IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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

PLAINTIFFS' REPLY IN SUPPORT OF SUMMARY JUDGMENT AND

OPPOSITION TO CROSS-MOTIONS FOR SUMMARY JUDGMENT

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INTRODUCTION

The legal doctrines applicable to this case prohibit determinations made to justify a foregone conclusion. But any objective review of the records of decision, the environmental impact statement, the conformity determination, and the approval of the compact shows the very types of justifications that are prohibited. When bad facts inconveniently arise, they are avoided entirely or addressed in such superficial manners as to appear irrelevant. The history of the applicant North Fork Tribe is reduced to a citation to a single document showing only that four individual Indians, unconnected to any specific tribe, voted to reject the IRA at the North Fork Rancheria. The acknowledged detrimental impacts of the casino on the surrounding community are overcome by large payouts to local government entities for "mitigation" while no discussion or analysis of how mitigation would occur or be effective is provided. Reasonable alternatives are rejected for inconsistent and self-serving reasons, and significant impacts are summarily dismissed through illogical analysis. In short, every determination that plaintiffs challenge can be read only as a justification of a decision that had already been made – a rubber stamping of the casino project.

The Secretary's failure to properly make the required determinations further manifests itself in the barrage of post hoc justifications developed after the determinations as litigation positions. The arguments of both the Secretary and the Tribe in their oppositions and cross-motions for summary judgment offer little else. This is most apparent in arguments, such as the ones involving the significance of the *Tillie Hardwick* litigation, where the Secretary and the Tribe offer different and contradictory interpretations of the records of decision. The Secretary's initial determinations are so lacking in reasoned analysis that the only arguments available seem to be post hoc explanations. But the court must not consider these. The Secretary's decisions

must rise or fall on the initial analysis or lack thereof, not on the Secretary's or Tribe's current, self-serving interpretations.

Finally, the State of California has rejected class III gaming at the Madera site. Consequently the possibility of any future gaming at the Madera site is entirely speculative and the court should order the land taken out of trust and the determination should be remanded to the agency for further review.

For these reasons, as well as those discussed below and in plaintiffs' motion for summary judgment, the Court should grant plaintiffs' motion and order that the fee-to-trust transfer be unwound.

ARGUMENT

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

A. The Secretary and the Tribe fail to demonstrate that a Section 18 election is conclusive proof that a tribe was under federal jurisdiction in 1934

Both the Secretary and the North Fork Tribe attempt to confuse the issues in plaintiffs' challenge by mischaracterizing plaintiffs' arguments. Plaintiffs do not contend that the Indians residing at the North Fork Rancheria must have accepted the IRA or voted to organize under Section 16 in order to show that the applicant North Fork Tribe was recognized and under federal jurisdiction in 1934. [Docket 112-1, p. 16; Docket 111-1, p. 11.] Rather, plaintiffs argue that the rejection of the IRA under Section 18 cannot, on its own, be conclusive evidence that a tribe was under federal jurisdiction at the Rancheria in 1934.

1. Table A of the Haas Report does not show the varied groups of Indians that resided on reservations when the IRA was enacted

When Congress enacted the IRA, it was not a given that a group of Indians residing at a Rancheria or reservation was a single, unified tribe. According to the Department of the Interior, at the time of the IRA's passage in 1934, Congress recognized at least four different situations

regarding the tribal-makeup of Indians at reservations when it authorized the following groups to organize as a tribe under Section 16:

> (a) A band or tribe of Indians which has only a partial interest in the lands of a single reservation;
>
> (b) A band or tribe which has rights coextensive with a single reservation;
>
> (c) *A group of Indians* residing on a single reservation who may be recognized as a "tribe" for purposes of the Wheeler-Howard Act regardless of former affiliations;
>
> (d) A tribe whose members are scattered over two or more reservations in which they have property rights as members of such tribe.

