would be no detriment to the surrounding community, similarly rests on the notion that large financial contributions financed by the Class III gaming activities would offset any local government expenses, environmental remediation, or societal impacts. NF_AR_0040533-34. These mitigation payments would be required by memoranda of understanding with Madera County and the City of Madera. NF_AR_0003701, NF_AR_0001313.

The decision to take the Madera Site into trust under IRA is equally predicated on expectations of Class III gaming. Describing his actions in taking the Madera Site into trust, the Secretary observed that his action would facilitate "Class III gaming conducted in accordance with the Indian Gaming Regulatory Act (IGRA) and Tribal-State Compact Requirements…." NF_AR_0041145. As required by the BIA regulations, 25 C.F.R. Part 151, the Secretary's IRA decision contains explanations of the "need of the … Tribe for additional land" and the "purpose for which the land will be used." 25 C.F.R. § 151.10(b)(c) (2014), NF_AR_0041198-99. The Secretary described need for the land as creating economic opportunity through the Class III gaming casino and hotel project, which was expected to provide "a significant revenue source." NF_AR_0041199. Pursuant to the requirement under 25 C.F.R. § 151(10)(e) to describe the impact of removal of the property from tax rolls, the Secretary listed millions in anticipated payments to the County and City of Madera pursuant to their Memoranda of Understanding. NF_AR_0041199-201.

All of these perceived benefits and anticipated mitigation payments were illusory, as shown by the outcome of Proposition 48. Because the IGRA Decision and the IRA Decision rested on these mistaken expectations, they lack foundation. If the BIA declines to voluntarily rescind these decisions given the unavoidable conflict with Proposition 48, the Court should remand them for just such action, or find them arbitrary and capricious as a matter of law. *See American Optometric Society v. F.T.C.*, 626 F.2d 896, 907 (D.C. Cir. 1980)*; see also Hughes Air Corp. v. C.A.B.* 482 F.2d 143, 145-46 (9th Cir. 1973) (while APA review is narrow, reviewing court may set aside agency action where it determines the action was "clearly wrong.")

B. The IGRA Decision failed to consider the North Fork Rancheria's lack of historical connection to the Madera Site.

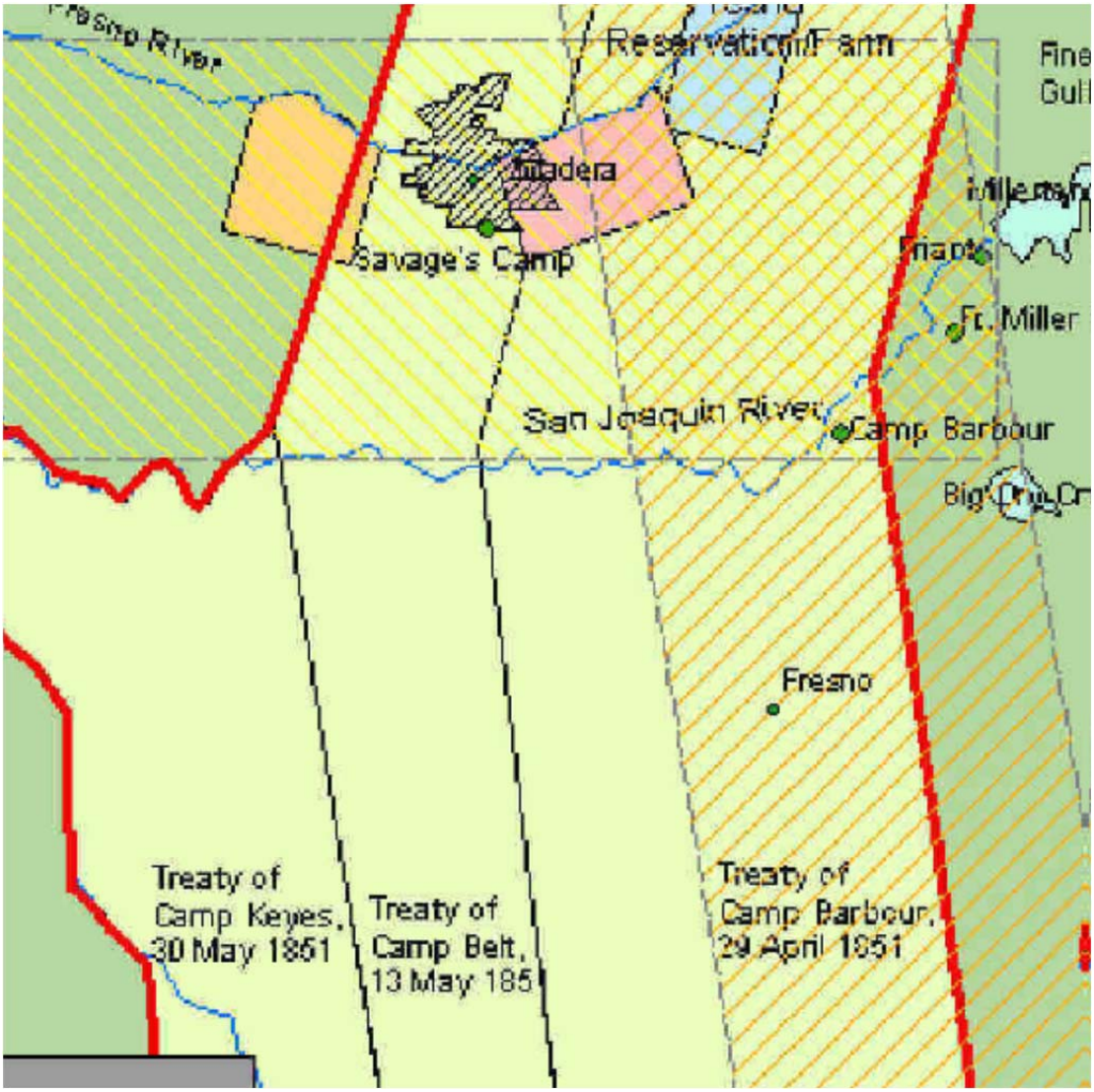
Under the APA, a reviewing court shall set aside an agency's actions where there is no reliable evidence to support it. *First Girl, Inc. v. Reg'l Manpower Adm'r of U.S. Dept. of Labor*, 499 F. 2d 122, 124 (7th Cir. 1974). The IGRA Decision made just such a flaw in finding that the North Fork Rancheria had a historical connection to the Madera Site.

