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
PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS, Plaintiff, v. UNITED STATES OF AMERICA, et al., Defendants.	

INTERVENOR THE NORTH FORK RANCHERIA OF MONO INDIANS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION 1

BACKGROUND 3

STANDARD OF REVIEW 7

ARGUMENT 8

I. The Secretary's Decision To Take Land Into Trust For The Tribe Was Lawful 8

A. The Secretary Correctly Determined That North Fork Was A Tribe Under Federal Jurisdiction In 1934 8

B. Stand Up's Speculation That The Modern North Fork Tribe Is Not The Same As The Historical North Fork Tribe Is Meritless 13

II. The Secretary's Two-Part Determination Conformed To IGRA's Requirements................16

A. The Secretary's Reliance On Mitigation In Finding That The Development Would Not Be Detrimental To The Surrounding Community Was Not Arbitrary, Capricious, Or Otherwise Inconsistent With IGRA.............................16

1. The Secretary Was Not Required To Find There Would Be No Detrimental Effects 17

2. The Secretary Was Permitted To Rely On The FEIS 19

3. The Secretary Adequately Considered Mitigation Of Stand Up's Alleged Detrimental Effects 20

B. The Secretary's Treatment Of Picayune's Concerns Was Not Arbitrary, Capricious, Or Otherwise Inconsistent With IGRA 22

1. Picayune Is Not A "Nearby Tribe" Within The "Surrounding Community" 22

2. The Secretary Reasonably Weighed Picayune's Concerns, And Her Determination Was Supported By Substantial Evidence...........................24

3. Picayune's Specific Evidentiary Arguments Are Unavailing....................26

4. The Secretary's Reasoning Tracked The Two Inquiries Required Under 25 U.S.C. § 2719(b)(1)(A) And Was Not Internally Inconsistent 29

C. The Secretary Properly Considered North Fork's Historical Connection To The Madera Site 34

1. The Secretary Considered The Relevant Evidence 34

2. Picayune's Objections Are Meritless 37

III. The State Referendum On The California Legislature's Ratification Of The Compact Does Not Undermine Any Of The Secretary's Prior Decisions 39

A. The Secretary Was Entitled To Rely On California's Facially Valid Submission Of The Compact For Her Approval 41

1. IGRA Requires Federal Officials To Rely On State And Tribal Officials To Execute Compacts In Accordance With State And Tribal Law Before Submitting Them For Secretarial Approval 42

2. Federal Officials Are Entitled To Rely On The Facially Valid Actions Of State Officials 44

3. California's Submission Of The Compact To The Secretary Was Facially Valid And Triggered The Secretary's Obligations Under IGRA, Despite The Possibility Of A State Referendum In The Future 46

B. IGRA Preempts The California Referendum To The Extent It Purports To Nullify The Compact 52

C. Even If The Referendum Were Held To Have Invalidated The Compact, The Court Should Not Vacate The Two-Part Or The Trust Decisions 55

IV. The Governor's Concurrence Was Valid And Provides No Basis For Challenging The Secretary's Two-Part Determination 59

A. The Secretary Properly Relied On The Governor's Facially Valid Concurrence 60

B. The Governor's Concurrence Was Valid 61

V. Defendants Fully Complied With NEPA 63

A. The BIA Considered A Reasonable Range Of Alternatives 63

1. The Secretary Reasonably Excluded The SR-41 And Avenue 7 Sites From Further Evaluation 65

2. The Secretary Reasonably Excluded The Old Mill Site From Further Evaluation 67

B. The FEIS Took A "Hard Look" At The Potential Impact On Crime 69

C. The FEIS Took A "Hard Look" At Problem Gambling and Adequately Discussed Associated Mitigation Measures....70

VI. Defendants Fully Complied With The Clean Air Act 72

A. The Conformity Determination Complied With Required Notice Procedures....72

B. The Conformity Determination Is Based Upon The Appropriate Emission Estimation Methods 76

C. Defendants Based Their Emissions Estimates On A Justifiable Trip Length 77

D. Stand Up's Cursory Challenges To The Conformity Determination's Compliance With EPA Regulations Are Meritless....78

CONCLUSION....80

TABLE OF AUTHORITIES

Page(s)

Cases

A.L. Pharma, Inc. v. Shalala,
62 F.3d 1484 (D.C. Cir. 1995) 59

Advocates for Highway Safety v. Fed. Motor Carrier Safety Admin.,
429 F.3d 1136 (D.C. Cir. 2005) 74

Am. Coke & Coal Chem. Inst. v. EPA,
452 F.3d 930 (D.C. Cir. 2006) 75

Am. Financial Svcs. Ass'n v. FTC,
767 F.2d 957 (D.C. Cir. 1985) 57

Am. Optometric Ass'n v. FTC,
626 F.2d 896 (D.C. Cir. 1980) 55, 56

Anchustegui v. Dep't of Agriculture,
257 F.3d 1124 (9th Cir. 2001) 75

Blue Ridge Envt'l Def. League v. Nuclear Reg. Comm'n,
716 F.3d 183 (D.C. Cir. 2013) 72

California v. Cabazon Band of Mission Indians,
480 U.S. 202 (1987) 52

Carcieri v. Salazar,
555 U.S. 379 (2009) 8, 9, 15

Carnegie Nat. Gas Co. v. FERC,
968 F.2d 1291 (D.C. Cir. 1992) 8

People ex rel. Casserly v. Fitch,
1 Cal. 519 (1851) 62

Citizens Against Burlington, Inc. v. Busey,
938 F.2d 190 (D.C. Cir. 1991) 63, 64, 70

Citizens Exposing Truth About Casinos v. Kempthorne,
492 F.3d 460 (D.C. Cir. 2007) 18, 30, 58

Citizens to Pres. Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 59

City of Grapevine v. U.S. Dep't of Transp.,
17 F.3d 1502 (D.C. Cir. 1994) 63

City of Olmsted Falls v. FAA,
292 F.3d 261 (D.C. Cir. 2002) 28

City of Roseville v. Norton,
219 F.Supp.2d 130 (D.D.C. 2002) 68

Cleveland Television Corp. v. FCC,
732 F.2d 962 (D.C. Cir. 1984) 57

Coalition for Responsible Regulation, Inc. v. EPA,
684 F.3d 102 (D.C. Cir. 2012) 75

Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell,
No. CV 13-849, 2014 WL 7012707 (D.D.C. Dec. 12, 2014) .... *passim*

Cotton Petroleum Corp. v. New Mexico,
490 U.S. 163 (1989) 52

County of Rockland v. FAA,
335 F. App'x 52 (D.C. Cir. 2009) 38, 75

Crawford v. Imp. Irr. Dist.,
253 P. 726 (Cal. 1927) 62

Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000) 52, 55

Dalton v. Pataki,
835 N.E.2d 1180 (N.Y. 2005) 53

Defenders of Wildlife v. Salazar,
698 F. Supp. 2d 141 (D.D.C. 2010) 71

Dickey v. Raisin Proration Zone,
151 P.2d 505 (Cal. 1944) 61

Eagle-Picher Industries, Inc. v. EPA,
822 F.2d 132 (D.C. Cir. 1987) 38

EarthLink, Inc. v. FCC,
462 F.3d 1 (D.C. Cir. 2006) 28

Envt'l Def. Fund, Inc. v. Costle,
657 F.2d 275 (D.C. Cir. 1981) 7

First Am. Disc. Corp. v. CFTC,
222 F.3d 1008 (D.C. Cir. 2000) 7

Gaming Corp. of Am. v. Dorsey & Whitney,
88 F.3d 536 (8th Cir. 1996) 53

Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Att'y,
369 F.3d 960 (6th Cir. 2004) 17

Hall v. Bellard,
157 F. App'x 992 (9th Cir. 2005) 75

Hillman v. Marietta,
133 S. Ct. 1943 (2013) 52

Hoffman v. City of Red Bluff,
407 P.2d 857 (Cal. 1965) 62

Husqvarna AB v. EPA,
254 F.3d 195 (D.C. Cir. 2001) 75

ICC v. Jersey City,
322 U.S. 503 (1944) 56, 57

Kickapoo Tribe of Indians v. Babbitt,
827 F. Supp. 37 (D.D.C. 1993) 50

Kornman v. SEC,
592 F.3d 173 (D.C. Cir. 2010) 25

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States,
367 F.3d 650 (7th Cir. 2004) 62

Langley v. Edwards,
872 F. Supp. 1531 (W.D. La. 1995) 49

Leser v. Garnett,
258 U.S. 130 (1922) 44

Lewis v. Colgan,
47 P. 357 (Cal. 1897) 61

Marsh v. Ore. Nat. Res. Council,
490 U.S. 360 (1989) 29

Mashantucket Pequot Tribe v. Connecticut,
913 F.2d 1024 (2d Cir. 1990) 54, 58

Mason v. Geithner,
811 F. Supp. 2d 128 (D.D.C. 2011) 21, 78

McMaster v. United States,
731 F.3d 881 (9th Cir. 2013) 10

Miss. Indus. v. FERC,
808 F.2d 1525 (D.C. Cir. 1987) 57

Montana v. Blackfeet Tribe,
471 U.S. 759 (1988)..17

Mosk v. Superior Court,
601 P.2d 1030 (Cal. 1979) 61

N. Alaska Envt'l Ctr. v. Kempthorne,
457 F.3d 969 (9th Cir. 2006) 71

Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005)..41, 49

Nat'l Comm. for the New River, Inc. v. FERC,
373 F.3d 1323 (D.C. Cir. 2004) 28, 72

Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs,
145 F.3d 1399 (D.C. Cir. 1998) 74

Nat'l Parks Conserv. Ass'n v. Jewell,
965 F. Supp. 2d 67 (D.D.C. 2013) 71

Nat'l Treasury Emp. Union v. Horner,
854 F.2d 490 (D.C. Cir. 1988) 7

Nat'l Wildlife Fed'n v. FERC,
912 F.2d 1471 (D.C. Cir. 1990) 72

Neighbors of Cuddy Mountain v. U.S. Forest Service,
137 F.3d 1372 (9th Cir. 1998) 72

Nevada v. Dep't of Energy,
457 F.3d 78 (D.C. Cir. 2006) 7

Oliphant v. Schlie,
544 F.2d 1007 (9th Cir. 1976) 45, 46, 60

Omaha Tribe of Neb. v. Village of Walthill,
334 F. Supp. 823 (D. Neb. 1971)...45, 46, 51

PDK Labs. Inc. v. DEA,
362 F.3d 786 (D.C. Cir. 2004) 7

Picayune Rancheria of Chukchansi Indians v. Brown,
178 Cal. Rptr. 3d 563 (Cal. App. 2014) 62

Pueblo of Santa Ana v. Kelly,
104 F.3d 1546 (10th Cir. 1997) 49

Rincon Band of Luiseno Mission Indians v. Schwarzenegger,
602 F.3d 1019 (9th Cir. 2010) 53, 56

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989) 63, 71

Safe Extensions, Inc. v. FAA,
509 F.3d 593 (D.C. Cir. 2007) 9, 25

Shawano County v. Acting Midwest Reg'l Dir.,
53 IBIA 62 (2011) 11

Sierra Club v. EPA,
762 F.3d 971 (9th Cir. 2014) 76

Sierra Club v. Johnson,
436 F.3d 1269 (11th Cir. 2006) 75, 76, 77

Sokaogon Chippewa Community v. Babbitt,
214 F.3d 941 (7th Cir. 2000) 27, 30

Sorenson Commc'ns, Inc. v. FCC,
567 F.3d 1215 (10th Cir. 2009) 13

Stand Up For California! v. State of California,
Case No. MCV062850 (Cal. Super. Ct. Madera Cnty. Mar. 3, 2014) 61

State of California v. Picayune Rancheria of Chukchansi Indians,
No. 14-CV-1593 (E.D. Cal.) 6

State Farm Mut. Auto. Ins. Co. v. Dole,
802 F.2d 474 (D.C. Cir. 1986) 13

Strycker's Bay Neighborhood Council, Inc. v. Karlen,
444 U.S. 223 (1980) 63

Theodore Roosevelt Conserv. P'ship v. Salazar,
661 F.3d 66 (D.C. Cir. 2011) 63, 69

Throckmorton v. NTSB,
963 F.2d 441 (D.C. Cir. 1992)....................9, 26

TOMAC v. Norton,
No. CV 01-0398, 2005 WL 2375171 (D.D.C. Mar. 24, 2005)....................29

Tozzi v. U.S. Dep't of Health & Human Servs.,
271 F.3d 301 (D.C. Cir. 2001)....................25

U.S. Air Tour Ass'n v. FAA,
298 F.3d 997 (D.C. Cir. 2002)....................25

U.S. Dep't of Transp. v. Pub. Citizen,
541 U.S. 752 (2004)....................65, 72

U.S. Postal Serv. v. Gregory,
534 U.S. 1 (2001)....................14

United Auburn Indian Community of the Auburn Rancheria v. Brown,
Case No. 34-2013-800001412 (Cal. Super. Ct. Sacramento Cnty. Aug. 19, 2013) 61

United States v. 1,216.83 Acres of Land,
574 P.2d 375 (Wash. 1978)....................62

United States v. Brown,
334 F. Supp. 536 (D. Neb. 1971)....................45, 46, 51

United States v. Lawrence,
595 F.2d 1149 (9th Cir. 1979) 45

Verizon v. FCC,
740 F.3d 623 (D.C. Cir. 2014)....................38

Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.,
435 U.S. 519 (1978)....................63

Watt v. Smith,
26 P. 1071 (Cal. 1891)....................62

Weyerhaeuser Co. v. Costle,
590 F.2d 1011 (D.C. Cir. 1978)....................74

U.S. ex rel. Widenmann v. Colby,
265 F. 998 (D.C. Cir. 1920)....................44, 45

Wisconsin Bell v. Bie,
340 F.3d 441 (7th Cir. 2003) 52

Constitutional and Statutory Provisions

U.S. Const. art. V 44

U.S. Const. amend. XVIII 44, 45

5 U.S.C. § 706 7

15 U.S.C. § 715k-5 61

16 U.S.C. § 7b 61

18 U.S.C. § 1166 43

25 U.S.C. § 478 10

25 U.S.C. § 479 .... 8, 12, 13

25 U.S.C. § 1323 .... 44, 45, 46

25 U.S.C. § 2701 43

25 U.S.C. § 2702 1

25 U.S.C. § 2710 .... *passim*

25 U.S.C. § 2711 4

25 U.S.C. § 2719 .... *passim*

42 U.S.C. § 4332 63

42 U.S.C. § 7506 .... 3, 72

42 U.S.C. § 7607 75

42 U.S.C. § 7916 61

54 U.S.C. § 101501 61

Pub. L. No. 88-419 15

Pub. L. No. 83-280 45

Pub. L. No. 85-671 15

Cal. Const. art. IV, § 19 .... 6, 61

Cal. Const. art. V, § 1 62

Cal. Const. art. V, § 4........62

Cal. Const. art. V, § 6........62

Cal. Gov. Code § 12010........62

Cal. Gov. Code § 12012........62

Cal. Gov. Code § 12012.5........61

Cal. Gov. Code § 12012.25........43, 47, 51, 61

Cal. Gov. Code § 12012.45........50

Cal. Gov. Code § 12012.46........50

Cal. Gov. Code § 12012.48........50

Cal. Gov. Code § 12012.49........50

Cal. Gov. Code § 12012.51........50

Regulations

25 C.F.R. Part 292........23

25 C.F.R. Part 293........49

25 C.F.R. Part 533........4

25 C.F.R. § 151.3........59

25 C.F.R. § 292.2........*passim*

25 C.F.R. § 293.3........43, 47, 48, 54

40 C.F.R. § 93.150........72

40 C.F.R. § 93.155........73, 74, 76

40 C.F.R. § 93.155........73, 74

40 C.F.R. § 93.156........73, 74

40 C.F.R. § 93.159........77

40 C.F.R. § 93.163........79

40 C.F.R. § 1502.14........63, 66

40 C.F.R. § 1503.1 25

31 Fed. Reg. 2911 (Feb. 18, 1966) 14

50 Fed. Reg. 6055 (Feb. 13, 1985) 16

69 Fed. Reg. 62,721 (Oct. 27, 2004) 63

69 Fed. Reg. 76,004 (Dec. 20, 2004) 50

72 Fed. Reg. 71,939 (Dec. 19, 2007) 50

73 Fed. Reg. 29,354 (May 20, 2008) .... *passim*

73 Fed. Reg. 74,004 (Dec. 5, 2008) 49, 54

75 Fed. Reg. 47,621 (Aug. 6, 2010) 63

75 Fed. Reg. 17,254 (Apr. 5, 2010) 80

78 Fed. Reg. 14,533 (Mar. 6, 2013) 76

78 Fed. Reg. 62,649 (Oct. 22, 2013) 6, 44

80 Fed. Reg. 1942 (Jan. 14, 2015) 16

Other Authorities

S. Rep. No. 446, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071 52

Cohen's Handbook of Federal Indian Law (2012) 9, 13, 45

David Carrillo & Danny Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. Rev. 655 (2011) 61

Heidi Staudenmaier & Ruth Khalsa, *Theseus, the Labyrinth, and the Ball of String: Navigating the Regulatory Maze to Ensure Enforceability of Tribal Gaming Contracts*, 40 J. Marshall L. Rev. 1123 (2007) 5

Ian Lovett, *Tribes Clash As Casinos Move Away From Home*, N.Y. Times (Mar. 3, 2014) 7, 55

INTRODUCTION

Congress enacted the Indian Gaming Regulatory Act ("IGRA") for the express purpose of "promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). The Secretary of the Interior's determinations relating to the North Fork's proposed gaming project clearly advance that policy. North Fork currently has no meaningful revenues to meet its citizens' pressing needs, and it was not economically or environmentally feasible for North Fork to build a gaming facility on its existing land in the Sierra Nevada foothills. For the better part of a decade, the Secretary carefully and thoroughly scrutinized the proposed North Fork project—reviewing an extensive administrative record and consulting with local governments and the community—and issued two reasoned decisions at the end of the process, rendered in conformity with every applicable statutory and regulatory regime. In turn, the elected officials of California, led by the Governor, have championed the North Fork project and undertaken their own state actions to enable the Tribe to game on a parcel of land outside of Madera. The Governor signed a tribal-state compact with North Fork, which the Legislature ratified, and the Secretary of State forwarded the compact to the Secretary of the Interior for her approval, after which the compact took effect, precisely as IGRA and agency regulations require.

Meanwhile, opponents of the North Fork project—led by plaintiffs—have used every means at their disposal to prevent North Fork from realizing IGRA's benefits. In addition to this litigation, they have mounted unsuccessful challenges to the underlying state actions in state court and mounted a multi-million-dollar campaign seeking to nullify those actions by popular referendum. At bottom, however, plaintiffs' challenges to the North Fork project are simply an attack on the federal policies embodied in IGRA. The Secretary's determinations under review by this Court were neither arbitrary, capricious, nor contrary to law, and should be upheld.

First, the Secretary correctly concluded that North Fork was under federal jurisdiction in 1934 and thus eligible to have land taken into trust, as conclusively shown by the North Fork Rancheria's 1935 vote on reorganization and the government's 1916 acquisition of land for the Tribe. Stand Up's unfounded speculations regarding tribal history provide no basis for upsetting the Secretary's decision.

Second, the Secretary properly reached a favorable two-part determination that gaming on the Madera land would be in the best interest of the Tribe and would not be detrimental to the surrounding community—a determination in which the Governor of California concurred. Plaintiffs' challenges to the Secretary's determination rest on a misreading of IGRA that this Court has already rejected and are inconsistent with the administrative record, agency regulations, and basic principles of APA review.

Third, the November 2014 referendum in California provides no basis for upsetting the Secretary's decisions. The Secretary was entitled to rely on the facially valid submissions of state officials, and she acted in strict accord with IGRA and its implementing regulations governing the submission, review, approval, and effectuation of tribal-state compacts. Moreover, once a compact has taken effect under federal law, subsequent state actions that purport to nullify it are preempted by IGRA.

Fourth, Stand Up's argument that the Secretary's two-part determination is invalid because the Governor lacked authority as a matter of state law to concur in it misconstrues the sequencing of IGRA's two-part process and, in any event, is meritless on its own. Indeed, Stand Up's argument has been rejected by both California courts to consider it.

Fifth, the Secretary fully complied with the National Environmental Policy Act ("NEPA"), which simply requires the agency to consider the environmental consequences of its

actions. The Secretary met that burden here, considering a reasonable range of alternatives, potential effects on crime, and the adequacy of problem-gambling mitigation measures.

Sixth, the Secretary fully complied with the Clean Air Act ("the CAA"), its implementing regulations, and this Court's instructions when the conformity determination was returned to the agency on partial remand. The Secretary provided the opportunity for notice and comment, used the appropriate emission estimation methods, and reasonably determined what mitigation measures were necessary.

The Secretary's determinations should be affirmed in every respect.

