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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA! et al.,)	
Plaintiffs)	
v.)	
)	**Case No. 1:12-cv-02039-BAH**
)	Judge Beryl A. Howell
UNITED STATES DEPARTMENT OF THE)	
INTERIOR, et al.,)	
Defendants)	**ORAL ARGUMENT REQUESTED**
)	

THE UNITED STATES OF AMERICA'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

I. INTRODUCTION……………………………………………………………………1

II. BACKGROUND……………………………………………………………………3

III. STANDARD OF REVIEW…………………………………………………………9

IV. ARGUMENT………………………………………………………………………10

A. THE SECRETARY HAS AUTHORITY TO TAKE LAND INTO TRUST FOR THE NORTH FORK TRIBE UNDER THE IRA…………………………………...11

B. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT ON STAND UP'S IGRA CLAIMS……………………………………………………..18

1. The Secretary's Determination That the Proposed Gaming Establishment on the Newly Acquired Trust Lands Will Not Be Detrimental to the Surrounding Community Is Entitled to Deference……………………..20

2. The Governor's Concurrence With the Two-Part IGRA Determination is Valid……………………………………………………..24

3. The Tribal-State Gaming Compact Remains in Effect………………….26

a. Federal Law Governing the Approval of a Tribal-State Gaming Compact……………………………………………………………27

b. The Secretary's Deemed Approval of the Tribal-State Compact Follows IGRA and the Applicable Regulations; Only Federal Law Applies…………………………………………………………..28

4. The Compact is Valid Under Federal Law and Its Fate Is Independent From the Secretary's Two-Part IGRA Determination and IRA Decision……………………………………………………………34

C. UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT ON PICAYUNE RANCHERIA'S CLAIMS…………………………………..36

1. The North Fork Tribe has Historical Connection to the Madera Site……………………………………………………………37

2. Picayune is Not a Part of the Surrounding Community and Therefore Was Not Part of the Formal Consultation Process Established by Regulation…………………………………………………………..42

3. The IGRA Determination is Consistent and Reasonable……………….46

4. The Brief's IRA Claims Should Be Rejected………………………….48

D. THE SECRETARY ADHERED TO THE NATIONAL ENVIRONMENTAL POLICY ACT……………………………………………………………….49

1. Secretary's Consideration of Alternatives was Reasonable and Not Arbitrary and Capricious……………………………………………50

2. The Secretary's Analysis of Impacts was Reasonable and Not Arbitrary and Capricious, Including the Secretary's Analysis Regarding Crime……………………………………………………54

3. The Secretary's Analysis of Mitigation was Reasonable and Not Arbitrary and Capricious…………………………………………………...56

E. DOI'S CONFORMITY DETERMINATION IS CONSISTENT WITH THE CLEAN AIR ACT AND IS AMPLY SUPPORTED BY THE ADMINISTRATIVE RECORD……………………………………………….57

1. The Clean Air Act and Conformity Regulations………………………57

2. Administrative and Litigation Background……………………………58

3. The Court Has Already Rejected Stand Up's Argument Regarding Compliance With the Notice Requirements Of the General Conformity Regulations……………………………………………………………..60

4. The Court Has Previously Rejected Stand Up's Argument that the Secretary Used the Wrong Emission Estimation Method………………61

5. Stand Up's Arguments that the Mitigation Is Inadequate Are Flawed…………………………………………………………………62

a. The Secretary reasonably estimated the average trip length…….63

b. The Mitigation Requirements Satisfy the General Conformity Regulations……………………………………………………64

F. CLAIMS RAISED IN STAND UP'S THIRD AMENDED COMPLAINT THAT ARE NOT PRESENTED IN THEIR MOTION FOR SUMMARY JUDGMENT ARE ABANDONED…………………………………………………………66

Cases

Am. Optometric Ass'n v. F.T.C.,
626 F.2d 896 (D.C. Cir. 1980) 41

Amador Cnty., Cal. v. Salazar,
640 F.3d 373 (D.C. Cir. 2011) 35

Artichoke Joe's California Grand Casino v. Norton,
353 F.3d 712 n.7 (9th Cir. 2003) 42

Big Lagoon Rancheria v. California,
C 09-1471 CW, 2009 WL 1855332 (N.D. Cal. June 29, 2009) 42

Block v. N. Dakota ex rel. Bd. of Univ. & Sch. Lands,
461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983) 24

Burgess v. United States,
553 U.S. 124, 128 S. Ct. 1572, 170 L. Ed. 2d 478 (2008) 24

Burlington Truck Lines, Inc. v. United States,
371 U.S. 156, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962) 48

California v. Cabazon Band of Mission Indians,
480 U.S. 202, 107 S. Ct. 1083, 94 L. Ed. 2d 244 (1987) 31

Carcieri v. Salazar,
555 U.S. 379, 129 S. Ct. 1058, 172 L. Ed. 2d 791 (2009) 7, 20

Chamber of Commerce of U.S. v. Sec. & Exch. Comm'n,
412 F.3d 133 (D.C. Cir. 2005) 55

Chickasaw Nation v. United States,
534 U.S. 84, 122 S. Ct. 528, 151 L. Ed. 2d 474 (2001) 28

Citizens Against Burlington, Inc. v. Busey,
938 F.2d 190 (D.C. Cir. 1991) 56, 57, 58

Citizens Exposing Truth about Casinos v. Kempthorne,
492 F.3d 460 (D.C. Cir. 2007) 25, 27

Citizens for Responsibility & Ethics in Washington v. Cheney,
593 F. Supp. 2d 194 (D.D.C. 2009) 42, 53

Citizens to Pres. Overton Park, Inc. v. Volpe,
401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971) 16, 17, 69

City of Alexandria, Va. v. Slater,
198 F.3d 862 (D.C. Cir. 1999) 58

City of Olmsted Falls, OH v. F.A.A.,
292 F.3d 261 (D.C. Cir. 2002) 66

City of Roseville v. Norton,
348 F.3d 1020 (D.C. Cir. 2003) 8

Cobell v. Babbitt,
91 F. Supp. 2d 1(D.D.C. 1999) .... passim

Cobell v. Norton,
240 F.3d 1081 (D.C. Cir. 2001) 18

Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell,
CV 13-849 (BJR), 2014 WL 7012707 (D.D.C. Dec. 12, 2014) 57

Confederated Tribes of Siletz Indians of Oregon v. United States,
110 F.3d 688(9th Cir. 1997) 31, 33

Cuyler v. Adams,
449 U.S. 433, 101 S. Ct. 703, 66 L. Ed. 2d 641 (1981) 33

Envtl. Def. Fund, Inc. v. Costle,
657 F.2d 275 (D.C. Cir. 1981) 17

Evans v. Chalmers,
703 F.3d 636 (4th Cir. 2012) 72

Fed. Mar. Bd. v. Isbrandtsen Co.,
356 U.S. 481, 78 S. Ct. 851, 2 L. Ed. 2d 926 (1958) 46

First Am. Disc. Corp. v. Commodity Futures Trading Comm'n,
222 F.3d 1008 (D.C. Cir. 2000) 17

Frandorson Properties v. Nw. Mut. Life Ins. Co.,
744 F. Supp. 154 (W.D. Mich. 1990) 60

Kansas v. Babbitt,
43 F.3d 1491 (D.C. Cir. 1995) 39

Kickapoo Tribe of Indians v. Babbitt,
827 F. Supp. 37(D.D.C. 1993) 39

Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States,
367 F.3d 650 (7th Cir. 2004) 30, 31

Langley v. Dardenne,
77 F.3d 479 (5th Cir. 1996) 37

Langley v. Edwards,
872 F. Supp. 1531(W.D. La. 1995)... 37, 39, 41

LaShawn A. v. Barry,
87 F.3d 1389 (D.C. Cir. 1996) 67

Marsh v. Oregon Natural Res. Council,
490 U.S. 360, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989) 62

Mechoopda Indian Tribe of Chico Rancheria, Cal. v. Schwarzenegger,
CIV.S-03-2327WBS/GGH, 2004 WL 1103021 n.4 (E.D. Cal. Mar. 12, 2004)......... 42, 44

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983) 48

Nat'l Archives & Records Admin. v. Favish,
541 U.S. 157, 124 S. Ct. 1570, 158 L. Ed. 2d 319 (2004) 48

Noble Energy, Inc. v. Salazar,
691 F. Supp. 2d 14 (D.D.C. 2010) 73

Oliphant v. Schlie,
544 F.2d 1007 (9th Cir. 1976) 38

Omaha Tribe of Neb. v. Vill. of Walthill,
334 F. Supp. 823 (D. Neb. 1971) 38

Omaha Tribe of Neb. v. Vill. of Walthill, Neb.,
460 F.2d 1327 (8th Cir. 1972) 38

Pub. Employees for Envtl. Responsibility v. Beaudreau,
CV 10-1079, 2014 WL 985394 (D.D.C. Mar. 14, 2014) 72

Pueblo of Santa Ana v. Kelly,
104 F.3d 1546 (10th Cir. 1997) 33, 37

Resolution Trust Corp. v. Dunmar Corp.,
43 F.3d 587 (11th Cir. 1995) 72

San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n,
789 F.2d 26 (D.C. Cir. 1986) 48

Seminole Tribe of Florida v. Florida,
517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) 33

Shakur v. Schriro,
514 F.3d 878 (9th Cir. 2008) 17

Sierra Club v. U.S. E.P.A.,
762 F.3d 971 (9th Cir. 2014) 68, 69, 70

Sisseton-Wahpeton Sioux Tribe, of Lake Traverse Indian Reservation, N. Dakota & S. Dakota v. United States,
895 F.2d 588 (9th Cir. 1990) 24

Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.,
705 F.2d 506 (D.C. Cir. 1983) 16

Soriano v. United States,
352 U.S. 270, 77 S. Ct. 269, 1 L. Ed. 2d 306 (1957) 24

Stand Up for CaliforniaA v. U.S. Dep't of the Interior,
919 F. Supp. 2d 51 (D.D.C. 2013) .... passim

Styrene Info. & Research Ctr., Inc. v. Sebelius,
944 F. Supp. 2d 71 (D.D.C. 2013) 73

Sugar Cane Growers Co-op. of Florida v. Veneman,
289 F.3d 89 (D.C. Cir. 2002) 66

Texas v. New Mexico,
482 U.S. 124, 107 S. Ct. 2279, 96 L. Ed. 2d 105 (1987) 33, 34

Theodore Roosevelt Conservation P'ship v. Salazar,
661 F.3d 66 (D.C. Cir. 2011) 58

TOMAC v. Norton,
193 F. Supp. 2d 182(D.D.C. 2002) 16

Taxpayers of Michigan Against Casinos v. Norton,
433 F.3d 852 (D.C. Cir. 2006) 16

U.S. Army Corps of Engineers,
515 F. Supp. 2d 69 (D.D.C. 2007) 55

United States v. Brown,
334 F. Supp. 536 (D. Neb. 1971) 38

United States v. Lawrence,
595 F.2d 1149 (9th Cir. 1979) 38

United States v. Mead Corp.,
533 U.S. 218, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001) 37, 51, 54

United States v. Mottaz,
476 U.S. 834, 106 S. Ct. 2224, 90 L. Ed. 2d 841 (1986) ... 24

United States v. Muriel,
919 F. Supp. 66(D.R.I. 1996) ... 19, 23

United Tribe of Shawnee Indians v. United States,
253 F.3d 543 (10th Cir. 2001) ... 46

Wilderness Soc. v. Salazar,
603 F. Supp. 2d 52 (D.D.C. 2009) ... 60, 61

Willis v. Fordice,
850 F. Supp. 523(S.D. Miss. 1994) ... 38

Statutes

25 U.S.C.A. § 2201 ... 19

25 U.S.C.A. § 2702 ... 57

25 U.S.C.A. § 2702(1) ... 25

25 U.S.C.A. § 2710(3)(B) ... 16, 34

25 U.S.C.A. § 2710(d)(3) ... 42

25 U.S.C.A. § 2710(d)(3)(A) ... 33

25 U.S.C.A. § 2710(d)(3)(B) ... 34

25 U.S.C.A. § 2710(d)(8)(B) ... 35

25 U.S.C.A. § 2710(d)(8)(C) ... 16, 34, 35, 36

25 U.S.C.A. § 2719(a)-(b) ... 4

25 U.S.C.A. § 2719(b)(1)(A) ... passim

25 U.S.C.A. § 465 ... 2, 7, 20

25 U.S.C.A. § 478 ... 18, 19, 22

25 U.S.C.A. § 479 ... 7, 20

25 U.S.C.A. § 479a ... 24

25 U.S.C.A. §§ 2701 ... 4

28 U.S.C.A. § 2401(a) 24

42 U.S.C.A. § 4332(2)(C)(iii) 56

42 U.S.C.A. § 7407(d)(1)(A) 63

42 U.S.C.A. § 7409 63

42 U.S.C.A. § 7410(a)(1) 63

42 U.S.C.A. § 7475(c) 68

42 U.S.C.A. § 7506 2

42 U.S.C.A. § 7506(c)(1) 63

42 U.S.C.A. §§ 7401-7671q 63

5 U.S.C.A. § 706 16

5 U.S.C.A. § 706(2)(A) 16

Cal. Const. art. IV 38, 42

California Government Code Section 12012.54 36

Title 25, United States Code, Section 2710(d)(8) 36

U.S.C. § 2710(d)(8)(B) 36

Regulations

25 C.F.R. § 151.10(b) 54

25 C.F.R. § 151.10-16 41

25 C.F.R. § 292 .... 25, 51

25 C.F.R. § 292.13(d) 30

25 C.F.R. § 292.16(j) 41

25 C.F.R. § 292.17(i) 43

25 C.F.R. § 292.18 29

25 C.F.R. § 292.18(a) 29

25 C.F.R. § 292.19 .... 48, 49, 50

25 C.F.R. § 292.2 .... passim

25 C.F.R. § 292.21(a) 43

25 C.F.R. § 293 .... 34, 37

25 C.F.R. § 293.13 .... 34, 36

25 C.F.R. § 293.3 .... 15, 34, 35, 36

25 C.F.R. § 293.7 34

25 C.F.R. §§ 292.16 .... 6, 26

25 C.F.R. §§ 292.16 51

25 C.F.R. §§ 293.10 .... 16, 34

25 C.F.R. §293.1 33

292 C.F.R. § 292.2 .... 44, 45

40 C.F.R. § 1502.13 56

40 C.F.R. § 1502.14(a) 56

40 C.F.R. § 1502.16 60

40 C.F.R. § 93.153(b) 64

40 C.F.R. § 93.155 .... 65, 66

40 C.F.R. § 93.155(a) 65

40 C.F.R. § 93.156 65

40 C.F.R. § 93.159(b)(1) 67

40 C.F.R. § 93.160 64

40 C.F.R. § 93.160(a) 70

40 C.F.R. § 93.160(d) 71

40 C.F.R. § 93.163(a) 71

40 C.F.R. §§ 1502.14 58

40 C.F.R. §§ 93.100 64

40 C.F.R. §§ 93.150 63

C.F.R. § 292.2 43

I. INTRODUCTION

This case involves challenges to three separate decisions of the Secretary of the United States Department of the Interior ("the Secretary"), regarding trust acquisition and gaming by the North Fork Rancheria of Mono Indians ("North Fork Tribe" or "Tribe") on a 305.49 parcel of land located in Madera County, California ("Madera site"). First, in September 2011, the Secretary determined that the North Fork Tribe could conduct gaming on the Madera site, pursuant to the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2719(b)(1)(A). This decision is challenged by both plaintiffs, Stand Up for California ("Stand Up") and the plaintiffs claiming to be the Picayune Rancheria of Mono Indians ("Picayune Rancheria").[1] The decision made pursuant to IGRA also included the Secretary's Final Environmental Impact Statement, a document produced pursuant to the National Environmental Policy Act ("NEPA"), which examined the environmental and socio-economic impacts of the proposed gaming establishment. The Secretary's IGRA decision also relied on the determination that the action would conform to the applicable state implementation plan, as required by the Clean Air Act. 42 U.S.C. § 7506. Second, in November 2012, the Secretary approved a fee-to-trust application submitted by the North Fork Tribe, made pursuant to the Indian Reorganization Act ("IRA"). 25 U.S.C. § 465. This decision allowed the United States to acquire the Madera site and to hold it in trust for the benefit of the North Fork Tribe.