Solicitor's Opinion ("Solicitor Op.") (Nov. 7, 1934) at 479, *in* 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974 (1979) (emphasis added).[1]

Only one of the above examples, example (b), contemplates a situation in which the "Indians living on a reservation" and a "tribe" are essentially the same. Two or more tribes may have existed on one reservation, as in example (a). Individual Indians may have lived on a reservation without regard to tribal affiliation, as in example (c). And a preexisting tribe may have had members residing on different reservations who maintained their membership in the broader tribe, as in example (d). As discussed in detail below, Table A of the Haas Report does not distinguish among these situations. It merely lists reservations and voting statistics.

The Solicitor, in the same 1934 opinion, also stated that the circumstances under which tribes could organize under Section 16 "do not throw any light on the situation prior to organization . . . . Prior to such organization the question of what tribal organization has any jurisdiction over restricted allotted lands of individual Indians is a matter of some uncertainty." *Id*. In California, the situation was particularly uncertain. According to the Department of

[1] Copies of the Solicitor's Opinions interpreting the IRA cited in this memorandum are attached as Exhibit 7.

Interior's Office of Indian Affairs, in 1934 only one actual reservation existed in California. Letter from O.H. Lipps to the Honorable Commissioner of Indian Affairs (July 24, 1934).[2] Besides this single reservation, there were about "60 small Government owned Indian rancherias" upon which small groups of Indians resided. *Id.* But these Indian groups had "no tribal business organization of any sort." *Id.* Despite the fact that some of these Rancherias were purchased for named groups, the federal government did not consider these groups to be tribes since no tribal restrictions applied to a Rancheria's use, and any individual California Indian could occupy any Rancheria parcel. Solicitor Op. (Aug. 1, 1960) at 1883, 1884.

In the IRA ROD, however, the Secretary ignored this uncertainty. Instead, the Secretary relied exclusively on Table A of the Haas Report, which states merely that four Indians voted at the North Fork Rancheria to reject the IRA under Section 18. [NF_AR_NEW_0002012] On that basis alone, the Secretary concluded that these four Indians were a single, unified tribe that was under federal jurisdiction in 1934. [NF_AR_0041198.] Table A, however, is not a list of tribes, but rather a list of reservations.

Contrary to the Secretary's assumption in the IRA ROD, Table A does not speak for itself. Table A does not distinguish among the (at least) four categories of Indians that could organize under Section 16. It merely lists reservations where the Secretary held a vote under Section 18 of the IRA. No conclusion regarding the specific tribal or cultural make-up of the Indians at a listed reservation can be drawn from Table A alone. Therefore, no conclusion can be drawn from the mere holding of a Section 18 election.

Contemporaneous practice demonstrates that the Secretary was wrong to equate a Section 18 election with tribal status. For example, in 1936, the Solicitor addressed the situation of the Indians of the Lower Sioux Indian Community and the Prairie Island Indian Community

[2] A copy of this letter is attached to this memorandum as Exhibit 8.

of Minnesota. These two groups of Indians both appear on Table A, and both voted to accept the IRA. [NF_AR_NEW_0002013.] But even after these Indians voted under Section 18 to accept the IRA, the Solicitor stated, "Neither of these two Indian groups constitutes a tribe but each is being organized [as a tribe] on the basis of their residence upon reserved land." Solicitor Op. (Mar. 31, 1936) at 479. Thus, according to the Department in 1936, the Section 18 election did not have the effect of making these groups tribes. They could not become so until the Indians voted under Section 16 to organize. Concluding that these groups of Indians were tribes solely on the basis of the Section 18 election reported in Table A would be unreasonable because these Indians were not considered tribes when they voted. Nor were they considered tribes by virtue of voting to accept the IRA at the reservation.