BACKGROUND

The North Fork Rancheria of Mono Indians ("North Fork" or "the Tribe") is comprised of descendants of Mono and other Indians who for centuries lived and used lands in California's Sierra Nevada foothills and the nearby San Joaquin Valley. AR 40393; *see generally* AR 40504-10. Today, about 69% of North Fork's roughly 2,000 tribal citizens live below the federal poverty line and some 16% of its potential labor force is unemployed—far higher than the state and national rates. AR 40501; Dkt. 34-1 ¶ 4. Aside from its potential gaming project, the Tribe has no economic development activities or revenue source other than federal grants and the California Revenue Sharing Trust Fund. AR 40502. The Tribe thus lacks resources to support its self-sufficiency, tribal government, and citizens' needs and to sustain cultural initiatives preserving the unique Mono heritage for future generations. AR 40502.

Other than the trust parcel at issue in this proceeding, the Tribe's existing land base cannot support significant economic development to address these issues. Dkt. 34-1 ¶ 5. The North Fork Rancheria, an 80-acre parcel of land in Madera County near the town of North Fork, is held in trust as residences for individual tribal citizens, and not for the Tribe as an entity. AR 40458-59, 41152-53. The only trust land the Tribe possesses is a 61.5-acre parcel in North

Fork ("HUD Tract") that the federal government placed in trust in 2002 premised on the Tribe using it—as it has—to build a community center, a youth center, and several homes. AR 40453-54, 41147-48. These lands are thus not eligible for gaming and, in any event, are mountainous, remote, and in an environmentally sensitive area next to the Sierra National Forest that is inappropriate for commercial development. AR 40453-54, 40458-59, 41147-48, 41152-53.

Therefore, to facilitate tribal economic development and self-determination, the Tribe's representatives approached the Madera County Board of Supervisors to discuss developing a tribal gaming facility on other lands within the Tribe's historic area. ARNEW 137. The Tribe's and Board's representatives concluded that the town of North Fork itself was not commercially or environmentally suited for a gaming resort, so the Tribe looked for sites closer to State Route 99, which connects Bakersfield, Fresno, and Modesto. ARNEW 137. The Tribe identified 305 acres ("the Madera Site") located on mostly vacant agricultural lands in an unincorporated area of Madera County north of the City of Madera. AR 40458, 41152; *see also* Dkt. 34-1 ¶¶ 14-15.

In 2005, the Tribe submitted a formal request to the U.S. Department of the Interior ("DOI") Bureau of Indian Affairs ("BIA") to acquire the Madera Site in trust pursuant to the Indian Reorganization Act ("the IRA"), 25 U.S.C. § 465, for the development of a gaming resort. ARNEW 132. The Tribe sought a two-part determination by the Secretary of the Interior ("Secretary") under IGRA, 25 U.S.C. § 2719(b)(1)(A), to authorize gaming on the Madera Site. ARNEW 132.[1] In its earlier opinion, this Court set forth the applicable statutory and regulatory framework governing the Tribe's requests under the IRA and IGRA. *See* Dkt. 42 at 4-7.

---

[1] The Tribe's application noted that it had agreements with Station Casinos, Inc. to develop and manage the casino. ARNEW 138-40. IGRA expressly contemplates such agreements. *See* 25 U.S.C. §§ 2710(d)(9), 2711(a)(1); *see also* 25 C.F.R. § 292.16(*l*); 25 C.F.R. Part 533. Indeed, tribal gaming would not work without such agreements, as most tribes do not have the financing or expertise to develop and operate casinos by themselves. Agreements like North Fork's are

The administrative review lasted seven years. As this Court described, *see id.* at 8-11, the process encompassed a scoping period in 2004 and 2005; a Draft Environmental Impact Statement ("DEIS") published in 2008; a 900-page Final Environment Impact Statement ("FEIS") submitted in 2010, AR 29681-30591, that includes 5,500 pages of appendices, AR 30592-36135; an 89-page IGRA Record of Decision ("ROD") issued in September 2011, AR 40444-538; the Governor of California's August 2012 concurrence in the Secretary's decision, AR 40988-89; and a 63-page IRA ROD issued in November 2012, AR 41138-206. In the IGRA ROD, the Secretary (acting through the Assistant Secretary for Indian Affairs) issued a favorable two-part determination, concluding that the Madera Site gaming project was "in the best interest of the Tribe and its citizens" and "would not result in detrimental impact on the surrounding community." AR 40532-34. In the IRA ROD, the Secretary concluded that acquiring the Site for the Tribe would meet "the purpose and need of the BIA, consistent with its statutory mission and responsibilities, to promote the long-term economic vitality and self-sufficiency, self-determination, and self-governance of the Tribe." AR 41204.

Two groups of plaintiffs challenged the Secretary's IGRA and IRA decisions—the Stand Up plaintiffs ("Stand Up"), consisting of various citizens and organizations located near Madera, and the Picayune Rancheria of the Chukchansi Indians ("Picayune"), an Indian tribe that once operated a presently closed gaming facility called the Chukchansi Gold Resort and Casino on its lands about 30 miles from the Madera Site.[2] In January 2013, this Court denied Stand Up's

---

commonplace. As plaintiffs' counsel have noted elsewhere, since IGRA was enacted "countless non-Indian contractors and businesses have entered into casino management or consulting agreements with tribes and tribal entities." Heidi Staudenmaier & Ruth Khalsa, *Theseus, the Labyrinth, and the Ball of String: Navigating the Regulatory Maze to Ensure Enforceability of Tribal Gaming Contracts*, 40 J. Marshall L. Rev. 1123, 1123 (2007).

[2] Picayune's casino was ordered closed by the National Indian Gaming Commission ("NIGC") on October 7, 2014 for substantial violations of IGRA, NIGC regulations, and

motion for a preliminary injunction, determining, among other things, that "the plaintiffs have not established a likelihood of success on the merits of any of their claims." Dkt. 42 at 45. On February 5, 2013, the Secretary took the Madera Site in trust for the Tribe. *See* Dkt. 77 at 3-4.

Meanwhile, when the Governor of California concurred in the Secretary's two-part determination in August 2012, he also executed a Tribal-State Compact ("Compact") with the Tribe to authorize class III gaming on the Madera Site. ARGC 107-340. He submitted the Compact to the State Legislature for ratification pursuant to article IV, section 19(f) of the California Constitution, and the Legislature voted to ratify the Compact. ARGC 12-13. In July 2013, the State submitted the Compact, signed by the Governor and the Tribe's chairperson, to the Secretary for her "review and approval" pursuant to 25 U.S.C. § 2710(d)(8). ARGC 7, 226. Because the Secretary took no action within 45 days of the submission, the Compact was deemed approved under 25 U.S.C. § 2710(d)(8)(C), and in October 2013, the Secretary published the required notice in the Federal Register, upon which the Compact took effect. 78 Fed. Reg. 62,649 (Oct. 22, 2013); *see* 25 U.S.C. § 2710(d)(3)(B).

Subsequently, in November 2013, a campaign initiated by Stand Up's Director Cheryl Schmit qualified a state referendum measure, Proposition 48, on the statute ratifying the

---

Picayune's gaming ordinance, and was ordered closed immediately on October 10, 2014, for failure to operate a casino in a manner that adequately protects public health and safety in light of an emergency situation involving a volatile takeover of the casino by a tribal faction. *See* NIGC, TCO-14-01 (Oct. 7, 2014) and NIGC, NOV-14-03/TCO-14-02 (Oct. 10, 2014), *available at* http://www.nigc.gov/Reading_Room/Enforcement_Actions.aspx. A federal court issued a temporary restraining order enjoining Picayune from "[o]perating the Casino unless and until it is established before this Court that the public health and safety of Casino patrons, employees, and tribal members can be adequately protected from the violent confrontations and threats of violent confrontation among the tribal factions disputing leadership of [Picayune] and control of the Casino." *State of California v. Picayune Rancheria of Chukchansi Indians*, No. 14-CV-1593, Dkt. 5 at 3 (E.D. Cal. Oct. 10, 2014). The federal court later issued a preliminary injunction to the same effect, *id.*, Dkt. 48 at 5 (E.D. Cal. Oct. 29, 2014), and as of this filing Picayune's casino remains closed pursuant to that injunction, *see id.*, Dkt. 66 at 2 (E.D. Cal. Feb. 10, 2015).

Compact. ARGC 101, 104. The campaign against the statute was financed in large part by Picayune and its outside investors as well as by several other tribes that have existing casinos.[3] In November 2014, California voters failed to approve the statute ratifying the Compact.

STANDARD OF REVIEW

Under the APA, a court may set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The court's review is "highly deferential" and "presumes the agency's action to be valid." *Envt'l Def. Fund, Inc. v. Costle*, 657 F.2d 275, 283 (D.C. Cir. 1981). Its task "is to determine whether the agency's decisionmaking was 'reasoned,' *i.e.*, whether it considered the relevant factors and explained the facts and policy concerns on which it relied, and whether those facts have some basis in the record." *Nat'l Treasury Emp. Union v. Horner*, 854 F.2d 490, 498 (D.C. Cir. 1988).

Moreover, the APA "instructs reviewing courts to take 'due account ... of the rule of prejudicial error.'" *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004). "As incorporated into the APA, the harmless error rule requires the party asserting error to demonstrate prejudice from the error." *First Am. Disc. Corp. v. CFTC*, 222 F.3d 1008, 1015 (D.C. Cir. 2000); *see also Nevada v. Dep't of Energy*, 457 F.3d 78, 94 (D.C. Cir. 2006) (applying harmless error in NEPA context). "Courts will sustain an agency decision resting on several

---

[3] Campaign finance records available from the California Fair Political Practices Commission ("FPPC") state that Picayune and Brigade Capital Management LLC (an outside firm that has invested in Picayune's casino) contributed more than $4 million to the referendum (Prop. 48). FPPC, Top Contributors to State Ballot Measure Committees Raising At Least $1,000,000, *available at* http://fppc.ca.gov/topcontributors/past_elections/nov2014/index.html; *see also* Ian Lovett, *Tribes Clash as Casinos Move Away from Home*, N.Y. Times (Mar. 3, 2014), *available at* http://www.nytimes.com/2014/03/04/us/tribes-clash-as-casinos-move-away-from-home.html?_r=0 (identifying Brigade as Picayune's "Wall Street backer[]"). The FPPC's records also show that the Table Mountain Rancheria (which operates the Table Mountain Casino near Fresno) contributed more than $12 million and that, in contrast, North Fork and other supporters of the Compact raised less than the $1 million minimum reporting requirement.

independent grounds if any of those grounds validly supports the result, unless there is reason to believe the combined force of these otherwise independent grounds influenced the outcome." *Carnegie Nat. Gas Co. v. FERC*, 968 F.2d 1291, 1294 (D.C. Cir. 1992).

ARGUMENT

I. The Secretary's Decision To Take Land Into Trust For The Tribe Was Lawful

The Secretary correctly determined that citizens of the present-day North Fork Tribe are "Indians" within the meaning of the IRA and are thus eligible to have the United States take land into trust on their behalf. Specifically, she correctly concluded that North Fork citizens are members of a "recognized Indian tribe" that, as of the enactment of the IRA, was "under Federal jurisdiction." 25 U.S.C. § 479. Stand Up's contrary arguments (SU Br. 6-18 [Dkt. 106-1]) are foreclosed by the IRA's text, authoritative agency guidance, and basic principles of APA review.

A. The Secretary Correctly Determined That North Fork Was A Tribe Under Federal Jurisdiction In 1934

The IRA authorizes the Secretary to acquire land and to hold it in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. The statute defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 479. In turn, the statute defines "tribe" broadly as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id.*

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that the word "now" in § 479 means that the Secretary may take land into trust only for members of Indian tribes that were "under Federal jurisdiction" when the IRA was enacted in 1934. *Id.* at 395. As Justice Breyer observed in his concurring opinion, there are many ways to establish that a tribe was under federal jurisdiction at that time; for instance, "a treaty with the United States (in effect in 1934), a (pre-1934) congressional appropriation, or enrollment (as of 1934) with the [BIA]," can

demonstrate the necessary relationship between the federal government and the tribe. *Id.* at 399 (Breyer, J., concurring). The leading treatise similarly explains that any federal action "such as treaty negotiations, provision of federal benefits, inclusion in a BIA census, or forcible relocation that reflects and acknowledges federal power and responsibility toward the tribe" can establish federal jurisdiction over the tribe in 1934. *Cohen's Handbook of Federal Indian Law* § 3.02 (2012). After *Carcieri*, the Secretary has thus described the inquiry as whether "the United States had, [in] or before 1934, taken an action or series of actions—through a course of dealings or other relevant acts for or on behalf of the tribe or in some instance tribal members—that are sufficient to establish, or that generally reflect federal obligations, duties, responsibility for or authority over the tribe by the Federal Government." AR 777 (citing BIA, Record of Decision for the Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe at 94 (Dec. 2010) ("Cowlitz ROD"), *available at* http://www.bia.gov/cs/groups/mywcsp/documents/text/idc012719.pdf).

Although the Secretary's determination need only be supported by "substantial evidence" to be upheld, *see, e.g.*, *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007); *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992), her determination that the United States had taken such actions here, and that the Tribe was "under Federal jurisdiction" in 1934, is not only supported but compelled by the record. As the Secretary explained, the election conducted by the federal government on the North Fork Rancheria in 1935 under § 18 of the IRA conclusively establishes that the North Fork Tribe was "under Federal jurisdiction" at the relevant time. AR 41198. Moreover, as she also noted, the government had earlier taken land into trust for the North Fork under the Appropriations Act of June 30, 1913, AR 41198, and, as

this Court observed, that land purchase is "likely dispositive in its own right" on the "under Federal jurisdiction" question, Dkt. 42 at 23-24. Stand Up's contrary arguments are meritless.

First, § 18 of the IRA provided that it would "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. Accordingly, in 1935, the BIA conducted an election at the North Fork Rancheria, at which the adult Indians on the reservation voted against application of the IRA. AR 41198. That election reflects that the United States considered itself to have "responsibility for or authority over the tribe," AR 777, and establishes that North Fork was a tribe "under Federal jurisdiction" when the IRA was enacted.

Indeed, DOI's authoritative guidance regarding the meaning of "under Federal jurisdiction," which is entitled to deference, *McMaster v. United States*, 731 F.3d 881, 896 (9th Cir. 2013), specifically states that an election under § 18 of the IRA is "unambiguous" "evidence of being under federal jurisdiction in 1934." DOI, Office of the Solicitor, The Meaning of "Under Federal Jurisdiction" for Purposes of the IRA at 19 (Mar. 12, 2014) ("Solicitor Memo"), *available at* http://www.bia.gov/cs/groups/webteam/documents/text/idc1-028386.pdf. "[T]ribes that voted whether to opt out of the IRA in the years following enactment (regardless of which way they voted) generally need not make any additional showing that they were under federal jurisdiction in 1934," "because such evidence unambiguously and conclusively establishes that the United States understood that the particular tribe was under federal jurisdiction in 1934." *Id.* at 20. "In order for the Secretary to conclude a reservation was eligible for a vote [under § 18], a determination had to be made that the relevant Indians met the IRA's definition of 'Indian'"—that is, that they were "members of [a] recognized Indian tribe[] now under federal

jurisdiction"—"and were thus subject to the Act." *Id.* at 21.[4] Here, the § 18 election conducted on the North Fork Rancheria reflects that the Secretary made such a contemporaneous determination. As the Secretary concluded, no further evidence is necessary to establish that the North Fork Tribe was a tribe under federal jurisdiction in 1934.

Stand Up contends (SU Br. 6-7) that the Secretary's reliance on North Fork's § 18 election was not "reasoned decision making," arguing that she had previously determined in a case involving the Cowlitz tribe that only a vote to reorganize under § 16 of the IRA could establish the existence of a tribe under federal jurisdiction in 1934. That is wrong. Cowlitz did not vote on the IRA, Cowlitz ROD 103 n.143, and thus the question was not even before the Secretary in making the Cowlitz decision, but as noted above, *supra*, at 11 n.4, the Cowlitz ROD explained that a tribe's voting "to accept *or reject* the IRA" under § 18 would be "unambiguous" "evidence of being under federal jurisdiction in 1934," *id.* at 95 n.98 (emphasis added).[5]

---

[4] Although the Solicitor's Memorandum was not issued until after the Secretary's determination of IRA eligibility in this case, the reasoning in the Memorandum is fully consistent with the Secretary's determination here and with DOI's previous determinations on this issue. For example, in an adjudication conducted by the Interior Board of Indian Appeals, the Board concluded that "in 1934, the Secretary necessarily recognized and determined that [a] Tribe did constitute a tribe under Federal jurisdiction when he called and conducted a special election at which the Tribe's adult Indians voted on the question of whether to accept or reject the application of the IRA." *Shawano County v. Acting Midwest Reg'l Dir.*, 53 IBIA 62, 71 (2011). The Board found the holding of a § 18 election to be "conclusive" and determined that "we need look no further to resolve this issue." *Id.* at 71-72. Similarly, the Cowlitz ROD states: "[F]or some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g. tribes that voted to accept *or reject* the IRA following the IRA's enactment, etc.), thus obviating the need to examine the tribe's history prior to 1934." Cowlitz ROD 95 n.98 (emphasis added).

[5] Stand Up also relies (SU Br. 10) on DOI's brief in the Cowlitz litigation—but the portion of the brief it cites addressed a different question than the one at issue here, and the brief does not conflict with the Secretary's conclusion in any event. *See* Dkt. 106-5 at 23-24. The issue addressed in the cited portion of the Cowlitz brief was whether the IRA required that a tribe be "recognized" as of 1934 or whether contemporary recognition was sufficient. DOI convincingly argued that a tribe did not need to be recognized in 1934. *Id.* at 23; *see generally id.* at 20-24. It also explained that the list of tribes that voted in Section 18 elections was not an exhaustive list of all existing tribes, because Section 18 voting occurred only among tribes that had a reservation

Stand Up further argues (SU Br. 7-11) that the § 18 election cannot show that North Fork was a tribe under federal jurisdiction in 1934 because § 18 requires a vote of "the adult Indians" on a "reservation," rather than a "tribe." Stand Up contends that only an election under § 16, which provides that "[a]ny 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," can establish the existence of a tribe under federal jurisdiction. The Secretary's contrary interpretation is not only entitled to deference, but is clearly correct. Stand Up is conflating two different concepts: whether a tribe decided to reorganize under the IRA, and whether a tribe under federal jurisdiction existed when the IRA was passed. A "tribe" could exist—and many did—without voting to reorganize under the IRA. Indeed, the IRA defined "tribe" broadly to incorporate "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479. Stand Up's attempted distinction between a "tribe" and the "adult Indians" on a "reservation" thus collapses: The IRA drew no such distinction. Rather, a § 18 vote of the adult Indians on a reservation was by definition a vote of a "tribe" under federal jurisdiction. *See* Solicitor Memo 21 ("In order for the Secretary to conclude a reservation was eligible for a vote [under § 18], a determination had to be made that the relevant Indians met the IRA's definition of 'Indian,'" "includ[ing] deciding the tribe was under federal jurisdiction.").

Second, as this Court previously recognized, Dkt. 42 at 24, the § 18 election was not the only evidence before the Secretary. In 1916, the United States purchased the North Fork Rancheria "for the use of the North Fork band of landless Indians," thus establishing well before

as of 1934. *Id.* at 23. Thus, the Cowlitz Tribe could be eligible for benefits under the IRA, even though it did not have a reservation in 1934 and did not vote in a Section 18 election. *Id.* Nothing in the Cowlitz brief suggests that those groups for whom the Interior Department did hold Section 18 elections were not "tribes" under the IRA.

1934 that the North Fork was a tribe under federal jurisdiction. AR 776. The 1916 purchase reflects the United States' understanding that North Fork was a distinct band and thus a "tribe" within the meaning of the IRA. *See* 25 U.S.C. § 479 ("tribe" includes an "organized band"). Likewise, the "provision of federal benefits" specifically for North Fork "reflects and acknowledges federal power and responsibility toward the tribe." *Cohen's Handbook of Federal Indian Law* § 3.02. As this Court observed, the land purchase is thus "important, and likely dispositive in its own right, regarding whether the North Fork Tribe was 'under Federal jurisdiction' in 1934." Dkt. 42 at 23-24.[6] And to the extent there is any question whether the North Fork Tribe remained under federal jurisdiction in 1934, the § 18 election among the members of the North Fork band resident on the North Fork Rancheria confirms that it did.

B. Stand Up's Speculation That The Modern North Fork Tribe Is Not The Same As The Historical North Fork Tribe Is Meritless

Stand Up's argument that the present-day North Fork Tribe is not the same as the North Fork Tribe from the late nineteenth and early twentieth centuries also fails. As an initial matter, Stand Up misconceives the nature of APA review. The Secretary was not required to disprove every possible scenario that Stand Up might conjure up—and its speculation (SU Br. 13), unsupported by any record evidence, that the present North Fork Tribe might have no historical connection to the "North Fork band of landless Indians" because Indians from other groups could have moved onto the North Fork Rancheria is entitled to no weight. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 481-82 (D.C. Cir. 1986) (mere speculation is insufficient to overturn an agency action as arbitrary and capricious); *Sorenson Commc'ns, Inc. v. FCC*, 567

[6] That the Secretary did not cite the 1916 purchase in the section of the ROD relating to the statutory authority for the acquisition is irrelevant. The purchase is undisputed; it is referenced in the very next sentence of the ROD, AR 41198; and, as this Court observed, a court's "task is to enforce a standard of agency reasonableness, not perfection." Dkt. 42 at 25 (quoting *Nw. Airlines, Inc. v. U.S. Dep't of Transp.*, 15 F.3d 1112, 1119 (D.C. Cir. 1994)).