[1] Multiple factions of the Picayune Rancheria claim authority to govern the Rancheria. It is unclear which factions, or if all of the various factions, have signed onto the brief filed in the name of the Rancheria. In filing this cross-motion and response for summary judgment, the United States refers to the 2010 tribal council, namely Dora Jones, Chance Alberta, Jennifer Stanley, Nancy Ayala, Morris Reid, Reggie Lewis, and Nokomis Hernandez, for limited purposes in accordance with Picayune Rancheria of the Chukchansi Indians v. Pacific Regional Director, IBIA Docket Nos. 14-065, 071, 073, 079 (Feb. 9, 2015).

Third, Plaintiffs challenge the Secretary's approval of the Tribal-State Gaming Compact entered into by the State of California and the North Fork Tribe ("Compact"). At the time of the Secretary's deemed approval, that compact had taken effect pursuant to IGRA. Under IGRA, when a Tribe and State enter into a gaming compact the Secretary has 45 days to approve or disapprove the Compact from its submission. If the Secretary takes no action within 45 days, as occurred here, IGRA provides that the compact is deemed approved as a matter of law and published in the Federal Register. Upon publication in the Federal Register, the compact goes into effect. Over a year after the Compact took effect the voters of California held a referendum purporting to overturn the Compact even though the Compact was, by that time, in effect under IGRA. The Compact remains in effect today. If a referendum can displace federal law, then states could unilaterally render compacts void as a matter of federal law; this would introduce uncertainty and potential chaos into a setting where Congress, through IGRA, intended to create stability.

The plaintiffs, both Stand Up and Picayune Rancheria, have advanced a variety of arguments under IGRA and IRA, but each of these arguments share a common flaw: they ask the Court to adopt statutory interpretations contrary to the plain meaning of the IRA and IGRA and to ignore the Secretary's regulations which interpret any ambiguity in those statutes.

The United States, Department of the Interior, the Secretary of the Interior, the Bureau of Indian Affairs, and the Assistant Secretary-Indian Affairs, collectively the "United States," respectfully request that this Court deny the plaintiffs' motions for summary judgment and grant the United States' motion for summary judgment for all the claims filed by the plaintiffs.

II. BACKGROUND

The North Fork Tribe consists of the modern descendants of the Mono Indians using and occupying lands in and near the San Joaquin Valley, since aboriginal times. NF_AR_0040509. The North Fork Tribe's connections to the area are historic, cultural, and documented by treaty. Culturally, the "Tribe and its ancestors have been renowned for the baskets made by the women citizens of the Tribe. The plants, which grow near the rivers and marshes in the San Joaquin Valley area, have been a rich source of basket-weaving material." NF_AR_0040509. Historic descriptions of the Federal Government's Fresno River Farm, the San Joaquin River Valley, and nearby mountains include first-hand accounts of Mono Indians working, living, fishing, and hunting near the present-day Madera Site, as well as the devastation following the arrival of white settlers. NF_AR_0040507. The unratified treaties negotiated between the United States and the Tribes describe land which was set aside as a reservation for the benefit of the Mono Indians and other tribes; those reservations include the present day Madera site.

Gaming on the Madera Site: In 2005, the North Fork Tribe submitted an application for the Madera site to be acquired in trust by the United States and plans to construct a gaming facility on that site. NF_AR_0040445. In order for gaming to take place on the Madera site, IGRA requires the Secretary to determine whether the site is eligible for gaming under one of the exceptions for land acquired after the date of IGRA's enactment. 25 U.S.C. § 2701-21. Here, the Secretary made what is termed the "two-part determination" for gaming eligibility—whether gaming would benefit the tribe and not be detrimental to the surrounding community. 25 U.S.C. § 2719(a)-(b). In September 2011, the Assistant Secretary-Indian Affairs ("Assistant Secretary" or "Secretary") determined, pursuant to IGRA, that the construction of a gaming facility on the Madera Site (implementation of the preferred alternative, Alternative A), would be in the best

interest of the North Fork Tribe and would not be detrimental to the surrounding community. NF_AR_0040445; see 25 U.S.C. § 2719(a)-(b); 25 C.F.R. § 292. On August 30, 2012, the Governor of the State of California concurred in the Secretary's determination. NF_AR_0040988; see 25 U.S.C. § 2719(b)(i)(A). [2]

The Secretary's determination that gaming on the Madera Site "would be in the best interest of the tribe and its members" has not been challenged. NF_AR_0040500; 25 U.S.C. § 2719(b)(i)(A). Other than the Madera Site, the only trust land held for the North Fork Tribe is a 61.5 acre parcel of land, on which the Tribe has built a community center, a youth center, and several homes. NF_AR_50563-65, 411147-48.

The Tribe's citizens have an unemployment rate far higher than state and national rates. NF_AR_0040501. The Secretary determined that the proposed casino would "offer substantial employment opportunities to citizens of the Tribe for several reasons, including that 73% of the adult citizens of the Tribe are located closer to the Madera Site than the original rancheria." NF_AR_0040501. The Secretary also examined the financial details of the project and, NF_AR_0040500, concluded that development of the Madera site, consistent with the purposes of IGRA, would "generate revenues" for tribal government and its effect would include "stimulating tribal economic development, promoting tribal self-sufficiency, and providing resources for the development of a strong tribal government." NF_AR_0040502. The gaming income will provide "much needed social, housing, government, administrative, education, health, and welfare services" to the "more than 1,750 tribal citizens." Id. Additionally, "tribal

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[2] For lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, a two-part determination also requires the consent of the Governor of the State in which the gaming activity will be conducted. 25 U.S.C. § 2719(b)(i)(A). The Governor of California concurred in this determination on August 30, 2012. NF_AR_0040988.

income from the Resort will help the Tribe and its citizens" to "revitalize and maintain their unique Mono heritage, language, and traditions for future generations." Id.

Just as the Secretary examined the gaming establishment's benefits to the North Fork Tribe, the Secretary also considered the detrimental impacts to the surrounding community. NF_AR_0040510. The Secretary has issued regulations to define the term "surrounding community" found in IGRA. The controlling regulations define "surrounding community" to mean "local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment." 25 C.F.R. § 292.2. Pursuant to the Secretary's regulations, 25 C.F.R. §§ 292.16-19, the Secretary initiated consultations with the surrounding community and analyzed the impacts to the surrounding community. NF_AR_0040510-31, 33-34. Although Picayune Rancheria requested to be considered as part of the surrounding community, the Secretary found that because they fell outside of the "25-mile radius of the site of the proposed gaming establishment," that they were "not a 'nearby Indian Tribe' within IGRA's definition of 'surrounding community' under [Interior's] regulations." NF_AR_0040534 (citing 25 C.F.R. § 292.2).

The Secretary's IGRA determination also examined any detrimental impacts to the surrounding community. NF_AR_0040510-31, 33-34. Before determining that the proposed gaming establishment was not detrimental to the surrounding community the Secretary prepared a Final Environmental Impact Statement ("EIS"), NF_AR_029679-036135, pursuant to NEPA, which considered the impacts of the proposed federal action on the human environment. Relying, in part, on the EIS's examination of impacts to the human environment, the Secretary's IGRA record of decision analyzed the proposed gaming establishment's impact on crime, problem gambling, utilities, water supply and waste-water, housing, character of the community

and land use patterns, noise and light, economic development, employment, and impacts to the local, city, and county governments. NF_AR_00405010-15. To account for costs that might be imposed on these local government entities, the North Fork Tribe signed a Memoranda of Understanding with the local governments, which set forth both one-time and annual payments necessary to mitigate any costs imposed by the casino and to pay for improvements to the area. NF_AR_0040515-28.

Trust Acquisition of the Madera Site: Following the Secretary's two-part determination under IGRA and the Governor's concurrence, the Secretary approved the North Fork Tribe's fee-to-trust application in November 2012. NF_AR_0041139. The Indian Reorganization Act 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 first definition of "Indian" in the IRA includes "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. In Carcieri v. Salazar, 555 U.S. 379 (2000), the Supreme Court interpreted "now" as used in the phrase "now under Federal jurisdiction" to refer to the date of the statute's enactment, June 18, 1934, and held that the Secretary may therefore take land into trust only for Indian tribes that were under federal jurisdiction as of that date. Id. at 395. The Secretary's fee-to-trust record of decision considered Carcieri and determined that "the calling of a Section 18 [of the IRA] election at the Tribe's Reservation conclusively establishes that the Tribe was under Federal jurisdiction for Carcieri purposes" in 1934. NF_AR_0041198.

The original trust land for the North Fork rancheria was established by purchase under the Interior Appropriations Act of June 30, 1913 (38 Stat. 77, 86). NF_AR_0041198; NF_AR_0001028, 0001034 (proposal and authorization to purchase land). In 1958, as part of

then-prevailing but short-lived assimilationist policies, Congress enacted the California Rancheria Act ("Rancheria Act"), Pub. L. No. 85-671, 72 Stat. 619 (1958) (as amended by Pub. L. No. 88-419, 78 Stat. 390 (1964)). The Rancheria Act authorized termination of the federal trust relationship with California rancheria residents and their governing bodies, and distribution of rancheria lands to individual Indians. City of Roseville v. Norton, 348 F.3d 1020, 1022 (D.C. Cir. 2003); NF_AR_0041198. The original 80 acres of tribal land was subdivided and distributed. NF_AR_0041198; NF_AR_0001061 (notice of termination published in Federal Register, including both the North Fork Tribe and the Picayune Rancheria).

On July 10, 1979, distributees from the terminated rancherias filed a class action against the United States, asserting that the United States violated the Rancheria Act in its efforts to terminate federal supervision. Tillie Hardwick v. United States, No. 79-1710 (N.D. Cal. July 10, 1979); NF_AR_0001063-83. The class members sought restoration of their Indian status, collective tribal status, and the reservation status of their lands. NF_AR_0001063. The Tillie Hardwick v. United States litigation settled, through two stipulated judgments, the status of the rancherias, including the North Fork Rancheria. The federal court first approved a master stipulated judgment between the United States and class members affiliated with seventeen rancherias on December 22, 1983. The stipulated judgment restored the Indian status of "all those persons who received any assets of the [Rancheria] . . . pursuant to the California Rancheria Act and any Indian heirs, legatees or successors in interest of any such persons with respect to any real property they received." Id. Additionally, the "Indian Tribes, Bands, Communities or groups" were restored to "the same status as they possessed prior to the distribution of the assets of the [ ] Rancherias under the California Rancheria Act . . . ." Shortly thereafter, the Secretary included the North Fork Rancheria of the Mono Indians and other Tillie

Hardwick tribes in the published list of federal recognized Indian Tribes. 50 Fed. Reg. 6055-02 (Feb. 13, 1985).

The second stipulated judgment, entered by the district court in 1987, was concluded between class members North Fork Rancheria and Picayune Rancheria, with Madera County. NF_AR_0001077. The judgment provides that the court declare that "the North Fork and Picayune Rancherias and the Plaintiffs were never and are not now lawfully terminated under the California Rancheria Act . . . ." NF_AR_0001080. Further, the court declared that "[t]he original boundaries of the North Fork and Picayune Rancherias . . . . are hereby restored, and all land within the restored boundaries of the North Fork and Picayune Rancherias are declared to be 'Indian Country.'" Id.

The Secretary in deciding to acquire the Madera site in trust, found that the North Fork Tribe "needs the [Madera Site] held in trust in order to better exercise its sovereign responsibility to provide economic development to tribal citizens" and that revenue from the project would "be used to strengthen the tribal government and fund a variety of programs that would improve the long-term welfare of the Tribe" through the reacquisition of "historical territory." NF_AR_0041199.

Court Denies Motion for Preliminary Injunction and Land Is Taken Into Trust: In January 2013, this Court denied Stand Up's motion for a preliminary injunction. Dkt. No. 42 at 45; Stand Up for California v. United States Department of the Interior, 919 F. Supp. 2d 51, 66 (D.D.C. 2013). The Court held that the "plaintiffs have not established a likelihood of success on the merits of any of their claims." Id. After the denial of the motion for preliminary injunction, the Secretary accepted the Madera site in trust for the North Fork Tribe. Dkt. No. 77 at 3-4.

Tribal-State Gaming Compact. Independent of the IGRA and IRA decisions of 2011 and 2012, and after resolution of the motion for preliminary injunction, the North Fork Tribe and the State of California concluded their negotiation of a Tribal-State gaming Compact, entered into the compact and submitted it to the Secretary during the summer of 2013. NF_AR_GC_000005 (transmitting compact); NF_AR_GC_000107 (gaming compact published in Federal Register). The Secretary "has the authority to approve the compacts or amendments 'entered into' by an Indian tribe and a State, as evidenced by the appropriate signatures of both parties." 25 C.F.R. § 293.3. When a Compact is "entered into," as evidenced by the signatures of the Indian Tribe and the State, and submitted to the Secretary, IGRA sets forth a timeframe of 45-days in which the Secretary must act to approve, or disapprove, a gaming compact:

> If the Secretary does not approve or disapprove a [Tribal-State] compact . . . before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

25 U.S.C. § 2710(d)(8)(C); 25 C.F.R. § 293.10-13. In this case, the 45 days passed and the Secretary published a notice of the Tribal-State Compact in the Federal Register on October 22, 2013. NF_AR_GC_000100. NF_AR_GC_000107. A compact shall "take effect" when "notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(3)(B). Over a year after the Compact went into effect, the California voters passed a voter referendum in November 2014, which purported to repeal it.

III. STANDARD OF REVIEW

Both plaintiffs bring their claims under the Administrative Procedure Act, 5 U.S.C. § 706. Section 706(2)(A) provides that a court may set aside agency action only where it finds the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard encompasses a presumption in favor of the validity of agency

action. "[T]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971); see also Small Refiner Lead Phase-Down v. EPA, 705 F.2d 506, 520-21 (D.C. Cir. 1983). The reviewing court's task is to determine "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Overton Park, 401 U.S. at 416. In making this determination, the Court's review is limited to the administrative record. See TOMAC v. Norton, 193 F. Supp. 2d 182, 194 (D.D.C. 2002) (citing Overton Park, 401 U.S. at 420). Review under the "arbitrary and capricious" standard is "highly deferential" and "presumes the agency's action to be valid." Envtl. Def. Fund v. Costle, 657 F.2d 275, 283 (D.C. Cir. 1981) (citations omitted). Any error must be prejudicial: "[a]s incorporated into the [Administrative Procedure Act], the harmless error rule requires the party asserting the error to demonstrate prejudice from the error." First. Am. Disc. Corp. v. CFTC, 222 F.3d 1008, 1015 (D.C. Cir. 2000).

IV. ARGUMENT

There are four statutory frameworks relevant to this case: the Indian Reorganization Act, the Indian Gaming Regulatory Act, the National Environmental Policy Act, and the Clean Air Act. Land into trust decisions are authorized under the IRA, gaming eligibility determinations are guided by the IGRA, NEPA requires environmental review, and the CAA requires the Secretary to ensure that emission from the Proposed Project will conform to the applicable state implementation plan. The United States is entitled to summary judgment on the plaintiffs' claims made under each of these statutes, for the reasons set forth below.