Also on Table A of the Haas Report is the Indian group at Fort Belknap, Montana. [NF_AR_NEW_0002014.] While Table A does not note this fact, the group listed was comprised of two historically different tribes. "The Indians of the Fort Belknap Reservation are, ethnologically, of two tribes. Neither of these Tribes is restricted to the Fork Belknap Reservation. *See* Solicitor Op. (Mar. 20, 1936) at 613. Despite their independent tribal histories, the Fort Belknap Indians chose to organize as a tribe under Section 16 and enacted a tribal constitution, which was approved on December 13, 1935.[NF_AR_NEW_0002020 (Haas Report, Table B).] The history of the Fort Belknap Indians demonstrates that tribal formation is a choice made by the tribe, not the federal government. Furthermore, while the Fort Belknap Indians were likely a tribe when they voted to accept the IRA in 1934, *see* Solicitor Op. (Mar. 20, 1936) at 613, Table A does not demonstrate that the 371 Indians that voted to accept application of the IRA at the reservation were made up of two different historical tribes that had chosen for themselves to act as a single tribe. [NF_AR_NEW_0002014.] In the same way,

Table A does not show that the Lower Sioux and the Prairie Island groups that voted to accept the IRA in 1934 were not tribes when they voted, or even after they voted, under Section 18.

As a third example, Table A shows that at the Quinaielt ("Quinault"[3]) reservation in Washington State 184 adult Indians voted to accept application of the IRA to the reservation. [NF_AR_NEW_0002016.] Prior to the 1934 vote, the United States Supreme Court held that "Chehalis, Chinook and Cowlitz are among those whose members are entitled to take allotments within the Quinaielt Reservation, if without allotments elsewhere." *Halbert v. United States*, 283 U.S. 753, 760 (1931). It is therefore clear that in 1934 at least three other different Indian groups likely resided within the Quinault Reservation that were not members of the Quinault Tribe. But the Table A reflects only the number of Indians that voted there.

These examples from Table A of the Haas Report demonstrate not only that Section 18 elections were not held for specific tribes, but also that such elections did not create tribes by operation of law, where none had existed prior thereto or where two or more distinct tribes resided on a single reservation. Rather, these examples show that tribal formation was left to the Indians to determine for themselves. The Haas Report is silent as to whether the Indians that voted on the North Fork reservation had made this determination for themselves. The fact that these Indians rejected the IRA and did not organize as a tribe under Section 16 demonstrates that these Indians did not make this choice under the IRA. Thus, whether these Indians were a tribe cannot be determined by reference to the Haas Report alone.

2. The Section 18 election at the Rancheria cannot show that a tribe was under federal jurisdiction

The Secretary and the Tribe rely on statutory interpretation that is contrary to the plain meaning and purpose of Section 18 and the historical examples discussed above. Both argue that

[3] While deemed "Quinaielt" on Table A and in the 1931 *Halbert* decision, the Cowlitz ROD refers to this reservation and tribe as "Quinault."

because "adult Indians residing on one reservation" is one of the definitions of "tribe" in Section 19 and "adult Indians" residing on the Rancheria voted under Section 18, the adult Indians that voted at North Fork were a tribe. This argument must be rejected, because it entirely ignores the language of Section 18, which does not contain the term "tribe."[4] The language of Section 18 does not limit the "adult Indians" that voted at a reservation to those that were members of the same tribe.

According to the Secretary's and the Tribe's approach to statutory interpretation, all adult Indians who voted were members of a tribe made up of the other Indians with whom they voted. This interpretation would undermine one of the most fundamental powers of a tribe – the right to determine membership. *See* Solicitor Op. (Dec. 13, 1934) at 487 ("[W]hether the organization is effected by a recognized tribe or by the residents of the reservation, first recognized as a tribe under the [IRA], the constitution so adopted may prescribe such qualifications of membership or suffrage and such procedures for adoption or abandonment of tribal relations as seem proper for the Indians concerned and the Secretary of the Interior.") Moreover, this interpretation is contrary to the purpose of Section 18. According to the Solicitor, "[t]he declared purpose of [Section 18] was to protect and safeguard every tribe of Indians against the possibility that the act might in some way deprive them of their existing rights, and in particular to protect them against the danger that this act might be modified at the last moment so as to work injury to some groups of Indians." Solicitor Op (Oct. 12, 1934) at 444.

Construing the Section 18 election in the manner proposed by the Secretary and the Tribe increases the danger to tribes. While it is convenient for the applicant Tribe now, it also means that the Cowlitz Tribe – for example – is not a tribe because Cowlitz Indians voted with the

[4] Under Section 19, the term "tribe" is expressly limited to "wherever used in this act." 25 U.S.C. §479.