Under Interior's regulations, the Secretary must consider "evidence of [the tribe's] significant historical connections, if any, to the land." 25 C.F.R. § 292.17(i); 25 C.F.R. § 292.21(a) (2014). The Department defines "significant historical connection" to require that "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty" or that "a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. §292.2 (2014). As the Department acknowledged in the IGRA Decision, "the Department's regulations require the Secretary to weigh the existence of a historical connection between an applicant tribe and its proposed gaming site as a significant factor in determining whether gaming on the proposed site would be in the best interest of the tribe and its citizens." NF_AR_0040504**.** The Decision then went on to find a "historical connection" to the Madera Site, based on mistaken readings of the relevant treaties and without considering the evidence in the administrative record.

The Department purports to link the North Fork Rancheria with supposed "predecessors" of the Tribe who "were represented by signatories to the 1851 Treaty signed at Camp Barbour." NF_AR_0040506. However, the Mono Indians were not present at the 1851 Treaty signing, which also was never subsequently ratified by the United States Congress. NF_AR_at 000006-7. The North Fork Rancheria have never been connected to the Camp Barbour Treaty, and there is

no evidence to support the Secretary's conclusion to conflate the current Mono Indians with the persons referred to as "mona" in that document.

More importantly, the Madera Site is not even located within the reservation that was allegedly established by the 1851 Camp Barbour Treaty. NF_AR_0039849; *see also* Treaty 275, Indian Land Cessions in the United States, 1784 to 1894, U.S. Serial Set, Number 4015, 56th Congress, 1st Session, pp. 782-783. The Madera Site is instead within the boundaries of a different unratified treaty, the Camp Belt Treaty. Treaty 276, Indian Land Cessions in the United States, 1784 to 1894, U.S. Serial Set, Number 4015, 56th Congress, 1st Session, pp. 783. The Administrative Record contains a map demonstrating the location of the Madera Site within the Camp Belt treaty territory:



NF_AR_0039856.

The remaining facts cited in the IGRA Decision to show a "historical connection" between the Madera Site and ancestors of the North Fork Rancheria consist of ephemeral and transactional contacts with the City of Madera, such as "often passing through Madera to the foothills and back again" in the course of sheep herding, or "drivi[ing] their hogs to a store in Borden, which was located along the Southern Pacific rail line within 600 yards of the border of Madera," and seasonal work in cities in the general vicinity of Madera. NF_AR_0040508-09. These contacts, however, are far from the documentation of "occupancy or subsistence use" required by 25 C.F.R. § 292.2.

The Administrative Record contains evidence that directly contradicts the Secretary's findings. The Report of Dr. Robert Manlove, Ph.D., offers the "unequivocal and unconditional" conclusion that the "homelands of the Northfork Mono Indians are in the Sierra Nevada Mountains far from their proposed construction site and … there is absolutely no justification for their claim that their traditional homelands included that site." NF_AR_0000003. Manlove further concludes:

> The historical record therefore shows that the Monos, in general, and the Northfork Monos, in particular, did not participate in the California reservation system as more than visitors. And, just as a visitor from another nation today would not be able to claim land in California for his own country by virtue of his visit, the Monos cannot be said to have gained rights to the reservation lands, whatever they may be, by visiting.
> NF_AR_0000008.

The Secretary does not address the Manlove report in his IGRA Decision.

Even Gaylen Lee, a Northfork Mono Indian and historian, confirms that Madera was not Mono territory. In discussing the events surrounding the establishment of trading posts, Lee states that the northern posts, on the Merced River and Mariposa Creek (approximately 40 and 20 miles north of Madera, respectively) were in Miwok territory but that the trading post at the

present-day town of Madera was in Chukchansi territory. NF_AR_0003956; NF_AR_0001095. Lee also presents a homeland map for the Northfork Mono that places the Northfork Monos far from the Madera site. NF_AR_0001105.