F.3d 1215, 1225 (10th Cir. 2009); *see also U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies."). In any event, ample evidence supports the Secretary's determination that the present-day North Fork citizens are members of a recognized tribe—the same tribe that was under federal jurisdiction in 1934. As the Secretary has concluded, and Stand Up does not dispute, a tribe need not have been "recognized" in 1934, but must only have been recognized at the time that land is taken into trust for it under the IRA. Solicitor Memo 25. The § 18 election demonstrates that the North Fork band was under federal jurisdiction in 1934, and other record evidence demonstrates that the present-day recognized North Fork Tribe is traceable to the 1934 entity.

Specifically, in 1958, as part of the ill-fated "allotment" and assimilation policy of the 1950s, the California Rancheria Act terminated the Tribe's existing relationship with the federal government, and the North Fork Rancheria was distributed to an individual Indian residing on the Rancheria. AR 41198; 31 Fed. Reg. 2911 (Feb. 18, 1966). In the 1970s, suit was brought against the United States for unlawful termination. In 1983, a judgment issued in *Tillie Hardwick v. United States* confirming and restoring the Tribe's status, and in 1987 the original boundaries of the North Fork Rancheria were restored and the land was declared Indian Country. AR 41198-99. The land remained in the hands of its individual owners. AR 41199. The United States recognized that it had trust obligations to the North Fork, however, and in 2002 took into trust a 61.5-acre parcel near the Rancheria for the Tribe. AR 41199.

Stand Up speculates that the North Fork band whose existence the federal government has recognized since 1916—even as its trust relationship with the government was terminated and restored—has somehow changed character over the years so that it is not the "same" tribe that was under federal jurisdiction in 1934. Nothing in the record supports that speculation. For

one thing, Stand Up mischaracterizes the California Rancheria Act and the *Tillie Hardwick* litigation. They wrongly contend (SU Br. 14) that the Act did not terminate the federal government's relationship with tribes, but only with individual Indians. To be sure, the termination *resulted in* the distribution of tribal land to individual Indians (and the termination of those individual Indians' rights to benefits), but the distribution consisted of "the land and assets of certain Indian rancherias and reservations in California," which were themselves terminated in the process. Act of Aug. 18, 1958, 72 Stat. 69, as amended by the Act of Aug. 11, 1964, 78 Stat. 390. Thus, for example, § 11 of the California Rancheria Act provided that, upon the Secretary's approval of the plan for distribution of rancheria and reservation assets, any tribal constitution or corporate charter adopted pursuant to the IRA would be revoked—terminating such tribes until the *Tillie Hardwick* litigation restored them.[7]

In the *Tillie Hardwick* litigation, individual plaintiffs representing 17 tribes—including North Fork and Picayune (which for obvious reasons does not join any of Stand Up's *Carcieri*-based arguments)—sued to restore their tribes to their status before their termination. That litigation concluded in a stipulated judgment (AR 1063-1076), which remains binding on the United States. As relevant here, that judgment states:

---

[7] Stand Up misreads the termination notice it relies upon (SU Br. 16, citing [31] Fed. Reg. 2911) as stating that none of the several terminated Rancherias listed in the notice were associated with tribes. But the cited notice merely references a provision of a 1964 law that amended the California Rancheria Act to read: "*After* the assets of a Rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families who are not members of any *other* tribe or band of Indians, shall not be entitled to any of the services performed by the United States for Indians." Pub. L. No. 88-419, 78 Stat. 390 (emphasis added) (amending Pub. L. No. 85-671, 72 Stat. 619). In other words, *after* a Rancheria had been terminated, its residents were no longer to be treated as Indians, unless they were members of some other, non-terminated tribe. This provision in no way suggests that, prior to termination, these residents were not part of a tribe associated with the now-terminated Rancherias—if anything, the use of the word "other" suggests the residents *were* members of tribes being terminated.

> The Secretary of the Interior shall recognize the Indian Tribes, Bands, Communities, or groups of the seventeen rancherias listed in paragraph 1 [which include North Fork and Picayune] *with the same status as they possessed prior to the distribution of the assets of these Rancherias under the California Rancheria Act*, and said Tribes, Bands, Communities, and groups shall be included on the Bureau of Indian Affairs' Federal Register list of recognized tribal entities pursuant to 25 CFR, Section 83.6(b). Said Tribes, Bands, Communities, or groups of Indians shall be relieved from the application of section 11 of the California Rancheria Act and shall be deemed entitled to any of the benefits or services performed by the United States for Indian Tribes, Communities or groups because of their status as Indian Tribes, Bands, Communities, or groups.

AR 1065-66 (emphasis added). Following the entry of judgment in 1983, North Fork and the other tribes (including Picayune) were restored to their prior status as tribes and accordingly listed as recognized Indian tribes eligible to receive government services administered by the BIA. 50 Fed. Reg. 6055 (Feb. 13, 1985). North Fork has been listed on the federal register of tribes ever since. *See, e.g.*, 80 Fed. Reg. 1942, 1945 (Jan. 14, 2015). At the very least, this history demonstrates that substantial evidence supports the Secretary's conclusion that the present-day North Fork is a recognized tribe that was under federal jurisdiction in 1934.

II. The Secretary's Two-Part Determination Conformed To IGRA's Requirements

A. The Secretary's Reliance On Mitigation In Finding That The Development Would Not Be Detrimental To The Surrounding Community Was Not Arbitrary, Capricious, Or Otherwise Inconsistent With IGRA

Stand Up no longer seriously presses its claim (3d Am. Compl. ¶¶ 65-68 [Dkt. 103]) that the Secretary's two-part determination failed to consider various alleged detrimental effects of North Fork's project. Nor could it—as this Court indicated earlier, the Secretary considered all the factors that IGRA required her to consider, including the specific effects that Stand Up alleges she ignored. Dkt. 42 at 30; *see also id.* at 31-39. Instead, Stand Up now contends principally (SU Br. 22-26) that 25 U.S.C. § 2719(b)(1)(A) requires the Secretary to conclude that there would be *no detriment whatsoever* from a proposed gaming facility. But this Court has already rejected that argument too, noting that Stand Up's "cramped reading" of IGRA is

inconsistent with IGRA's "overarching intent." Dkt. 42 at 34. Stand Up further contends that because IGRA and NEPA are "at cross purposes," it was improper for the Secretary to rely on the FEIS's analysis of mitigation to conclude there was no overall detrimental impact to the surrounding community (SU Br. 26-27) and that, in any event, the mitigation was inadequate (SU Br. 27-28). These latest arguments conflict with IGRA's text, the BIA's implementing regulations, and the administrative record.

1. The Secretary Was Not Required To Find There Would Be No Detrimental Effects

Stand Up's principal argument (SU Br. 22-26)—that the Secretary had a "duty to find no detriment" (SU Br. 25)—rests on a misreading of the statute. As this Court already explained:

> Contrary to the plaintiffs' apparent premise, the IGRA does not require that a new gaming development be completely devoid of any negative impacts…. All new commercial developments are bound to entail *some* costs, but the Secretary's duty under the IGRA is to determine whether those costs will be significant enough to be "detrimental to the surrounding community." The plaintiffs' reading of the IGRA would essentially preclude any new gaming establishments, since every gaming establishment is highly likely to entail *some* negative impacts on the surrounding community.

Dkt. 42 at 33-34 (citation omitted).

Stand Up's reading not only fails as a matter of common sense but also is foreclosed by a canon of construction requiring that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1988). As the Sixth Circuit explained: "Although § 2719 creates a presumptive bar against casino-style gaming on Indian lands acquired after the enactment of the IGRA, that bar 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 & Chippewa Indians v. Office of the U.S. Att'y*, 369 F.3d 960, 971 (6th Cir. 2004) (emphasis added) (citing *City of Roseville v. Norton*, 348 F.3d 1020, 1030-32 (D.C. Cir. 2003)); *see also*

Citizens Exposing Truth About Casinos v. Kempthorne, 492 F.3d 460, 469 (D.C. Cir. 2007) ("IGRA was designed primarily to establish a legal basis for Indian gaming as part of fostering tribal economic self-sufficiency, not to respond to community concerns about casinos.").[8]

Stand Up's argument is also foreclosed by the regulations BIA promulgated to implement 25 U.S.C. § 2719(b)(1)(A), which contemplate that adverse effects will occur and can be mitigated. The regulations provide that an application for a two-part determination must include "[i]nformation regarding environmental impacts *and plans for mitigating adverse impacts*," "[a]nticipated costs of impacts to the surrounding community *and identification of sources of revenue to mitigate them*," and "[a]ny other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, *including memoranda of understanding and inter-government agreements with affected local governments*." 25 C.F.R. § 292.18(a), (d), (g) (emphases added). They further provide that the Secretary will consider "all the information"—that is, information regarding "adverse impacts" *and their mitigation*—"in evaluating whether the proposed gaming establishment … would not be detrimental to the surrounding community." *Id.* § 292.21(a).

BIA's preamble also recognizes that all gaming facilities will have some costs but that such costs can be mitigated and do not preclude a favorable determination: "A determination that results in a gaming facility on after-acquired land will result in costs to the surrounding community for roads, police and fire services, reduction of property tax rolls, government services, education, housing, and problem gambling. The NEPA document will address the mitigation of significant impacts." 73 Fed. Reg. 29,354, 29,374 (May 20, 2008). The preamble

---

[8] Stand Up's attempt (SU Br. 24 n.21) to limit the Sixth Circuit's reasoning to the "restored lands" exception is untenable. The Sixth Circuit's command to construe "the exceptions" broadly must be read to include *all* of the § 2719(b) exceptions.

further notes that along with imposing costs that may be mitigated, gaming establishments also benefit the surrounding community: "The benefits of gaming on newly acquired land will be for the tribe, employees, State and local government, nearby businesses, and local economic conditions," including new jobs at the gaming facility and secondary jobs at nearby businesses, increased income and property tax revenues, and decreased unemployment and welfare payments. *Id.* at 29,374. Contrary to Stand Up's argument (SU Br. 25), consideration of these benefits is not inconsistent with determining whether a new facility would be detrimental. The Secretary thus undertook exactly the inquiry the statute and its implementing regulations contemplate.

2. The Secretary Was Permitted To Rely On The FEIS

Stand Up's argument (SU Br. 26-27) that the Secretary's decisional process was flawed because she relied on the FEIS findings regarding mitigation lacks any support in IGRA and is foreclosed by BIA's regulations, which instruct the Secretary to incorporate the NEPA process into her determination. The Secretary must consider "[i]nformation regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act." 25 C.F.R. § 292.18(a); *see also id.* § 292.21(a). The preamble explains that "[t]he Secretary must have the results of the NEPA analysis in order to consider whether or not there is detriment to the surrounding community." 73 Fed. Reg. at 29,369; *see also id.* at 29,374 ("The NEPA document will address the mitigation of significant impacts.").

The Secretary properly relied on the FEIS. Her ROD describes the impacts identified in the FEIS, AR 40464-73; describes the mitigation measures, AR 40475-500; and then relies on the FEIS in analyzing each of the seven factors that 25 C.F.R. § 292.18 requires in assessing "detrimental impacts to the surrounding community," AR 40500-28. In doing so, the Secretary took into account that the FEIS "concludes that there are no significant impacts from the Resort

after mitigation," AR 40534, but herself determined, based on all the evidence, that the facility would not be detrimental to the surrounding community. AR 40533-36. Considering the FEIS's analysis, along with the rest of the record, was proper.

3. The Secretary Adequately Considered Mitigation Of Stand Up's Alleged Detrimental Effects

BIA's regulations require the Secretary to consider seven factors "in evaluating whether the proposed gaming establishment … would or would not be detrimental to the surrounding community." 25 C.F.R. § 292.21(a); *see id.* § 292.18; *cf. id.* § 292.20(b). In her IGRA ROD, the Secretary considered each factor, analyzing potential detrimental impacts on a case-by-case basis. AR 40510-36. Her detailed consideration of those factors was the "heavy scrutiny," AR 40531-32, Stand Up claims (SU Br. 24) she failed to apply. IGRA and the regulations require nothing more. *See* 73 Fed. Reg. at 29,356 ("The Department will consider detrimental impacts on a case-by-case basis, so it is unnecessary to include a standard."). As this Court indicated earlier, the Secretary considered everything that IGRA required her to consider, including the particular effects that Stand Up alleged (*see* 3d Am. Compl. ¶¶ 65-68). Dkt. 42 at 30.[9]

The only detrimental impact that Stand Up still specifically argues (SU Br. 27-28) was inadequately mitigated is problem gambling. That is incorrect. North Fork's annual payments will fully compensate the surrounding community for the anticipated costs associated with any additional problem gambling. And for purposes of the two-part determination, the Secretary's

---

[9] Moreover, as this Court noted, *see* Dkt. 42 at 30-31, IGRA's two-part determination process does not require the Secretary to respond to comments from "members of the community" (3d Am. Compl. ¶ 66). *See* 25 C.F.R. §§ 292.2, 292.21(a); *see also* 73 Fed. Reg. at 29,367-68 (rejecting recommendation that "citizen input and State legislative participation should be included in the Secretary's determination that the casino will not be detrimental to the community … because the regulations already require consultation with appropriate State and local officials, consistent with the statutory language"); *id.* at 29,370 ("It is most appropriate that citizen comments funnel through appropriate State, local and tribal officials."). In any event, the Secretary responded to all comments in the NEPA process. Dkt. 42 at 31 n.23.

consideration of "the potential detrimental impact" of problem gambling is limited to "any anticipated costs of treatment programs." 73 Fed. Reg. at 29,369; *see* 25 C.F.R. §§ 292.18(e), 292.20(b)(5). The FEIS estimated that the additional costs to Madera County problem gambling treatment programs attributable to the new casino will be $63,606. AR 30197-98. The FEIS explained that the Tribe will fully mitigate this cost by annually paying the County $50,000 for expanded treatment services and by funding the remaining $13,606 from the Tribe's additional annual contribution of $1,038,310 to the County. AR 29753-54, 30198, 30211-12, 30509.[10] In addition, the FEIS explained that the Tribe will implement precautionary measures on the casino's premises that will reduce the amount and effects of problem gambling otherwise expected to occur. AR 29753-54, 30509. The FEIS concluded that the financial contributions and precautionary measures will mitigate the effect of problem gambling "to a less than significant level." AR 30198; *see also* AR 20753-54, 30212. The Secretary relied on these findings in her ROD, noting the financial contributions and precautionary measures, and concluding that, in light of those mitigation efforts, problem gambling would not be a significant detrimental effect. AR 40469, 40488-89, 40519, 40526. As this Court stated earlier: "The Secretary clearly considered this aspect of the problem in concluding that permitting gaming on the Madera Site would not be detrimental to the surrounding community." Dkt. 42 at 31.[11]

---

[10] The FEIS makes clear that $13,606 of the $1,038,310 contribution is for the anticipated costs of treatment programs that remains after the $50,000 contribution. AR 30211 tbl. 4.7-16.

[11] Stand Up also cursorily alludes (SU Br. 25) to impacts on traffic and the Swainson's hawk's habitat. That type of bare-bones argument requires no response. *See, e.g.*, *Mason v. Geithner*, 811 F. Supp. 2d 128, 190 (D.D.C. 2011), *aff'd*, 492 F. App'x 122 (D.C. Cir. 2012). In any event, the FEIS includes a transportation analysis, AR 30511-37, and traffic impact study, AR 31377-33606. The IGRA ROD describes the mitigation adopted, such as providing shuttles, bus shelters, and bicycle trails and widening streets, for which the Tribe "shall pay a proportionate share of costs for the recommended mitigation," AR 40482, 40489-94, 40516. The FEIS notes that one Swainson's hawk nest was found 2.6 miles north of the Madera Site, AR 30175, and that potential impact on its habitat would be mitigated by prohibiting project-

In sum, the administrative record confirms what this Court previously observed: "[T]he Secretary appears to have considered all aspects of the problem that [s]he was required to consider under the IGRA, and this Court must confer significant deference to the Secretary's expertise." *Id.* at 30.

B. The Secretary's Treatment Of Picayune's Concerns Was Not Arbitrary, Capricious, Or Otherwise Inconsistent With IGRA

Picayune's arguments (P Br. 13-27 [Dkt. 108-1]) against the Secretary's decision are foreclosed by IGRA and its regulations and contradicted by the record. As a threshold matter, the Secretary was not required to give Picayune any consideration *at all* because Picayune is not part of the "surrounding community." Her decision to consider its concerns was discretionary—and, having exercised her discretion, she reasonably reviewed the evidence in the record in reaching her conclusion. Her review was not, as Picayune argues, internally inconsistent, but rather conformed to the two distinct inquiries called for by the two-part determination.

1. Picayune Is Not A "Nearby Tribe" Within The "Surrounding Community"

Picayune's objections to the Secretary's review of its concerns fail for the threshold reason that neither IGRA nor BIA regulations required her to give Picayune any consideration whatsoever. As this Court explained earlier, because "IGRA's implementing regulations define 'nearby Indian tribe' as any tribe within a 25-mile radius of the proposed development, *see* 25 C.F.R. § 292.2, but the Picayune Tribe indisputably falls outside that radius …, the Secretary was not required to consider the Picayune Tribe's concerns at all." Dkt. 42 at 36.[12]

---

related construction activities near any active nests and by creating equally suitable, protected habitat elsewhere within the hawk's nearby territory, AR 30502. The Secretary relied on those mitigation efforts in her ROD. AR 40468, 40485-86.

[12] IGRA's regulations define "surrounding community" as "local governments and nearby Indian tribes *located within a 25-mile radius of the site* of the proposed gaming establishment."

Tribes located outside the 25-mile radius "may petition for consultation." 25 C.F.R. § 292.2. Unless such a petition is granted, IGRA's consultation process limits communication with the Secretary to State officials, local officials, and officials of "nearby Indian tribes" within the 25-mile radius. *Id.* § 292.19-21; *see supra*, at 20 n.9.

Picayune falls outside the 25-mile radius. AR 40526, 40530, 40534.[13] Nonetheless, the BIA sent a letter to Picayune enclosing a "courtesy copy" of the two-part consultation letter that was sent to local governments and tribes within the 25-mile radius. *See* AR 40530; Dkt. 30-16. Picayune, in turn, submitted a letter regarding "Petition for Nearby Tribe Status," AR 36148, and comments to the Secretary on the proposed facility's impacts on Picayune, AR 39781. The Secretary reviewed those comments and exercised her discretion to consider them.

Because Picayune falls outside the 25-mile radius, the Secretary correctly concluded that "Picayune is not a 'nearby Indian tribe' within IGRA's definition of 'surrounding community' under our regulations," AR 40534; *see* AR 40530, and that "neither IGRA nor the Department's regulations require that I consider the Picayune Rancheria's comments in this process," AR 40432. She explained, however, that based on her "discretionary authority under IGRA and 25 C.F.R. Part 292," she "deci[ded] to consider the comments submitted by the Picayune Rancheria." AR 40432. Having reviewed its concerns, she reasonably concluded: "While we must accord weight to Picayune's concerns, competition from the Tribe's proposed gaming

---

25 C.F.R. § 292.2 (emphasis added). The regulations define "nearby Indian tribe" similarly as "an Indian tribe with tribal lands located within a 25-mile radius of the location of the proposed gaming establishment." *Id.* The preamble explains that "if an Indian tribe qualifies as a nearby Indian tribe under the distance requirements of the definition, the detrimental effects to the tribe's on-reservation economic interests will be considered. *If the tribe is outside of the definition, the effects will not be considered*." 73 Fed. Reg. at 29,356 (emphasis added).

[13] There are inconsistencies in the administrative record regarding the distance between the Madera Site and Picayune's reservation, but all parties (including Picayune) agree that the distance is greater than 25 miles.

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." AR 40535.

The Secretary thus granted Picayune *far more* than it was entitled to under the statute and regulations. The Secretary was not required to consider Picayune's concerns at all, but nonetheless did so and weighed those concerns in her determination.

2. The Secretary Reasonably Weighed Picayune's Concerns, And Her Determination Was Supported By Substantial Evidence

Picayune contends (P Compl. ¶¶ 25-26 [No. 12-CV-2071, Dkt. 1]; P Br. 20-27) that the Secretary erred by giving less weight to its concerns than she would have given to those of a tribe within the 25-mile radius. Its arguments fail on multiple grounds.

First, as noted above, a tribe more than 25 miles away is entitled only to ask for consultation—not to have its concerns placed on equal footing with those of closer tribes.[14] As this Court explained:

> The weight accorded to the Picayune Tribe's comments was based on the logical premise that "[t]he 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."

Dkt. 42 at 36-37 (quoting AR 40535). The regulations do not convert a tribe beyond the 25-mile radius into a "nearby" tribe or a member of the "surrounding community" merely because the Secretary exercises her discretion to consult with the tribe and consider its concerns. Picayune points to nothing in the text of the IGRA regulations or agency guidance that would support its

[14] Picayune asserts (P Br. 23-24) that the Secretary "claimed" to treat the Picayune's comments "in a manner consistent with the definition of 'Surrounding Community' under 25 C.F.R. § 292.2," when (in its view) she did not do so (quoting AR0040530). But that assertion does not advance the analysis at all: The definition of "Surrounding Community" in § 292.2 itself permits tribes outside the 25-mile radius to petition for consideration, and as explained in the text, it does so without placing such tribes on equal footing with those closer to the project.

contrary interpretation.[15] In any event, Picayune's preferred reading must yield to the Secretary's interpretation under basic principles of agency deference.[16] The Secretary quite reasonably concluded that Picayune "is not a 'nearby Indian tribe.'" AR 40534.