A. THE SECRETARY HAS AUTHORITY TO TAKE LAND INTO TRUST FOR THE NORTH FORK TRIBE UNDER THE IRA

In 1935, a vote of eligible, “adult Indian” voters was conducted on the North Fork Rancheria pursuant to Section 18 of the IRA. 25 U.S.C. § 478, Stand Up, 919 F. Supp. 2d at 58. Accordingly, the Secretary properly concluded that statutory authority exists under the IRA to take land into trust for the North Fork Rancheria. That “election conclusively establishes that the Tribe was under federal jurisdiction for Carcieri purposes.” NF_AR_0041198;[3] see also Stand Up, 919 F. Supp. 2d at 67 (“[T]he Secretary’s conclusion that he had authority to acquire land for the North Fork Tribe, based solely on the IRA election, was rational because the text of the IRA establishes that only people eligible to vote in such elections were ‘adult Indians.’”) (quoting 25 U.S.C. § 478). The results of most elections completed by Interior after enactment were noted in a report prepared in 1947 by Theodore Haas. Theodore Hass, Ten Years of Tribal Government Under I.R.A. (1947) (“Haas Report”) (Table A lists most of the reservations that voted to accept or reject the IRA, including the North Fork.). NF_AR_0041198; NF_AR_NEW_0001995. Stand Up now makes only narrow arguments, compared to their Third Amended Complaint and its motion for a preliminary injunction, regarding the IRA in its brief, and has waived any other claims regarding the statute. Public Employees for Environmental Responsibility v. Beaudreau, 25 F. Supp. 3d 67, 129 (D.D.C. 2014) (citing Grenier v. Cyanamid Plastics, Inc., 703 F.3d 667 (1st Cir. 1995) (“Even an issue raised in the complaint but ignored at summary judgment may be deemed waived.”)) Its circumscribed claims have no force, and should be rejected. In summary judgment, “the onus is upon the parties to formulate arguments; grounds alleged in the complaint

[3] Section 18 elections were to be held within one year of the IRA's enactment, 25 U.S.C. § 478, but the timeframe was extended to June 18, 1936 by subsequent legislation. *See* Act of June 15, 1935, Ch. 260, Pub. L. No. 74-148, 49 Stat. 378.

but not relied upon in summary judgment are deemed abandoned." Resolution Trust Corp v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995) (citation omitted); Shakur v. Schiro, 514 F.3d 878, 892 (9th Cir. 2008) (holding that a plaintiff abandoned claims by not raising them in his summary judgment briefs).[4]

The Secretary correctly concluded that the 1935 vote is dispositive of the federal government's jurisdiction over the North Fork Tribe at the time of IRA's enactment. NF_AR_0041198. In doing do, the Secretary explained that by holding the election, North Fork inherently met the first definition of Indian in the IRA. Indeed, Section 19, besides defining "Indians," also defines "tribe" for purposes of the IRA and includes in that definition "the Indians residing on one reservation." Id. Therefore, the adult Indians residing on the North Fork Rancheria who were eligible to vote in the Section 18 election also constituted a tribe under federal jurisdiction for purposes of the IRA. Simply put, if the North Fork Rancheria was not composed of "Indians," "now under Federal jurisdiction," residing on a "reservation," the Secretary would not have called a Section 18 election for it. 25 U.S.C. §§ 478-79.[5] Moreover, the Secretary held elections where there are reservations and, where there are reservations, there is land under federal jurisdiction for Indian tribe(s). Stand Up, 919 F. Supp. at 68, 70 ("purchase of land is important, and likely dispositive in its own right" and "the North Fork Tribe was

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[4] The Haas Report listed reservations at which the adult Indian residents voted to accept or reject the IRA, (table A of Report); tribes that reorganized pursuant to the IRA, (table B); tribes that accepted the IRA with pre-IRA constitutions, (table C), and; tribes not under the IRA with constitutions, (table D). NF_AR_NEW_0001995-2013 (providing results of the Section 18 election held at Fort Totten, the reservation for the Spirit Lake Sioux Tribe, on November 17, 1934).

[5] Shawano County, Wisconsin v. Acting Midwest Regional Director, Bureau of Indian Affairs, 53 IBIA 62, 71 (Feb. 28, 2011) ("[I]n 1934, the Secretary necessarily recognized and determined that the Tribe did constitute a tribe under Federal jurisdiction when he called and conducted a special election.").

clearly 'recognized' in the cognitive sense of the word both before and after 1934"); Solicitor's Opinion M-37029 at 20-21, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (Mar. 12, 2014) (Available at http://www.doi.gov/solicitor/opinions/M-37029.pdf). Consequently, the Secretary has authority to accept land into trust for the North Fork Rancheria and Carcieri offers no basis to invalidate the Secretary's decision.[6]

Stand Up objects that the vote does not establish that North Fork was a tribe "under Federal jurisdiction" at the time the IRA was enacted because "the calling of a Section 18 election did not establish the existence of a tribe, but rather only the existence of a reservation with Indians living on it." Stand Up Br. at 8; see also id. at 10 ("Under Section 18, the only conclusion that can be drawn solely from the vote is that Indians voted."). Stand Up's argument supports the fact that statutory authority exists to take land into trust for the North Fork.

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[6] That the North Fork voted against the IRA is of no moment. Tribes that rejected the IRA pursuant to Section 18 did lose the right to have land taken in trust at that time under the IRA as a result of that vote, but in 1982, Congress enacted the Indian Land Consolidation Act. 25 U.S.C. § 2201 et seq. That Act "by its terms simply ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478," and applies to "those who satisfied the definition of 'Indian' in § 479 at the time of the statute's enactment but opted out of the IRA shortly thereafter." Carcieri, 555 U.S. at 394-95; NF_AR_0041198. See also S. Rep. No. 97-507, at 4 (1982) (discussing proposed legislation, which would eventually be enacted together with ILCA, to extend the IRA to the Devils Lake Sioux Tribe (now known as the Spirit Lake Sioux Tribe) since the tribe "voted to reject [the IRA] on November 17, 1934" to allow the Secretary to assist the tribe in remedying land fractionation issues); S. 503, To Authorize the Purchase, Sale, and Exchange of Lands by the Devils Lake Sioux Tribe of the Devils Lake Sioux Reservation, North Dakota, and for Other Purposes, 97th Cong. At 35 (statement of Kenneth L. Smith, Assistant Secretary – Indian Affairs) ("The proposed amendment [to the bill] would merely extend the land acquisition authority of the IRA to the reservations of tribes who rejected the Act in elections held in the mid-1930s"); Stand Up, 919 F. Supp. 2d at 68 n. 19 (a vote "not to reorganize under the IRA in 1935 does not affect the Secretary's authority to acquire land into trust for the benefit of the North Fork Indians").

Section 465 of the IRA provides the Secretary authority to take land into trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. "Indians" is defined in Section 19 as including (1) "members of any recognized Indian tribe now under Federal jurisdiction," as well as (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." 25 U.S.C. § 479. As Stand Up correctly notes, the Section 18 vote establishes that North Fork consisted of "Indians" under Section 19 of the IRA. Stand Up Br. at 9. And that conclusion is sufficient to bring the Carcieri inquiry to an end. Stand Up's contention that we cannot know, based on the fact of the Section 18 vote alone, whether North Fork's members constituted a tribe is irrelevant so long as North Fork's members were "Indians" within the terms of the IRA. If they qualified as "Indians" under the IRA, the Secretary may take land into trust for them.

Plaintiffs attempt to confuse the matter by citing to the Section 16 vote to organize as the dispositive vote based on a mistake in the first Record of Decision for the Cowlitz Indian Tribe, which has since been corrected. Stand Up Br. at 8. Importantly, there is no such mistake in the North Fork Record of Decision. NF_AR_0041198. Furthermore, the theory fails to account for those tribes that voted against the application of the IRA under Section 18, such as the North Fork Rancheria and the Spirit Lake Sioux Tribe. NF_AR_NEW_0002010; Confederated Tribes of Grand Ronde Community of Oregon v. Jewell, --- F. Supp. 3d ---, 2014 U.S. Dist. LEXIS 172111, *12-13 n.4 (discussing court's 2013 order to the Department to rescind the 2010 Record of Decision and reissue a new Record of Decision within sixty days); s*ee also* Record of Decision; Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe at 95 n.9 (April 22, 2013) (including corrections to description of the Section 18 IRA vote) available at

http://www.cowlitzeis.com/documents/record_of_decision_2013.pdf.. Reservations that voted against the IRA were not eligible to reorganize under Section 16 at that time. As a result, if Stand Up's arguments were correct, and reservations that voted against the application of the IRA had to organize under Section 16 in order to be "under Federal jurisdiction," then every reservation that voted to reject the IRA would essentially be voting to terminate the federal government's jurisdiction over them. And the IRA, instead of protecting tribal self-government would have resulted in the wholesale termination of tribes voting against it, frustrating the very purpose of the Act. This absurd result is not only contrary to the text and purpose of the IRA, but it is contrary to the actions of Congress and Interior, which continued to exercise jurisdiction over tribes that voted against the application of the IRA to their reservation after the vote. See, e.g., Senate Report No. 1874, 85th Congress, Providing For the Distribution of the Assets of Certain Indian Rancherias and Reservations in California, July 22, 1958, at 4 ("Estimated costs to terminate Federal *trusteeship* on 41 rancherias in California" listing North Fork) (emphasis added).

Stand Up next misconstrues arguments made by the United States in the Cowlitz briefing in a further attempt to confuse the issue. Stand Up claims that "[Interior] has also expressly stated in recent briefing in Cowlitz that a Section 18 election cannot be determinative that a tribe was under jurisdiction because the IRA's voting requirements applied to reservations, not tribes." Stand Up Br. at 3. The United States' brief actually says that the list of reservations "that voted to accept or reject the IRA's provisions are not *definitive*." Id. (emphasis added). In this context, the United States meant that the list is not the exclusive means for showing that Indians were "under federal jurisdiction." Likewise, "determinative" and "definitive" are not the same. If a tribe voted pursuant to Section 18 of the IRA, the vote is determinative of that tribe's status as

under federal jurisdiction, but the list of tribes that voted under Section 18 does not define the entire universe of tribes under federal jurisdiction in 1934. This is due to the fact that votes were conducted by reservation and only one definition of "Indian" in Section 19 uses the term "reservation." 25 U.S.C. §§ 478, 479.[7] Moreover, as explained in the IRA record of decision and the Solicitor's M-Opinion, a vote on whether to opt out of the IRA is a unambiguous evidence of being under federal jurisdiction in 1934. Solicitor's Opinion M-37029 at 19-20.

Next, Stand Up asserts that termination and restoration are of no import to being under Federal jurisdiction in 1934 and that the Secretary's reliance on this evidence is a *post hoc* rationalization for her decision. Stand Up Br. at 11-12. Indeed, the fact that North Fork underwent the termination process and was restored is irrelevant to their status in 1934, because those activities occurred after 1934 and contrary to Stand Up's assertions, the Secretary did not rely on North Fork's termination and restoration as evidence of this status, but to refute Stand Up's argument regarding the import of the IRA Sections 16 and 18 votes. Further, the termination/restoration of the Rancheria in the second half of the 20th Century disproves Stand Up's argument that it was necessary for North Fork to vote to apply the IRA to their reservation and organize under Section 16 in order for the federal government to exercise jurisdiction over the Rancheria. There would have been no need for Congress to set in motion the termination of the Rancheria and distribute the assets, if it was no longer under federal jurisdiction based on the IRA. The termination and subsequent restoration of the Rancheria demonstrates that the federal

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[7] Stand Up leaves out the point made by Interior in the Cowlitz Brief that, "If only those that voted were eligible to organize, every tribe in Table B should be listed in Table A, but that is not the case. Groups that fit within the definition of Indian in Section 19 were still eligible to organize under the IRA, despite not being eligible to vote to accept or reject the Act." Confederated Tribes of Grand Ronde Community of Oregon v. Jewell, Case No. 12-00849 (D.D.C.) ECF 106-5 at 23 n. 23.

government continued to assert jurisdiction over the Indians residing on the North Fork Rancheria. NF_AR_0041198.

Finally, Stand Up argues that the Department could not restore North Fork to tribal status through the Tillie Hardwick litigation because no determination as to North Fork's tribal status was made at the time of termination. Stand Up Br. at 16. Stand Up admits though that the North Fork Rancheria was purchased by the United States in 1916 to be used to provide a home for the then-landless "band" of North Fork Indians. Id. at 13. Stand Up also conceded that the Indians use of this land was under the superintendence of the Department of the Interior. Id. Stand Up further acknowledges that the litigation in Tillie Hardwick over the legality of the termination of the Rancheria resulted in stipulated judgments restoring the Rancheria and the rights of the Indians on it to their previously existing status. Id. at 16. North Fork was then included on the list of federally recognized tribes.[8] Subsequently, Congress enacted the Federally Recognized Indian Tribe List Act in 1994 directing the Secretary to update and regularly publish the list, which included North Fork. See Pub. L. No. 103-454, 108 Stat. 4791 (1994), codified at 25 U.S.C. § 479a-1. Under the List Act, the federal recognition of these listed tribes can only be

[8] See 49 Fed. Reg. 24007, 24084 (June 11, 1984) (announcing restoration of the Tillie Hardwick plaintiff Rancherias to federal recognition as Indian tribes); 50 Fed. Reg. 5969, 6057 (Feb. 13, 1985) (including the North Fork Rancheria on the Department's official list of "Indian Tribal Entities Recognized and Eligible to Receive Services"). The Stand Up Plaintiffs try to assert that membership changes within the tribe over the last century somehow diminish the North Fork Tribe's tribal status today. Stand Up Br. at 11-14. Whether the North Fork Tribe's membership changed over time is irrelevant to whether the tribe was under federal jurisdiction in 1934, or whether the tribe is federally recognized today, because changes in membership do not change the tribal status of an Indian tribe. Despite what the Stand Up Plaintiffs suggest, there is only one federally recognized North Fork Indian tribe: the tribe for whom the Secretary held a Section 18 election in 1935; the tribe whose status was terminated pursuant to the California Rancheria Termination Act and subsequently restored through the Tillie Hardwick litigation; and the tribe for whom the Secretary agreed to acquire the Madera site in trust in 2012.

terminated by Act of Congress, Pub. L. No. 103-454 § 103(4), and the statute of limitations to challenge North Fork's tribal status or the terms of the Tillie Hardwick settlement has long since run. 28 U.S.C. § 2401(a).[9]

B. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT ON STAND UP'S IGRA CLAIMS

The Secretarial Determination under IGRA that the Madera parcel is eligible for gaming was reasonable. IGRA was enacted "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1); Citizens Exposing Truth About Casinos v. Kempthorne, (CETAC), 492 F.3d 460, 462 (D.C. Cir. 2007).

Gaming regulated by IGRA is allowed on lands acquired by the Secretary after October 17, 1988, if certain requirements are met. 25 U.S.C. § 2719(b)(1)(A). The requirements of this "two-part" test are that

> the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination[.]

Id.; 25 C.F.R. § 292.2 (regulations interpreting this statutory provision). Interior's regulations define "surrounding community" to mean "local governments and nearby Indian tribes located

[9] Sovereign immunity precludes suit against the United States without the consent of Congress; the terms of its consent define the extent of the court's jurisdiction. Sisseton-Wahpeton Sioux Tribe v. United States, 895 F.2d 588, 592 (9th Cir. 1990) (citing United States v. Mottaz, 476 U.S. 834, 841 (1986); Block v. North Dakota, 461 U.S. 273, 292 (1983); Soriano v. United States, 352 U.S 270, 273 (1957)). See also John R. Sand & Gravel Co. v. U.S., 553 U.S. 130 (2008) (confirming that 28 U.S.C. § 2501, the analogue statute to 28 U.S.C. § 2401(a), establishes a jurisdictional period of limitations not subject to equitable principles of waiver and estoppel). Moreover, this does not fall under the APA's waiver of sovereign immunity.

within a 25-mile radius of the site of the proposed gaming establishment." 25 C.F.R. § 292.2. In 2008, the Secretary promulgated regulations at 25 C.F.R. § 292 to implement 25 U.S.C. § 2719. No plaintiff in this case challenges these regulations.

Stand Up makes three flawed arguments regarding the Secretary's two-part IGRA determination. First, it contends that the Secretary's determination that the "weight of the evidence in the record strongly indicates the Tribe's proposed gaming facility in Madera County would not result in detrimental impact to the surrounding community," NF_AR_0040534, is "contrary to Congress's clear intent" because the Secretary considered the benefits of the land into trust decision and the proposed gaming facility as well as detrimental impacts. This argument fails because it is not supported by any statutory language, is not compelled by Interior's regulations, and cannot be supported even if the statute and regulations were, on this question, ambiguous. In any event, the Secretary reasonably considered the statutory and regulatory criteria and is entitled to deference for that determination. Second, Stand Up contends that the Governor's concurrence in the two-part determination was invalid. Not only is this wrong as a matter of federal law, it is also an issue that Stand Up has litigated and lost under California law. Finally, Stand Up claims that the Secretary's publication of the Compact is invalid because after the Compact was signed and submitted to the Secretary for approval, California voters held a referendum that purported to overturn the Compact. Interior's regulations describe requirements for the submission of a compact to Interior for review by the Secretary; here, the Compact satisfied those regulations, was entered into by the Tribe and the State, and was submitted to the Secretary for review.