The Secretary nevertheless concluded that the North Fork Rancheria had a "significant historical connection" to the Madera Site, as that term was defined by 25 C.F.R. § 292.2, on the basis that the Madera Site was "within the reservations contemplated by the San Joaquin Valley treaties," and on the basis of the sheep herding and similar contacts. NF_AR_040509-10. The administrative record demonstrates, however, that the North Fork Rancheria's aboriginal territory was in the Sierra Nevada mountains, and tribal members were no more than visitors to the Madera Site.[3] The Secretary's determination that the application satisfies 25 C.F.R. § 292.17(i) is contradicted by the record before him. The Court must vacate the Secretary's IGRA Decision as it lacks evidence for his finding on what he himself calls a "significant factor." *See United Techs. Corp. v. U.S. Dept. of Defense*, 601 F.3d 557, 562-63 (D.C. Cir. 2010) (courts "do not defer to [an] agency's conclusory or unsupported suppositions") *quoting McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182, 1187 (D.C. Cir. 2004).

C. The IGRA Determination under 25 C.F.R. Part 292 employs inconsistent and arbitrary reasoning to justify the Madera Site and ignore its detrimental impacts.

On review under the APA, a court "must be assured that the agency has exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." *Ethyl Corp. v. EPA*, 541 F.2d 1, 35-36 (D.C. Cir. 1976). A careful review of the IGRA

[3] The Secretary implies that because some members of the North Fork Rancheria "can trace their lineage" to other tribes that have a more meaningful connection to the Madera Site, those familiar connections help establish a historical connection on behalf of the North Fork Rancheria. NF_AR_0040508. That notion has no basis in the regulations, and in fact conflicts with the requirement that the Secretary consider how a tribe's request would impact other nearby tribes that have a significant historical connection to the site. 25 C.F.R. § 292.18(f).

Decision shows that the Secretary failed to meet that requirement, because he contradicted the acknowledged intent of Congress and frequently contradicted himself.

1. The Statutory framework of IGRA and IRA establish a legislative preference for on-reservation gaming and discourage taking land into trust for off-reservation gaming.

The Secretary's two-part decision under the Indian Gaming Regulatory Act conflicts with a fundamental tenet of that law: the promotion of on-reservation gaming instead of off-reservation gaming. The statute contains a broad prohibition against gaming on newly acquired land, stating that Class III gaming "shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." 25 U.S.C. § 2719(a) (2014). Except for on-reservation gaming conducted on reservations that consist of "restored" lands, Class III gaming may not be conducted on land recently taken into trust unless the Tribe can meet all of a series of rigorous standards. These standards include required findings that the proposed gaming establishment would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community (the "two-part determination"), and require that the Governor of the State in which the proposed facility concur in these findings. 25 U.S.C. § 2719(b)(1)(A) (2014). The Secretary has acknowledged that the intent of Congress "favors tribal gaming on existing and former reservations, and on lands acquired in trust prior to October 17, 1988," and accordingly, "the Department will apply heavy scrutiny to tribal applications for off-reservation gaming" on newly acquired lands. NF_AR_0040531. This is a fundamental policy that the Department previously used as a formal guideline for making the "two-part determination" under § 2719(b)(1)(A.). In a January 3, 2008 memorandum, Assistant Secretary Carl Artman wrote:

> *The Department has taken the position that although IGRA was intended to promote the economic development of tribes by facilitating Indian gaming*

> *operations it was not intended to encourage the establishment of Indian gaming facilities far from existing reservations.*

Department of Interior guidance on taking off-reservation lands into trust for gaming purposes, January 3, 2008. NF_AR_0004203.

This aversion to off-reservation gaming also has roots in the Indian Reorganization Act. Adopted many decades before IGRA, IRA "has nothing directly to do with Indian gaming." NF_AR_0004203. Recognizing that the primary purpose of IRA was "to provide a tribal land base on which tribal communities … could exist and flourish," the Department's policy is to view off-reservation acquisitions with disfavor, and to require a heightened showing of need for acquisitions as the distance from a reservation increases. NF_AR_004203. Under 25 C.F.R. § 151.11, "as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns [of state and local governments]." 25 C.F.R. § 151.11 (2014).

In evaluating the North Fork Rancheria's fee-to-trust application and making its two-part determination regarding the Madera Site, however, the Secretary violated both the IGRA and IRA presumptions against off-reservation gaming, through outcome-driven analysis that sought to justify Class III gaming at the Madera Site.

2. The Secretary's findings were inconsistent and conflicted with one another.

Where an agency has demonstrated internally inconsistent reasoning in coming to a decision, a reviewing court shall set aside the action as arbitrary and capricious. *Gen. Chem. Corp. v. U.S.*, 817 F.2d 844, 857 (D.C. Cir. 1987) (vacating and remanding agency decision that was "internally inconsistent and inadequately explained"). The Secretary's IGRA Decision is

replete with inconsistent reasoning as he sought to reach the conclusion of approving the North Fork Rancheria's Madera Site casino.