Quinault Reservation and are therefore part of the Quinault Tribe.[5] 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 (April 22, 2013) ("Cowlitz ROD (2013)") at 101, *available at* http://www.cowlitzeis.com/documents/record_of_decision_2013.pdf.

Despite the various attempts to support the proposition that a Section 18 election conclusively establishes that a tribe was under federal jurisdiction at the Rancheria in 1934, the Secretary appears to concede that the Section 18 election is not so conclusive. The Secretary now appears to argue that the Section 18 election was evidence of a tribe's being under federal jurisdiction because the Section 18 vote establishes that "the North Fork consisted of 'Indians' under Section 19 of the IRA. And that conclusion is sufficient to bring the *Carcieri* inquiry to an end." [Docket 112-1, p. 14.] Further, "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." [*Id.*] This explanation was not proffered by the Secretary in the IRA ROD, but by counsel in the brief.

But this argument is also incorrect. The Secretary stated in the IRA ROD that she was acquiring land in trust for a "recognized tribe under federal jurisdiction." [NF_AR_0041198.] Merely recognizing the residents of the Rancheria as "Indians," cannot, as a matter of law, be dispositive of whether those Indians were a single, unified tribe because the term "Indian" has three definitions, which include Indians who were not members of any tribe. 25 U.S.C. §479. Not only that, the Secretary's new argument fails to satisfy the Supreme Court's rule from *Carcieri* requiring that she determine that the applicant North Fork Tribe was "a recognized

[5] In the Cowlitz ROD, the Secretary stated that at the Quinault Reservation, there were separate rolls for tribes residing thereon and a general Quinault Reservation roll. Cowlitz ROD (2013) at 101. According to the Secretary, "receipt of an allotment on the Quinault Reservation by a Chinook, Chehalis, or Cowlitz Indian did not mean that such Indians should be included on the tribal roll for Quinault, only that he/she should be included on the census roll for the Quinault reservation." *Id.*

Indian tribe . . . under federal jurisdiction" in 1934, *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009), and ignores the fact that the Secretary expressly purports in the IRA ROD to have met the *Carcieiri* standard. [NF_AR_0041198.] Thus, the Secretary's new argument cannot be a defense of the reasoning in the IRA ROD because it is directly contrary to that reasoning.

3. The Secretary's interpretation of Section 18 is not reasonably supported by the 2014 Solicitor's Memorandum or past DOI determinations

To overcome the flaws in its statutory interpretation argument, the Secretary and the Tribe now argue that the Secretary's unexamined and bare conclusion made in the 2012 IRA ROD was reasonable because, in a 2014 memorandum, the Solicitor of the Department of the Interior concluded that the Secretary may rely on a Section 18 election as unambiguous evidence that a tribe was under federal jurisdiction in 1934. Office of the Solicitor, United States Department of the Interior, M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act ("2014 Memorandum") (2014) at 20. The Tribe claims this memorandum is entitled to deference and should be considered now, after-the-fact, because "the reasoning in the Memorandum is fully consistent with the Secretary's determination here and with the DOI's previous determinations on this issue." [Docket 111-1, p. 11 & n. 4.] The Tribe is wrong on both claims, and furthermore, the references to past determinations are either inapplicable or outright deceptive.

The Memorandum is not entitled to deference because it was not "promulgated in the exercise of [the Department's] authority" to issue regulations regarding the acquisition of lands into trust for the benefit of Indians and therefore lacks force of law. *See McMaster v. U.S.*, 731 F.3d 881, 891-92 (9th Cir. 2013) (quoting *United States v. Mead*, 533 U.S. 218, 226-227 (2001); *The Wilderness Society v. U.S. Fish & Wildlife Service*, 353 F.3d 1051, 1068 (9th Cir. 2003), *amended on reh'g en banc in part sub nom.*, *Wilderness Society v. U.S. Fish & Wildlife* Serv.,

360 F.3d 1374 (9th Cir. 2004); *Manning v. U.S.*, 146 F.3d 808, 814 n.4 (10th Cir. 1998). Nevertheless, whether the opinion is entitled to deference is irrelevant because it is being used solely as an improper post hoc justification.