1. <u>The Secretary's Determination That the Proposed Gaming Establishment on the Newly Acquired Trust Lands Will Not Be Detrimental to the Surrounding Community Is Entitled to Deference</u>

The Administrative Record demonstrates that the Secretary carefully considered the required factors under her regulations and reasonably determined that the proposed gaming determination would not be detrimental to the surrounding community. At the outset, the Secretary initiated consultation with the surrounding community pursuant to 25 C.F.R. §§ 292.16-19, NF_AR_0040528-32, analyzed the impacts on the surrounding community, NF_AR_0040533-36, carefully reviewed the Tribe's government-to government agreements in the form of Memoranda of Understanding with Madera County, the City of Madera, and the Madera Irrigation District, NF_AR_0001302, 0003694, 0003968, and determined that any detrimental impacts would be mitigated. <u>See</u>, <u>e.g.</u>, NF_AR_0029705-812. The Secretary carefully considered many issues, including those in the Final Environmental Impact Statement, including problem gambling, NF_AR_0030197, Crime, NF_AR_0030195, Environmental Impacts, NF_AR_0030122, Economic Impacts, NF_AR_0030190-92, 0030198-200, 0030205-13, and the effects on local Indian Tribes and local governments within 25 miles. Together, the Tribe's Memoranda of Understanding provide for significant payments (<u>e.g.</u>, $4.035 million to Madera County), which are intended to mitigate any potential financial impacts of the North Fork Tribe's project. NF_AR_0001309, 003698-701, 0003972. After carefully identifying the potential impacts of the casino and the mitigation measures in the Environmental Impact Statement and the IGRA record of decision, the Secretary concluded that the "weight of the evidence in the record strongly indicates the Tribes' proposed gaming facility in Madera County would not result in detrimental impact to the surrounding community." NF_AR_0040534.

Stand Up reads IGRA and the implementing regulations to not provide for any detrimental impact to the surrounding communities, nor to allow for the mitigation of any impacts. Stand Up Br. at 23-28. Stand Up's narrow interpretation of "detrimental to the surrounding community" as prohibiting any detrimental impacts at all, is neither based on clear statutory language nor supported by "the 'overarching intent' of the IGRA, which was 'in large part to provide a statutory basis for the operating of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments.'" Stand Up for California, 919 F. Supp. 2d 51, 74 (quoting CETAC, 492 F.3d at 468). The Secretary's construction of the statute is entitled to deference and the two-part determination made pursuant to implementing regulations was reasonable and supported by the administrative record.

Further, Stand Up "misconstrue[s] the standard by which the Secretary must judge the potential negative effects of a gaming establishment under the IGRA." Stand Up, 919 F. Supp. 2d at 73. It does so in several ways. At the outset, Stand Up vaguely and erroneously contends that IGRA must be "construed narrowly" so that the statute's purpose to promote economic development somehow "ignore[s] the limits Congress set on gaming on post-1988 lands." Stand Up Br. at 24. In particular, although it never seeks to explain how this narrow construction would be implemented in practice, Stand Up argues that it must be applied to the language requiring the Secretary to determine whether the gaming will be "detrimental to the surrounding community." Stand Up Br. at 24 (citing 25 U.S.C. § 2719(b)(1)(A)). Yet it can point to no statutory language or legislative history to support such a cramped reading.

What IGRA and the Part 292 regulation do provide is that the Secretary should consider whether the gaming establishment is in "the best interest of the Indian tribe and its members, and

would not be detrimental to the surrounding community. . . ." 25 U.S.C. § 2719(b)(1)(A). That is exactly what the Secretary did. Stand Up's argument relies on manufacturing a purported ambiguity and therefore lacks force. Moreover, to the extent there is any ambiguity in the statute or in the regulations, these must be "construed liberally in favor of Indians with ambiguous provisions interpreted to their benefit." Chickasaw Nation v. United States, 534 U.S. 84 (2001). Accordingly, Stand Up's argument must fail and its assertions that IGRA "provides no allowance based on the benefits of the proposed project outweighing any detriment" and that "[m]itigation is not the same as elimination," are refuse from the same tree. Stand Up Br. at 27.

Second, "[c]ontrary to the plaintiffs' apparent premise, the IGRA does not require that a new gaming development be completely devoid of any negative impacts." Stand Up, 919 F. Supp. 2d at 73. Following the requirements of IGRA and the Part 292 regulations, the Secretary determined "in consultation with state, local, and tribal governments," id. at 73, that the North Fork Tribe and affected governmental entities had agreed upon appropriate mitigation to account for any impacts and found that there was no detrimental impact to the surrounding community. The Department's regulations specifically allow for mitigation. 25 C.F.R. § 292.18(a). There is therefore simply no basis for Stand Up's conclusion that "NEPA allows projects to proceed despite a finding of detrimental impact. IGRA does not." Stand Up Br. at 26. The Secretary followed IGRA and the regulation's standards to determine whether there was a detrimental impact to the surrounding community, and there is no basis to assert that the Secretary acted unreasonably when she considered the effects of mitigation that were the product of the memoranda of understanding with both Madera County and the City of Madera. Again, even if IGRA was ambiguous or silent as to the Secretary's authority to consider mitigation to determine

whether a gaming development is detrimental to the surrounding community, the Department's regulations are entitled to Chevron deference, as is the Secretary's decision.

The two-part determination and the Environmental Impact Statement on which it relies carefully analyzed the potential impacts of the project and the mitigation measures developed in consultation with state, local, and tribal governments. NF_AR_0040475-500. Stand Up's contention that IGRA "does not analyze the acknowledged detrimental effects of the project," Stand Up Br. at 26, ignores the fact that this analysis is contained in the Environmental Impact Statement which the IGRA record of decision relied upon. In light of 25 C.F.R. § 292.18 ("information on detrimental impacts" and mitigation should be contained in the Environmental Impact Statement) it is unclear why Stand Up thinks "NEPA analysis in the EIS and the required analysis under section 2719(b)(1)(A) are at cross purposes." Stand Up Br. at 26. The Secretary's record of decision for the two-part determination concluded there were no detrimental impacts based on the Environmental Impact Statement. NF_AR_0040533-36.

Finally, Stand Up asserts that the mitigation measures are inadequate, and that the Secretary has merely listed such measures without discussing them. Stand Up Br. at 27-28. In addition to measures that mitigate issues like problem gaming, NF_AR_0030198, 0030508-10, the Environmental Impact Statement contains an extensive discussion (NF_AR_0029848-59, 0030204-05, 0030207-12), of the fiscal reimbursement to Madera County and the City of Madera. The County's resolution in support of the project and language in the memoranda of understanding, NF_AR_0034386, state that the contributions are sufficient to mitigate impacts of the gaming development.

For the above reasons, the United States is entitled to summary judgment on Stand Up's Second and Sixth Claims for Relief.

2. The Governor's Concurrence With the Two-Part IGRA Determination is Valid

The Governor of California's concurrence with the Secretary's two-part determination is valid as a matter of federal law. A two-part determination requires the concurrence of the Governor of the State where the gaming activity will take place. 25 U.S.C. § 2719(b)(1)(A). Here, the Governor of California concurred in the two-part determination. NF_AR_0040988-89. No further inquiry is necessary. Nevertheless, Stand Up asks that this Court delve into state law, but state law is only relevant under IGRA to the extent that "a State permits such gaming for any purpose by any person," 25 U.S.C. §§ 2710(b)((1)(A), (d)(1(B), and California does permit class II and class III gaming. In any event, even the California courts have rejected plaintiff's arguments.

Neither IGRA nor the Secretary's regulations require the Secretary to examine the merits of the Governor's decision. 25 U.S.C. § 2719(b)(1)(A), see also 25 C.F.R. §§ 292.13(d), 292.22-23. The Governor's concurrence "preserves state sovereignty by merely encouraging the States to decide whether to endorse federal policy and by reserving the ultimate execution of that policy to the federal government." Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin v. United States, 367 F.3d 650, 663 (7th Cir. 2004). This section of IGRA "neither imposes on the States nor depends on them for the implementation of federal law," instead, it provides state input into gaming on Indian lands, an area generally outside the jurisdiction of a state, and seeks "the voluntary input of the States in the federal government's execution of federal law." Id. In Lac Courte Oreilles, the Seventh Circuit held that "the Governor's decision regarding any particular proposal is not analogous to creating Wisconsin's gaming policy wholesale—a legislative function—but rather is typical of the executive's responsibility to render decisions based on existing policy." Id. at 664 (legalized forms of gambling are evidence

of a state policy that tolerates Indian gaming) (citing California v. Cabazon Band of Mission Indians, 480 U.S. 202, 211 (1987)). California, via constitutional amendment, has sanctioned gaming within its borders. There is simply no *federal* law which requires more than the Governor's concurrence. The Secretary is instead required to comply with the IGRA two-part test, and ensure that the Governor of the state has concurred.

None of the federal cases or laws cited by Stand Up support its argument. Both Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688, 693 (9th Cir. 1997), and La Courte Oreilles, 367 F.3d at 663, examined whether IGRA's requirement that the Governor concur in a two-part determination is an unconstitutional delegation or violation of the appointments clause. Those cases did not, in dicta or holdings, conclude that the Secretary is required to review the merits of the Governor's concurrence under state law, nor did they hold, or even suggest, that the Governor's concurrence is reviewable in federal court. Stand Up commits grave error by misreading statements such as "[t]he power to place public lands in trust for Native Americans for the purpose of gaming is not an Executive power," Stand Up Br. at 30 (citing Confederated Tribes of Siletz, 110 F.3d at 694) to mean that under federal law a state legislature must assent to the Governor's concurrence. Id. at 30. Confederated Tribes did not so hold, nor is the claim consistent with the plain language of the statute. In describing who must consent to the two-part determination the plain language of IGRA says "governor," 25 U.S.C. § 2719(b)(1)(A), not "Stand Up" or "the state legislature" or any other body. Stand Up also confuses the Governor's "concurrence" in a two-part determination with entering into a gaming compact. Stand Up Br. at 32-35. These are separate issues and separate statutory provisions. There is no case law to support Stand Up's contention that the validity of the Governor's concurrence under State law must be examined by the Secretary.

To the extent that Stand Up seeks to have this Court declare the Governor's concurrence invalid, they have neglected to join the party that is purported to have acted unlawfully—the Governor of California. Further, any such ruling would contradict the rulings of the courts of California. In Stand Up For California! v. California, No. MCV062850 (Superior Ct. Cal. Mar. 27, 2013), the California courts rejected Stand Up's claim that "Governor Brown had no authority to 'concur' with the Secretary of the Interior." Id. at 2. By filing this case, Stand Up acknowledged that the state court was the proper forum, but unhappy with that result, they are re-litigating the matter and seek an order from this Court that contradicts the actions of a California State Court. Stand Up's efforts should be rejected—there is no basis upon which to request an injunction against a state court in this matter and Stand Up has not even addressed this issue. Regardless, the Secretary may properly rely upon IGRA's plain language which states that the Governor's concurrence is sufficient.

For the above reasons, the United States is entitled to summary judgment on Stand Up's Second and Sixth Claims for Relief.

3. The Tribal-State Gaming Compact Remains in Effect

The Secretary's deemed approval of the Tribal-State gaming compact which was entered into and submitted to the Secretary by the North Fork Tribe and the State of California is reasonable and complies with IGRA. The Secretary's deemed approval complied with the procedures created by IGRA and the regulations interpreting IGRA. 25 C.F.R. §293.1-16. This is not a question of state law. Contrary to Stand Up's view, states that permit gaming cannot unilaterally change the terms by which they deal with the federal government and Indian Tribes when Congress, through IGRA, and Interior, through its regulations, have already established the applicable process and law.

a. Federal Law Governing the Approval of a Tribal-State Gaming Compact

Any "Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity . . . is to be conducted," must request that "State in which such lands are located to enter into negotiations for the purpose entering into a Tribal-State Compact governing the conduct of gaming activities." 25 U.S.C. § 2710(d)(3)(A). The State "shall negotiate with the Indian tribe in good faith to enter into such compact." Id. Once negotiated, a tribal-state compact is similar to a "congressionally sanctioned interstate compact the interpretation of which presents a question of federal law." Cuyler v. Adams, 449 U.S. 433, 442 (1981). "A compact is a form of contract." Kelly, 104 F.3d at 1558 (citing Texas v. New Mexico, 482 U.S. 124, 128 (1987)).[10]

The Secretary has set forth regulations that contain her interpretation of IGRA provisions governing the submission of Tribal-State compacts for review. See 25 C.F.R. § 293. These regulations enumerate procedures that "Indian tribes and States must use when submitting Tribal-State compacts" and "[t]he Secretary will use for reviewing" the compacts. Id. at § 293.1. 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." Id. at § 293.3. "Either party (Indian tribe or State) to a compact . . . can submit the compact . . . to the Secretary for review and approval." Id. at § 293.6. "The Indian tribe or State should submit the compact

[10] Although IGRA did not waive the states' immunity to lawsuits, Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996), a state that has waived its sovereign immunity is still subject to an IGRA action by a Tribe or the United States to negotiate in good faith. California is among those states that has waived its sovereign immunity to suits under IGRA brought by Tribes and the United States. Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 716 n.7 (9th Cir. 2003); Mechoopda Indian Tribe v. Schwarzenegger, No. Civ. 5:03-2327, 2004 WL 1103021, at *3 n.4 (E.D. Cal. 2004). California has amended its State Constitution to authorize, with a Tribal-State Compact, the operation of slot machines, lottery games, and banking and percentage card games by federal recognized Indian tribes on Indian lands "in accordance with federal law." Cal. Const. art. IV, § 19(f).

or amendment after it has been legally entered into by both parties." 25 C.F.R. § 293.7. A compact shall "take effect" when "notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(3)(B).

When a Compact is "'entered into' by an Indian tribe and a State, as evidenced by the appropriate signatures of both parties," 25 C.F.R. § 293.3, and submitted to the Secretary, IGRA sets forth a timeframe of 45 days in which the Secretary must act to approve, or disapprove, a gaming compact:

> If the Secretary does not approve or disapprove a [Tribe-State] compact . . . before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

25 U.S.C. § 2710(d)(8)(C); 25 C.F.R. § 293.10-13. A compact may be withdrawn after it has been received if "the Indian tribe and State [ ] submit a written request . . . ." 25 C.F.R. § 293.13. A Tribal-State compact goes into effect when it is published in the Federal Register. 25 U.S.C. § 2710(d)(3)(B).

b. <u>The Secretary's Deemed Approval of the Tribal-State Compact Follows IGRA and the Applicable Regulations; Only Federal Law Applies</u>

The Secretary's deemed approval here complied with the requirements of IGRA. This Circuit has held that a Secretary's deemed approval is subject to judicial review, "but only to the extent the compact" is inconsistent with IGRA. <u>Amador County v. Salazar</u>, 640 F.3d 373, 381 (D.C. Cir. 2011). Indeed, Congress specifically stated the *only means by which a Compact could be disapproved*: "[t]he Secretary may disapprove a compact . . . only if such compact violates (i) any provision of [IGRA]; (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or (iii) the trust obligations of the United States to Indians." 25 U.S.C. § 2710(d)(8)(B). Of these three provisions, Stand Up alleges only that the

Compact violates IGRA.[11] They claim that the Compact was never "entered into" by the State and Tribe. Stand Up Br. at 35-37. Additionally, Stand Up claims that "the state and tribe must be validly bound under state law," Stand Up Br. at 35-36, although this language does not appear anywhere in IGRA or the regulations interpreting it.

The Compact was entered into by the Tribe and the State of California. The Secretary's regulations state that a compact is "entered into" "by the appropriate signatures of both parties." 25 C.F.R. § 293.3. California's Secretary of State submitted the compact with a letter to Interior stating that California had "executed Tribal-State gaming compact," passed "a statute ratifying the compact," and that this was "signed by the Governor" and the North Fork Tribe. NF_AR_GC_00005. The California Secretary of State claimed ignorance as to whether "such a compact has been *entered into* by the State of California within the meaning of 25 U.S.C. § 2710(d)(8)(C)," in light of a potential voter referendum. NF_AR_GC_00005 (emphasis added). The plain language of 25 C.F.R. § 293.3 makes clear that a compact is "entered into" when it has the "appropriate signatures of both parties." 25 C.F.R. § 293.3. The California Governor's office was clear when it stated "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 . . . ." NF_AR_GC_0000007.