The Department's regulations pertaining to applications for off-reservation gaming pursuant to 25 U.S.C. § 2719(b)(1)(A) require that the Secretary consider a series of factors regarding the financial, physical, environmental, and socioeconomic benefits or flaws of the proposed gaming facility. 25 C.F.R. § 292.16-21 (2014). The administrative record shows that as he evaluated the application for Class III gaming at the Madera Site, the Secretary employed a pattern of conflicting and arbitrary reasoning in order to find benefits to the North Fork Rancheria and to minimize or ignore the impacts to the Picayune Rancheria.

a. Inconsistent Treatment of Competitive Impacts

This arbitrary and inconsistent pattern is highly evident in how the Secretary evaluated the effects of competition from other casino projects. In describing why the Secretary eliminated certain alternative projects from consideration, competition from other tribal casinos played a major role. The Secretary eliminated from consideration a gaming facility on tribal property provided by the U.S. Department of Housing and Urban Development (the "HUD Tract,"), observing that "[t]he draw to the facility would likely be further limited by the proximity of three existing tribal gaming facilities located within 20 miles of the town of North Fork." NF_AR_0040454. One of those tribal facilities is the Chukchansi Gold Casino. SOF ¶ 11. The Secretary similarly relied on concerns about "gaming operations of neighboring tribes, particularly the Picayune Rancheria and Table Mountain Rancheria" to eliminate proposed alternative gaming sites at the Avenue 7 and Avenue 9 Properties. NF_AR_0040454. The Secretary rejected a suggested large resort on the North Fork's reservation lands due to economics driven by "the level of competition in the market." NF_AR_0040457. The Secretary

continued to emphasize competition in choosing among the alternatives that remained. The Final Environmental Impact Statement reduced the Secretary's gaming alternatives to two alternatives at the Madera Site, and a casino on the North Fork reservation. NF_AR_0040459-40474. That FEIS disfavored gaming on the North Fork reservation because, in part, the on-reservation casino "would be located in a competitively disadvantaged area." NF_AR_0016658.

In the second part of his two-part IGRA determination, however, the Secretary dismissed these very same competitive effects when they worked to disadvantage the Madera Site project. Presented with evidence that the Picayune Rancheria could face considerable loss of revenue due to the proposed Madera Site casino, the Secretary inexplicably swept these concerns aside, writing "competition from the Tribe's proposed gaming facility in an overlapping gaming market is not sufficient, in and of itself, to conclude that it would result in a detrimental impact to Picayune." NF_AR_0040535. The Secretary offered no authority or explanation for why increased competition should not be considered a detrimental impact, nor any explanation why competitive concerns should only be considered when they support the selection and approval of the Madera Site.[4] More disturbingly, the internal inconsistency runs counter to the core tenet of gaming law that the Secretary quoted on the very same page: "IGRA favors on-reservation gaming over off-reservation gaming, and the Department's policy is to narrowly apply the Secretarial Determination exception to the general prohibition" on off-reservation gaming. NF_AR_0040535.

[4] The Secretary cited *Sokoagon Chippewa Community v. Babbitt*, 214 F.3d 941 (7th Cir. 2000) for the proposition that "IGRA does not guarantee that tribes operating existing facilities will continue to conduct gaming free from both tribal and non-tribal competition." NF_AR_0040535. *Sokoagon* was an appeal of the "narrow question" of whether the St. Croix Chippewa Indians of Wisconsin should have been permitted to intervene in litigation. 214 F.3d at 943. The Court specifically declined to resolve the question of what interest the St. Croix had to be free from economic competition. *Id.* at 947-48. Moreover, the citation was used to attack an argument that the Picayune did not advance.

b. Inconsistent Treatment of Distance from Reservation

The Secretary's IGRA decision follows this arbitrary and capricious inconsistency in its consideration of the distance between the Madera Site and tribal reservations. In evaluating the objections of the Picayune Rancheria, the Secretary acknowledged that he must consider the comments given the "relative proximity of Picayune to the [Madera] Site." NF_AR_0040526; NF_AR_0040534. The Madera Site sits only 26.4 miles of the Picayune Rancheria. SOF ¶ 5; NF_AR_0036150, NF_AR_0039782. The Decision goes on, however, to state that the "weight accorded to the comments of tribes and local governments … will naturally diminish as the distance between their jurisdictions and the proposed off-reservation gaming site increases." NF_AR_0040535. This geographic discounting of the Picayune Rancheria has no basis in the applicable law or regulations, and was a premise used to utterly ignore the Picayune's objections to the Madera Site.