Second, because the Secretary was not required to consider Picayune's concerns at all, any error in reviewing its concerns was necessarily harmless. Put another way, since Picayune is not part of the "surrounding community" and the Secretary was not required to consider any detriment to it, it cannot show that any detriment to it that she did not consider could affect her decision that the proposed facility "would not be detrimental *to the surrounding community*."

Third, even if IGRA required the Secretary to give some weight to its concerns, Picayune misstates the relevant inquiry when it frames the issue (P Br. 24) as whether the record contains "evidence of detrimental impact to the Picayune Rancheria." Under settled principles of APA review, the relevant inquiry is whether the Secretary's determination is supported by "substantial evidence," *see Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007), not whether evidence might also support a contrary determination. "'The substantial evidence test is a narrow standard of review,' requiring only 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" and an "agency conclusion 'may be supported by

---

[15] Picayune argues for a contrary interpretation by noting that the BIA recognized Picayune as an "affected Indian tribe" for the NEPA process (P Br. 22 (citing AR 1371, 4024)). But IGRA's definition of "nearby" tribe is different—and narrower—than an "affected" Indian tribe under NEPA. Under NEPA, an "affected" tribe is one for which "the effects [of a proposed action] may be on [its] reservation." *See* 40 C.F.R. § 1503.1(a)(2)(ii). NEPA's definition is not geographically limited and includes all tribes that may experience any on-reservation effects.

[16] A reviewing "court will defer to an agency's reasonable interpretation of its regulations." *Kornman v. SEC*, 592 F.3d 173, 181 (D.C. Cir. 2010). The court "need not find that the agency's construction is the only possible one, or even the one that the court would have adopted in the first instance." *Tozzi v. U.S. Dep't of Health & Human Servs.*, 271 F.3d 301, 311 (D.C. Cir. 2001). Instead, it defers unless the agency's interpretation is "plainly erroneous or inconsistent with the regulation." *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1005 (D.C. Cir. 2002).

substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.'" *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992). This Court has already stated that "the Secretary's conclusion that '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' was supported by the evidence in the record." Dkt. 42 at 37 (quoting AR 40535). That assessment is just as true today.

3. Picayune's Specific Evidentiary Arguments Are Unavailing

Picayune takes a number of passing shots (P Br. 24-27) at specific aspects of the Secretary's analysis of the competitive effects on Picayune, but none of them has merit.

First, as a threshold matter, Picayune's contention (P Br. 26) that the Secretary "was required by IGRA to make a determination regarding whether the Madera Site would pose a detriment to the Picayune" is incorrect. IGRA requires the Secretary to make only a single determination that the proposed facility would not be "detrimental to the surrounding community" as a whole. *See* 25 C.F.R. § 292.21 (Secretary makes *one* favorable or unfavorable "Secretarial Determination"). In any event, for the reasons above, Picayune is *not* part of "the surrounding community." And even if the Secretary were required to consider potential detriment to Picayune specifically, the Secretary reasonably concluded that any competitive effect on Picayune from the proposed North Fork casino was insufficient to warrant a conclusion that the project would be detrimental to the surrounding to community as a whole.

Second, Picayune is incorrect (P Br. 24-25) that the Innovation Group's assessment of the Madera County gaming market (AR 34154-279) undermines the Secretary's decision. That assessment found that the market was not oversaturated, noting, among other things, that Picayune's casino has a "reasonable amount of clientele during the off-season and reaches capacity constraints during the summer tourism season" and that Picayune was building a new

hotel to double its resort's capacity. AR 34265-66. Relying on Innovation Group's gravity model impact analysis, the FEIS projected that North Fork's facility would increase total gaming expenditures in the market by over $90 million. AR30250. It recognized that "given the competitiveness of the market, some decline in market share at competing facilities is expected" and projected a 19% revenue decline at Picayune's casino. AR 30250. It explained:

> It should be noted that even in the scenario where market share declines by 19%, the impact on the viability of operations is not one that jeopardizes the casino's ability to remain open…. A 19% revenue decline is … commonplace for incumbents in expanding gaming markets, and does not generally result in a loss in ability to operate profitably…. Finally, the current central California gaming market is not over-saturated and therefore multiple operators can successfully co-exist in the long run…. Thus, even in the worst case, … all of the facilities are expected to remain open and to *continue to generate sustainable profits for their tribal owners*.

AR 30250-51 (emphasis added). The Secretary's reliance on this analysis was reasonable.[17] After considering the detrimental impact that Picayune alleged would result from competition, she noted that Picayune's casino "has proven to be a successful operation in a highly competitive gaming market" and that competition "in an overlapping market is not sufficient, in and of itself, to conclude that [the project] would result in a detrimental impact to Picayune." AR 40535.[18]

Third, Picayune's speculation that the FEIS's analysis "may have underestimated the harm" to Picayune (P Br. 25) provides no basis for overturning the decision. "[A]n agency's predictive judgments about areas that are within the agency's field of discretion and expertise are

---

[17] Picayune's assertion (P Br. 25 n.6) that the Secretary did not consider Innovation Group's analysis and the FEIS is baseless. Her ROD was expressly "based on thorough review and consideration" of the FEIS and record. AR 40450.

[18] *Cf. Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) (noting that tribe's contention that if neighboring tribe's two-part "application is granted, its own casino operations will become less profitable … does not resemble any [interest] that the law normally protects"); *id.* ("[I]t is hard to find anything in [IGRA] that suggests an affirmative right for nearby tribes to be free from economic competition").

entitled to particularly deferential review as long as they are reasonable." *EarthLink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006). Picayune notes (P Br. 25) that the FEIS's prediction cannot be "empirically tested," but that is precisely when deference to the agency's decision is greatest. *See* Dkt. 42 at 15-16 (citing *Rural Cellular Ass'n v. FCC*, 588 F.3d 1095, 1105 (D.C. Cir. 2009) ("In circumstances involving agency predictions of uncertain future events, complete factual support in the record for the [agency]'s judgment or prediction is not possible or required ….").).

Fourth, Picayune's contention (P Br. 25) that the FEIS was out of date when the Secretary issued her decision in 2011 fails because Picayune has not even alleged in its Complaint, let alone established through briefing, that it was unlawful for the Secretary not to have prepared a supplemental EIS. *See City of Olmsted Falls v. FAA*, 292 F.3d 261, 274 (D.C. Cir. 2002) (rejecting claim that ROD was based on outdated EIS because plaintiff "failed to meet its burden" to show "it was arbitrary and capricious for [agency] not to undertake a supplemental EIS"). Even if the issue were properly before this Court, Picayune's contention is baseless. A "supplemental EIS is only required where new information 'provides a *seriously* different picture of the environmental landscape,'" and the agency's "determination that the new information was not significant enough to warrant preparation of a supplement … is entitled to deference." *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004). Further, even "new information that is environmentally significant" does not require a supplemental EIS if the agency "could reasonably conclude that the information did not significantly transform the nature of the environmental issues." *Id.* Picayune's current speculation (unsupported by any new information) about what a supplemental EIS might have shown does not transform the nature of the issue and cannot trigger an obligation to prepare a supplemental EIS.

Fifth, it does not matter that Picayune's own consultants predicted a greater impact than the Innovation Group did. The main difference between the FEIS and the evidence Picayune submitted was that the FEIS predicted a 19% revenue decline and Picayune consultants predicted 22-32%. P Br. 26 (citing AR 9351). That difference does not establish that the FEIS's prediction was unreasonable or a different estimate would have affected the Secretary's conclusion.[19] She specifically considered the effects Picayune predicted would occur from the loss of that revenue but determined that its casino was and would remain profitable and thus that there would be no detrimental impact requiring a negative two-part determination. AR 40535.

4. The Secretary's Reasoning Tracked The Two Inquiries Required Under 25 U.S.C. § 2719(b)(1)(A) And Was Not Internally Inconsistent

Picayune makes several related arguments (P Br. 14-20) that the Secretary's determination was improper or internally inconsistent. Those arguments fail to appreciate either the § 2719(b)(1)(A) exception's purpose or the distinct inquiries called for in the two-part determination. The Secretary's determination was both consistent and reasonable.

First, Picayune is wrong to suggest (P Br. 14-15) that the very issuance of the Secretarial Determination violated IGRA because the statute favors gaming on lands acquired before its enactment. Although IGRA generally prohibits gaming on after-acquired land, it has exceptions, including the exception permitting gaming if the Secretary makes a favorable determination in which the Governor concurs. *See* 25 U.S.C. § 2719(b)(1)(A). As this Court recognized, "IGRA was intended to allow Indian Tribes like the North Fork 'to engage in gaming on par with other

[19] *See, e.g.*, *Marsh v. Ore. Nat. Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *cf. TOMAC v. Norton*, No. CV 01-0398, 2005 WL 2375171, at *5 n.4 (D.D.C. Mar. 24, 2005) ("The record does reflect a conflict between the opinions of [the casino opposition's] experts and those of BIA and its consultants, but BIA is entitled to reasonably rely on its own experts, which it has done in this case.") (citations omitted), *aff'd*, 433 F.3d 852 (D.C. Cir. 2006).

tribes,' *Citizens Exposing Truth*, 492 F.3d at 468, not to insulate Indian gaming from normal market forces." Dkt. 42 at 39; *see also Sokaogon Chippewa Community*, 214 F.3d at 947.

Second, Picayune is wrong to argue (P Br. 14-15) that the Secretary's determination was inconsistent with DOI's January 3, 2008 memorandum. That memorandum was wholly irrelevant to the Secretary's determination because DOI withdrew it on June 13, 2011, before the two-part determination issued. *See* DOI, Office of the Secretary, Guidance for Processing Applications to Acquire Land in Trust for Gaming Purposes at 1, 7 (June 13, 2011), *available at* http://www.bia.gov/cs/groups/webteam/documents/text/idc1-028384.pdf. The DOI guidance in place at the time of the Secretary's determination made clear that the only applicable requirements were in IGRA and the existing regulations. *Id.* at 3-7.

In any event, the Secretary's two-part determination was entirely consistent with the withdrawn January 3, 2008 memorandum. That memorandum provided guidance on how to apply the greater scrutiny of anticipated benefits generally required for off-reservation acquisitions "for those applications that *exceed a daily commutable distance from the reservation*," AR 4204 (emphasis added), specifically requiring consideration of how an acquisition *that exceeds a daily commutable distance* would impact tribal unemployment and reservation life, AR 4204-05. But the Madera Site is located within a commutable distance to North Fork, so the specific guidance does not apply. Nonetheless, the Secretary explained that the proximity presents "employment opportunities for a significant portion of tribal citizens," "will provide an opportunity for tribal citizens living far away to return to their community," and "will help correct the lasting impacts of previous Federal Indian policy eras, which encouraged tribal citizens to leave their communities." AR40532. And consistent with the memorandum's

guidance for off-reservation acquisitions generally, the Secretary recognized and applied "heavy scrutiny" to North Fork's application but found it withstood such scrutiny. AR 40531-32.

Third, Picayune's contends (P Br. 16-17) that the Secretary treated the effect of competition inconsistently, considering the effect of competition on North Fork in determining whether alternative sites might be appropriate but not considering the effect of competition on Picayune from the choice of the Madera Site. This Court has already rejected that argument:

> [I]t was rational for the Secretary to reject potential alternative[sites] if they would not, in the Secretary's informed judgment, allow for a large enough development to provide the North Fork Tribe with revenues that would meet the purpose and need of the proposed action. It was not inconsistent with this rationale for the Secretary to refuse to eliminate the Madera Site because, although it would meet the purpose and need of the proposed action, it would have a competitive economic impact on neighboring gaming operations.

Dkt. 42 at 42.

The Secretary considered which site would fulfill the project's purpose and the need driving it—improving the Tribe's socioeconomic status by providing a revenue source that could allow it to establish economic self-sufficiency, strengthen tribal government, provide employment opportunities, fund social services, and improve the quality of tribal life. AR 40451. She concluded that the Madera Site would fulfill that purpose and need, *see* AR 40451, 40453, 40532-33, and other alternatives would not—for many reasons, including but by no means limited to nearby gaming facilities, *e.g.*, AR 40457-58, 40533. Specifically, the HUD Tract was unsuitable not only because of proximity to three existing tribal gaming facilities but also because of its varied topography, sensitive biological features, limited access, rural location, and expensive construction costs. AR 40454. The Avenue 7 and Avenue 9 sites were rejected not only because of nearby casinos but also because they were constrained by train tracks, a casino would be inconsistent with existing land uses, and the development would not inure primarily to the benefit of Madera County. AR 40454. Gaming on the North Fork Rancheria was rejected

not only because of the level of existing competition in the market but also because it was situated "in a remote, environmentally-sensitive area that is difficult to access," commercial development was incompatible with existing land use, and the hilly, rocky nature of the land made construction costs far too expensive to support a feasible facility. AR 40457-58, 40533.

That analysis is fully consistent with the Secretary's treatment of the effects of economic competition on Picayune: She considered those effects but found that they were not dispositive in determining whether the project would be detrimental to the surrounding community.

*Fourth***,** Picayune is also wrong in contending (P Br. 18-19) that the Secretary's treatment of distances is internally inconsistent. The Secretary considered distances as part of two distinct inquiries. She considered the 36-mile distance between the Madera Site and the Tribe's headquarters in analyzing whether the facility would benefit the Tribe through employment, job training, and career development, AR 40501; *see* 25 C.F.R. § 292.17(b), and was in the best interest of the Tribe and its members, AR 40532-33; *see* 25 C.F.R. § 292.21(a). As noted above, she reasonably concluded that because the Madera Site was within commuting distance of North Fork's headquarters and the homes of most of its tribal citizens, the development presented "immediate employment opportunities for a significant portion of tribal citizens" and was "in the best interest of the Tribe and its members." AR 40532-33. By contrast, the Secretary considered the distance between the Madera Site and Picayune's casino in analyzing whether Picayune was outside the "surrounding community," defined by the regulations by reference to a 25-mile radius. AR 40526, 40530, 40534-35. There is no inconsistency here.

*Fifth***,** contrary to Picayune's contentions, (P Br. 19-20) of the Secretary's treatment of revenue impacts, employment, and programs was also fully consistent. Once again, the Secretary considered those factors as part of two distinct inquiries. The Secretary properly

concluded that the Madera facility would be in North Fork's best interest because it would generate revenue for "essential services to tribal citizens, such as health care and education, where few currently exist," revenue to strengthen North Fork cultural programs and initiatives, and job opportunities for tribal citizens to work at the facility and implement on-reservation tribal programs. AR 40532. When analyzing the different question whether the development would be detrimental to the surrounding community, she reasonably concluded that the potential effect of economic competition on revenue and employment at another gaming facility did not render the Madera facility detrimental to the surrounding community. AR 40534-35. Those conclusions were neither inconsistent nor unreasonable.

At bottom, Picayune's claim is that even though substantial evidence showed that the net economic effect of North Fork's entry into the gaming market would not jeopardize the Picayune casino's ability to remain profitable, it was nonetheless unreasonable for the Secretary to issue a favorable Secretarial Determination if it "would result in the Picayune Tribe having a smaller slice of a larger gaming pie." *See* Dkt. 42 at 38. But Picayune already had a large slice at the time of the Secretary's decision: The record showed that Picayune's casino "reaches capacity constraints during the summer tourism season," Picayune was enlarging its facility, and it gives per capita payments to its citizens. AR 34265-66, 40535. North Fork has none of that, and the record showed that it was not economically or environmentally feasible for North Fork to build a casino on the HUD Tract or the North Fork Rancheria property held in trust for individual tribal members. *See, e.g.*, AR 40453-54, 40457-58, 40533. The Secretary reasonably determined that development on the Madera Site would allow North Fork to share in the benefits of gaming, without precluding Picayune from sharing them too.

C. The Secretary Properly Considered North Fork's Historical Connection To The Madera Site

The IGRA ROD includes a seven-page analysis that considers "[e]vidence of [North Fork's] significant historical connections, if any, to the land [the Madera Site]." AR 40504-10. Picayune's challenges (P Br. 10-13) to the Secretary's consideration of that evidence misunderstand both the applicable regulations and her analysis.

1. The Secretary Considered The Relevant Evidence

BIA regulations require the Secretary to consider "[e]vidence of [the tribe's] significant historical connections, if any, to the land." 25 C.F.R. § 292.17(i); *see id.* § 292.21(a). The Secretary is required only to consider any such evidence as one of ten factors relevant to the two-part determination. *See* 25 C.F.R. § 292.17. "[H]istorical connections are not mandatory under IGRA for purposes of" a two-part determination. 73 Fed. Reg. at 29,368.[20]

"Significant historical connections" exist if either "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, *or* 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 (emphases added). The preamble emphasizes that the latter criterion is broad: It is *not* "limited to ancestral homelands," 73 Fed. Reg. 29,360; *see also id.* at 29,361 ("may or may not include [lands] that are close to aboriginal homelands"); and it does *not* require "uninterrupted connection" or "historically exclusive use," which would "create too large a barrier to tribes in acquiring lands" and be "beyond the scope of the regulations and inconsistent with IGRA," *id.* at 29,360; *see also id.* at 29,366 ("not limited to the tribe's exclusive use and occupancy area"). "The regulation

---

[20] *See id.* (such a requirement is "beyond the scope of the regulations and inconsistent with IGRA"); *id.* ("The two-part Secretarial Determination does not require a tribe to have an ancestral tie to the lands they seek to acquire.").

does not require that the occupancy and use be 'long term' or that the tribe claim any ownership or control, exclusive or otherwise, over the land." *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, No. CV 13-849, 2014 WL 7012707, at *16 (D.D.C. Dec. 12, 2014).[21]

Further, the tribe need not have "occupied or used the Parcel or the land adjacent to it"—only land within its "vicinity." *Id.* "The regulations simply require that the Parcel be located within an area where the tribe has significant historical connections, which, in turn, can be demonstrated through tribal use or occupancy of land in the vicinity of the Parcel." *Id.* at *18. "Vicinity" is not defined, but the Secretary "previously determined that the Karuk Tribe of California had established significant historical connections 'where the parcel owned by the Tribe was 38 miles from the tribal headquarters and not in an area of exclusive use by the tribe.'" *Id.* at *19. In sum, the significant historical connections inquiry is not rigid; it means "something more than evidence that a tribe merely passed through a particular area," 73 Fed. Reg. at 29,366, but requires only that the tribe have used or occupied land in the vicinity of the parcel.

The IGRA ROD considered the relevant criteria. The Secretary recognized that "IGRA does not require an applicant tribe to demonstrate an aboriginal, cultural, or historical connection to the land" but that the regulations required her to consider the existence of a historical connection as one factor in evaluating North Fork's best interest. AR 40504. She noted that

---

[21] The court in *Confederated Tribes* considered 25 C.F.R. § 292.2's definition in the context of the initial reservation exception, which *requires* a finding of "significant historical connections." *See* 25 C.F.R. § 292.6(d) (under initial reservation exception, "the tribe must demonstrate the land is located … within an area where the tribe has significant historical connections"); *see also id.* § 292.12(b) (under restored lands exception, "[t]he tribe must demonstrate a significant historical connection to the land"). As set forth above, the two-part determination *does not require* any such finding.

subsistence use or occupancy means "something more than a transient presence in an area." AR 40504. She considered, *inter alia*, the following evidence[22]:

- Joe Kinsman, an American who in 1849 settled in the San Joaquin Valley near the Madera Site, married a Mono Indian and had children who are the ancestors of many tribal citizens. AR 40504-05. He also drove and traded hogs by the Site. AR 40508.

- In 1851, Federal commissioners negotiated treaties with Indian leaders of the Valley, and the signatories included ancestors of tribal citizens. One treaty referenced the Mono Indians and provided that they would become beneficiaries of a reservation located in the Valley near the Madera Site. AR 40506; *see also* AR 38504.

- In 1852, Federal treaty commissioner G.W. Barbour reported that the Valley floor near the Madera Site was an area of intertribal use and was used by Mono Indians to hunt, fish, and otherwise share resources there. AR 40505; *see also* AR 38503.

- In the 1850s, ancestors of tribal citizens are listed among the Indians who lived near the Madera Site at the federally operated Fresno River Farm, and federal Indian agents counted Mono Indians among the Indians who "live on, visit, and recognize [the Farm] as their home and headquarters." AR 40507. The Mono were the most populous tribe living at the Farm identified in the agents' reports. AR 40506-08.

- Late-nineteenth-century documents show that tribal ancestors traveled through the Valley floor while herding sheep for local ranches, working in the timber industry, and picking grapes in vineyards "in very close proximity to the Site." AR 40508.

- In 1916, federal Indian agent John Terrell reported that many North Fork Indians regularly go to the Valley to work in the grape-picking, farming, and sheep-shearing industries. AR 40509. In the early 1900s, many tribal families, including some still-living citizens, worked in those industries near the Madera Site. AR 40508-09. Madera was the closest city for tribal members to shop and socialize. AR 40509.