The Secretary was obligated to follow her regulations. She did so. The Secretary had a Compact that was "entered into" by the tribe and State, as "evidenced by the appropriate

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[11] Picayune Rancheria's Complaint does not include any mention of the voter referendum nor have they filed an amended complaint to add these claims. Amending their complaint after they have filed their summary judgment motion and months after Stand Up amended their complaint would only be for the purposes of delay.

signature of both parties." 25 C.F.R. § 293.3. The Compact was submitted by the State of California. NF_AR_GC_000005-07. At this point, the Secretary had 45 days to approve or disapprove the Compact. 25 U.S.C. § 2710(d)(8)(C). Likewise, the Tribe and State could have withdrawn the Compact before approval or disapproval, in light of the pending referendum, 25 C.F.R. § 293.13, but they did not do so.

Although the Secretary is not required to consider state law, the California Secretary of State made clear that "[t]he Governor is the designated state officer responsible for negotiating and *executing, on behalf of the state, tribal-state gaming compacts* . . . ." NF_AR_GC_000011 (emphasis added). The Secretary of State also made clear that the California Legislature had passed a statute ratifying the Compact and that it had been "signed by the governor." NF_AR_GC00005. The Secretary of State then made clear that she was required, by "California Government Code" to "forward upon receipt a copy of an executed Tribal-State gaming compact and statute ratifying the compact." NF_AR_GC00005. Stand Up insists that not only must the Secretary delve into state law, despite the absence of any language in IGRA suggesting that she must do so, but also that the Secretary has a duty to disagree with the Governor of California and the Secretary of State of California's own characterization of the signed compact.

A straightforward interpretation of IGRA supports the Secretary's deemed approval of the Compact. IGRA states, without any ambiguity, that the Secretary must act within 45 days or the Compact submitted will be deemed approved. 25 U.S.C. § 2710(d)(8)(C). It sets forth three—and only three—grounds by which a Compact may be rejected by the Secretary. U.S.C. § 2710(d)(8)(B). Once a compact is approved, or deemed approved, the Secretary must publish the notice of approval in the Federal Register. Nothing in IGRA permits the Secretary to revisit, or otherwise rescind, publication of a compact in the Federal Register. Those standards, like

IGRA, do not include any mention of the effects of State referenda—so to the extent there is any ambiguity, the Secretary's regulations must govern. Here, the Secretary has determined that "entered into" means "the appropriate signature of both parties." 25 C.F.R. § 293.3. The Compact bore the signatures of the Governor of California and the Chairperson of the North Fork Tribe. AR_GC_00226. The Secretary's regulations are clear, and entitled to deference. "No substantive right exists to challenge the approval on the basis of state law irregularities. The IGRA expresses a congressional policy of putting compacts into force quickly . . . ." Langley v. Edwards, 872 F. Supp. 1531, 1535 (W.D. La. 1995) (compact approval by the Secretary "cannot be invalidated on the basis of a governor's ultra vires action"). Accordingly, because the Secretary's decision was made according to the Secretary's interpretation of IGRA, and the implementing regulations, the decision is entitled to Chevron deference. See United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

Stand Up contends that the Compact was never entered into by the State of California because there was later a referendum which purported to overturn the compacts of two specific Indian Tribes, Stand Up Br. at 35-36, while doing nothing to change the legality of Class III Indian gaming in California. In support of this, Stand Up cites Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997), but does not address the Secretary's regulations issued eleven years after that case. That compact had not been "entered into," id. at 1557-58, but the Secretary's regulations have clarified the meaning of "entered into" since then, 25 C.F.R. § 293, 73 Fed. Reg. 74,004 (Dec. 5, 2008), but here the Compact was entered into. Further, in Pueblo of Santa Ana, the Governor of New Mexico signed a compact even though the State had not authorized class III gaming. California, by contrast, has authorized Class III gaming in state constitution:

> Notwithstanding subdivisions (a) and (e), and any other provision of state law, the Governor is authorized to negotiate and conclude compacts, subject to ratification by the Legislature, for the operation of slot machines and for the conduct of lottery games and banking and percentage card games by federally recognized Indian tribes on Indian lands in California in accordance with federal law. Accordingly, slot machines, lottery games, and banking and percentage card games are hereby permitted to be conducted and operated on tribal lands subject to those compacts.

Cal. Const. art. IV, § 19(f); see also Willis v. Fordice, 850 F. Supp. 523, 532 (S.D. Miss. 1994) (Governor had authority to approve compact). Although Pueblo of Santa Ana involves a very different situation, other courts have assessed the validity of various federal legislative and executive measures dealing with jurisdiction over Indian lands against a claim that state law applies. These cases lend no support to Stand Up's claims.

Precedent supports the principle that the Secretary may rely on federal law because it promotes finality and prevents future nullification of federal law by state actors; it also avoids entanglement in complex questions of state law that would undermine Congress's statutory scheme and purposes. In a similar context involving retrocession of Public law 280 jurisdiction, an Executive Order required that the Secretary of the Interior publish in the Federal Register notice that a state had ceded jurisdiction over an Indian territory to the federal government. The underlying statute, however, did not specify what action of the state was necessary to trigger the Secretary's action. Since the necessary procedures were unstated, in United States v. Lawrence, 595 F.2d 1149 (9th Cir. 1979), Oliphant v. Schlie, 544 F.2d 1007 (9th Cir. 1976); United States v. Brown, 334 F. Supp. 536 (D. Neb. 1971); and Omaha Tribe of Nebraska v. Walthill, 334 F. Supp. 823 (D. Neb. 1971), several parties challenged state retrocession of jurisdiction as contrary to state law. In each case the federal court rejected collateral attacks on the retrocession agreement that was valid once accepted by Interior and published in the Federal Register based on a claim of failure to comply with state law. "The courts found that several factors contributed

to this conclusion: 1) a desire to avoid forcing the Secretary of the Interior delving into complex questions of state law to determine whether the state's retrocession was valid as a matter of state law; 2) an attempt to avoid future nullification of accepted retrocession agreements due to subsequently passed legislation or unfavorable court determinations; and 3) a need for finality." Kickapoo Tribe of Indians v. Babbitt, 827 F. Supp. 37, 45 (D.D.C. 1993) (discussing retrocession cases), rev'd on other grounds, 43 F.3d 1491 (D.C. Cir. 1995).

Stand Up's argument would, in effect, allow California voters to target a specific tribe, force the Secretary to consider complex questions of state law, undermine IGRA's purposes of providing stable and long-term employment and economic resources to Tribes, and potentially nullify other gaming compacts whenever California voters next decide to attack another Tribe and its right to conduct gaming in compliance with IGRA.

Indeed, the present case has many similarities to the retrocession cases. See Langley, 872 F. Supp. 1531, 1535 (W.D. La. 1995) (Secretary need not consider state law before approving compact); cf. Kickapoo Tribe of Indians, 827 F. Supp. at 46 (determination of acceptance of a compact is a matter of federal law, but due to delays in approval of the compact by Kansas, the Kansas's Supreme Court's holding that the Governor lacked authority to sign compact made the compact invalid). California voters have already made legal many types of Class III gaming on Indian lands and California's Constitution makes clear that the Governor had authority to enter into these Compacts. Fundamentally, these state law issues are irrelevant, because they do not address and are not pertinent to what is required under IGRA. The Secretary has already published the Compact. Class III gaming on Indian lands is still legal in California. The Secretary, by issuing regulations through the notice and comment rulemaking process, has

already resolved any statutory ambiguity concerning whether a compact has been entered into and submitted to the Secretary. Stand Up would render those regulations meaningless.

Once a compact is in effect, as evidenced by publication in the Federal Register, it remains in effect unless and until a compact expires. A post-approval state referendum decision on a question of state law cannot render an IGRA compact no longer "in effect," where the Secretary has already published the Compact pursuant to IGRA. This would allow states to unilaterally render compacts void, as a matter of federal law, and would introduce uncertainty and potential chaos into a setting where Congress intended to create stability. As a matter of policy, all parties must be able to rely on a Compact once it has been approved and published. After all, whether a compact is "in effect" determines whether a tribe's class III gaming activities are either entirely lawful or a criminal offence under federal law. Any other interpretation would render the Secretary's action and IGRA's statutory language meaningless and without force.

In these respects, the federal decision to approve and publish an IGRA compact is analogous to the "retrocession" authority discussed earlier. Accordingly, the Court should find that the Secretary's publication of the Compact did not violate IGRA and grant the United States' Motion for Summary Judgment as to Claims 5 and 6 of Stand Up's Complaint.

4. The Compact is Valid Under Federal Law and Its Fate Is Independent From the Secretary's Two-Part IGRA Determination and IRA Decision

Stand Up contends that if there is no Tribal-State gaming compact then the Secretary's 2012 and 2011 IGRA and IRA determinations are invalid. Stand Up Br. at 18-21. To the contrary, the Secretary's decision to accept land into trust under the IRA and two-part determination are independent of any determination regarding the validity of the Tribal State Compact. An application for a Secretarial Determination for gaming eligibility should contain any gaming compact, but only "if one has been negotiated," 25 C.F.R. § 292.16(j), and "[i]f the

tribe has not negotiated a class III gaming compact with the State where the gaming establishment is to be located" the application must instead include "the tribe's proposed scope of gaming, including the size of the proposed gaming establishment." Id. at § 292.16(k). Likewise, among the regulations listing the factors the Secretary must consider in reaching a land-into-trust determination, the Secretary need only consider the tribe's purpose for the land. 25 C.F.R. § 151.10-14. There is simply no legal basis for Stand Up's demand that the "fee-to-trust transfer be vacated and set aside" if there is no gaming compact. No regulation or statutory provision under IRA or IGRA requires a gaming compact to be in place for a land-into-trust determination or a two-part determination. In short, the status of the Compact has no effect on whether the Secretary's IGRA and IRA decisions were reasonable, and Stand Up has cited no authority that supports its argument. Even if that were the law, as demonstrated above, there is a gaming compact in place. Furthermore, a tribal-state compact is unnecessary for North Fork to conduct class II gaming, 25 U.S.C. § 2710(b), so the land into trust decision does not hinge on the validity of the Compact.

Stand Up likewise claims that the Memoranda of Understanding between the Tribe, Madera County, the City of Madera, and the Madera Irrigation District are invalidated in the absence of a Tribe-State gaming compact. This is not the case. The terms of those Memoranda of Understanding state that they go into effect when the Tribe and State enter into a gaming compact. They require a gaming compact to go into effect. They do not "terminate" in the absence of a gaming compact.

Finally, even if the Compact were held invalid, it would not be a change in the "'core-circumstances" that go to the "very heart of this case." Am. Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980). The absence of a compact now does not prohibit another compact because

either the Tribe and State could negotiate a new compact or the Tribe's entitlement to a compact could be tested in Court. 25 U.S.C. § 2710(d)(3). California has waived its sovereign immunity as to an IGRA action by a Tribe or the United States to negotiate in good faith and has legalized Class III gaming on Indian lands. See Artichoke Joe's Cal. Grand Casino v. Norton, 353 F.3d 712, 716 n.7 (9th Cir. 2003); Mechoopda Indian Tribe v. Schwarzenegger, 2004 WL 1103021, at *3 n.4 (E.D. Cal. 2004). California has amended its State Constitution to authorize, with a Tribal-State gaming compact, the operation of slot machines, lottery games, and banking and percentage card games by federal recognized Indian tribes on Indian lands "in accordance with federal law." Cal. Const. art. IV, § 19(f). Moreover, a Tribal-State gaming compact is unnecessary for North Fork to conduct class II gaming, 25 U.S.C. § 2710(b), so the land into trust decision does not hinge on the validity of the Compact. For these reasons, the United States is entitled to summary judgment on Stand Up's Sixth Claim.

C. United States is Entitled to Summary Judgment on Picayune Rancheria's Claims

The United States is entitled to summary judgment on the claims raised in the Picayune Rancheria of Chukchansi Indians' ("Picayune Rancheria")' Complaint.[12] At the outset, it is important to note that the Picayune Rancheria's statement of facts, see Picayune Br. at 3, are not accurate. It is unclear which of the factions claiming to be the federally recognized Indian Tribe filed the brief. Second, pursuant to closure orders of the National Indian Gaming Commission, no casino is now being operated on the reservation lands of the Picayune Rancheria of

[12] The Picayune Rancheria's complaint does not include arguments under IGRA related to the Compact, although they are raised in the motion for summary judgment. These arguments should not be considered. Citizens for Responsibility & Ethics in Wash. v. Cheney, 593 F. Supp. 2d 194, 217 (D.D.C. 2009) ("It is well established that a plaintiff cannot add or amend claims" by moving for summary judgment). To the extent that any response is necessary, the United States' response to these arguments is included, supra pages 26-35.

Chukchansi Indians. Infra n.14. Finally, the North Fork Rancheria of Mono Indians is a federally recognized Indian Tribe. 80 Fed. Reg. 1942, 1945 (Jan. 14, 2015). Its restored recognition and status as a tribe under federal jurisdiction in 1934 rests on the same basis as that of the Picayune Rancheria of Chukchansi Indians. To the extent that Picayune Rancheria claims North Fork is not a federally recognized tribe, they should review the second stipulation in Tillie Hardwick which concerned two tribes—North Fork Rancheria and the Picayune Rancheria.

1. The North Fork Tribe has Historical Connections to the Madera Site

The Secretary reasonably concluded that the North Fork Tribe has a significant historical connection to the land. 25 C.F.R. § 292.17(i) (to demonstrate that a proposed gaming establishment will benefit the applicant tribe and its members, an application can contain "[e]vidence of significant historical connections, if any, to the land," although this is not a requirement). This is one of many factors that the Secretary must consider before determining that a proposed gaming establishment is in the interest of the Tribe. 25 C.F.R. § 292.21(a) ("The Secretary will consider all the information submitted under §§ 292.16-19 in evaluating whether the proposed gaming establishment is in the best interest of the tribe and its members and whether it would or would not be detrimental to the surrounding community."). Under the Secretary's regulations, a significant historical connection to the land means land that it "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." Id. §292.2. After considering these factors, and applying the agency's specialized expertise on this matter, the Secretary concluded that the North Fork Tribe has a significant historical connection to the Madera Site. NF_AR_0040504-09

The Secretary relied upon evidence in the Administrative Record to determine that the North Fork Tribe has a significant historical connection to the Madera Site. First, the Secretary found that "ancestors of the Tribe used and occupied the San Joaquin Valley floor and the adjacent Sierra Nevada foothills," based on the historic witness of Joe Kinsman, an American settler, and one of the Federal treaty commissioners. NF_AR_0040504-5; 292 C.F.R. § 292.2 (historical connection can be demonstrated by "occupancy or subsistence use in the vicinity of the land"). Another factor cited in the regulations, the presence of a "ratified or unratified treaty" which includes the land, was satisfied in this case. NF_AR_0040505-6. "The 1851 Treaty signed at Camp Barbour on the San Joaquin River specifically mentioned the Mono ancestors of the Tribe . . . and made them express beneficiaries of the reservation contemplated by the Treaty." NF_AR_0040506. In 1851, within or near the boundaries of the present day City of Madera, the United States established the "Fresno River Farm." Id. Members of the North Fork Tribe can trace their ancestry back to the Mono Indians who were among those listed as at the farm. Id. The North Fork Tribe's citizens can recall working in vineyards near the Madera site and early photographs confirm this. NF_AR_0040508-09. These facts and others demonstrate the North Fork Tribe's "continuous presence" near the Madera site, through a treaty that included the Madera Site "within the boundaries of the tribe's" reservation, whether unratified or ratified, 25 C.F.R. § 292.2, and a "continuous presence in the vicinity of the Site, through occupancy and subsistence activities over a period of time." NF_AR_0040509; 25 C.F.R. § 292.2.