The geographic penalty applied to the Picayune is arbitrary and capricious, given that the North Fork Rancheria is *even further from the Madera Site.* The North Fork Rancheria sits to the east of the Picayune Rancheria, at a straight-line distance from the Madera Site of 38.21 miles, roughly 12 miles farther than the Picayune reservation. NF_AR_0039782. Nowhere does this distance serve to reduce the Secretary's enthusiasm for the perceived benefits of the Madera Site casino; in fact, the Secretary cites as a benefit the fact that "62 percent of tribal citizens live within 50 miles of the Site." NF_AR_0040501. Notwithstanding the extremely generous 50 mile radius, the Secretary's finding ignores the fact that 38 percent of the North Fork citizens must therefore live *more* than 50 miles away from the Madera Site. In fact, in issuing his finding that the Madera Site casino would be in the best interest of the tribe, the Secretary observed that

the 38 mile distance from the Madera Site to the North Fork Rancheria is a "relatively short distance." NF_AR_0040532.

This inconsistent application of the same facts is manifestly arbitrary and capricious, and directly contradicts the statutory and administrative preference for on-reservation gaming.

c. Inconsistent Treatment of Revenue Impacts, Employment, and Programs

The Secretary's pattern of inconsistently evaluating the same factors permeates the IGRA Decision, and extends to its discussion of the Madera Site casino's anticipated revenues, employment, and funding for Tribal programming. The Secretary's conclusion that the Madera Site casino would be in the best interest of the North Fork Rancheria rests principally on the anticipated revenues that would be achieved from Class III gaming. *See* NF_AR_0040532 (listing net income and cash flow from gaming operations as the first, second, and third reasons for the Secretary's best interest finding). When presented with evidence that the Picayune Rancheria would face a significant loss of revenue, however, the Secretary simply ignores the evidence: he makes neither a finding that there is a detrimental impact nor a finding that there are no such impacts. NF_AR_0040535. Similarly, the Secretary highlighted potential employment benefits of the project – albeit without making any finding that any number of jobs would employ members of the North Fork Rancheria – as an additional reason for his best interest finding. NF_AR_0040532. Although acknowledging evidence in the record that the Madera Site casino would cause job losses at the Chukchansi Gold casino, these job losses did not receive consideration or evaluation. NF_AR_0040535. Finally, the Secretary highlights how the Madera Site casino would provide revenues that would "help the Tribe strengthen Mono cultural programs and initiatives" as among the reasons that the casino would be in the Tribe's best interests. NF_AR_0040532. Despite evidence that Picayune Rancheria "government

programs will be cut or eliminated due to the loss of revenues," the Secretary did not consider this same factor to be relevant to whether or not there would be a detrimental impact from the project. NF_AR_0040535.

The Secretary's self-contradictory application of identical issues and facts is the very paradigm of "arbitrary and capricious" agency action. *Gen. Chem. Corp*., 817 F.2d at 854. Here, the Secretary contradicts himself even as to the evaluation of nearly identical facts. When evaluating the Picayune Rancheria's detrimental impact evidence, the 39 mile distance between the Coarsegold casino and the Madera Site was used as a basis to ignore the Picayune Rancheria's concerns. NF_AR_0040534-5. When evaluating the 38.21 mile distance between the North Fork Rancheria and the Madera Site, however, the Secretary considered that "a relatively short distance." NF_AR_0040532. This kind of irrational and contradictory decisionmaking cannot withstand APA review. "To survive arbitrary and capricious review, an agency action must be the product of reasoned decisionmaking." *Fox v. Clinton*, 68 F. 3d 67, 74-75 (D.C. Cir. 2012). An agency decision will be set aside where, as here, the agency's action "lacks any coherence." *Coburn v. McHugh*, 679 F.3d 924, 934 (D.C. Cir. 2012) (quoting from *Tripoli Rocketry Ass'n., Inc., v. Bureau of Alcohol, Tobacco Firearms and Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006). The inconsistent and contradictory IGRA Decision must be vacated.[5]

D. The IGRA Decision improperly ignored evidence of detrimental financial impact to the Picayune.

The Administrative Procedure Act requires that the Court intervene to ensure that an agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its

[5]APA case law also shows that "an agency may not treat like cases differently." *Freeman Eng. Assocs., Inc., v. FCC*, 103 F.3d 169, 178 (D.C. Cir. 1997). While this doctrine typically refers to an agency's handling of multiple cases, *see Airmark Corp. v. F.A.A.*, 758 F.2d 685 (D.C. Cir. 1985) (inconsistent denial of regulatory exemptions to different applicants), the reasoning applies here, where the agency has applied the same criteria in an inconsistent fashion to two parties within a single application.

action." *State Farm*, 463 U.S. at 43, *quoted in County of Los Angeles v. Shalala*, 192 F.3d 1005, 1021 (D.C. Cir. 1999). The IGRA Decision is arbitrary and capricious as a matter of law because it does not evaluate whether the Madera Site project would be "detrimental to the surrounding community" as required by 25 U.S.C. § 2719(b)(1)(A). The Secretary simply ignored uncontroverted evidence of substantial detriment to the Picayune Rancheria, who were part of the surrounding community according to the applicable regulations.

1. IGRA and agency regulations required the Secretary to determine whether the Madera Site casino would be detrimental to the Picayune.

The second "part" of the two-part determination required under IGRA is a determination that "a gaming establishment on newly acquired lands would … not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A) (2014). The statute does not define who should be considered members of the "surrounding community" for purposes of assessing the detriment of off-reservation gaming.