- In the twentieth century, tribal women gathered material to make their renowned baskets during trips to work on farms in the Valley near the Madera Site. AR 40509.

Based on this and other evidence, the Secretary found that "in the vicinity of the Site" tribal ancestors hunted game, gathered plants and other materials, occupied the Fresno River Farm, and earned a living, including from logging and agriculture. AR 40509-10. She therefore concluded that North Fork "has a significant historical connection to the Site." AR 40510.

---

[22] The Secretary's review was based on the BIA regional office's analysis of North Fork's application, which included pertinent documentation of the evidence, *see* AR 38502-09.

2. Picayune's Objections Are Meritless

Picayune's contention (P Br. 12) that the evidence failed to "show" "occupancy or subsistence use" begins from a mistaken premise, ignores relevant evidence, and misunderstands the relevant criteria. The Secretary was not required to "show" a historical connection; she was required only to "consider" evidence of such a connection, "if any." *See* 25 C.F.R. §§ 292.17(i), 222.21(a). In any event, the evidence she reviewed documented that tribal members hunted, gathered, traded, worked, and lived in the vicinity of the Madera Site—not that they merely passed through or had a transient presence in the area. AR 40504-10. Even if North Fork were required to "show" a significant historical connection to the land (and it is not), the evidence would be sufficient. *See, e.g.*, *Confederated Tribes of Grand Ronde Cmty.*, 2014 WL 7012707, at *18 (upholding determination based on evidence of hunting, trade, use of natural resources, and residency). Moreover, to show a "significant historical connection" to land, the land need only be "in the vicinity of 'a particular site with direct evidence of historic use or occupancy,'" *id.* at *18, which can include land "'38 miles from the tribal headquarters and not in an area of exclusive use by the tribe,'" *id.* at *19. Because its tribal headquarters are within 38 miles of the Madera Site, North Fork necessarily occupies and uses land in the vicinity of the Site.

Picayune's argument (P Br. 12-13) that the record contains evidence that "directly contradicts the Secretary's findings" is both wrong and inconsequential. The report of Robert Manlove—who worked for Chukchansi attorneys in opposing North Fork's project, *see* AR 3, 36474, 36561-62—does not contradict the Secretary because the report addresses an irrelevant question: whether the Site is part of North Fork's "original homelands." AR 3. A tribe may have "significant historical connections" to land that is *not* its "ancestral homelands." 73 Fed. Reg. 29,360; *see also id.* at 29,361 ("may or may not include [lands] that are close to aboriginal homelands"); *Confederated Tribes of Grand Ronde Cmty.*, 2014 WL 7012707, at *16.

Manlove's opinion that North Fork's "homelands" are in the Sierra Nevada foothills (AR 3) is not inconsistent with the Tribe's occupancy and use of the San Joaquin Valley a few dozen miles away.[23] In any event, it is inconsequential because the Secretary was entitled to rely on the BIA's analysis, AR 38502-09, rather than defer to an opponent's expert, *see supra* at 29 n.19, and her analysis adequately explains her conclusion.[24]

Finally, this Court need not address Picayune's argument (P. Br. 10-11) that the ROD's treaty analysis was flawed, because the Secretary independently reviewed evidence of the Tribe's occupancy and use of land in the vicinity of the Madera Site and on that alternative basis found that the Tribe "has a significant historical connection to the Site." AR 40510.[25] A tribe may have "significant historical connections" to land if *either* the occupancy-and-use *or* the treaty criterion is met. 25 C.F.R. § 292.2; *see Confederated Tribes of Grand Ronde Cmty.*, 2014 WL 7012707, at *15 & n.13. Because the Secretary had an independent basis for her conclusion, any error in her treaty analysis was harmless. Any error was also harmless because (1) the Secretary was not required to make any determination of "significant historical connections"—only to *consider* such evidence, *if any*—and (2) that consideration is only in the context of determining whether the proposed facility is in North Fork's best interest. *See* 25 C.F.R.

[23] Similarly, it does not matter that Gaylen Lee's memoirs may be evidence that North Fork's ancestral "homeland" is in the Sierra Nevada (*see* P Br. 12-13). The BIA and Secretary considered Lee's memoirs and found that they supported North Fork's historical connection to the Site because they documented that tribal women gathered resources from the San Joaquin Valley near the Madera Site to make baskets. AR 38508, 40509.

[24] *See Verizon v. FCC*, 740 F.3d 623, 643-44 (D.C. Cir. 2014) (court must uphold agency's "factual determinations if on the record as a whole, there is such relevant evidence as a reasonable mind might accept as adequate to support the conclusion") (citation omitted); *Confederated Tribes of Grand Ronde Cmty.*, 2014 WL 7012707, at *18.

[25] *Cf., e.g.*, *County of Rockland v. FAA*, 335 F. App'x 52, 56 (D.C. Cir. 2009) (declining to consider plaintiffs' challenge to alternative basis for agency decision where another basis was lawful); *Eagle-Picher Industries, Inc. v. EPA*, 822 F.2d 132, 145 n.65 (D.C. Cir. 1987) (same).

§§ 292.17(i), 292.21(a). There is no reason to believe—and Picayune has made no persuasive case—that the Secretary would have changed her determination if she had found that the land expressly set aside for the Tribe's Mono ancestors in the Camp Barbour Treaty, *see* AR 40506, was actually located a few miles away from the Madera Site, *see* AR 39856.

In any event, there was sufficient evidence to support the Secretary's conclusion that the Madera Site is within the boundaries of a North Fork reservation under a related unratified treaty—the Camp Belt Treaty. Because Native groups that survived the devastating diseases and land disentitlements of the 1850s were absorbed into other Native groups in the area, modern North Fork citizens can trace their ancestry to multiple Native groups listed in the historical records of the 1850s. AR 38504-06, 40507-08. The evidence showed that Native groups to which modern North Fork citizens can trace their ancestry signed three related San Joaquin Valley treaties in 1851 that set aside tracts of contiguous land, including the Camp Belt Treaty, which specifically encompassed the Madera Site. AR 38504, 39856. Based on that evidence, the Secretary could reasonably conclude that the Madera Site was located within the unratified "reservations contemplated by the San Joaquin Valley treaties for North Fork's predecessors," including the Camp Belt Treaty, and thus met the criteria in 25 C.F.R. § 292.2. *See* AR 40509.

III. The State Referendum On The California Legislature's Ratification Of The Compact Does Not Undermine Any Of The Secretary's Prior Decisions

Plaintiffs argue that the November 2014 referendum on the California Legislature's ratification of the North Fork Compact invalidates each of the Secretary's prior decisions under review—the October 2013 decision to place the compact into effect via notice in the Federal Register (SU Br. 35-37), the November 2012 decision to take the Madera Site into trust (SU Br.

18-21; P Br. 7-9), and the September 2011 two-part determination (SU Br. 19; P Br. 8).[26] As a matter of federal law, however, the state referendum could not and did not invalidate any of the Secretary's previous determinations. At the time they were made, the Secretary's decisions were based upon facially valid submissions from California's elected officials, upon which the Secretary properly relied in fulfilling her own statutory obligations under IGRA. Now that the Secretary has reasonably discharged those obligations under federal law, her actions cannot be undone by subsequent state-law developments.

That is so for two related reasons. *First*, the Secretary was entitled to rely on the facially valid submissions of state officials called upon to play a role in IGRA's cooperative federal-state regime; she was under no obligation (and was in no position) to question their actions on state-law grounds, to make predictions about the outcome of nascent state referendum efforts, or to hold the federal regime in abeyance for more than a year until the state referendum process played out. Indeed, she acted in strict accord with BIA regulations governing her handling of compacts submitted for her approval. The Compact was thus validly "entered into" and placed "in effect" under IGRA. 25 U.S.C. § 2710(d)(1). *Second*, any state action seeking to nullify a compact after it had been entered into and had taken effect under federal law would conflict with the process federal law prescribes to ensure that tribes may realize their statutory benefits and frustrate IGRA's central objective. Accordingly, whatever effect a state-law referendum might have *before* state officials have submitted a compact for approval by the Secretary and it has taken effect under federal law, under the circumstances of this case, the November 2014 referendum—to the extent it purported to nullify the Compact—is preempted by IGRA.

[26] Picayune is in no position to seek summary judgment on the basis of the referendum because its Complaint lacks any allegations to support a judgment on that basis. While this Court thus need not consider Picayune's arguments, North Fork will respond to them nonetheless.

In any event, even if the 2012 Compact were held invalid under federal law, that would provide no basis for vacating the Secretary's two-part and trust decisions. The Governor had not even *executed* the Compact at the time of the two-part determination, and the Legislature did not ratify it until long after the Secretary had taken the Madera Site into trust. Simply put, an executed or ratified compact is not a prerequisite to either the two-part or the trust decision. For that reason, invalidation of the Compact would not constitute a "change in core circumstances" (SU Br. 18-21; P Br. 8) sufficient to warrant vacatur of either determination.

A. The Secretary Was Entitled To Rely On California's Facially Valid Submission Of The Compact For Her Approval

The Secretary reasonably relied on the State's submission of the Compact for her approval and lawfully published notice of the Compact in the Federal Register notwithstanding the ongoing efforts to overturn the ratification of the Compact through a referendum. Indeed, under IGRA and its implementing regulations, the Secretary was not even *permitted*—let alone required—to look behind the State's submission to question it on state-law grounds or to hold the federal approval process in abeyance to await the outcome of plaintiffs' referendum effort. As a general matter, federal officials are entitled to rely on the facially valid actions of state officials without independently inquiring into their validity under state law. And with respect to IGRA in particular, the BIA has promulgated regulations—entitled to *Chevron* deference, *see Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982-83 (2005)—that prescribe exactly how the Secretary is to determine whether a compact has been properly submitted for federal approval. The Secretary followed precisely those procedures here.

1. IGRA Requires Federal Officials To Rely On State And Tribal Officials To Execute Compacts In Accordance With State And Tribal Law Before Submitting Them For Secretarial Approval

IGRA prescribes the exclusive process under which tribal-state compacts are entered into and take effect under federal law—the prerequisites for a tribe to conduct class III gaming under IGRA. *See* 25 U.S.C. § 2710(d)(1)(C) (authorizing class III gaming "conducted in conformance with a Tribal-State compact *entered into* by the Indian tribe and the State … that is *in effect*" (emphasis added)). That process begins with the negotiation of a compact between a tribe and a state. *Id.* § 2710(d)(3). The state is obligated to negotiate with the tribe and to do so in good faith, *id.*, but the particular manner in which a state and tribe bind themselves to a compact is governed by state and tribal law (provided it is not inconsistent with federal law). Once the tribe and state have executed a compact, IGRA requires the compact to be submitted to the Secretary for approval before the compact may go into effect under federal law. *Id.* § 2710(d)(8)(C).

Once a compact has been submitted for secretarial approval, state law has no further part to play. At that point, IGRA governs the Secretary's obligations. And it requires her to act quickly. The Secretary has just 45 days either to approve the compact or to disapprove it on one of three specific statutory grounds. 25 U.S.C. § 2710(d)(8)(B)-(C). If the Secretary does not affirmatively approve or disapprove the compact within that 45-day period, "the compact shall be considered approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter." *Id.* § 2710(d)(8)(C). And once the compact has been approved or considered approved, IGRA requires the Secretary to publish notice of such approval in the Federal Register, *id.* § 2710(d)(8)(D), whereupon the compact takes effect, *id.* § 2710(d)(3)(B).

To allow that process to operate within the tight schedule that Congress prescribed, BIA regulations make clear that the Secretary is not required to conduct her own inquiry into the intricacies of state or tribal law to determine whether state or tribal officials properly discharged

their own responsibilities in executing the compact. Rather, BIA regulations state that "[t]he Secretary has the authority to approve compacts … 'entered into' by an Indian tribe and a State, *as evidenced by the appropriate signatures of both parties*." 25 C.F.R. § 293.3 (emphasis added). In other words, while IGRA charges state and tribal officials with executing a compact in conformance with the laws of their respective governments, whether a compact has been "entered into" under IGRA is a question of federal law that is answered by reference to the signatures of the responsible state and tribal officials. And to ensure that those signatures were rendered appropriately, the regulations require that the submission of a compact include a "[c]ertification from the Governor or other representative of the State that he or she is authorized under State law to enter into the compact," *id.* § 293.8(c), and a "tribal resolution or other document … that certifies that the tribe has approved the compact … in accordance with applicable tribal law," *id.* § 293.8(b).

Each of those steps occurred here. The Tribe and the State executed a compact in August 2012. ARGC 226. The State submitted the Compact to the Secretary for approval in July 2013 (after it was ratified by the California Legislature). ARGC 5-13. The Compact bore the signatures of the Governor of California and the Chairperson of the North Fork (ARGC 226) and was accompanied by copies of the relevant provisions of the California Government Code and the state assembly bill ratifying the Compact (ARGC 5-13), as well as by a resolution from North Fork providing the necessary tribal authorization (ARGC 45-47).[27] The Secretary took no action on the Compact within the 45-day period IGRA prescribes, so that the Compact was

[27] In particular, Cal. Gov. Code § 12012.25(d) provides: "The Governor is the designated state officer responsible for negotiating and executing, on behalf of the state, tribal-state gaming compacts with federally recognized Indian tribes located within the State of California pursuant to the federal Indian Gaming Regulatory Act of 1988 (18 U.S.C. Sec. 1166 to 1168, incl., and 25 U.S.C. Sec. 2701 et seq.) for the purpose of authorizing class III gaming, as defined in that act, on Indian lands within this state."

approved by operation of law. In October 2013, the Secretary published the required notice in the Federal Register, upon which the Compact took effect. 78 Fed. Reg. 62,649 (Oct. 22, 2013).

2. Federal Officials Are Entitled To Rely On The Facially Valid Actions Of State Officials

Courts have long recognized that federal officials are entitled to rely on the facially valid actions of state officials within federal regimes that depend upon state involvement—and, relatedly, that federal officials should not be put in the position of looking behind actions undertaken by their state counterparts to assess their legality under state law.[28] The case law to this effect has developed principally in two contexts—state ratification of constitutional amendments under Article V of the U.S. Constitution and state retrocession of jurisdiction over Indian lands to the federal government under 25 U.S.C. § 1323.

In particular, the Supreme Court held that ratification of the Nineteenth Amendment was valid, even if the ratifying resolutions of Tennessee and West Virginia were in violation of state legislative rules and procedures. *Leser v. Garnett*, 258 U.S. 130, 137 (1922). It ruled that, because states were undertaking a federal function in ratifying the amendment, official notice of ratification, submitted by these states to the U.S. Secretary of State, was conclusive for purposes of federal law—as to the Secretary in the first instance and, following the Secretary's reliance upon such notice, to the courts as well. *Id.*

Similarly, the D.C. Circuit's predecessor court held that the U.S. Secretary of State acted lawfully when he accepted ratification notices from three-fourths of the states and announced that the Eighteenth Amendment had been adopted, regardless of whether those notices were valid under state law. *U.S. ex rel. Widenmann v. Colby*, 265 F. 998, 999-1000 (D.C. Cir. 1920). The

[28] Stand Up acknowledges this principle in connection with the Governor's concurrence with the two-part determination. *See* SU Br. 28 ("[T]he secretary was not bound at the time to inquire to [*sic*] the legality of the concurrence in authorizing gaming at the Madera site[.]").

petitioner in that case claimed that state officials should not have submitted notice to the Secretary. The court of appeals rejected that line of argument, stating that the Secretary "had no authority to examine into that matter, to look behind the notices." *Id.* Accordingly, the Secretary had no choice but to perform the duties imposed upon him by the statute, namely to accept the state notices and to announce the adoption of the Eighteenth Amendment. *Id.* at 1000.

The retrocession cases follow the same logic.[29] They arose after the Secretary of the Interior accepted gubernatorial proclamations of retrocession under 25 U.S.C. § 1323 and gave effect to the retrocession by publishing notice in the Federal Register. A number of individuals challenged the retrocessions as invalid under state law. Courts held that their validity under state law was irrelevant: "The acceptance of the retrocession by the Secretary … made the retrocession effective, whether or not the Governor's proclamation was valid under [state] law." *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979); *see also, e.g.*, *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191 (1978); *United States v. Brown*, 334 F. Supp. 536, 540-41 (D. Neb. 1971). As one court explained:

> [O]nce the Secretary received from the state officials what appeared to be an official act of the state offering a retrocession, he was entitled to rely thereon for purposes of the acceptance authorized by the federal statute. If the elected representatives of the State … acted beyond their power in sending the Secretary of [the] Interior a notice offering a retrocession of jurisdiction over certain Indian country, then they must answer to the people of the state for their negligence.

Omaha Tribe of Neb. v. Village of Walthill, 334 F. Supp. 823, 831-32 (D. Neb. 1971).

---

[29] The retrocession cases arose from two sets of federal statutes. In 1953, Congress delegated to some states jurisdiction over most crimes and many civil matters in Indian Country within their borders, and gave other states the option to acquire such jurisdiction. *See* Pub. L. No. 83-280; Cohen's *Handbook of Federal Indian Law* § 6.04[3][a]. Congress later provided that states could retrocede such jurisdiction to the federal government, as codified at 25 U.S.C. § 1323 ("The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to [Pub. L. No. 280]."). The litigation involved challenges to the validity of states' retrocession of jurisdiction.

The courts reached this conclusion based on "[t]he plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action." *Oliphant*, 544 F.2d at 1012 (quoting *Brown*, 334 F. Supp. at 541). Thus, "[t]he federal government, having the power to preempt jurisdiction over [Indian] Reservation[s], had the power to so define and construe the word 'retrocession' as to remove from the determination of federal assumption of jurisdiction any question of the procedural validity or invalidity of the state's act of retrocession." *Id.* (quoting *Brown*, 334 F. Supp. at 541). These courts accordingly held that "retrocession by the State" in 25 U.S.C. § 1323 was fulfilled by a state's apparently valid act of retrocession, regardless of whether the act was actually valid under state law. *Oliphant*, 544 F.2d at 1012; *Omaha Tribe*, 334 F. Supp. at 831-32; *Brown*, 334 F. Supp. at 541. Similarly, here, as discussed further below, the Secretary has the authority to interpret, and has interpreted, the term "entered into" in IGRA in a manner that does not require any inquiry into the validity of the compact under state law if the state's submission is facially valid.

3. California's Submission Of The Compact To The Secretary Was Facially Valid And Triggered The Secretary's Obligations Under IGRA, Despite The Possibility Of A State Referendum In The Future

The Secretary reasonably relied on California's submission of the Compact for her approval, under both the general principles set forth above and the specific terms of IGRA and BIA regulations. She was under no obligation to look behind the State's submission to question the Governor's and Secretary of State's representations. And she was not at liberty (as Stand Up wrongly argues, SU Br. 36-37) to reject the Compact submitted by the State because of the mere *possibility* that opponents of the North Fork project would eventually qualify a referendum for statewide ballot; the electorate would vote to overturn the Legislature's ratification; the

referendum would be upheld by California state courts against any state-law challenges; and the federal courts would find a place for post-hoc state referenda under federal law.

The Compact that California submitted to the Secretary for approval had every indication of validity. It bore the signatures of California's Governor and North Fork's Chairperson and the official state seal and signature of California's Secretary of State. ARGC 226. Those signatures conclusively establish that the Compact had been "entered into" for purposes of federal law. 25 C.F.R. § 293.3 ("The Secretary has the authority to approve compacts or amendments 'entered into' by an Indian Tribe and a State, *as evidenced by the appropriate signatures of both parties*.") (emphasis added). The Secretary was required to look no further than the signatures and the tribal and state certifications that accompanied them. *Id.* § 293.8(b), (c).

Moreover, the letters from California's elected officials that accompanied the State's submission expressly stated that the Compact had been "entered into" and was being submitted for the Secretary's approval. The letter from the California Governor's office states:

> On behalf of the State of California, Governor Brown has *entered into* compacts with the North Fork Rancheria Band of Mono Indians and the Wiyot Tribe. Pursuant to Title 25, United States Code, section 2710(d)(8) and California Government Code section 12012.54, I am forwarding you, through the California Secretary of State, original compacts *for the Secretary of the Interior's review and approval*.

ARGC 7 (emphasis added). In turn, the California Secretary of State's letter stated: "Pursuant to California Government Code § 12012.25, Subdivision (f), I am forwarding you the Tribal-State Gaming Compacts *entered into* by the State of California with the North Fork Rancheria of Mono Indians and the Wiyot Tribe." ARGC 5 (emphasis added).[30] Thus, both the California

---

[30] Stand Up misstates the terms of the State's submission in stating (SU Br. 37) that "[w]hen 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" (emphasis added).

Governor's office and the California Secretary of State expressly informed the Secretary of the Interior that the North Fork Compact had been "entered into" by the State.[31]

To be sure, the California Secretary of State also informed the Secretary of the Interior that a referendum effort had begun, which she said may "impact if and when the statute ratifying the compacts may take effect." ARGC 5. But the Secretary of State's letter made clear that, even though the ratification statute would not take effect *under state law* until the State's internal referendum process had played out, whether the Compact had been properly "entered into" and submitted for the Secretary's approval were questions of federal law for the Secretary to resolve:

> It is, *of course, a question of federal law* whether this act of forwarding to the Secretary of the Interior a compact with a ratifying statute that is, in this case, subject to the referendum power, constitutes submitting the compact within the meaning of 25 U.S.C. § 2710(d)(8)(C), and whether, prior to the exhaustion of the referendum process, such a compact has been entered into by the State of California within the meaning of 25 U.S.C. § 2710(d)(8)(A).