Even if the Secretary made the determination for the reason articulated in the Memorandum, the determination was unreasonable. In the Memorandum, the Solicitor states, "In order for the Secretary to conclude a reservation was eligible for a vote, a determination had to be made that the relevant Indians met the IRA's definition of 'Indian' and were thus subject to the Act. *Such an eligibility determination would include deciding the tribe was under federal jurisdiction, as well as an unmistakable assertion of jurisdiction.*" 2014 Memorandum at 21 (emphasis added). This conclusion fails to consider and is contrary to the plain language of Section 19, which shows that those voting under Section 18 may have qualified as Indians by definitions – blood quantum and descent from Indians living on reservation in 1934 – that do not require any tribal affiliation. 25 U.S.C. §479.[6] Section 18 elections were held without regard to tribal status. The Act required the Secretary to hold Section 18 elections on every reservation. It was not an election for tribes.[7] The Solicitor offers no support for the proposition that the

[6] Indeed, the Supreme Court in *Carcieri* expressly rejected the argument that the definition of "tribe" in Section 19 can operate independently from the definitions of "Indian" in Section 19. *Carcieri,* 555 U.S. at 393 ("There is simply no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §§465 and 479.").

[7] As plaintiffs have already shown, the DOI fully understands this. In its recent *Cowlitz* briefing, the DOI agreed with plaintiffs' argument here that the Section 18 election was conducted by reservation, not by tribe. [Docket 106-1, p. 10.] Both the Tribe's and the Secretary's attempts to distinguish the DOI's position in *Cowlitz* fail. [Docket 111-1, p. 11 n.5; Docket 112-1, pp. 15-16.] In *Cowlitz*, the Grande Ronde Tribe argued that Section 18's requirements were evidence that the Cowlitz Tribe had to have been recognized in 1934, and the list of Tribes that voted (i.e., Table A) constituted the entire universe of tribes that were eligible for benefits under the IRA. In other words, if *Cowlitz* was not on Table A, it did not qualify. Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment and Cross-Motion in Support of Summary Judgment, *Clark County Wash. v. Jewell*, Case No. 13-cv-00849-BJR (D.D.C., filed November 6, 2013) at 23. The DOI disagreed, expressly pointing out that Grand Ronde's argument ignored the language of Section 18, which stated that the election was given to Indians at reservations, not to tribes. Thus it could not be determined from the list of Section 18 elections whether a tribe could still be a recognized tribe under federal jurisdiction in 1934. *Id.* at 23-

Secretary had to first determine that a Tribe was under federal jurisdiction at the reservation. Moreover, this conclusion conflicts with the indisputable fact that the Section 18 elections listed in the Haas Report include elections where more than one tribe on a reservation voted in a single Section 18 election at a reservation [NF_AR_NEW_0002016 (Quinault)] and where groups that were expressly considered not to be tribes voted. [NF_AR_NEW_0002013 (Lower Sioux; Prairie Island).]

The Tribe's argument that the Secretary's reasoning is consistent with past Department decisions is incorrect and also demonstrates the deceptive nature of the Secretary's post hoc attempts to justify this decision.

The Tribe cites *Shawano County, Wisconsin v. Acting Midwest Director*, 53 IBIA 62 (Feb. 18, 2011) for the proposition that a Section 18 election is dispositive that the North Fork Tribe was under federal jurisdiction in 1934. [Docket 111-1, p. 11 n.4.] *Shawano*, however, cannot stand for that proposition. *Shawano* involved the Stockbridge Indians of Wisconsin, which did not have a reservation in 1934. *Shawano*, 53 IBIA at 64. "Notwithstanding the lack of a tribal land base and pursuant to §478,[8] the Secretary held an election for members of the Tribe on December 15, 1934, on the question of whether the Tribe would accept or reject application of the IRA." *Id.* Thus for the Stockbridge Indians, the facts show that the Secretary specifically held an election for a recognized tribe. While "Stockbridge" appears under the "Reservation" column on Table A of the Haas Report, it is not a reservation but a tribe.