The Department's regulations, originally issued in 2008, state:

> *Surrounding community* means local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.
> 25 C.F.R. § 292.2 (2014).

Recognizing that the Picayune Rancheria sits just barely outside this 25-mile radius, the Picayune Rancheria consistently sought to be considered part of the "surrounding community" for purposes of the detrimental impact determination. On March 3, 2009, following issuance of this regulation, the Picayune Rancheria submitted a petition to the BIA seeking to be designated a "nearby Indian tribe" as part of the "surrounding community" as provided for in 25 C.F.R. § 292.2 (2014). NF_AR_0036148. In a letter later that month, the Picayune submitted

additional information on the detrimental effects that the Madera Site casino would present to the Picayune Rancheria. In that letter, the Picayune Rancheria reemphasized that the "Picayune Rancheria believes that it *must, as a matter of law, be considered a nearby tribe* and that its comments should be given the same weight as other surrounding communities as they are defined in 25 C.F.R. § 292.2." NF_AR_0039782 (emphasis added).

The record does not appear to contain any direct response from the Agency to the Picayune Rancheria's petition under § 292.2, but BIA indicated throughout the review process that an evaluation of the impacts on the Picayune Rancheria would be part of its determination. In one letter, the BIA stated that "the BIA recognizes the Picayune Rancheria of the Chukchansi Indians as an affected Indian tribe … for the above proposal." NF_AR_0004024. In another, the Department wrote, "[w]e recognize the Picayune Rancheria of the Chukchansi Indians as an affected Indian tribe, as defined under NEPA." NF_AR_001371.

In his IGRA Decision, however, the Secretary ignored both this history and the Department's own regulations, stating that the Picayune "is not a 'Nearby Indian tribe' as defined in our regulations." NF_AR_0040530. The Secretary made a similar finding that "[t]here are no nearby Indian tribes as defined under 25 C.F.R. § 292.2. NF_AR_0040526. There is no explanation in the IGRA Decision or elsewhere in the record for why the Secretary ignored the regulatory definition, the Picayune's petition thereunder, and the course of dealing indicating that the Picayune would be afforded the protections provided to the surrounding community.

Notwithstanding his finding that the Picayune were not a "nearby Indian tribe," the Secretary concedes that he was required to consider evidence of detrimental impact on the Picayune. He admitted, "[g]iven the relative proximity of Picayune to the Site, and the relative proximity of the Chukchansi Gold Casino to the Site," such consideration would be given.

NF_AR_0040526. The Secretary claimed that based on those factors, he "reviewed and considered Picayune's comments regarding North Fork's application in a manner consistent with the definition of 'Surrounding community' under 25 C.F.R. § 292.2." NF_AR_0040530.

Despite this statement, the Secretary proceeded to manufacture a basis to avoid making a finding of detrimental impact, stating: "[the Picayune's] comments must be accorded less weight than comments submitted by our communities and tribes that fall within the definition of 'surrounding community' in our regulations." NF_AR_0040534. The Secretary goes on to declare, without authority, that "the weight accorded to the comments of tribes and local governments outside the definition of 'surrounding community' will naturally diminish as the distance between their jurisdictions and the proposed off-reservation gaming site increases." NF_AR_0040535. The Secretary then acknowledged the Picayune Rancheria's evidence of the harm that the Madera Site would pose to them, including substantial loss of revenues at the Chukchansi Gold casino, and ensuing employment losses and program cuts, but did not make a finding that there would be no detrimental effects on the Picayune or that there would be mitigating factors. NF_AR_0040535. Instead, the Secretary brushed off this evidence with the spurious statement that gaming competition "is not sufficient, in and of itself, to conclude that it would result in a detrimental impact to Picayune." NF_AR_0040535. The IGRA Record of Decision contains no clear statement that the Agency did or did not find there to be a "detrimental impact" to the Picayune Rancheria, nor is there any finding that the detrimental impacts of the Class III gaming facility on the Picayune would be mitigated in any way.

The Secretary's treatment of the Picayune Rancheria is inconsistent with the Department's regulations and the IGRA requirements. The agency's own definition of "surrounding community" includes tribes that petition to have the impacts on their

"governmental functions, infrastructure or services" be a part of the Secretary's detrimental impact findings. 25 C.F.R. § 292.2 (2014). The Picayune Rancheria submitted such a petition, NF_AR_0036148, and the Secretary's own Decision acknowledges facts that show that the petition should have been granted. NF_AR_0040534 (citing the Madera Site casino's impacts on Picayune Rancheria's Class III gaming, tribal government services, and tribal interests in land). Despite reason to believe that the Agency considered the Picayune Rancheria as part of the "surrounding community," the Secretary chose to exclude them from that category for purposes of his detrimental impact finding.

2. The Record Is Full of Evidence of Detrimental Impact to the Picayune Rancheria.

It is not surprising that the Secretary tried so hard to avoid deeming the Picayune Rancheria part of the "surrounding community": that was the only way he could avoid a finding of detrimental impact.