ARGC 6 (emphasis added).[32] Those questions of federal law are answered by BIA's regulations defining what it means for a compact to have been "entered into" for purposes of the Secretary's approval and when a state should a submit a compact for Secretarial approval. *See* 25 C.F.R. §§ 293.3 (defining "entered into" for purposes of Secretary's approval authority by reference to

---

[31] Even after the referendum had been qualified for the 2014 ballot, the Secretary of State continued to represent that the Compact had been "entered into" by the State, notwithstanding the upcoming referendum. *See* ARGC 101 (referring to "the gaming compact[] *entered into* by the State of California with the North Fork") (emphasis added).

[32] It bears noting that Picayune acknowledges that these are properly questions of federal law and therefore does not join Stand Up (SU Br. 35-36) in urging this Court to rule otherwise. *See* ARGC 92, Letter from Allison C. Binney to Kevin Washburn, Assistant Secretary of Indian Affairs (Aug. 28, 2013) ("[T]he Secretary of State *properly indicated that it is 'a question of federal law* whether this act of forwarding to the Secretary of the Interior a compact with a ratifying statute that is, in this case, subject to the referendum power, constitutes submitting the compact within the meaning of 25 U.S.C. § 2710(d)(8)(C), and whether, prior to the exhaustion of the referendum process, such a compact has been entered into by the State of California within the meaning of 25 U.S.C. § 2710(d)(8)(A).'") (emphasis added).

the authorized signatures of both parties), 293.7 ("[A] State should submit the compact or amendment after it has been legally entered into by both parties.").

Stand Up is wrong to rely (SU Br. 35-36) on the Tenth Circuit's decision in *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546 (10th Cir. 1997), to argue that whether a compact has been validly "entered into" is a question of state law that the Secretary should determine before approving the compact. The Tenth Circuit's ruling was expressly premised on the lack of an express definition of "entered into" under IGRA, a gap the Tenth Circuit thought should be filled by state law. *Id.* at 1557-58. But the BIA is the agency charged with interpreting and implementing IGRA, a federal law, and to the extent a gap exists, it has since been filled by the BIA's 2008 promulgation of rules clarifying the meaning of "entered into" under IGRA. *See* 25 C.F.R. Part 293; 73 Fed. Reg. 74,004 (Dec. 5, 2008) (regulations promulgated following formal notice-and-comment process). The BIA's intervening clarification of the meaning of "entered into" under IGRA is now controlling. *See Brand X Internet Servs.*, 545 U.S. at 982-83 ("*Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps," and therefore subsequent agency interpretations displace prior judicial interpretations of statutes unless the court determined that the statute unambiguously forecloses the agency's interpretation).[33] In any event, other courts have come to the opposite conclusion, determining that compact approval by the Secretary under IGRA cannot be challenged on the basis that a state governor did not comply with state law when signing and submitting a compact. *See, e.g.*, *Langley v. Edwards*, 872 F. Supp. 1531, 1535 (W.D. La. 1995) ("Compact approval by the Secretary cannot be invalidated

[33] Moreover, the Tenth Circuit addressed a very different set of circumstances. There, New Mexico's Governor had no authority under state law to execute the tribal-state gaming compacts in the first place, which the New Mexico Supreme Court held to be void from their inception under state law. Here, there is no doubt the Compact was lawfully negotiated and executed by the Governor before the State submitted it to the Secretary for approval.

on the basis of a governor's *ultra vires* action, because a contrary rule would compel the Secretary to consider state law before approving any compact."); *cf. Kickapoo Tribe of Indians v. Babbitt*, 827 F. Supp. 37, 46 (D.D.C. 1993) (holding that the determination of acceptance of a compact was a matter of federal law, but finding that a compact was invalid because governor lacked authority to sign the compact and the state supreme court had already so ruled), *rev'd on other grounds*, 43 F.3d 1491 (D.C. Cir. 1995).

In short, the Secretary acted reasonably and lawfully in accepting California's submission and allowing the Compact to be approved by operation of law pursuant to 25 U.S.C. § 2710(d)(8)(C). And once approved, the Secretary acted reasonably and lawfully by publishing notice of the Compact in the Federal Register, allowing it to take effect. In fact, once the 45-day period had expired, she was obligated to do so. *See* 25 U.S.C. § 2710(d)(8)(D) ("The Secretary *shall* publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.") (emphasis added). And her decision to do so here was consistent with the Department's established practice for submissions from California: The Secretary has approved compacts numerous times in the past even before the expiration of the State's referendum deadlines.[34]

Stand Up's contention that the Secretary should have departed from that practice in this case would, if adopted, raise serious problems of public policy. As reflected in the retrocession

---

[34] *E.g.*, *compare* 72 Fed. Reg. 71,939-40 (Dec. 19, 2007), *with* 2007 Cal. Stats. ch. 38-41 (SB 174, 175, 903, 957), *codified at* Cal. Gov. Code §§ 12012.46, 12012.48, 12012.49, 12012.51 (compacts of Agua Caliente Band of Cahuilla Indians, Morongo Band of Mission Indians, Pechanga Band of Luiseno Indians, and Sycuan Band of the Kumeyaay Nation all approved prior to both a referendum on the statute through which Legislature ratified each compact and the effective date of the statute); *compare* 69 Fed. Reg. 76,004 (Dec. 20, 2004), *with* 2004 Cal. Stats. ch. 856 (SB 1117), *codified at* Cal. Gov. Code § 12012.45 (compacts of Buena Vista Rancheria of Me-Wuk Indians and Coyote Valley Band of Pomo Indians approved prior to both the 90-day deadline to qualify a referendum on the statute through which the Legislature ratified the compacts and the effective date of the statute).

cases discussed above, making the federal process dependent on future actions by states would "lead to endless delay and the hazard, in every federal response to state action, that such reliance might, due to the improper conduct of the state officials, be deemed a nullity at a future date." *Brown*, 334 F. Supp. at 540. Moreover, permitting federal officials to second-guess state officials' interpretations of state law could itself lead to abuse and the undermining of Congress's purposes in passing IGRA. IGRA strictly limits the grounds on which the Secretary may disapprove a compact submitted for her review and provides that, in the absence of disapproval on one of three statutory grounds, compacts are deemed approved within 45 days of submission. 25 U.S.C. § 2710(d)(8)(B). Under plaintiffs' construction, the Secretary could disapprove any validly submitted compact based on her own interpretation of state law, indefinitely delaying compact approval and undermining IGRA's 45-day approval provision.

Ultimately, Stand Up's grievance is not properly directed at the Secretary, but rather at state officials. *See Omaha Tribe*, 334 F. Supp. at 831-32. California's Government Code states:

> *Upon receipt* of a statute ratifying a tribal-state compact negotiated and executed [by the Governor], … the Secretary of State shall forward a copy of the executed compact and the ratifying statute, if applicable, to the Secretary of the Interior for his or her review and approval, in accordance with paragraph (8) of subsection (d) of Section 2710 of Title 25 of the United States Code.

Cal. Gov. Code § 12012.25(f) (emphasis added). It is undisputed that the Secretary of State submitted the North Fork compact to the Secretary upon receiving the statute ratifying it. ARGC 5. Whether she properly did so (or instead should have waited to initiate the federal approval process on behalf of the State until the referendum process had run its course) is a question of state law, which the Secretary of the Interior has no prerogative to investigate, let alone resolve. Her obligations are established by federal law, and how she discharged those responsibilities is measured by federal law. Under those standards, her actions were proper.

B. IGRA Preempts The California Referendum To The Extent It Purports To Nullify The Compact

Under general preemption principles, state law is preempted to the extent of any conflict with a federal statute or regulation. "Such a conflict occurs when compliance with both federal and state regulations is impossible, or 'when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillman v. Marietta*, 133 S. Ct. 1943, 1949-50 (2013) (citation omitted). If, under the circumstances of a particular case, the federal law's "'operation within its chosen field must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.'" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000). The conflict need not be substantive—state procedures that conflict with the operation of federal procedures are likewise preempted under the Supremacy Clause. *See, e.g., Wisconsin Bell v. Bie*, 340 F.3d 441, 444 (7th Cir. 2003) (state tariffing requirement preempted by Telecommunications Act where it interfered with federally prescribed negotiation procedures).

"To determine whether a state law conflicts with Congress' purposes and objectives," the Court "must first ascertain the nature of the federal interest." *Hillman*, 133 S. Ct. at 1950. In the field of Indian affairs, the federal interests are plenary, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989), and states have no inherent regulatory authority over gaming on Indian lands, *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207, 222 (1987). Their only authority derives from IGRA, which allows states to play a limited role in regulating tribal gaming through the compacting process. *See* S. Rep. No. 446, 100th Cong., 2d Sess. 5-6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. When Congress passed IGRA, it "intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to

determine the extent to which various gaming activities are allowed." *Id.* at 6, *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076. IGRA thus has "'extraordinary' preemptive force," *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 548 (8th Cir. 1996), and has been held to preempt provisions of state constitutional law that conflict with its aims, *see, e.g.*, *Dalton v. Pataki*, 835 N.E.2d 1180, 1189 (N.Y. 2005) (IGRA preempts state constitutional prohibition on commercial gaming insofar as such gaming is conducted on Indian lands pursuant to IGRA).

As set forth above, *see supra*, Section III.A.1, IGRA prescribes a highly regimented process for the negotiation and effectuation of tribal-state compacts. The manifest purpose of that process is to permit states to play a limited role in regulating Indian gaming within their borders, without allowing that role to prevent tribes from exercising their federal rights under IGRA. Congress was expressly concerned that states might use IGRA's compacting requirement as "subterfuge" and sought to ensure that states "deal fairly with tribes as sovereign governments." S. Rep. No. 446, 100th Cong., 2d Sess. 14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3084; *see Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1027 (9th Cir. 2010) ("Congress enacted IGRA to provide a legal framework within which tribes could engage in gaming—an enterprise that holds out the hope of providing tribes with economic prosperity that has so long eluded their grasp—while setting boundaries to restrain aggression by powerful states."). Thus, IGRA permits tribes to sue states in federal court if they fail to enter into a compact within 180 days of the tribe's request for negotiations. 25 U.S.C. § 2710(d)(7)(B). And if a court concludes that a state failed to negotiate with a tribe in good faith, it may order the parties to mediation to conclude a compact, failing which the tribe may conduct gaming on terms provided by the Secretary of the Interior. *Id.*

This regime ensures that tribes have an assured path to class III gaming (in states that do not prohibit such gaming outright), with the intent that tribes may realize their federal rights under IGRA relatively quickly—preferably through negotiated compacts, but with a federal backstop to ensure that the federal rights of Indian tribes will not be impeded at the state level. *Cf. Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1033 (2d Cir. 1990) ("[T]he manifest purpose of the statute is to move negotiations toward a resolution where a state either fails to negotiate, or fails to negotiate in good faith, for 180 days after a tribal request to negotiate."). That regime leaves no room for subsequent efforts under state law unilaterally to rescind or invalidate a compact that has been placed into effect under federal law, which is precisely what the November 2014 referendum purported to do.[35]

Allowing a referendum to do so would frustrate IGRA's objectives and wreak havoc on the governing statutory and regulatory regime for the negotiation, submission, approval, and effectuation of tribal-state compacts by leaving federally approved compacts exposed to collateral attacks under state law. To permit such collateral attacks should be anathema to any federal regime, but it would be particularly inappropriate in the context of IGRA, which was enacted pursuant to Congress's plenary authority over Indian affairs and carved out only a narrow role for states to play. And the practical consequences for tribes that have yet to realize IGRA's benefits would be disastrous, as it would place their fate at the mercy of well-capitalized competitors, including other tribes and their financial backers, that could seek to override the judgment of elected state officials by funding ballot propositions to block competition from

[35] Indeed, BIA regulations make clear that even before the Secretary approves a compact, once a compact has been submitted for approval, it may not be withdrawn unilaterally by the state; rather, any withdrawal may occur only with the written consent of both parties. *See* 25 C.F.R. § 293.13; 73 Fed. Reg. at 74,007 ("[T]he request must be 'written' and submitted by both the Indian tribe and State (meaning that both must execute the request).").

incoming tribes. *See supra*, at 7 n.3; *see also* Ian Lovett, *Tribes Clash As Casinos Move Away From Home*, N.Y. Times (Mar. 3, 2014) (explaining the efforts of Picayune and their outside investors and noting that "casino-owning Indian tribes have emerged as some of the most powerful and dogged opponents of new Indian casinos").

The state referendum—as exercised in this case, *after* the State has submitted a compact for approval, and *after* the Secretary has approved it and taken it into effect pursuant to IGRA's statutory and regulatory scheme—thus conflicts with IGRA and is preempted. *See Crosby*, 530 U.S. at 373 (preemption inquiry is directed to the "circumstances of [a] particular case"). The referendum therefore has no legal effect under federal law and provides no basis for setting aside any of the actions challenged here.

C. Even If The Referendum Were Held To Have Invalidated The Compact, The Court Should Not Vacate The Two-Part Or The Trust Decisions

For the reasons above, the referendum had no effect under federal law and provides no basis for setting aside the Secretary's decisions. But even if the Court were to disagree and hold the referendum to have effectively rescinded the Compact, it does not follow that the two-part determination should be vacated or that the Madera Site should come out of trust. Plaintiffs' argument (SU Br. 18-21; P Br. 7-9) that the Court must vacate and remand the Secretary's decisions because the referendum "'rises to the level of a change in 'core' circumstances, the kind of change that goes to the very heart of the case,'" *Am. Optometric Ass'n v. FTC*, 626 F.2d 896, 907 (D.C. Cir. 1980), is based on the faulty assumption that the referendum (if held to be effective under federal and state law) forever prohibits class III gaming on the Madera Site. In fact, under IGRA, invalidation of the Compact would merely send the parties either back to the negotiating table under 25 U.S.C. § 2710(d)(3) or to IGRA's remedial scheme under

§ 2710(d)(7).[36] Because circumstances are still in flux, and because class III gaming would still be possible on the Madera Site under either a new compact or Secretarial procedures, *see* 25 U.S.C. § 2710(d)(7)(B)(vii); *see also Rincon Band of Luiseno Mission Indians*, 602 F.3d at 1030, it would be premature to require reconsideration of the Secretary's decisions.

"Courts are properly reluctant to base a remand of an agency's decision on the ground that the decision relies on evidence which has grown stale while decision awaits judicial review." *Am. Optometric* 626 F.2d at 906.[37] As a result, only where "events [have] so eroded the basis for [the decision] that it is no longer amenable to coherent judicial analysis" should the Court remand to the agency. *Id.* at 913. There have been no such events here.

A change in the compact status would not constitute a "core" change in circumstances because BIA regulations permit the Secretary to make the two-part determination and trust acquisition *even in the absence of an enforceable gaming compact*. *See* 25 C.F.R. § 292.16(j)-(k) (requiring tribe to submit copy of compact only "if one has been negotiated" and providing for alternatives in situations where "the tribe has *not* negotiated a class III gaming compact with the State where the gaming establishment is to be located" (emphasis added)). Instead, it is sufficient that the Secretary review the "proposed" scope of the gaming establishment. *Id.* § 292.16(k); *see also id.* § 151.11(c) (for off-reservation acquisitions, "tribe shall provide a plan which specifies the *anticipated* economic benefits associated with the *proposed* use") (emphasis

---

[36] California, like many other states, has waived its immunity from IGRA's remedial process. *See Rincon Band of Luiseno Mission Indians*, 602 F.3d at 1026 (citing Cal. Gov. Code § 98005).

[37] As the Supreme Court explained, if courts were to order a new round of decisionmaking for every change of circumstance, "there would be little hope that the administrative process could ever be consummated." *ICC v. Jersey City*, 322 U.S. 503, 514 (1944). The problem is especially acute for "difficult" and "intricate" cases involving "deliberate and careful" decisionmaking—not only do changes inevitably arise, given the size of the record and the length of the process, but also the cost and delay of duplicating the process is immense. *Id.*

added). This is precisely what happened here. As Plaintiffs recognize (SU Br. 19 n.17), the Secretary did not start the decisionmaking process anew when the 2012 Compact was approved, but instead relied on the projections and impacts from the 2008 compact that was negotiated with Governor Schwarzenegger but never ratified by the California Legislature.

Plaintiffs have not alleged in their Complaints (let alone supported such allegations with arguments) that the Secretary improperly relied on these earlier estimates. *Cf. Jersey City*, 322 U.S. at 519 (refusing to reopen proceedings for consideration of updated financials); *Miss. Indus. v. FERC*, 808 F.2d 1525, 1567-68 (D.C. Cir. 1987) (refusing to reopen record for updated cost estimates), *vacated in part on other grounds*, 822 F.2d 1104 (D.C. Cir. 1987). Nor have Plaintiffs argued that the referendum itself called into question North Fork's projections for the economic benefits of a class III gaming facility or the Secretary's assessment of effects to the surrounding community.[38] Any speculation that the final conditions will be radically different is not sufficient to overturn a final agency decision. *See Cleveland Television Corp. v. FCC*, 732 F.2d 962, 973 n.13 (D.C. Cir. 1984) (denying remand where suspicions of fraud arose after a license was granted); *Am. Financial Svcs. Ass'n v. FTC*, 767 F.2d 957, 964 n.5 (D.C. Cir. 1985) (denying remand for reconsideration of rule because it was not yet clear what effect the Bankruptcy Act of 1978 would have on credit practices).

The need for final agency decisionmaking in the face of uncertainty is especially strong in the context of Indian gaming, where agency approvals proceed simultaneously with potentially multiple rounds of tribal-state negotiations. Under IGRA, a State's rejection of a

---

[38] Stand Up is incorrect (SU Br. 19-20) in claiming that the referendum invalidated the MOUs the Secretary relied upon to show mitigation. Just as when the Secretary made her decision, the MOUs remain in effect but none of the Tribe's payment obligations has yet become due because the Tribe has been unable to commence construction due to this litigation. None of the parties has purported to rescind any of the MOUs.

compact does not foreclose class III gaming in perpetuity. Because States have an obligation to negotiate in good faith to enter into a compact, a rejection would in the first instance simply return the tribe and the State to the negotiating table to work out the remaining differences. 25 U.S.C. § 2710(d)(3)(A). IGRA obligates States to "move negotiations toward a resolution." *Mashantucket Pequot Tribe*, 913 F.2d at 1033. And if a State refuses to do so or the negotiations otherwise prove futile, the Secretary may ultimately be required to prescribe appropriate procedures on her own. 25 U.S.C. § 2710(d)(7)(B)(iii)-(vii).

Accordingly, courts in this district have recognized that it is proper for the Secretary to take land into trust even when a compact has been invalidated. For example, in *Michigan Gambling Opposition v. Norton (MichGO)*, the court upheld the Secretary's land-into-trust decision despite the Michigan Senate's vote to rescind the proposed class III gaming compact before it was signed by the Governor. 477 F. Supp. 2d 1, 20 (D.D.C. 2007). The court dismissed the plaintiff's argument that the decision was invalid because the mitigation measures were based on the "false assumption" that there would be a compact, reasoning that the alternative solution of offering interim class II gaming was "in full compliance with IGRA." *Id.* Similarly, in *Citizens Exposing Truth About Casinos v. Norton*, the district court refused to invalidate the Secretary's land-into-trust decision, although the compact had been declared invalid by a lower state court and was pending review in the state court of appeals. 2004 WL 5238116, at *2 (D.D.C. Apr. 23, 2004), *aff'd*, 492 F.3d 460 (D.C. Cir. 2007).