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24. The Tribe and the Secretary argue here that this reasoning does not apply because the issues are different. But neither offers any argument that contradicts the plain statement that Section 18 did not apply to tribes. This principle applies here with equal force. Because Section 18 elections were for Indians at reservations, not tribes, a reservation's presence on Table A says nothing about whether a single, unified tribe was under federal jurisdiction at the reservation.

[8] The election was arguably contrary the express language of Section 18. Nonetheless, the facts of the Stockbridge election show that the Secretary considered that the Stockbridge Indians were a tribe. It is the factual circumstances surrounding the vote and not the mere fact that a Section 18 vote occurred that were dispositive in the Stockbridge case.

[NF_AR_NEW_0002017.] Stockbridge represents a unique circumstance on the Haas Report and cannot be used to support a general principle. There is no evidence that the situation at the North Fork Rancheria was similar. In fact, as plaintiffs have repeatedly pointed out, the evidence points to opposite conclusion.

The Tribe, the Secretary, and the Solicitor in the 2014 Memorandum all rely on the revised 2013 Cowlitz ROD as supportive of the Secretary's decision. [Docket 111-1, p. 11; Docket 112-1, p. 14; 2014 Memorandum at 19-20.[9]] The 2013 ROD was the result of a court-ordered remand that required rescinding the 2010 ROD and issuing a new ROD. Cowlitz ROD (2013) at 5. The 2013 Cowlitz ROD states, "For some tribes evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g., tribes that voted to *accept or reject* the IRA in the years following the IRA's enactment), thus obviating the need to examine the tribe's history prior to 1934. *Id*. at 95 n.99 (emphasis added). Therefore, according to the Secretary and the Tribe, accepting or rejecting the application of the IRA through a Section 18 election is conclusive. But this conclusion is deceptive.

As plaintiffs discussed in their motion for summary judgment [Docket 106-1, pp. 6-8], the 2010 Cowlitz ROD referenced a Section 16 election as the conclusive or dispositive election: "For some tribes evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g., tribes that voted *to reorganize* under the IRA in the years following the IRA's enactment), thus obviating the need to examine the tribe's history prior to 1934." [NF_AR_0000778 (emphasis added).] The North Fork Tribe fails to acknowledge the difference between the two Cowlitz RODs at all. But the Secretary contends that the statement in the 2010 ROD was a mistake which was rectified in 2013. [Docket 112-1, p. 14.] There is no evidence of this. The 2013 Cowlitz

[9] The Solicitor quotes the text from the 2013 Cowlitz ROD almost verbatim but uses no quotation marks and offers no citation to that document.

ROD does not mention any change. It is identical in all other respects and merely replaces the words "reorganize under" with "accept or reject." The difference is not trivial. It is the difference between a Section 16 election, which the North Fork Tribe did not take, and a Section 18 election, which the Indians at the North Fork Rancheria did take. Moreover, though the change is of monumental importance in the North Fork determination, it was absolutely irrelevant to the Cowlitz ROD because the Cowlitz, as a unified group, took neither a Section 18 nor a Section 16 election. Cowlitz ROD (2013) at 103 n.143.

The Secretary did not believe the 2010 Cowlitz ROD contained this alleged mistake when she originally drafted the IRA ROD under the erroneous belief that the North Fork Tribe had voted in a Section 16 election. [NF_AR_0000778; *see also* Docket 106-1, pp. 8-9 & n.5.] The only acknowledged mistake was the Secretary's misunderstanding that the Tribe had taken a Section 16 election. When this mistake was uncovered, the Secretary merely substituted the Section 18 election for the Section 16 election. Following this Court's January 2013 opinion finding that the Section 18 election was likely dispositive, language in the Cowlitz ROD, irrelevant to that decision, was changed, without citation or discussion, to justify the Secretary's determination here. This Court should therefore reject any reliance on the 2013 Cowlitz ROD or the Solicitor's 2014 Memorandum.