The administrative record is in full agreement that a Class III gaming facility at the Madera Site will present a severe detrimental impact on the Chukchansi Gold casino, and by extension, to the Picayune Rancheria. The North Fork Rancheria's own consultants, the Innovation Group, plainly stated that the Chukchansi Gold casino "would likely compete with the proposed facility for clients from the region." NF_AR_0021726. The consultant concluded that the Picayune Rancheria's on-reservation would be badly harmed:

> In the scenario where the full-scale casino is developed in Madera, it is projected that the most significant impacts will be felt on the Chukchansi, Table Mountain and the proposed Big Sandy facilities. While actual revenues for the properties is proprietary to the respective tribes, based on our models, it is projected that a revenue decline of approximately 19% would be felt at Chukchansi as a result of the operation of the subject casino….
> NF_AR_0021739

Even according to the North Fork's consultants, therefore, a substantial negative impact is conceded.[6]

The record shows that the Innovation Group's estimate of 19% loss of revenues to the Picayune Rancheria property may have underestimated the harm to the Picayune Rancheria, and that the actual harms would likely be even greater. First, the North Fork Rancheria's own consultant admits that it does not have the information necessary to properly evaluate the effect on the Chukchansi Gold casino. As the FEIS warns, "[g]iven that the financial performance of tribal casinos is not public record, a conclusion regarding profitability cannot be empirically tested." NF_AR_0024237; NF_AR_0021739. Even more important, the data and projections on which the competitive gaming analysis relied were out of date and unreliable, particularly in light of the 2008 financial crisis and ensuing Great Recession. The Picayune Rancheria noted this deficiency in the Draft EIS, which relied on an economic analysis performed in 2005. NF_AR_0039790 ("[o]f course, the economic situation in the United States is far different at the current time than it was in either 2005 or 2008"). Although the EIS consultant ostensibly updated that analysis, even the updated technical memorandum in Appendix R to the Final EIS was prepared in June 2008 and utilized 2007 data and assumptions. NF_AR_0021720. The analysis failed to account for the effects of the Great Recession on the gaming market, resting on assumptions that were demonstrably incorrect by the September 1, 2011 IGRA Decision. NF_AR_21723 (projecting that effective buying income in the Madera vicinity would increase by 2% per year from 2007 through 2012).

[6] The consultant opined, without supporting analysis or data, that even if the revenues of a gaming facility were to fall by 20%, "the impact on the viability of operations is not one that jeopardizes its ability to remain open." NF_AR_0021740. The Secretary made no reference to this statement in the IGRA Decision, and there is no basis to infer that the Secretary considered that a 19% or 20% loss of revenues to the Picayune would not qualify as "detrimental." The consultant's statement therefore cannot be used by counsel *post hoc* as a basis to infer a conclusion that the Secretary did not make. *See Internat'l Union, United Mine Workers of Am. v. Mine Safety and Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010) (remanding rule where agency offered only conclusory response to comments and refusing to accepting counsel's *post hoc* explanation of agency's determination during litigation).

The Picayune Rancheria presented additional evidence that it would face considerable detriment if the Madera Site casino were built. Consultants Klas/Robinson evaluated concluded that the Madera Site casino would reduce revenues at Chukchansi Gold at least 22.2%, with losses as high as 32.4% depending on the scope of gaming activity at the Madera Site. NF_AR_0009351. The Tribe estimated that if the Madera Site casino proceeds, the Chukchansi Gold casino "would have to cut the equivalent of 570 full time positions." NF_AR_0039791. There would likely be closure of a tribal day care center, which would jeopardize the ability of 20 tribal members to stay employed, seek an education, or receive job training. NF_AR_0039791. The Tribe would further be forced to cease per capita payments to its members, on which Picayune Rancheria members rely for car payments, rent, insurance, or utility payments. NF_AR_0039791. The loss of revenues would similarly force the loss of annual payments to the City of Fresno for maintenance of Chukchansi Park, as well as other grant funding. NF_AR_0039793.

The IGRA Decision essentially concedes that the Picayune Rancheria would face significant detrimental impact. The Secretary does not dispute that the Madera Site casino will result in these effects, and indeed, the FEIS strongly supports the Picayune Rancheria's claims. NF_AR_0040535. Instead, the Secretary responds that "competition ... is not sufficient, in and of itself, to conclude that it would result in a detrimental impact to Picayune. NF_AR_0040535.

The Secretary was required by IGRA to make a determination regarding whether the Madera Site casino would pose a detriment to the Picayune, a member of the surrounding community. The IGRA Decision, however, contains nothing more than the simplistic and nonresponsive observation that competition "is not sufficient" to demonstrate a detrimental impact. That Decision contains no evaluation of the harms described in the record, or of any

anticipated mitigation measures.[7] Having failed to perform an essential task required by the governing statute, the Secretary's Decision must be vacated. *See State Farm*, 463 U.S. at 43; *see also United Techs. Corp.*, 601 F.3d at 562-63 (courts do not defer to an agency's conclusory or unsupported conclusions).