Stand Up also argues (SU Br. 20) that the referendum has "created circumstances under which gaming can occur" that the Secretary did not analyze—*i.e.*, class II gaming. This possibility was not created by the referendum; IGRA itself is what permits class II gaming without a compact once land is taken into trust. *MichGO*, 477 F. Supp. 2d at 20; *see also* 25

U.S.C. § 2710(b). In any event, the possibility that the use of trust land may not conform precisely to the projections used at the time of the trust acquisition does not invalidate the Secretary's decision if it was based on projections that were reasonable when made. The future is always uncertain when an agency acts, and that is no less true under IGRA. For example, a class III gaming casino may become financially impractical and never move beyond the planning stages; the facility once built could be damaged by fire or earthquake; or (as in the case of the Picayune casino) it could be forced to suspend operations because of serious regulatory violations, *see supra*, at 5 n.2. These possibilities do not call into question the Secretary's prior decisions; trust land can still be used for economic development purposes other than class III gaming. 25 C.F.R. § 151.3(a)(3). And as with any agency decision based on projections about the future, the inquiry is directed at the soundness of the decision when made.[39]

IV. The Governor's Concurrence Was Valid And Provides No Basis For Challenging The Secretary's Two-Part Determination

Stand Up argues (SU Br. 28-35) that the Governor's concurrence in the Secretary's two-part determination, *see* AR 40988, was invalid under state law and therefore "the Secretary's two-part determination must be vacated and set aside." SU Br. 28 n.24. As a threshold matter, this argument makes no sense: Under IGRA, the Secretary's determination is not dependent on

[39] Picayune makes a related argument (P Br. 27-28) that the IRA decision falls if the IGRA decision is invalidated. But just as the referendum does not warrant vacating and remanding the IRA decision, it would be premature to vacate and remand if the court finds the IGRA decision arbitrary and capricious. When a court finds agency action "arbitrary and capricious," the court does not substitute its judgment for the agency and make a final determination on the merits, but remands to the agency to provide an adequate explanation for its decision. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). In such cases, the agency may simply provide additional reasoning and issue the same ultimate determination. *See, e.g.*, *A.L. Pharma, Inc. v. Shalala*, 62 F.3d 1484, 1492 (D.C. Cir. 1995) (giving agency 90 days to provide an "adequate justification" before vacating rule). Only if the Secretary declined to re-issue the two-part determination would reconsideration of the IRA decision be warranted. In the interim, there no is legal problem with keeping the land in trust—as discussed above, federal law does not require any particular sequencing of IRA and IGRA decisions.

the Governor's concurrence, and necessarily comes *before* the Governor even has a chance to concur. *See* 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. §§ 292.13, 292.22(c) ("If the Secretary makes a favorable Secretarial Determination, the Secretary will send to the Governor … [a] request for the Governor's concurrence in the Secretarial Determination."). Setting that aside, the argument fails because under federal law the Secretary was entitled to rely on the Governor's facially valid concurrence. In any event, the Governor was authorized under state law to concur.

A. The Secretary Properly Relied On The Governor's Facially Valid Concurrence

As discussed above, *see supra*, Section III.A.2, federal officials are entitled to rely on the facially valid actions of state officials within federal regimes that depend upon state involvement. These concerns are particularly strong in the context of the Governor's concurrence.

First, neither IGRA nor its regulations provide the Secretary any authority, obligation, or basis to inquire into the validity of the Governor's concurrence under state law. Indeed, Stand Up recognizes (SU Br. 28) that "the Secretary was not bound at the time to inquire to the legality of the concurrence in authorizing gaming at the Madera site." That should end the matter.

Second, IGRA circumscribes the State's involvement in the Secretary's two-part determination to the Governor's concurring, providing no other room for the State to operate. The statute grants the Governor—and the Governor alone—the power to concur. *See* 73 Fed. Reg. at 29,367 ("Congress has implicitly rejected the need for concurrence by other officials."); *id.* at 29,372 (§ 2719(b)(1)(A) "specifically identifies the Governor and not the State[, unlike] other sections of IGRA that specifically mention the State."); *cf. Oliphant*, 544 F.3d at 1012.

Third, the need for finality is particularly strong with respect to gubernatorial concurrences, which are a one-time act removing a restriction on federal land use. Numerous federal statutes that authorize federal land acquisitions or particular land uses based on

gubernatorial concurrences would be unworkable if private parties could challenge the concurrences under state law after the federal government has acted in reliance on them.[40] The condition set forth in 25 U.S.C. § 2719(b)(1)(A) was fulfilled upon the Governor's concurrence, AR 40988, as the Secretary properly determined, AR 41144.

B. The Governor's Concurrence Was Valid

Even if the court decides to address the state law question, the Governor's concurrence was valid under California law. The two California state courts that have addressed Stand Up's argument have rejected it. *See Stand Up For California! v. State of California*, Case No. MCV062850 (Cal. Super. Ct. Madera Cnty. Mar. 3, 2014), *appeal docketed*, Case No. F069302 (Cal. App. Dist. 5); *United Auburn Indian Community of the Auburn Rancheria v. Brown*, Case No. 34-2013-800001412 (Cal. Super. Ct. Sacramento Cnty. Aug. 19, 2013), *appeal docketed*, Case No. C075126 (Cal. App. Dist. 3). Stand Up's state law argument lacks merit.

The concurrence power is part of the Governor's express constitutional authority to negotiate and conclude compacts for gaming by federally recognized Indian tribes on Indian lands in California in accordance with federal law, Cal. Const. art. IV, § 19(f), authority that the Legislature has reinforced by statute, *see* Cal. Gov. Code §§ 12012.5(d), 12012.25(d). Under California law, state officials may exercise any implied power necessary to effectuate an express power.[41] For the Governor to effectuate his power to negotiate a valid compact authorizing

---

[40] *See, e.g.*, 15 U.S.C. § 715k-5 (federal acquisition of wetlands under Migratory Birds Conservation Act conditioned on consent of Governor); 16 U.S.C. § 7b (Park Service acquisition of lands for airstrips conditioned on consent of Governor) (to be re-codified at 54 U.S.C. § 101501(c)(2)); 42 U.S.C. § 7916 (federal acquisition of land for radioactive waste requires consultation of Governor and, in certain cases, consent).

[41] *See* David Carrillo & Danny Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. Rev. 655, 677 (2011); *e.g.*, *Lewis v. Colgan*, 47 P. 357, 358 (Cal. 1897); *see also, e.g.*, *Mosk v. Superior Court*, 601 P.2d 1030, 1035 (Cal. 1979); *Dickey v. Raisin Proration Zone*,

gaming on Indian lands for which federal law requires a Secretarial Determination and the Governor's concurrence in that decision, 25 U.S.C. § 2719(b)(1)(A), the Governor must have the power to concur. In this role, the Governor carries out the California policy embodied in the state constitution and statutes that authorize compacts for all Indian lands in accordance with IGRA—and do not make any exception prohibiting gaming on lands acquired after 1988. *See also Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 663-65 (7th Cir. 2004) (rejecting argument that concurrence interfered with state law).

Moreover, the Governor's concurrence power is inherent in his constitutional and statutory role as the State's chief executive, which grants him extensive powers to deal with Indian tribes, gather relevant information, and communicate with the federal government. *See* Cal. Const. art. V, §§ 1, 4, 6; Cal. Gov. Code §§ 12010, 12012; *see also Picayune Rancheria of Chukchansi Indians v. Brown*, 178 Cal. Rptr. 3d 563, 569 (Cal. App. 2014) (suggesting that concurrence power reflects Governor's "supreme executive power"), *review denied* Jan. 14, 2015. The Governor need not have specific authorization for each finding he makes or communication he has with the federal government. Were state law otherwise, myriad cooperative federal-state schemes that depend on gubernatorial action would be unworkable. *See, e.g.*, *supra*, at 61 n.40; *see also, e.g.*, *United States v. 1,216.83 Acres of Land*, 574 P.2d 375, 379 (Wash. 1978).

Finally, any concern about the Governor's authority to concur was cured by the Legislature's ratification of the Compact, which expressly recognized and incorporated the Governor's concurrence. ARGC 118-19; *see, e.g.*, *Hoffman v. City of Red Bluff*, 407 P.2d 857, 861-62 (Cal. 1965) (legislature may retroactively authorize act that was invalid when made).

---

151 P.2d 505, 513 (Cal. 1944); *Crawford v. Imp. Irr. Dist.*, 253 P. 726, 732 (Cal. 1927); *Watt v. Smith*, 26 P. 1071, 1072 (Cal. 1891); *People ex rel. Casserly v. Fitch*, 1 Cal. 519, 536 (1851).

V. Defendants Fully Complied With NEPA

NEPA is an "essentially procedural" statute, *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978), and "does not mandate particular consequences," *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 194 (D.C. Cir. 1991). "NEPA merely prohibits uninformed—rather than unwise—agency action." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 351 (1989). The court's "only role" is "to insure that the agency considered the environmental consequences." *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980). Accordingly, this Circuit has "consistently declined to flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor." *Theodore Roosevelt Conserv. P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011).

DOI began the NEPA review process in 2004, *see* 69 Fed. Reg. 62,721 (Oct. 27, 2004), and completed it six years later by making the FEIS public, *see* 75 Fed. Reg. 47,621 (Aug. 6, 2010). The FEIS devotes over five thousand pages to identifying and discussing environmental impacts for each alternative project, proposing feasible mitigation measures for these impacts, and responding to more than 330 public comments on the February 2008 DEIS. The FEIS was further considered in November 2012 when the Secretary approved Alternative A ("the Project") and issued her IRA ROD to take the Madera Site into trust. The record shows that DOI thoroughly reviewed the Project's environmental impacts and fully met its NEPA mandate.

A. The BIA Considered A Reasonable Range Of Alternatives

NEPA requires agencies to include in an EIS "a detailed statement … [on] alternatives to the proposed action." 42 U.S.C. § 4332(2)(C)(iii). When an agency eliminates an alternative from detailed study, it need only "briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14. Courts evaluate "both *which* alternatives the agency must discuss, and the *extent* to which it must discuss them," under the "rule of reason." *City of Grapevine v. U.S.*

Dep't of Transp., 17 F.3d 1502, 1506 (D.C. Cir. 1994). They will uphold an agency's "discussion of alternatives so long as the alternatives are reasonable and the agency discusses them in reasonable detail." *Citizens Against Burlington*, 938 F.2d at 196.

The FEIS identified numerous sites as possible alternatives before narrowing the field down to five alternatives, which it discussed in significant detail. AR 29829-96, 40614-19, 41154-58. The five alternatives included the full-scale casino project at Madera, a smaller casino at Madera, a non-gaming alternative at Madera, a casino at North Fork, and a No Action alternative. As this Court stated earlier, "the Secretary appears to have considered a reasonable range of alternatives and provided a rational and concise explanation of why each potential alternative was rejected from further consideration." Dkt. 42 at 42; *see also Confederated Tribes of Grand Ronde*, 2014 WL 7012707 at *24 (upholding discussion of alternatives that considered the preferred location for gaming and one alternative site).

Stand Up challenges (SU Br. 38-42) only the reasons the Secretary identified for eliminating certain alternatives from further consideration, arguing that the Secretary excluded sites along SR-41, sites along the SR-99 corridor near Avenue 7, and the Old Mill site in North Fork based upon flawed findings in order to justify the Tribe's most desired alternative.[42] SU Br. 38. Stand Up's argument ignores applicable law, the record evidence, and this Court's prior order rejecting virtually identical arguments.

[42]To the extent that Stand Up implies (SU Br. 39) that it was wrong for the Secretary to consider alternatives that would benefit the Tribe, Stand Up has it backwards. The Project's objectives help to define what is a reasonable alternative. *Citizens Against Burlington*, 938 F.2d at 196. In setting the objectives, the agency must consider the "needs and goals of the parties involved in the application." *Id*. The Secretary properly considered the Tribe's needs and goals.

1. The Secretary Reasonably Excluded The SR-41 And Avenue 7 Sites From Further Evaluation

Stand Up's argument (SU Br. 38-39) that the Secretary inappropriately excluded the SR-41 sites and the Avenue 7 sites based on concerns that the sites "would potentially have a very detrimental competitive effect on the gaming operations of the neighboring Tribes" is meritless.

As a threshold matter, Stand Up waived any objection that the Secretary wrongfully excluded the SR-41 and Avenue 7 sites from further evaluation. Parties challenging an agency's compliance with NEPA "must 'structure their participation so that it … alerts the agency to the [parties'] positions and contentions,' in order to allow the agency to give the issue meaningful consideration." *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004). During the NEPA process, Stand Up failed to present arguments concerning the need to evaluate the SR-41 or the Avenue 7 sites and never argued that the EIS must not consider potential competitive impacts when evaluating alternatives. It has therefore forfeited any objection that the Secretary wrongfully excluded these sites from further consideration. *See id.* at 764-65 (parties who did not raise particular objections regarding alternatives "forfeited any objection" that the NEPA document "failed adequately to discuss potential alternatives to the proposed action").

In any event, although Stand Up suggests that the Secretary focused exclusively on competitive impact as the basis for rejecting these sites, the FEIS included multiple other reasonable bases for eliminating the SR-41 and Avenue 7 sites from further consideration. With respect to the SR-41 sites, the FEIS identified the following additional concerns:

- Most of the corridor situated in Madera County "lies within the environmentally sensitive foothills," raising concerns regarding development on steep terrain, loss of habitat for native plants and animals, and water scarcity;
- Development would "conflict with the scenic nature of the corridor, which is lined with rolling pastures sprinkled with oaks and large rock outcroppings in the vicinity of the intersection of State Route 145 (SR-145)";

- "North of SR-145, the road narrows and winds up into the Sierra foothills to the towns of Coarsegold, Oakhurst, and the south entrance of Yosemite";
- The "overburdened two-lane system" would present traffic concerns; and
- Development along the southern portion of the corridor would primarily benefit Fresno County residents [with] minimal impact on improving the lives of Madera County residents."

AR29901. Similarly, the Avenue 7 sites were eliminated "from further consideration for a variety of reasons." AR 29903. These reasons include the following concerns:

- Access to the sites "was constrained by the train tracks that run just east and parallel SR-99;
- The development's benefits "would inure primarily to the residents of Fresno County"; and
- Such development would be inconsistent with existing land uses since most of "the surrounding area was used for agriculture, including orchards, a horse ranch, vineyards, and various crops."

AR 29903. Thus, the FEIS included an extensive discussion of the broader reasons beyond competitive impact for eliminating these sites from detailed study—far more than required by 40 C.F.R. § 1502.14(a).[43]

---

[43] Even if sites were excluded solely based on concerns regarding economic competition, such an action would nonetheless be reasonable. *First*, as this Court indicated: "[I]t was rational for the Secretary to reject potential alternatives if they would not, in the Secretary's informed judgment, allow for a large enough development to provide the North Fork with revenues that would meet the purpose and need of the proposed action." Dkt. 42 at 42. *Second*, Stand Up's assertion (SU Br. 39) that the Madera Site "unquestionably would have at least an identical competitive impact on nearby tribes as the rejected sites," finds no record support and is wrong. The Madera Site is farther away from Clovis and Fresno—major markets for Picayune's casino located north along SR-41 in Coarsegold—than the Avenue 7 sites or certain southern sites along SR-41 are. A casino on SR-41 south of Coursegold would thus have the opportunity to directly intercept traffic to Picayune's casino.

2. The Secretary Reasonably Excluded The Old Mill Site From Further Evaluation

This Court has already rejected Stand Up's argument that the Secretary improperly excluded the Old Mill site from detailed study. *See* Dkt. 42 at 41. Stand Up's reiteration of that argument (SU Br. 40-42) fails again because the record includes substantial evidence showing the unsuitability of the Old Mill site, and the Secretary reasonably relied upon that evidence.

The NEPA process included an extensive scoping process that included two public comment periods during which no commenter mentioned the Old Mill site as a potential alternative. AR 29825. That possibility was not raised until after publication of the DEIS. Upon learning of the Old Mill site as a possible site, Assistant Secretary Carl Artman requested that the BIA amend the DEIS "to include the Old Mill Site as an additional alternative." AR 9396. The BIA evaluated the Old Mill site but concluded that it "cannot be considered as a reasonable alternative to be analyzed in the [EIS]." AR 9661. Among other things, BIA evaluated concerns relating to environmental contamination from legacy wood mill operations, the site's similarity to other alternatives evaluated in detail in the EIS, and the site's owner confirming that it "will not sell this land to the North Fork Rancheria of Mono Indians for the development of a casino project." AR 9398, 9404-05, 9411-13. The FEIS also discussed the various reasons for eliminating the Old Mill site from further evaluation, including a more detailed discussion of the concerns relating to residual environmental contamination. AR 29908-10. In particular, the FEIS noted that the site was "contaminated with petroleum hydrocarbons in the soil and water, pentachlorophenol (PCP) and dioxins, furans, asbestos, and lead-based paint," and even with remediation, "the potential for the presence of unknown contamination related to past uses on the site remains." AR 29908-09. As the Court indicated earlier, the environmental problems were a rational basis to eliminate the Old Mill site. Dkt. 42 at 41.

In addition, the FEIS noted that the Old Mill site's remote location would prevent the Project from meeting job creation and revenue objectives. AR 29909. As this Court stated: "[I]t was rational for the Secretary to reject potential alternatives if they would not, in the Secretary's informed judgment, allow for a large enough development to provide the North Fork Tribe with revenues that would meet the purpose and need of the proposed action." Dkt. 42 at 42; *see also Confederated Tribes of Grand Ronde*, 2014 WL 7012707 at *24 (agency reasonably excluded five alternative sites that were more remote "and therefore could not meet the economic objectives and needs of the Tribal government"). Thus, even if the Old Mill site could have been acquired for gaming, the site was reasonably rejected for other reasons.

In short, the Administrative Record confirms the Court's earlier indication that the Secretary "considered a reasonable range of alternatives and provided a rational and concise explanation" of why she eliminated the SR-41, the Avenue 7, and the Old Mill site from detailed study. Dkt. 42 at 42.[44] Although Stand Up might have preferred a different alternative, it has not met its burden to prove that the Secretary's action violated NEPA. *See City of Roseville v. Norton*, 219 F.Supp.2d 130, 170 (D.D.C. 2002) (rejecting challenge to agency's failure to consider alternative casino sites preferred by plaintiffs as such preferences are "simply not grounds for finding that the agency failed to meet its obligations … or that the agency's decision was arbitrary and capricious"), *aff'd*, 348 F.3d 1020 (D.C. Cir. 2003).

[44] Stand Up also makes a passing reference to the North Fork Rancheria site being eliminated, but does not develop this argument—presumably because the North Fork Rancheria site was evaluated as a potential alternative and, as the Court noted earlier, was not selected for a number of reasons, including "most notably the fact that the 'particularly varied and steep topography' would inflate construction costs in that area, leading to the conclusion that a casino development in that area could not be successfully financed." Dkt. 42 at 42; *see also* AR 40457-58, 40533.

B. The FEIS Took A "Hard Look" At The Potential Impact On Crime

An agency complies with NEPA when it takes a "hard look" at the environmental effects of its proposed action. *Theodore Roosevelt Conserv. P'ship*, 661 F.3d at 75. The "hard look" doctrine "ensure[s] that the agency has adequately considered and disclosed the environmental impact of its actions." *Id.* at 93. This Court explained earlier how the FEIS and the Secretary's two-part determination adequately considered the Project's potential impacts on crime, *see* Dkt. 42 at 32-34, and Stand Up's argument (SU Br. 42-43) that the FEIS fails to satisfy this deferential standard as to the casino's potential impact on crime should again be rejected.

Stand Up's challenge to the FEIS's statements regarding the link between crime and casinos are baseless. For example, Stand Up's assertion (SU Br. 42-43) that the FEIS "advances a skewed analysis" when it compares the crime rate in the unincorporated portions of Santa Barbara County, where the Chumash Casino Resort is located, to the crime rates in the county overall misunderstands the FEIS's analysis. The FEIS evaluated crime rates in several California counties with tribal casinos in order to analyze whether a tribal casino was likely to result in a significant "increase in regional crime rates," AR 30197—an inquiry this Court found "perfectly rational," Dkt. 42 at 32. In conducting that analysis for the Chumash Casino, the FEIS compared the crime rate for the "local jurisdiction" or region in which the casino is located (unincorporated Santa Barbara County) to the crime rate for an otherwise comparable region (the rest of the county), and the FEIS found that the crime rates for the casino's region was "slightly below" average. AR 30197. Stand Up fails to show why this analysis was unreasonable. Moreover, the FEIS noted that the results of its multi-county study supported what previous studies have shown: A link between casinos and increased crime rates in the locality of casinos has not been conclusively established. AR 30197. Moreover, Stand Up's assertion (SU Br. 43) that the FEIS lacked support for stating that the amount of crime associated with opening a casino is not much

different from the amount of crime associated with the opening of any other tourist attraction is refuted by the FEIS's literature review, including the National Opinion Research Center's comprehensive study. AR 30197.

Further, the FEIS fully addresses impacts from an increased demand on law enforcement resources once the Project is built. Based on an analysis of existing literature about the social impacts of casino gambling, interviews of local law enforcement personnel, studies of five tribal casinos in four California counties, and crime statistics for each county and each location within each county where the casino under study was located, the FEIS summarizes the casino's possible impact on crime, AR 30195-97, and estimates the cost of increased demand for local law enforcement services, AR 30201-03. The FEIS notes that to fully mitigate that cost, the Tribe will annually provide the City of Madera funding to cover the costs of six new law enforcement positions, provide Madera County funding to cover five new deputy sheriffs and a half-time sergeant, and make a $1,038,310 general contribution to cover the County's remaining fiscal impacts. AR 29772-73, 29849, 29851, 29855, 30201-03, 30211-12, 30338, 30509.

In short, the FEIS took the "hard look" required by NEPA, carefully addressing the potential impacts from crime associated with a new casino and discussing measures to mitigate these impacts. NEPA requires no more for informed decisionmaking.