B. The Secretary did not establish that the applicant North Fork Tribe was a preexisting tribe at the time of the IRA's passage

The Indians at the North Fork Rancheria rejected application of the IRA at the Rancheria. They do not therefore qualify as a tribe by operation of the statute that they rejected.[10] Therefore,

[10] The Secretary continues to cling to the claim that the outcome of the Section 18 election "is of no moment" after the enactment of 25 U.S.C. §2201 *et seq.*, which allows tribes to benefit from the IRA even if they originally opted out. [Docket 112-1, p. 113 n.6.] This is yet another attempt to mischaracterize plaintiffs' argument that the Section 18 election is not dispositive of federal jurisdiction over a tribe in 1934. Indeed, if North Fork can show that it was a tribe under federal jurisdiction prior to 1934, that this jurisdiction remained intact in 1934, and that the applicant North

the applicant Tribe must show that it existed as a tribe independent of the IRA's enactment in 1934. The Secretary and the Tribe argue that the purchase of the Rancheria in 1916 and the events surrounding the California Rancheria Act and the *Tillie Hardwick* Stipulation demonstrate that the applicant Tribe is the same tribe as a tribe purportedly under federal jurisdiction at the Rancheria prior to 1934. As plaintiffs have already discussed [Docket 106-1, pp. 11-12], these arguments are merely post hoc justifications that were not part of the decision in the IRA ROD and must therefore be rejected. *Amerijet Intern., Inc. v. Pistole*, 753 F.3d 1343, 1351 (D.C. Cir. 2014) ("Under well-established law, [courts] evaluate an agency's contemporaneous explanation for its actions and not . . . counsel's post hoc rationalizations."). Furthermore, these arguments ignore not only the relevant history and law but also the facts that were before the Secretary in the administrative record.

1. The Secretary failed to identify or discuss any factors that lead to the conclusion that the Rancheria was the applicant Tribe's reservation in 1934

The IRA ROD does not mention the purchase of the Rancheria as relevant to whether the Secretary had the authority to take the land into trust. It mentions the purchase in the next section of the ROD, which address the applicant Tribe's need for more land. [NF_AR_0041198.] According to the Tribe, viewing the purchase discussion from the next section of the ROD as part of the *Carcieri* determination is acceptable because "a court's 'task is to enforce a standard

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Fork Tribe is the same tribe, then it may be entitled to a trust acquisition under the IRA. These findings, however, were not made, nor could they be made based on the administrative record. Because the Indians at the Rancheria rejected the IRA and never voted to organize under the IRA, the rejection under Section 18 alone cannot be dispositive of any tribe at the Rancheria in 1934. To hold otherwise would be to create a tribe through the operation of Section 18. This is contrary to the Section 18's plain language, contemporaneous understandings of the provision, and the on-the-grounds facts at reservations in 1934. Such a holding would also violate the principle that the DOI cannot create tribes where none may have existed before. *See U.S. v. State Tax Commission of State of Miss.*, 535 F.2d 300, 306 (5th Cir. 1976) ("We see nothing in the Acts of Congress conferring authority upon the Secretary of the Interior to create Indian tribes where none had theretofore existed.").

of reasonableness, not perfection." [Docket 111-1, p. 13 n.6 (quoting *Northwest Airlines, Inc. v. U.S. Dep't of Transp.*, 15 F.3d 1112, 1119 (D.C. Cir. 1994).] But in making this claim, the Tribe ignores the fact that the "very next sentence" and all of the sentences after that (1) fail to identify any entity for which the Rancheria was purchased, and (2) demonstrate that the Secretary considered the Rancheria's purchase as relevant only to a determination that the applicant Tribe needs more land because it currently lacks tribal land on which to conduct gaming. [NF_AR_0041198-99.] The IRA ROD unequivocally demonstrates that Secretary did not consider the purchase as dispositive of, or even relevant to, the jurisdiction issue at the time the decision was made.[11] The Secretary and the Tribe only raise the argument now as a post hoc justification, which the Court must not entertain.