E. The Secretary's IRA Decision Shares the Flaws of His IGRA Decision.

In November 2012, Assistant Secretary Washburn issued a Record of Decision under IRA, ostensibly approving the fee-to-trust application for the Madera Site. NF_AR_0041138. This decision, effectively implementing the Agency's 2011 IGRA Decision, relied on the same findings and analysis, and exhibits the same legal flaws. Moreover, the Department's regulations on acquisitions of off-reservation trust property impose their own stringent requirements to show that such property is essential to the Tribe, requirements that the casino project did not meet.

1. The IRA Decision Rests on an Arbitrary and Capricious IGRA Decision.

The Secretary's IRA Decision purports to utilize his authority under 25 U.S.C. § 465 to acquire the Madera Site, and to hold that property in trust on behalf of the North Fork Rancheria. Because the Madera Site was not within the boundaries of an existing reservation, the Department's regulations limit trust acquisitions to instances in which "the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3 (2014). The Secretary wrote that he was proposing to accept the parcel into trust "in order for the Tribe to conduct tribal government

[7] In the Court's Memorandum Opinion dated January 29, 2013, the Court indicated that the gaming compact between the North Fork Tribe and the State of California called for large financial payments to the Picayune Rancheria, which would mitigate the detrimental impacts of the Madera Site casino. Doc. No. 42 at 38. As the Court also noted, the compact also contained a provision eliminating those payments in the event that the Picayune pursued legal or lobbying challenges to the decision to accept the Madera Site into trust. *Id.* at fn. 24. As stated above, that compact has been rejected by the voters of California. Whether due to the terms of the compact, or the vitiation of it by the voters, there is no reason to believe the Picayune Rancheria will receive any mitigation payments from the North Fork Rancheria. The Secretary apparently understood this, and did not assert that there would be any mitigation of the harms to the Picayune Rancheria in his IGRA Decision.

gaming authorized under IGRA" because gaming tools would allow the Tribe to meet the "urgent economic needs of its members." NF_AR_0041145. Read together, the Secretary's action in taking the land into trust under IRA rests on the notion that the property was, in fact, authorized for tribal gaming under IGRA, and that the gaming activity was necessary to the North Fork Rancheria's economic development.

Further, the Department's regulations for acquisition of off-reservation property require the Secretary to consider a series of criteria, including:

> (b) The need of the individual Indian or the tribe for additional land;
> (c) The purposes for which the land will be used;
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls

25 C.F.R. § 151.10(b),(c), (e) (as required by § 151.11(a). The Secretary cited to the Class III gaming casino authorized by the 2011 IGRA Decision, and its anticipated revenues, employment benefits, and MOU payments, in response to these criteria. NF_AR_0041198-201

Because the IGRA Decision was arbitrary, capricious, and contrary to law for the reasons set forth above, the decision to take the Madera Site into trust was necessarily without a basis. *See* Mem. Op., Doc. No. 42, at 29 ("permitting gaming on trust land would be essential to the Secretary's conclusion under IRA that the acquisition meets the criteria") (citing *Sokokakogan Chippewa Comm'y v. Babbitt*, 929 F. Supp. 1165, 1170 (W.D. Wis. 1996).

2. The IRA Decision Failed to Meet The Heightened Scrutiny Required For Off-Reservation Acquisitions.

The Secretary's IRA Decision was unlawful for the additional reason that it failed to apply the additional scrutiny required for off-reservation trust acquisitions under the Department's regulations. Those regulations state:

> (b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section. 25 C.F.R. § 151.11(b) (2014).

In his decision taking the Madera Site into trust, the Secretary makes no effort whatsoever to show that he has applied any greater scrutiny to the purported benefits of acquiring the Madera Site. In fact, in the section of the IRA Decision addressing § 151.11(b), the Secretary *even chose not to quote the section of the regulation that requires greater scrutiny*. NF_AR_0041203. In his response to that regulation, the Secretary merely recited the rote facts that the property sits 38 miles from the North Fork Rancheria and 36 miles from that Tribe's headquarters. NF_AR_0041203.

The Secretary cannot simply delete his regulatory obligations as he deleted the regulatory text from his Decision. The Madera Site sits a very considerable distance from the North Fork Rancheria. As discussed in the IGRA Decision, the record shows that nearly 40 percent of the North Fork tribal citizens live more than 50 miles from the Madera Site, a fact that the Secretary does not acknowledge in the IRA Decision. NF_AR_0040501. The record demonstrates that the Madera Site was not chosen for a fee-to-trust acquisition because of its connections to the North Fork Rancheria, or its ability to employ North Fork Rancheria tribal citizens, but because that is where Station Casinos wanted to put in a Class III gaming casino and resort. SOF ¶¶ 5-13. This is exactly the reason that Departmental regulations demand "greater scrutiny" of off-reservation land acquisitions, and the Secretary's failure to comply with this regulatory requirement rendered the IRA Decision arbitrary and capricious.

V. Conclusion

For the foregoing reasons, Plaintiff's Motion for Summary Judgment should be GRANTED.

Respectfully submitted,

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