Picayune's brief argues that the unratified treaties do not demonstrate a historical connection to the Madera Site, but this argument ignores the relevant portions of the Administrative Record and the controlling regulations. It contends that the North Fork Tribe

"were not present at the1851 treaty signing" and that the treaty "was never subsequently ratified by the United States Congress." Picayune Br. at 10-11. Both of these things are true and, when examined with the full historical record, they fully support the Secretary's decision. The North Fork Tribe was indeed not present for the signing because they "had not yet arrived from the foothills," but the ancestors of the modern North Fork Tribe, by the terms of the treaty, were included as "represented signatories." NF_AR_0040506. The Picayune brief's contention that the treaty was never ratified is irrelevant because a Tribe may demonstrate a significant historical connection to a site via "ratified or unratified treaty." 292 C.F.R. § 292.2. The brief also contends there is no evidence to link the North Fork Tribe to the treaty. Picayune Br. at 10. However, the treaty "specifically mentioned the Mono ancestors of the Tribe." NF_AR_0040506. The inclusion of the Mono Indians in the treaty was no accident. After a military expedition bogged down into a pointless chase, NF_AR_0001101-1109, a peace parley was announced by which the Indians were to be promised food, clothing, and protection, or face extermination. NF_AR_0001109. Fearing military attacks, many Mono "continued to distrust white people and [continued] to steal horses from the San Joaquin Valley," having retreated to the mountains. NF_AR_0001119. Hence, viewed in light of the applicable regulation and the full facts which demonstrate the Tribe's connections to the Madera site, the Picayune Rancheria's argument instead demonstrates the soundness of the Secretary's decision, in light of the evidence and applicable regulations.

Next, Picayune's brief displays a small portion of a map that shows, generally, the reservation boundaries promised to the Indians and claims that the Madera Site is outside of the reservation made by the Treaty of Camp Barbour. Picayune Br. at 11. This conclusion is based on nothing more than their reading of this map. Their lay-opinion contradicts the reasoned and

informed opinion of the Secretary, who was acting within her agency's scope of expertise. E.g., Fed. Mar. Bd. v. Isbrandsten Co., 356 U.S. 481, 498 (1958) (Courts "should avail themselves of the aid implicit in the agency's superiority in gathering the relevant facts and marshaling them into a meaningful pattern); United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 551 (10th Cir. 2001) ("Determining whether a group of Indians exist as a tribe is a matter requiring . . . specialized agency expertise"); New York v. Salazar, No. 6:08-cv-00644, 2012 WL 4364452 (N.D.N.Y. Sept. 24, 2012) ("There is an institution specifically designed and coordinated to have expertise in the social, cultural, political, and legal history of the indigenous peoples of the United States. This institution is not the court. It is the Bureau of Indian Affairs."). The map is also explained by the "Explanatory Notes to the Map." NF_AR_0039857-58. The treaties, which "covered a significant portion of the San Joaquin Valley between the Chowchilla and Kaweah Rivers" were never "directly surveyed." Id. The Madera Site is within the red border that demarcates the "reservation lands promised in the unratified treaties." Id. The Record of Decision relies upon the description of the areas covered by the Treaty and nowhere is the map represented as more than a helpful visualization. To the extent that Picayune disagrees, it also disagrees with the faulty Manlove Report that it later relies upon. Picayune's purported expert concluded that the reservation set aside by the Camp Barbour treaty "would include the area of the proposed casino . . . ." NF_AR_000006. Hence, there is no basis to contest the Secretary's conclusion that the Camp Barbour area included the Madera site is reasonable and supported by the record.

Finally, the brief objects to the Secretary's detailed findings regarding the North Fork Tribe's occupation and subsistence of areas near the Madera site. Picayune Br. at 12-13. The Secretary relied upon extensive evidence to conclude that the North Fork Tribe has a significant

historical connection to the Madera site. One report, submitted to the United States Senate in 1852, details travels in the San Joaquin Valley. It describes the treatment of three "classes, (which distinctions they themselves seemed to recognize) to wit: the Christian or mission, Gentile, and Monas or lost tribes." NF_AR_0000973. The first two of those groups were either "induced to come," or "forced" to go to missions where they were "forced to labor" and "held the position of . . . . slaves." Id. The Monos took to the "higher mountains" and would "visit occasionally the plains and watercourse for the purpose of fishing and hunting" and assisted the other tribes "in times of war," using the mountains to secret away large bands of animals. NF_AR_0000973-4. Before the arrival of the United States government the Monos were "in the habit of crossing the coast range of mountains" and raiding Spanish settlements. They knew that when they reached the "plains," where the Madera Site is located, "that they felt secure, knowing that the Spaniards dare not follow them so far." NF_AR_0000974. The report makes clear that the Mono Indians, the predecessors of the modern North Fork Tribe, were present on the plains. Id. Other reports reflect that the Monos not only subsisted near the Madera site, but lived there as well. NF_AR_0001002 (reporting on the Fresno Indian Farm).

Picayune Rancheria's further aspersions on the Secretary's decision are also without merit. The brief claims that historian Gaylen Lee concluded that "the present-day town of Madera was in Chukchansi territory" but what Lee actually said was that Chukchansi territory was where "Madera County Road 415 crosses the [Fresno] River." NF_AR_0001095. That road does not run near Madera, but rather near Coarsegold and Hensley Lake. The brief likewise contends that Lee's book contains a "homeland map" of the North Fork Tribe of 1850's, Picayune Br. at 13 citing NF_AR_0001105, but that map is labeled Moore Homeland Today. NF_AR_0001105. "Today" presumably refers to the date of publication, 1998, not the 1850s.

Fundamentally, the argument ignores the appropriate standard of review for agency actions such as the Secretary's determination. Courts may not overturn an agency's decision simply because there may be conflicting evidence, and "in the absence of clear evidence to the contrary, courts presume that [agencies] have properly discharged their official duties." Nat'l Archives & Record Admin. v. Favish, 541 U.S. 157, 174 (2004). Moreover, an agency decision must be upheld so long as the agency examines the relevant data and sets out a satisfactory explanation including a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962)). "[T]he party challenging an agency's action as arbitrary and capricious bears the burden of proof." San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n, 789 F.2d 26, 37 (D.C. Cir. 1986). The Secretary used the appropriate standards in analyzing whether the Madera Site met the requirements of Section 2719 of IGRA, by considering numerous first-hand accounts, the boundaries of treaties, and her own regulations, and that determination is entitled to deference. Picayune Rancheria has not borne its burden of proof.

The Secretary's conclusion was reasonable and within the scope of the agency's expertise, and for those reasons the United States is entitled to summary judgment.

2. Picayune is Not a Part of the Surrounding Community and Therefore Was Not Part of the Formal Consultation Process Established by Regulation

The Secretary was entitled to rely upon regulations which define "nearby Indian tribes" entitled to consultation during the two-part consultation as "an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters." 25 C.F.R. 292.12. Picayune Rancheria asserts that the Secretary did not adequately respond to its

comments and that as a result the Secretary did not adequately assess the alleged "detrimental impacts" to the Picayune Rancheria. Picayune Br. at 15-27. Although the United States responds, below, to those allegations, at the outset, it notes that it is unnecessary to do so because the Secretary was under no obligation to consider any "detrimental" impact to Picayune, because the tribe falls outside of the 25-mile radius established by the Secretary's regulation.

The Secretary's regulations establish that the Picayune Rancheria is not part of the "surrounding community" that must be considered as part of IGRA's two-part determination. . Pursuant to the Part 292 regulations, the Secretary must consult with appropriate State and local officials and officials of a nearby Indian tribe:

> How will the Regional Director conduct the consultation process?
> (a) The Regional Director will send a letter that meets the requirements in § 292.20 and that solicits comments within a 60-day period from:
> (1) Appropriate State and local officials; and
> (2) Officials of nearby Indian tribes.

25 C.F.R. 292.19. These regulations define "nearby Indian tribe" as "an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters," and "surrounding community" as "local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment." 25 C.F.R. § 292.2. As discussed in the final publication of the Section 20 Regulations, Interior established the 25-mile radius because

> [b]ased on our [Interior's] experience, a 25-mile radius best reflects those communities whose governmental functions, infrastructure or services may be affected by the potential impacts of a gaming establishment. The 25-mile radius provides a uniform standard that is necessary for the term 'surrounding community' to be defined in a consistent manner. We have, however, included a rebuttable presumption to the 25-mile radius. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services

> will be directly, immediately and significantly impacted by the proposed gaming establishment.

73 Fed. Reg. 29354, 29357 (May 20, 2008). Therefore, a tribe

> located beyond the 25-mile radius of the site of the proposed gaming establishment may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed establishment.

Id. If a tribe petitions for consultation and establishes, to the satisfaction of the Secretary, that it will be directly, immediately and significantly impacted by the proposed establishment, and if the Secretary waives the regulation and exercises her discretion to grant the petition, it is included in the formal consultation process set forth in 25 C.F.R. § 292.19.

The Picayune Rancheria is not a nearby Indian Tribe as defined under the regulations. NF_AR_0050534. The Secretary has never, at any point, acknowledged them as part of the surrounding community or waived the regulations. The Secretary is only obligated to review detrimental impacts to members of the surrounding community. 25 C.F.R. § 292.2. Thus, the inquiry should end here.

Beyond that end point, the Regional Director of the Bureau of Indian Affairs nonetheless sent a letter to Picayune informing it, as a courtesy, of the initiation of the consultation process. In that letter, dated January 23, 2009, BIA stated that the "Picayune Rancheria is not within the 25-mile radius as required by the regulations" and this fact was acknowledged by the Picayune Tribe. NF_AR_0036148. The brief attempts to overcome this by a carefully placed ellipsis, stating "[i]n one letter, the BIA stated that 'the BIA recognizes the Picayune Rancheria of the Chukchansi Indians as an affected Indian tribe . . . for the above proposal.'" NF_AR_0004024. Read in whole, the sentence and letter containing it refers only to NEPA, not IGRA: "[T]he BIA recognizes the Picayune Rancheria of the Chukchansi Indians as an affected Indian tribe as a

result of the scoping process, for the above proposal." Id. The Secretary never granted a "petition for consultation" under IGRA and in order to do so, the Secretary would need to wiave the regulation. 73 Fed. Reg. 29354, 29357 (May 20, 2008).

Despite the regulations setting forth the Secretary's reasoning for a within 25-mile definition for surrounding communities, as articulated in the Secretary's notice of the proposed regulation, the Secretary's response to comments, and the final decision promulgating the regulation, Picayune Rancheria contends that "the geographic penalty applied to the Picayune is arbitrary and capricious." Picayune Br. at 18. If it is so, they have failed to challenge the regulation on its face. Instead, the brief contends that because the Madera Site is also more than 25 miles from the North Fork Rancheria, the Secretary has acted inconsistently. The argument ignores the Secretary's careful consideration of a number of factors to determine whether the Madera Site was in the best interest of the North Fork Tribe. See 25 C.F.R. §292.16-21 and NF_AR_0040445-0538 (applying these regulations in the record of decision). The brief cites no authority to show that there is any inconsistency, nor has Picayune challenged the regulations it implicitly alleges are inconsistent.

The brief does, ultimately, concede that IGRA itself does not contain a definition of "surrounding community." Picayune Br. at 22-23. But the Secretary's regulations are clear, and are entitled to deference. 25 C.F.R. § 292. Accordingly, because the Secretary's decision was made according to the Secretary's interpretation of IGRA, and the implementing regulations, it is entitled to deference. See Mead, 533 U.S. at 226-27.

The Secretary unambiguously determined that Picayune was not a member of the surrounding community. There is no applicable standard of review or provision of law that allows the Picayune Rancheria to challenge the Secretary's consideration of its comments.

Although the Secretary noted that its comments would be accorded "less weight than comments submitted by communities and tribes that fall within the definition of 'surrounding community,' the Secretary stopped short of applying anything more than "some weight." NF_AR_0040534. Although the Secretary afforded Picayune Rancheria's comments some weight, there is no basis to review the Secretary's response to the Picayune Rancheria's comments. The fact that the Secretary gave any weight at all to these comments is no more than a matter of sheer discretion and grace. Accordingly, the United States is entitled to summary judgment on Picayune Rancheria's claims that the Secretary did not properly consider its comments. To the extent that Picayune may seek judicial review of the Secretary's response to its comments, that issue is addressed below, and the Secretary's response to the Picayune Rancheria's comments is reasonable.

3. The IGRA Determination is Consistent and Reasonable

The Secretary's two-part IGRA determination is consistent and reasonable. Picayune's brief, however, alleges that the decision contains inconsistent treatment of competitive impacts, inconsistent treatment of distance from reservation, and inconsistent treatment of revenue impacts, employment, and programs. Picayune Br. at 15-20. At the outset, it is important to note that these claims are all based on alleged competitive harms to the Picayune casino, Picayune Br. at 15-27, which has been closed by order of the National Indian Gaming Commission. To the extent that there remains any basis for a claim, the Secretary acted reasonably in affording "some weight" to the comments of the Picayune Rancheria.

The purported inconsistency relies on alleged negative economic impacts to the Picayune Rancheria's shuttered gaming operation.[13] When the Secretary considered Picayune Rancheria's

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[13] The National Indian Gaming Commission administratively closed the Picayune

comments, the casino was still operational. At that time, the Secretary concluded that while Picayune identified "potential detrimental economic impacts . . . from competition with the North Fork Rancheria's proposed gaming facility," IGRA did not guarantee a right to avoid gaming competition. NF_AR_0040535. The brief argues that a conclusion that IGRA does not guarantee a right to avoid gaming conflicts with the Secretary's reasons for eliminating some alternative project sites from consideration. Picayune Br. at 16, discussing NF_AR_0040453-58. Fundamentally, IGRA requires the Secretary to select a site that is "in the best interest of the Indian tribe and its members . . .," 25 U.S.C. §2719(b)(1)(A), and the Secretary's consideration of competition complied with that standard. The Avenue 7 and 9 properties were removed because of train tracks across the property, environmental issues, and because those sites would be too close to Fresno and also would create additional competition with the Table Mountain and Picayune casinos. NF_AR_0040454. The HUD site was rejected because the Tribe, Madera County, and the Department of Housing and Urban Development had already expended over 2.5 million dollars to put into place sewers, water lines, and roads to service a community center and several homes. Moreover, the site was too steep for a casino. It was also within 20 miles of three other existing tribal gaming facilities. Id. There is no "inconsistency" here—in each case, the Secretary considered whether the proposed project site would be "in the best interest of the

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Rancheria's casino on October 7, 2014, citing violations of IGRA, National Indian Gaming Commission regulations, and the Picayune Rancheria's gaming ordinance. On October 10, 2014, it was ordered closed immediately. 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. Moreover, a federal court has issued a preliminary injunction against Picayune, enjoining them from operating the casino. State of California v. Picayune Rancheria of Chukchansi Indians, No. 14-CV-1593, ECF No. 48 at 5 (E.D. Cal. Oct. 29, 2014). Picayune's casino remains closed pursuant to that injunction, see id., ECF No. 66 at 2 (E.D. Cal. Feb. 10, 2015).

Indian tribe and its members . . .," 25 U.S.C. § 2719(b)(1)(A), and the detriments to the surrounding community. Although there is no right to be free from gaming competition (and North Fork, similarly, is not free from gaming competition), there is no legal basis for Picayune claims.

The Secretary's evaluation of any factual impact on the Picayune Tribe was supported by the record. In particular, the EIS, cited in the IGRA record of decision, discussed a "gravity model impact analysis" performed by a gaming entertainment consulting firm. NF_AR_0030250-51. This model evaluated the gaming market in and around Madera County and determined that a casino on the Madera Site would not "jeopardize[] the [Picayune Tribe's] casino's ability to remain open." NF_AR_0030250 The Picayune Tribe's casino is no longer open for reasons quite independent of any casino yet-to-be-opened by the North Fork Tribe.

The Secretary's consideration complied with all applicable laws, and the Picayune Rancheria has cited no authority to support their naked assertion that the Secretary may not consider competition when eliminating potential alternatives.