C. The FEIS Took A "Hard Look" At Problem Gambling and Adequately Discussed Associated Mitigation Measures

The FEIS took the requisite hard look at problem gambling by estimating the increase in the number of problem gamblers, AR 30197-98, and by describing specific measures designed to mitigate the Project's impact on problem gambling, AR 29753-54, 30508-10, 30198. The hard look under NEPA "compel[s] only 'a reasonably complete discussion of possible mitigation measures.'" *Citizens Against Burlington,* 938 F.2d at 206. Mitigation measures are "reasonably

complete" if they provide "sufficient detail to ensure that environmental consequences have been fairly evaluated." *Nat'l Parks Conserv. Ass'n v. Jewell*, 965 F. Supp. 2d 67, 77 (D.D.C. 2013) (quoting *Methow Valley*, 490 U.S. at 352). They are inadequate if and only if they are "overly vague or underdeveloped," *Methow Valley*, 490 U.S. at 358, so that an agency is "unable to determine the environmental consequences of the project and thus unable to take the requisite 'hard look' at the project's effect on the environment," *Defenders of Wildlife v. Salazar*, 698 F. Supp. 2d 141, 149 (D.D.C. 2010). NEPA thus does not require that "a complete mitigation plan be actually formulated and adopted" or that adverse effects be fully remediated. *Methow Valley*, 490 U.S. at 352; *see, e.g.*, *Confederated Tribes of Grand Ronde*, 2014 WL 7012707 at *26 ("EIS is not required to discuss the outcome of mitigation measures.").

The FEIS's discussion of mitigation measures for problem gambling fully complied with NEPA. It cited to a California Office of Problem Gambling study which identified that "problem gambling may be attenuated, or possibly reversed, through the expansion of gambling services." AR 30198. As discussed above, *see supra*, Section II.A.3, the FEIS explained that the Tribe will fully fund the anticipated cost of treatment services and will implement additional precautionary measures on the casino's premises that will reduce the amount and effects of problem gambling otherwise expected to occur. In short, the FEIS contains sufficient detail regarding problem gambling and specific mitigation measures to ensure that the environmental consequences of the Project were fairly evaluated.[45] Since Stand Up requests a quantification and explanation of mitigation measures that NEPA does not require, its argument should be rejected.[46]

[45] Moreover, Stand Up's argument (SU Br. 43-45) that the FEIS's consideration of these mitigation measures was insufficient rests entirely on a misreading and misapplication of Ninth Circuit cases, which it asserts stand for the proposition that mitigation measures must be demonstrably effective. This is not the law in the Ninth Circuit. *See, e.g.*, *N. Alaska Envt'l Ctr. v. Kempthorne*, 457 F.3d 969, 979 (9th Cir. 2006) ("NEPA does not require an agency to

VI. Defendants Fully Complied With The Clean Air Act

Stand Up's claim (SU Br. 46-53) that the conformity determination violated the Clean Air Act and EPA's implementing regulations for conformity determinations, 42 U.S.C. § 7506(c)(4)(A); 40 C.F.R. §§ 93.150-93.165, relies on arguments that this Court has already rejected, misapplies applicable law, and ignores record evidence.

A. The Conformity Determination Complied With Required Notice Procedures

Stand Up's challenge (SU Br. 46-47, 51-53) to the BIA's issuance of reporting notices ignores the Court's specific order enabling the very process it challenges. *See* Dkt. 77 at 7-8.

---

formulate and adopt a complete mitigation plan."). In addition, Stand Up's reliance upon *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372 (9th Cir. 1998), is misplaced because the mitigation measures in that case were "broad generalizations and vague references" that the agency's own experts claimed were "so general that it would be impossible to determine where, how, and when they would be used and how effective they would be." *Id.* at 1381. The measures described in the FEIS to mitigate the impact on problem gambling are specific and are based upon studies regarding the effectiveness of such measures.

[46] Stand Up's suggestion (SU Br. 21 n.20), raised only in a footnote to its IGRA argument, that there were NEPA violations because class II gaming was not analyzed in the FEIS is meritless. *First*, its suggestion assumes both that the Compact is invalid and that the mitigation measures were improperly considered; as discussed above, both assumptions are invalid, and the possibility of a class II gaming facility was and remains speculative. NEPA "does not require detailed discussion of the environmental effects of remote and speculative alternatives." *Nat'l Wildlife Fed'n v. FERC,* 912 F.2d 1471, 1485 (D.C. Cir. 1990). *Second*, Stand Up's argument is waived because during the NEPA process Stand Up failed to argue that class II gaming should have been considered as an alternative. *See Dep't of Transp.*, 541 U.S. at 764. *Third*, the suggestion misunderstands the FEIS's analysis of gaming alternatives, which focuses on the impacts from possible gaming alternatives of different sizes and locations, not impacts based on the IGRA gaming classification of that facility. Stand Up has failed to demonstrate how a hypothetical Class II facility would provide a "seriously different picture of the environmental landscape" than the gaming alternatives already discussed in the FEIS. *See Nat'l Comm. for the New River*, 373 F.3d at 1330 (rejecting arguments that a supplemental EIS was required even when there was new and environmentally significant information because that information did not "significantly transform the nature of the environmental issues raised in the DEIS and comments"); *see also Blue Ridge Envt'l Def. League v. Nuclear Reg. Comm'n*, 716 F.3d 183, 198 (D.C. Cir. 2013) (rejecting supplementation arguments when party failed to explain "what specific 'new and significant' environmental information [the agency] failed to consider, or what deficiency in the existing EIS it failed to rectify").

This Court noted that the BIA had complied with the EPA regulations' public notice-and-comment provisions, 40 C.F.R. § 93.156(b) and (d), by placing notices of the Draft Conformity Determination ("DCD") and Final Conformity Determination ("FCD") in the Madera Tribune, *see* Dkt. 77 at 4; *see also* ARNEW 1109, 1113, but that the BIA was unable to determine that it had fully complied with the separate reporting notice provisions, 40 C.F.R. § 93.155(a) and (b), by providing the DCD and FCD to all of the required federal, state, local, and Indian government entities, *see* Dkt. 77 at 2-3. This Court noted that "public notice and comment is not at issue" and "[t]he procedural defect, if present at all, only pertains to a small number of government entities, not including those most likely to have substantive comments, namely, the local air quality district and the regional EPA office, which already received notice." *Id.* at 5. Consequently, this Court declined to require the BIA to perform the entire conformity determination again, *id.* at 7, and granted the federal defendants' motion for a partial remand "to remedy a minor procedural defect," *id.* at 1, and ordered federal defendants "to undertake the notice process required by 40 C.F.R. § 93.155," *id.* at 8.

The BIA complied with that order. On January 23, 2014, it sent reporting notices to the required entities under 40 C.F.R. § 93.155(a). ARNEW 1178-1221. The BIA received comment letters on the DCD from Stand Up, Picayune, and the Table Mountain Rancheria, ARNEW 1427, 1422, 1573, considered their comments, and reviewed responses to them prepared by its EIS consultant in consultation with the BIA Pacific Regional Office, ARNEW 1770.[47] After this review, the BIA Pacific Regional Office's director determined that a revision to the 2011 FCD was "not warranted" and issued her decision not to modify the 2011 FCD. ARNEW 1770. The

[47] Stand Up is not one of the government entities specified in 40 C.F.R. § 93.155(a), but the BIA still reviewed its comments. And although Stand Up was not even entitled to notice, it is the only entity that challenges this process.

BIA reissued the 2011 FCD to the required parties specified in 40 C.F.R. § 93.155(b) "to insure proper notice and consistent with a court order." ARNEW 1770; *see also* ARNEW 1768-69.

In short, the BIA's process was consistent with the EPA's regulations and this Court's orders. Contrary to Stand Up's argument (SU Br. 47), the BIA published public notice of and provided an opportunity to comment on the DCD in 2011 under 40 C.F.R. § 93.156(b) prior to taking any formal action. ARNEW 1099-101. The only minor procedural defect, if any, had been the alleged failure to provide specific notice to all required government entities under 40 C.F.R. § 93.155, which this Court's order made clear the BIA could remedy by providing the specific notices in 2014 without performing the entire 2011 conformity determination again.

Moreover, even if Stand Up had proven a notice violation, its contention (SU Br. 51-52) that the violation would require vacatur of the trust decision, "of which the conformity determination is only a small piece," Dkt. 77 at 6, rehashes the same arguments that this Court already rejected. *See id.* at 6-8. Stand Up again relies (SU Br. 42) on case law finding vacatur of rules appropriate when agencies wholly violated public notice-and-comment procedures. *See, e.g.*, *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1029-31 (D.C. Cir. 1978) (vacating revision of regulation between publication of interim regulation and final regulation where agency denied the public "the opportunity to comment on a significant part of the Agency's decisionmaking process" and where the agency's final published explanation includes "computations now admitted to be erroneous" and "deletes mention of … adjustment that Agency attorneys now deem crucial").[48] Those cases are inapplicable to conformity determinations,[49] and in any event,

[48] The other cases Stand Up cites (SU Br. 51-52) fail to support its vacatur argument. *See, e.g.*, *Advocates for Highway Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151-52 (D.C. Cir. 2005) (finding vacatur inappropriate where the petitioners "advance[d] no argument" that the rule would "have a detrimental effect on safety"); *Nat'l Min. Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) (discussing the scope of an

this Court has noted that the "alleged violation is not … a 'notice and comment' violation, but, rather, a notice defect that did not affect" public participation and that "if present at all, only pertains to a small number of government entities," not including those most likely to have substantive comments. Dkt. 77 at 4-5. As this Court stated, Stand Up's argument that vacatur is categorically required for such minor procedural violations "is 'simply not the law.'" *Id.* at 6 (quoting *Sugar Cane Growers Co-Op of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002).

Finally, even if there had been a violation, the remand process demonstrates that any error was necessarily harmless.[50] Stand Up cannot show a substantial likelihood that the BIA's decision would have been *significantly different* if any notice error had not been made, *see Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 124 (D.C. Cir. 2012), because after the BIA issued new notices, received new comments, and considered those comments, it

---

injunction when an agency promulgates unlawful regulations); *Sierra Club v. Johnson*, 436 F.3d 1269, 1280 (11th Cir. 2006) (finding that EPA acted inappropriately when it failed to exercise its nondiscretionary duty to object to an air permit); *Anchustegui v. Dep't of Agriculture*, 257 F.3d 1124, 1129 (9th Cir. 2001) (finding that an agency failed to provide the statutory required notice and opportunity to cure before it revoked a party's grazing permit).

[49] *See, e.g.*, *Hall v. Bellard*, 157 F. App'x 992, 994 (9th Cir. 2005) ("Plaintiff also claims the conformity determinations are invalid because the Department did not comply with the APA's notice and comment requirements. Only 'rule making,' however, is subject to notice and comment. The conformity determinations are not rules, but case-by-case assessments of whether a plan or program meets specific criteria…. APA rule-making requirements do not apply.").

[50] Contrary to Stand Up's argument (SU Br. 51-52), harmless error analysis applies to notice-and-comment violations under the APA, *see Am. Coke & Coal Chem. Inst. v. EPA*, 452 F.3d 930, 939 (D.C. Cir. 2006), and is also consistent with the CAA, which has its own harmless error rule for EPA rulemaking, *see* 42 U.S.C. § 7607(d)(8). The D.C. Circuit has accordingly applied the harmless error analysis in rejecting challenges to both conformity determinations and notice errors under the CAA. *See, e.g.*, *Cnty. of Rockland v. FAA*, 335 F. App'x 52, 57 (D.C. Cir. 2009) ("Assuming the agency erred when it failed to inventory emissions, the petitioners still have failed to identify any way in which the error was or might have been harmful."); *Husqvarna AB v. EPA*, 254 F.3d 195, 203 (D.C. Cir. 2001) (notice error is harmless under the CAA where a challenger cannot establish a *substantial likelihood* that the rule would have changed it if had an expanded opportunity to comment).

issued *the same* conformity determination it had issued prior to the new notices. There is no likelihood that any additional notice in 2011 would have resulted in any change to the FCD.

B. The Conformity Determination Is Based Upon The Appropriate Emission Estimation Methods

Stand Up's argument (SU Br. 47-48) that the conformity determination is based on an outdated emissions model has also been rejected by this Court, which already stated that "the new models are not required for the already instituted conformity determination at issue here." Dkt. 77 at 7-8. Stand Up argues that the 2011 conformity determination should have used the EMFAC2011 model, but EPA did not approve that model's future use until March 6, 2013. 78 Fed. Reg. 14,533 (Mar. 6, 2013). The conformity determination here was issued on June 18, 2011—almost two years earlier—and properly used the latest emissions model in effect at that time. ARNEW 1109, 1113.[51] In its earlier order, this Court declined to require the BIA to perform "the entire Clean Air Act conformity determination again—from start to finish," Dkt. 77 at 7, and remanded the conformity determination *without vacatur* to allow BIA to provide notice under 40 C.F.R. § 93.155, *id.* at 8. This Court therefore properly concluded that the EMFAC2011 model did not apply to the conformity determination at issue here. Dkt. 77, at 7-8.

Contrary to Stand Up's argument (SU Br. 48), *Sierra Club v. EPA*, 762 F.3d 971 (9th Cir. 2014), is not inconsistent with that conclusion. *Sierra Club* involved a permit that the Ninth Circuit decided had been wrongly issued in the first place using older air quality standards that no longer applied, and the Ninth Circuit required the agency to reconsider the permit under the current standards. *Id.* at 981-82. In contrast, the 2011 FCD was issued based upon "the latest

[51] As the BIA explained in response to comments from Stand Up, Picayune, and the Table Mountain Rancheria, "project-related emissions were estimated using the latest and most accurate emission estimation techniques available at the time of the 2011 DCD and 2011 FCD." ARNEW 1946.

and most accurate emission estimation techniques available" at the time of its issuance as 40 C.F.R. § 93.159(b) required. This Court did not vacate that already issued FCD, *see* Dkt. 7-8, so it is still based upon the emissions model that was in effect in 2011 when it was issued. Thus, the concerns identified in *Sierra Club* do not apply. BIA's decision not to use the EMFAC2011 model or to redo the entire conformity determination process was not arbitrary and capricious.

C. Defendants Based Their Emissions Estimates On A Justifiable Trip Length

Stand Up's argument (SU Br. 49-50) that the Administrative Record provides no basis for using 12.6 miles as the average trip length ignores evidence in the DEIS, FEIS, and BIA environmental consultant's responses to comments on the conformity determination. *See* AR 4655 (DEIS explanation of trip length values), 30148 (FEIS explanation), ARNEW 1949-51 (FCD explanation); *see also* AR 31377-33606 (EIS traffic impact study). As the BIA's consultant explained in its response to comments on the reissued DCD:

> The air quality analysis provided in the DEIS, FEIS, and 2011 DCD was based on project specific traffic data developed through the use of Fresno County Council of Governments (FCCOG) and Madera County Transportation Commission (MCTC) model data. Proposed Project average trip length was estimated using the latest and most accurate data available in the MCTC traffic model at the time of the transportation and air quality analysis in the DEIS (2005). A description of the Proposed Project was provided to FCCOG and MCTC by TPG Consulting, Inc. (the traffic engineers who developed the EIS [traffic impact study]). Model outputs files provided by the FCCOG and MCTC …. Using the FCCOG and MCTC model data, an average trip length of 12.6 miles was determined, and this data was used in Proposed Project emissions estimates in the EIS and 2011 DCD.

ARNEW 1949-50. The response explains that no agency, tribal government, or individual commented on the average trip length during the 2011 DCD comment period and provides further context on why the 12.6-mile estimate is reasonable. ARNEW 1949-51.

Stand Up's (SU Br. 49-50) contention that the 12.6-mile average is at odds with the description of the Project as a "destination resort" is unsupported. The 12.6-mile average for project-related trips includes not only trips for the resort's overnight guests but also its numerous

employees, who are likely to live near the resort, and other local residents who would use the resort to dine or shop. *See* ARNEW 1948-49. While the Project may have been described as a destination resort and the trip length analysis accordingly anticipates hundreds of daily trips from locations outside Madera and Fresno Counties, the much greater number of shorter trips from within those counties pulls down the average length to 12.6 miles. ARNEW 1949.

The BIA thus relied on a reasonable and supported trip length of 12.6 miles. Stand Up has not shown any errors in the data or the calculations from which the length was derived, and its argument (SU Br. 51) that an incorrect trip length led to an incorrect calculation of the emissions offsets needed to mitigate the emissions generated accordingly is baseless.

D. Stand Up's Cursory Challenges To The Conformity Determination's Compliance With EPA Regulations Are Meritless

Stand Up devotes (SU Br. 50-51) one sentence each to three other cursory challenges to the conformity determination's compliance with EPA regulations. This type of bare-bones contention requires no response. *See, e.g.*, *Mason*, 811 F. Supp. 2d at 190 ("[C]ourts need not resolve arguments raised in a cursory manner and with only the most bare-bones arguments in support."). In any event, Stand Up's arguments are meritless.

First, the Tribe's resolution precisely identifies actions and timelines to ensure that the conformity requirements are met. The 2011 FCD gave the Tribe the choice, prior to operating the Project, either (1) to purchase Emission Reduction Credits ("ERCs") in the amount of 42 tons of NOx and 21 tons of ROG or (2) to enter into a Voluntary Emissions Reduction Agreement ("VERA") with the San Joaquin Valley Area Pollution Control District ("SJVAPCD") to fund emission reduction projects to achieve the same amount of emission reduction. AR 39238. In June 2011, the Tribe adopted Tribal Resolution 11-26, in which it reported those two mitigation options and agreed to implement "the Emissions Reduction Mitigation Measures in the Final

General Conformity Determination prior to the operation of the project." ARNEW 1111. That resolution identifies with sufficient concreteness that the Tribe will implement the mitigation required by the FCD before the Project is operational.

Second, the Secretary's approval of the fee-to-trust transfer was conditioned upon the Tribe's meeting the mitigation measures. The IRA ROD describes the "mitigation measures and related enforcement and monitoring programs [that] *have been adopted as a part of this decision*. Where applicable, *mitigation measures will be monitored and enforced* pursuant to Federal law, tribal ordinances, and agreements between the Tribe and appropriated governmental authorities, as well as this decision." AR 41169 (emphasis added). In particular, the IRA ROD states that the "[final] conformity determination recommends mitigation to achieve conformity with the State Implementation Plan" and incorporates and includes the FCD as an attachment and a Mitigation Monitoring and Enforcement Plan ("MMEP") as "Chapter 2." AR 41161. The FCD itself requires the Tribe to implement one of the two, or a combination of the two, air quality mitigation measures described above "prior to the operation of the project," AR 39238, while the MMEP more specifically requires the Tribe to purchase offsets in the form of ERCs (rather than through a VERA with the SJVAPCD) during the planning or construction phase, *i.e.*, prior to the operation of the Project, AR 39082. Thus, the IRA was clearly conditioned on the Tribe's meeting mitigation measures necessary to achieve conformity.

Third, because the conformity determination requires the Tribe to offset emissions in the same calendar year as the emissions increases from the Project's operation, the Tribe is not required to offset emissions by a factor of 1.5 to 1.0. The applicable EPA regulation provides that generally emissions reductions must occur "during the same calendar year as the emissions increases from the action except, as provided in paragraph (b)." 40 C.F.R. § 93.163(a).

Paragraph (b) provides an exception allowing an alternative schedule but, in turn, requires that the "reductions are greater than the emission increases" by a particular ratio, *id.* § 93.163(b), which is 1.5 to 1.0 for the area around the Madera Site. By its terms, paragraph (b) applies only if the emissions reduction is not in the same calendar year, which EPA's preamble makes clear. *See* 75 Fed. Reg. 17,254, 17,268 (Apr. 5, 2010) ("To ensure that *these non-contemporaneous emissions* reductions provide greater benefits in the long term, EPA [requires] that offset or mitigation ratios for alternative schedules be greater than one for one.") (emphasis added).

As discussed above, the IRA ROD's MMEP, the FCD, and the IRA ROD itself require the Tribe to purchase the emissions offsets to achieve conformity during the planning or construction phases of the Project, prior to its operation. *See* AR 39082, 39238, 41161. The Tribe has also resolved to meet these conformity mitigation requirements prior to the operation of the Project. ARNEW 1111. Because the Tribe's ERCs or other emissions offsets will be in place at the beginning of the Project's operational phase, the Tribe will be offsetting the emissions from the Project's operations in the same calendar years as those operational emissions occur and the 1.5 to 1.0 ratio is inapplicable. *See* ARNEW 1952 ("[B]ecause ERCs offset emissions [start] during the year of purchase, the commitment to purchase ERCs shows compliance with 40 C.F.R. § 163(a). Given this approach to purchasing ERCs, the 1.5 to 1.0 ratio of offsets … is not applicable."). In sum, because the Tribe will comply with the required mitigation by purchasing ERCs and/or by entering into a VERA to provide for contemporaneous offsets before the Project is operational, the FCD and IRA ROD comply with the applicable conformity regulations.

CONCLUSION

North Fork's motion for summary judgment should be granted, and Stand Up's and Picayune's motions for summary judgment should be denied.

Dated: February 13, 2015

Respectfully submitted,

/s/ Christopher E. Babbitt

Seth P. Waxman (D.C. Bar No. 257337)
Danielle Spinelli (D.C. Bar No. 486017)
Christopher E. Babbitt (D.C. Bar No. 982508)
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 663-6000
Facsimile: (202) 663-6363
E-mail: christopher.babbitt@wilmerhale.com

John M. Schultz (D.C. Bar No. 414191)
Lori Irish Bauman (admitted *pro hac vice*)
ATER WYNNE LLP
1331 NW Lovejoy Street, Suite 900
Portland, OR 97209
Telephone: (503) 226-8647
Facsimile: (503) 226-0079
E-mail: jms@aterwynne.com

Counsel for North Fork Rancheria of Mono Indians