4. The Brief's IRA Claims Should Be Rejected

The brief also raises two issues under the IRA. First, the brief contends that if the IGRA decision is arbitrary and capricious then so is the IRA decision. This argument fails out of necessity if the Secretary's IGRA determination was valid. But even so, the Secretary's IRA decision considered the factors listed in 25 C.F.R. § 151.10(b), (c), (e) and determined that the trust acquisition would in fact serve the North Fork Tribe's need for land for tribal self-determination and economic development. Second, the brief claims that the IRA decision failed to meet the "heightened scrutiny for off-reservation acquisitions." Picayune Br. at 28-29. The Secretary's record demonstrates that the Secretary applied the appropriate scrutiny to "the tribe's

justification of anticipated benefits of the acquisition." NF_AR_0041203-04. There is no basis for the brief's bald assertion that the Madera Site was selected "because that is where Station Casinos wanted to put in a Class III gaming casino and resort," Picayune Br. at 29, particularly in light of the full administrative record which demonstrates the numerous reasons the Madera site was selected. See, e.g., NF_AR_0041147-58. The United States is entitled to summary judgment on these IRA claims.

D. The Secretary Adhered to the National Environmental Policy Act

The Secretary is entitled to summary judgment on Stand Up's NEPA claims because she took a "hard look" at the environment and socioeconomic impacts, including local impacts, of the proposed federal action to the communities. The Administrative Record confirms that the agency made a reasoned decision based on its analysis of the evidence before it. See generally Chamber of Commerce of U.S. v. SEC, 412 F.3d 133, 140 (D.C. Cir. 2005); Environmental Defense v. United States Army Corps of Engineers, 515 F. Supp. 2d 69, 78 (D.D.C. 2007). In arriving at her conclusions, the Secretary reasonably evaluated a range of feasible and reasonable alternatives, properly analyzed the impacts of her decision, considered mitigation measures, and complied with the applicable public involvement and public hearing requirements. At the outset, Stand Up's approach to cast the EIS as an analysis of Station Casinos' motivations is flawed. Stand Up Br. 38. The EIS was instead a hard look at the potential environmental consequences of the Secretary's land into trust acquisition and two-part determination under IGRA.

1. Secretary's Consideration of Alternatives was Reasonable and Not Arbitrary and Capricious

The Secretary sufficiently considered a reasonable range of alternatives, in this case five alternatives, for the proposed gaming sites, as required by the NEPA. 42 U.S.C. § 4332(2)(C)(iii) (requiring agencies to consider "alternatives to the proposed action"). In considering alternatives, an agency must "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which are eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a). Agency decisions as to the alternatives proposed and those that are considered in detail are subject to review based on a rule of reason and should be afforded substantial deference. Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991).

Here, the Secretary examined a reasonable set of alternatives, based on the underlying purpose and need for the proposed action, 40 C.F.R. § 1502.13, in a thorough, comprehensive, and detailed examination. NF_AR0029828-912. In short, (1) Alternative A was the full development of the Madera Site, as discussed above; (2) Alternative B was "a smaller-scale version of Alternative A, but without hotel or pool components;" (3) Alternative C was "a mixed-use retail development" on the Madera Site that "would include several larger retail outlet stores and smaller storefronts, including food and beverage establishments," but would not include any gaming, id. at 2–45; (4) Alternative D would be located on the North Fork Rancheria and would "consist of a smaller-scale version of Alternative A, without retail, high-limit gaming, entertainment, hotel, or pool components," id. at 2–54; and (5) Alternative E would have been the status quo, or the "no-action alternative" required to be considered under NEPA regulations, under which "neither site would be developed."

Although it is not clear, it appears that Stand Up objects to the rejection of Alternative D (located on the North Fork Rancheria) as the preferred alternative. Stand Up Br. at 38-39. To that end, Stand Up contends that the EIS "makes much of the Tribe's purported concern that 'development along the SR-41 corridor . . . would potentially have a very detrimental competitive effect on the gaming operation of neighboring Tribes" and that somehow this NEPA analysis contradicts the Secretary's IGRA determination. Id.[14] There is no specific mention of a failure to consider a specific alternative in the Stand Up Brief or Complaint, and thus, Stand Up's argument does not appear to be tied to any alleged legal deficiency. To the extent that Stand Up contests the rejection of Alternative D, NF_AR_0029882-900, Alternative D was not selected as the preferred alternative because it would produce reduced revenue, could not be financed, was more biologically sensitive, and was located further from existing development and infrastructure necessary to construct the casino. NF_AR_0029911. In contrast, the preferred alternative best met "the purpose and need of the proposed action, given that it would maximize long-term Tribal revenues" that would promote "'tribal economic development, self-sufficiency, and strong tribal governments.'" Id. (quoting 25 U.S.C. § 2702). The Secretary also concluded that the Madera site "is less biologically sensitive than the North Fork site" and that although the preferred alternative was a more intense development of that site than Alternatives B and C, that mitigation measures accounted for those impacts and therefore, the preferred alternative was judged "to best meet the purpose and need while minimizing impacts on the human

[14] To the extent that Stand Up is attempting to assert alleged detriments to the Picayune Rancheria of Chukchansi Indians, they lack standing to assert alleged injuries on behalf of other parties. Moreover, these are economic, not environmental harms. See Confederated Tribes of Grand Ronde Community of Oregon v. Jewell, No. 13-849, — F. Supp. 3d —, 2014 WL 7012707 at *8 (D.D.C. Dec. 12, 2014).

environment." NF_AR_0029912. Because the Secretary's analysis included a reasonable range of alternatives, summary judgment is appropriate.

The Old Mill Site Was Not a Feasible Alternative. Stand Up contends that the Secretary should have studied the Old Mill Site in more detail, and that the refusal to do so was a "self-serving rationalization[]". Stand Up Br. at 38-42. The record demonstrates Secretary made a reasonable decision to reject that Old Mill Site for several reasons; it is not a feasible alternative. For example, the owners of the Old Mill site stated that they would not sell the land for development of a casino project and several environmental problems were identified with the site.

"An alternative is 'reasonable' if it is objectively feasible as well as 'reasonable in light of [the agency's] objectives.'" Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 72 (D.C. Cir. 2011) (citations omitted); 43 C.F.R. § 46.420(b) (reasonable alternatives are "alternatives that are technically and economically practical or feasible and meet the purpose and need of the proposed action.") Council on Environmental Quality "regulations oblige agencies to discuss only alternatives that are feasible, or (much the same thing) reasonable." Citizens Against Burlington, 938 F.2d at 195 (citing 40 C.F.R. §§ 1502.14(a)-(c); 1508.25(b)(2)). Thus, if an alternative "does not 'bring about the ends of the federal action,'" or is not feasible in light of the goals of the Agency's action, the agency need not consider it. City of Alexandria v. Slater, 198 F.3d 862, 867 (D.C. Cir. 1999).

The Secretary reasonably determined that the Old Mill Site was not feasible or reasonable because it would have required substantial decontamination efforts to remove a laundry list of contaminants, with an "elevated" risk for the presence of unknown contaminants, the owners of the land asserted that it was not for sale for development of a casino project, and it was too

remote to meet the purpose and needs of the requested agency action. Stand Up , 919 F. Supp. 2d at 78 (citing NF_AR_0029908-9). Id. Any one of those reasons was sufficient to justify not considering the Old Mill Site as an alternative, because each one made the Old Mill site not feasible in light of the Secretary's goals. See Slater, 198 F.3d at 7867 (no need to consider alternatives that do "not bring about the ends of the federal action").

Despite the fact that the land was not available for sale, Stand Up claims that the identification of problems with the Old Mill Site are "the most self-serving rationalizations . . . ." Stand Up Br. at 40. First, Stand Up claims that the presence of community opposition should not have been considered, given that they opposed the alternative ultimately selected and that such opposition was also "community opposition." This misstates the Administrative Record. The owner of the Old Mill Site cited community opposition as a reason not to sell the land; the Secretary relied on far more than that to reject the Old Mill Site. NF_AR_0029909-10. Second, the land was not available for sale. Stand Up offers no explanation, nor could they, of how the Secretary could obtain land that is not for sale. The record contains proof that the land was not for sale. Id. The Secretary's decision to exclude an alternative that would have been based on the availability of land that could not be purchased was reasonable. Third, Stand Up contends that the Master Plan referred to by the land owner does not support the land owner's reasons for not selling the land in the letter. Stand Up Br. at 41-42. This does not undermine the fundamental fact that the land was not available for sale.[15] Finally, Stand Up contends that the Secretary's assertion that the Old Mill Site could potentially have undiscovered contamination is

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[15] Stand Up inserts IGRA into this discussion, presumably because it believes that "if acquired, the land would qualify for gaming under IGRA," Stand Up Br. at 39-40, n.28, but that has little to do with the Secretary's NEPA analysis, which reasonably concluded the land was not available for acquisition.

speculative, while Secretary relied on reasonable sources to make her determination . In sum, the rejection of the Old Mill Site was reasonable because the site was contaminated, too remote to achieve the desired project goals, its topography would have raised construction costs, and the land was not available for sale.

2. The Secretary's Analysis of Impacts was Reasonable and Not Arbitrary and Capricious, Including the Secretary's Analysis Regarding Crime

"NEPA requires that agencies take a 'hard look' at the environmental consequences of the proposed course of action." Theodore Roosevelt Conservation P'ship, 744 F. Supp. 2d at 159 (citations omitted); see 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. The Court's role is to ensure the agency take that look, "not to interject its own judgment as to the course of action to be taken." Wilderness Soc'y v. Salazar, 603 F. Supp. 2d 52, 59 (D.D.C. 2009) (citations omitted).

The Secretary's EIS took the requisite "hard look." Among others impacts, the EIS discussed the project's sociological and environmental effects. NF_AR_0030121. In this context, Stand Up's motion for summary judgment contests only the "analysis of the casino's impact on crime." Stand Up Br. at 42-43. To the extent Stand Up argues that any other aspect of the EIS failed to take the requisite hard look at the project's impacts, there are no citations to the record or authority.

In its discussion of the project's effect on Crime, the EIS surveyed five California communities that have had Indian casinos within close proximity or in their jurisdiction for at least the past two years. NF_AR_0030195. Local law enforcement officers were contacted to inquire about the impacts of the casinos, historical and present crime stats were reviewed, local social service agencies were also contacted, and a literature review of the social impacts of casino gambling was conducted. NF_AR_0030196. In addition to this, the EIS also considered the impacts of the Chukchansi Casino in Madera County. NF_AR_0030197. The EIS concluded

that "[a]fter surveying similar California casino communities and reviewing relevant literature, no definitive link between casinos and regional crime rates was found. Therefore, although an increase in calls for service is expected, an increase in regional crime rates would not result from [the project]. Thus, "[the project]'s impact to crime would be less than significant." NF_AR_0030195-7.

Stand Up contends that the EIS "engages in blatant deception in an effort to dismiss the indisputable impact that a casino will have on crime." Stand Up. Br. at 42. First, it asserts that the FIES "advances a skewed analysis of crime statistics in other counties," because some counties are very large, Santa Barbara County is 2,735 square miles, and that the EIS cannot "conflat[e] the crime rate in the entire unincorporated area of a county with that generated by a single facility within the county." Stand Up is describing the rather large Santa Barbara County, which had a population of 399,347 in 2000. NF_AR_0030195. In Santa Barbara County, the casino had 204 calls for service in 2003, resulting in 20 arrests. There were 8,536 arrests that year in Santa Barbara County. The local law enforcement agency for Santa Barbara County, like all other local law enforcement agencies surveyed, confirmed the conclusions of the academic literature and said that they could not "implicate the casino as the direct cause of" any crime increase. NF_AR_0030196. It is unclear how any of that is a "blatant deception." Stand Up Br. at 42. Stand Up cites no authority, or portion of the Administrative Record, which contradict those findings. Second, Stand Up contends that the EIS is wrong to compare the crime associated with a casino to "the opening of any other type of tourist attraction," in particular, Lego Land. Id. The Administrative Record does not, in fact, discuss Lego Land, but Stand Up is convinced that the casino "will generate more crime." Id. Stand Up offers no citations for these propositions.

The EIS considered the casino's potential impact on crime by carefully reviewing the relevant literature, the effects of casinos in other jurisdictions, and regional crime rates, and that information supports the finding of no significant impact. Although the Court should carefully review the record, it must defer to the "informed discretion of the responsible federal agencies" if the determination is based on the record. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989). In this case, "the Secretary's reasonable reliance on empirical socioeconomic data, as well as the tangible mitigation efforts proposed by the North Fork Tribe," Stand Up , 919 F. Supp. 2d at 73, was reasonable. Accordingly, summary judgment is appropriate.

3. The Secretary's Analysis of Mitigation was Reasonable and Not Arbitrary and Capricious

The Secretary's analysis of mitigation measures is reasonable and supported by the administrative record. The EIS includes numerous mitigation measures that will reduce the impact of problem gamers, including: $50,000 per year to support alcohol education and the treatment and prevention of problem gambling and gambling disorders; a "contract with a gambling treatment professional to train management and staff and to develop strategies for recognizing and addressing customers" with gambling problems; signage; and refusal of service to any customer whose gambling behavior convincingly exhibits indications of problem or pathological gambling. NF_AR_0030198, 0030509. In addition, the Tribe will contribute a one-time amount of $835,110 to Madera County and $1,038,310 annually for fiscal impacts to the county. The EIS recognizes that an additional $13,606 is necessary to compensate for gambling treatment programs, but explained that after mitigation measures, including the one-time payment and annual fiscal payment, that there would be a less than significant impact accounting for the mitigation. NF_AR_0029753-54, 0030211 tbl. 4.7-16. Because the Secretary has reasonably determined that several mitigation measures, as well as the one time and annual

payments to the County, will account for the $13,606 shortfall, the Secretary's finding of a less than significant impact is reasonable.

E. DOI'S CONFORMITY DETERMINATION IS CONSISTENT WITH THE CLEAN AIR ACT AND IS AMPLY SUPPORTED BY THE ADMINISTRATIVE RECORD

1. The Clean Air Act and Conformity Regulations

The Clean Air Act, 42 U.S.C. §§ 7401-7671q ("CAA"), establishes a joint state and federal program to control the Nation's air pollution by prescribing national primary and secondary ambient air quality standards. See 42 U.S.C. § 7409. The United States Environmental Protection Agency ("EPA") establishes national ambient air quality standards ("NAAQS") for certain pollutants, id., and each air quality control region in each state is later designated as "attainment," "nonattainment," or "unclassifiable" with respect to each NAAQS. 42 U.S.C. § 7407(d)(1)(A). Each State must adopt and submit to EPA for approval a state implementation plan ("SIP") that provides for the implementation, maintenance, and enforcement of the NAAQS in a designated air quality region. 42 U.S.C. § 7410(a)(1). Federal agency actions must conform to these plans:

> No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP] after it has been approved or promulgated under section 7410 of this title.

42 U.S.C. § 7506(c)(1). "Conformity" to a SIP generally means that the anticipated emissions from a proposed activity will not frustrate an implementation plan's purpose of attaining and maintaining the NAAQS. See 42 U.S.C. §§ 7506(c)(1)(A)-(B).

EPA has promulgated regulations to assist federal agencies in determining the conformity of their actions with SIPs. See 40 C.F.R. § 93.150-165 ("General Conformity Regulations").[16] In relevant part, these regulations require a conformity determination for proposed federal actions in nonattainment areas. 40 C.F.R. § 93.153(b). A determination must be prepared for each pollutant (or its specified precursors) where the total emissions caused by the proposed federal action would equal or exceed specified emissions levels. Id.

2. Administrative and Litigation Background

The land subject to the Secretary's fee-to-trust approval at issue here is located in the San Joaquin Valley Air Basin, which EPA has designated as an extreme nonattainment area with respect to the most recent NAAQS for the pollutant ozone. Ozone is formed by photochemical reactions involving sunlight and various ozone precursors. Final General Conformity Determination for the North Fork Casino/Hotel Resort Project, at 4 (June 18, 2011) ("2011 Determination") (identifying the relevant ozone precursors for this project as nitrogen oxides ("NO_X") and reactive organic gases ("ROG")). NF_AR_0039190. The Secretary projected that operation of the Proposed Project will result in emissions of 42 tons of NO_X and 21 tons of ROG. Id. at 4.

The 2011 Determination states that the Proposed Project will conform to the applicable SIP if the Tribe provides sufficient mitigation, consistent with 40 C.F.R. § 93.160, to offset the projected emissions. The 2011 Determination requires the Tribe to (1) purchase corresponding amounts of emission reduction credits; or (2) enter into a Voluntary Emissions Reduction Agreement with the local air quality district, the San Joaquin Valley Air Pollution Control

[16] EPA has also promulgated a separate set of regulations that apply only to certain transportation plans, programs, or projects. 40 C.F.R. §§ 93.100-93.129. All other federal activity is governed by the General Conformity Regulations

District. 2011 Determination at 7.[17] The Secretary concluded that the Tribe must secure the required mitigation before the Proposed Project opens. The Secretary noted that these mitigation measures are consistent with the mitigation required by the ROD. Id. at 6.

As part of the conformity determination process, the Secretary had published notice of the proposed conformity determination in a daily newspaper available in Madera County as required by 40 C.F.R. § 93.156. NF_AR_NEW_0001109. Notice of the final determination was also published in the newspaper as required by section 93.156. NF_AR_NEW_0001113.

After Stand Up raised its CAA claims in the first amended complaint, ECF No. 56, the Secretary determined that the record lacked proper documentation of compliance with 40 C.F.R. § 93.155, which requires that 30 days' notice of the proposed action and the draft conformity determination, as well as notice of the final determination, must be provided to specific federal, state, local and agencies and tribal governments. Id. § 93.155(a), (b). Therefore, the United States moved the Court to remand the conformity determination to the Secretary to complete the notice procedures required by section 93.155. ECF No. 63. The Court granted this motion over Plaintiffs' opposition. Memorandum Opinion and Order (Dec. 16, 2013) ("Opinion"). ECF No. 77.

Consistent with the Court's Order, DOI reissued the draft conformity determination and provided notice to the required agencies and tribal governments on January 23, 2014. NF_AR_NEW_0001179; NF_AR_NEW_0001334. DOI received comments from Picayune Rancheria, Stand Up, and Table Mountain Rancheria. NF_AR_NEW_0001422,

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[17] Under the Voluntary Emissions Reduction Agreement option, the Tribe would provide funding to the District, which would use the money to pay for emission reduction projects that would achieve the necessary NO_X and ROG emissions. 2011 Determination, at 6. Such an Agreement is essentially an alternate way to acquire the necessary emission credits.

NF_AR_NEW_0001427, NF_AR_NEW_0001573. All three letters raised the same issues. DOI reissued the 2011 Determination on April 9, 2014, 2014, after reviewing the letters, responding to the comments they presented, and determining that revision to the 2011 Determination "is not warranted." NF_AR_NEW_0001768. See also NF_AR_NEW_0001770. DOI provided notice of this final action to the required agencies and tribal governments. NF_AR_NEW_0001960.

3. The Court Has Already Rejected Stand Up's Argument Regarding Compliance With the Notice Requirements Of the General Conformity Regulations.

Stand Up[18] argues that the Secretary's provision of notice to the agencies and tribal governments in 2014 cannot remedy the absence of clear information in the administrative record to show that the Secretary met the requirements of 40 C.F.R. § 93.155 back in 2011.[19] According to Stand Up, the notice had to be issued before the 2011 Determination was signed. Therefore, Stand Up maintains that the Conformity Determination, as well as the entire trust determination, must be vacated and the Secretary must repeat the process from the beginning. Stand Up Br. at 46-47, 51-53.

This argument is essentially the same one on which Stand Up based its opposition to the United States' motion for remand. ECF No. 71. The Court previously rejected the argument that a procedural deficiency required vacatur of the 2011 Determination as "directly counter [] to the D.C. Circuit's decision in Sugar Cane Growers Co-op. of Florida v. Veneman, 289 F.3d 89, 98 (D.C. Cir. 2002) (Sugar Cane Growers)." Opinion at 6. The Court explained that, under Sugar Cane Growers and other relevant D.C. Circuit precedent, the appropriate remedy for the particular procedural default at issue here was not vacatur, but a remand to allow the Secretary to

[18] Stand Up is the only plaintiff seeking summary judgment on the CAA issue.

[19] The Secretary's determination is subject to review under the deferential standard established by the APA. City of Olmsted Falls v. FAA, 292 F.3d 261, 269 (D.C. Cir. 2002).

provide notice consistent with section 93.155. Opinion at 7. Thus, the Court has previously recognized that the Secretary could remedy any inadequacy in compliance with section 93.155 in 2011 by reissuing the notice, which the Secretary has now done.

The Court's Opinion on the motion to remand established the law of the case on this point. LaShawn A. v. Barry, 87 F.3d 1389, 1393 (D.C. Cir. 1996) (en banc) (explaining that under the law-of-the-case doctrine "the same issue presented a second time in the same case in the same court should lead to the same result" (emphases omitted)). Stand Up does not even address the Court's Opinion, much less present the Court with any reason to reconsider its prior decision. Accordingly, Stand Up's argument should be rejected again.

4. The Court Has Previously Rejected Stand Up's Argument that the Secretary Used the Wrong Emission Estimation Method.

The General Conformity Regulations provide that "[t]he analyses required under this subpart must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate." 40 C.F.R. § 93.159(b)(1). As in its opposition to remand, Stand Up contends that the Conformity Determination must be vacated because the Secretary did not redo the underlying analysis and use a new model for calculating motor vehicle emissions in California. Stand Up Br. at 47-48. The Secretary's analysis used the model in effect in 2010; the new model cited by Stand Up was not approved by EPA until 2013. See 78 Fed. Reg. 14,533 (Mar. 6, 2013).

Stand Up's claim is contrary to the plain language of section 93.159(b)(1)(ii), which provides, in relevant part, that "[c]onformity analyses for which the analysis was begun . . . no more than 3 months before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA." The regulation explicitly focuses on when the analysis begins; not when the agency issues a final determination.

Here, the Secretary properly used the model in effect when the analysis began in 2010. Nothing in the regulation even suggests that the Secretary's subsequent decision to remedy a procedural deficiency with respect to notice under section 93.155 would require revisiting the entire analysis.

Furthermore, EPA's notice approving the new model stated that its use would be required only where the conformity analysis began after September 2013. 78 Fed. Reg. at 14533. As the Court previously held, this language means that the new model is not required "for the already instituted conformity determinations at issue here." Opinion at 7-8. See also 2014 Response to Comments, at 2. NF_AR_NEW_0001946.

Stand-Up is once again repeating an argument already addressed by the Court without even acknowledging its prior decision, much less articulating any reason that the Court should reopen the issue. Stand Up does cite to one decision that post-dates the Opinion: Sierra Club v. United States Environmental Protection Agency, 762 F.3d 971 (9th Cir. 2014). There the Ninth Circuit held that, in deciding a permit application under an unrelated provision of the CAA, 42 U.S.C. § 7475(c), EPA must apply the air quality standards in effect when the permit is issued. Id. at 983-84. Sierra Club, however, was premised on the specific language of section 7475(c), which is quite different from section 93.159(b)(1)(ii), and has no relevance here.

5. Stand Up's Arguments that the Mitigation Is Inadequate Are Flawed.

a. The Secretary reasonably estimated the average trip length.

The length of trips is a factor in running the models to estimate the projected emissions associated with the Proposed Project. The Secretary's conformity analysis relied on an average trip length of 12.6 miles. Stand Up contends that the administrative record does not explain the

basis for this figure.[20] Stand Up Br. at 49. The Secretary, however, addressed this issue in response to the comments submitted in 2014. 2014 Response to Comments, at 5-7. NF_AR_NEW_0001949-51. As the Secretary explained, the length of trips was based on the traffic data developed from the model data from the Fresno County Council of Governments and the Madera County Transportation Commission. Id. at 5-6. The consultant preparing the EIS provided a description of the Proposed Project to these local government entities, which provided the model outputs that resulted in the estimate of 12.6 miles for the average trip length. Id.

Stand Up provides no reason why these local governmental entities would be an unreliable source of data. Instead, Stand Up only complains that the models and data were not included in the administrative record. Stand Up Br. at 49. In fact, the Secretary included the Madera County Travel Forecasting Model: Model Documentation and User Manual in the Supplement to the Administrative Record filed with the Court on May 5, 2014. ECF No. 83. NF_AR_NEW_0000002. On June 4, 2014, Stand Up filed yet another motion to supplement the record. ECF No. 85. In this motion, however, Stand Up did not contend that any additional material pertaining to the models and data should be included in the record. It is now too late for Stand Up to assert such a claim.

In the 2014 Response to Comments, at 5-7, the Secretary also explained that the chosen average trip length of 12.6 miles was reasonable in light of the distribution of the population

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[20] Stand Up suggests that this estimate, rather than a higher figure, was chosen during preparation of the Draft and Final EIS so that the emissions would be below the de minimis level applicable at the time (when the Basin was classified as a serious nonattainment area), which would make a conformity determination unnecessary. Stand Up Br. at 49-50. The Secretary, however, has consistently recognized that a conformity determination would be required for the operational phase of the Proposed Project. 2011 Determination, at 5; 2014 2014 Response to Comments, at 5-7. Thus, Stand Up's suggestion of impropriety cannot be sustained, particularly in light of the judicially-recognized presumption of regularity afforded to agency proceedings. See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971).

centers in the region. NF_AR_NEW_0001949-51. The distances between the Proposed Project site and the surrounding population centers range between 4.1 and 32.7 miles. Id. Given the presence of several other casinos in the metropolitan Fresno area that would be more convenient to the more distant of these centers, 12.6 miles was deemed to be an appropriate average trip length. Id. at 6. Finally, the Secretary explained that the fact that the Tribe had entered into an agreement with Madera County requiring that 50% of the employees were to be County residents would shorten the length of the average trip. Id. Stand Up has failed to show that the Secretary's explanation is insufficient to support the use of 12.6 miles as the average trip length for projecting the emissions from operation of the Proposed Project.

b. The Mitigation Requirements Satisfy the General Conformity Regulations.

Stand Up raises three other very cursory objections in a single paragraph. Stand Up Br. at 50. As set forth below, none have merit.

First, Stand Up contends that the Tribe's resolution to implement the mitigation measures in the Determination does not comply with 40 C.F.R. § 93.160(a), which requires that "[a]ny measures that are intended to mitigate air quality impacts must be identified and the process for implementation and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation." Br. at 50. However, the 2011 Determination meets these criteria: (1) it specifies the exact amount of credits that the Tribe must obtain through purchase or a Voluntary Emissions Reduction Agreement; (2) it further specifies that the credits must be "real, surplus, permanent, quantifiable and enforceable," and (3) it requires that the acquisition must be completed before the casino will open. 2011 Determination at 7. On June 17, 2011, the Tribe adopted Resolution 11-26, in which the Tribe expressly agrees to implement the mitigation required by the 2011 Determination and to provide

documentation of implementation before operation of the Project begins. NF_AR_NEW_0001110. Thus, even assuming that the requirements of section 93.160(a) apply to the Tribe's commitment, as well as the Secretary's Determination, the requirements are fully satisfied when the documents are considered together.

Second, Stand Up complains that the record contains no evidence that approval of the fee-to-trust transfer was "conditioned upon" the Tribe's meeting the mitigation measures. Stand Up Br. at 50 (citing 40 C.F.R. § 93.160(d)) (emphasis in original). This regulation provides: "[i]n instances where the Federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the Federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination." (emphasis added). The fee-to-trust transfer is an action that will be taken by the Secretary, not another governmental or private entity. Therefore, the regulation is not applicable to the transfer. While not relevant for the purposes of this particular provision, the action that will eventually be taken by the Tribe as a direct result of the Secretary's action is the operation of the casino. As noted previously, that operation is expressly conditioned upon prior compliance with the mitigation measures by the 2011 Determination. Such compliance can be enforced under the CAA. Thus, the casino cannot open unless the required mitigation is in place.

Finally, Stand Up claims that the Secretary did not comply with the requirements of section 40 C.F.R. § 93.163(a) and (b). Stand Up Br. at 50. Section 93.163(a) requires that the mitigation must offset the emissions from the Proposed Project in the year that the emissions occur. The emissions from the operation of the Project will occur each year from when it opens to when it finally closes. Stand Up's cursory assertion that the mitigation required by the 2011 Determination will not meet this requirement is wrong. The Determination requires that the

Tribe must acquire permanent emission reduction credits. These credits "provide a perpetual right to emission reductions . . . [which] means that the [credits] would reduce project emissions both in the year the [credits] are purchased and in future years when the emissions would occur." 2014 Response to Comments, at 8. Accordingly, section 93.163(a) has been satisfied. This conclusion necessarily disposes of Stand Up's claim with respect to section 93.163(b) as well. That provision only provides alternatives (such as higher emission offset ratios) that may be used if section 93.163(a) is not satisfied. Therefore, section 93.163(b) is not relevant here.

F. CLAIMS RAISED IN STAND UP'S THIRD AMENDED COMPLAINT THAT ARE NOT PRESENTED IN THEIR MOTION FOR SUMMARY JUDGMENT ARE ABANDONED.

Stand Up's summary judgment brief fails to present many claims raised in its third amended complaint and referenced in prior motions for preliminary injunction and to supplement the Administrative Record. Those claims should, under well-established law, be deemed abandoned. "[G]rounds alleged in the complaint but not relied upon in summary judgment are deemed abandoned." Resolution Trust Corp. v. Dunmar Corp., 43 F.3d 587, 599 (11th Cir. 1995). This Court has adopted the same approach. When a plaintiff, in summary judgment briefing, "mentioned in passing" two statutes" but failed to "advance" any arguments concerning these claims, the Court determined that the claims were abandoned. Public Employees for Environmental Responsibility v. Beaudreau, 25 F. Supp. 3d 67, 129 (D.D.C. 2014) (citing Grenier v. Cyanamid Plastics, Inc., 703 F.3d 667 (1st Cir. 1995) ("Even an issue raised in the complaint but ignored at summary judgment may be deemed waived.")); Morales v. Gotbaum, — F. Supp. 2d —, 2014 WL 2031244 at *18 n.27 (D.D.C. May 19, 2014) (issue raised in complaint but not mentioned in summary judgment motion is abandoned); United States ex rel. Davis v. District of Columbia, — F. Supp. 2d —, 2014 WL 1273608 at *14 n.11 (D.D.C. Mar.

31, 2014) (issue raised in complaint but not mentioned in summary judgment motion is abandoned); Styrene Info. and Research Ctr. v. Sebelius, 944 F. Supp. 2d 71, 83 (D.D.C. 2013) (deeming a claim that plaintiffs did not raise in their summary judgment briefs to be abandoned); Noble Energy, Inc. v. Salazar, 691 F. Supp. 2d 14, 23 n.6 (D.D.C. 2010). The doctrine is particularly applicable in cases such as this one, where summary judgment is the only vehicle for resolution of claims under the APA.

Stand Up makes only narrow arguments regarding the IRA in its brief, and has waived any other claims regarding the statute. Arguments that Stand Up has previously made in its motion for preliminary injunction and motions to supplement the record, which it has not made in its summary judgment brief, are therefore abandoned. Likewise, Stand Up does not raise several aspects of its IGRA claims. E.g. Third Amended Complaint ¶ 66 (claiming Secretary failed to consider "detrimental impacts" such as "environmental and economic impacts on Fresno, Mariposa, Merced and Madera counties," and "infringement upon the tribal sovereignty of other indigenous peoples," "impacts on water supply and water wells."). Additionally, Stand Up advances only narrow arguments under NEPA. Stand Up has abandoned its arguments concerning the projects "statement of purpose and need," "arguments concerning a supplemental EIS," public participation and statutory consultation," and its concerns about Interior's contractor. Third Amended Complaint ¶ 70. Further, Stand Up has abandoned arguments not raised about specific environmental impacts, the effect of taking land into trust on state and local governments, animal and plant species, habitat, greenhouse gas emissions, traffic, flooding, airport safety, and rejection of alternatives not mentioned in the motion for summary judgment Third Amended Complaint ¶¶ 72-82.

For these reasons, the United States is entitled to summary judgment on all claims set forth in Stand Up's Third Amended Complaint that are not raised in its motion for summary judgment.

CONCLUSION

The United States' and the North Fork Tribe's motions for summary judgment should be granted and the Picayune Rancheria's and Stand Up For California's denied.

Dated: February 13, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 13, 2015, the foregoing Joint Status Report was filed electronically through the Court's ECF system, which distributes an electronic copy to all counsel of record.

Dated: February 13, 2015

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