Even if "North Fork band of landless Indians" for which the Rancheria was purchased qualifies as a tribe under federal jurisdiction in 1934,[12] there are no findings in the IRA ROD that the applicant Tribe is that same "band." As plaintiffs have already discussed, even where a

[11] In opposition to plaintiffs' motion to compel supplementation of the record with the North Fork Band documents, [Docket 85], the Secretary appealed to her expertise in matters relevant to the existence of a tribe. [*See* Docket 89, p. 9 (citing *James v. Dep't of Health and Human Servs.*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) (Interior "employs experts in the fields of history, anthropology and genealogy, to aid in determining tribal recognition . . . weighs in favor of giving deference to the agency by providing it with the opportunity to apply its expertise.").] Accordingly, the Secretary must be presumed to have had good reason to exclude the Rancheria's purchase, the California Rancheria Act, and the *Tillie Hardwick* litigation from the *Carcieri* determination in the IRA ROD. Based on her expertise, these facts were irrelevant to the *Carcieri* determination, and it is improper to include them now. *Amerijet Intern., Inc. v. Pistole*, 753 F.3d at 1351; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.").

[12] Plaintiffs do not concede this. The contemporaneous documents in the administrative record that purport to show that the purchase was for the North Fork Tribe speak only of a group of Indians in geographical terms. [Docket 106-1, p. 13.] In 1934, the Solicitor specifically stated that "a tribe is not a geographical but a political entity." Solicitor Op. (Nov. 7, 1934) at 478. Therefore, merely deeming a group of Indians in a region a "band" does not confer tribal status on that group. Even the language of the deed, which describes the "North Fork band of landless Indians," is suggestive solely of geography rather than polity or even ethnography. Why, for instance, did the deed not read "North Fork Band of Mono Indians"? The logical conclusion is that neither ethnographical nor political identity was considered.

Rancheria was purchased for a specific group of Indians residing in a particular area, the deed was not restricted to use by those Indians; any California Indian could use Rancheria land. Solicitor Op. (Aug. 1, 1960) at 1883, 1884. "In actual practice, Indians occasionally moved onto the property without any assignment, occupying a parcel abandoned or never assigned. Such possession was not disturbed since these occupants were also 'Indians of California' for whose use the land was acquired." [*Id* at 1883.] Moreover, by 1933, the Department of the Interior realized that "very few [Indians] had moved to these rancherias or had remained there." [*Id.*]

Both the Secretary and the Tribe ignore the DOI's understanding of the relationship between the purchase and use of Rancherias. But this understanding is certainly not news to the Secretary. In recent litigation involving the Alexander Valley Rancheria in California, the Secretary made the very points plaintiff makes here and relied on the same 1960 Solicitor's opinion to conclude that "[t]he use of Rancheria land by individual Indians was by assignment and required occupancy; otherwise assignment would pass to another. As a result, occupation of a Rancheria by individual Indians remained uncertain and in flux." Federal Defendants' Motion for Summary Judgment, Case No. 5:09-cv-02502-EJD, (N.D. Cal., filed June 5, 2009) at 2. The Secretary found that the occupation of the Alexander Valley Rancheria was "typical of this population flux. While dozens of Individuals resided on the Rancheria during the 1940s, by 1951 only one family and one non-Indian squatter lived there." *Id.*

The occupation of the North Fork Rancheria was also "typical of this population flux." The Rancheria was purchased for approximately two hundred Indians of the North Fork vicinity. [NF_AR_0041113-14.] But four years later, "the tract [was] unoccupied." [NF_AR_0041092.] By 1935, six adult Indians resided at the Rancheria. [NF_AR_NEW_0002012.] And there is no evidence in the record of any connection between these six Indians and the 200 for which the

Rancheria was purchased. By the time of the California Rancheria Act, only one adult Indian resided at the Rancheria, and there was no tribal roll at the Rancheria. S. Rep. 85-1874 (1958) at 33. At the termination of the Rancheria in 1966, the DOI specifically stated that this single individual Indian was "not [a] member[] of any tribe or band." 30 Fed. Reg. 2911 (Feb. 18, 1966).

Even if the court concludes, as it did in its Memorandum Opinion, that the North Fork band of landless Indians was a "tribe" under the IRA [Docket 42, pp. 24-25], plaintiffs have sufficiently demonstrated that the administrative record does not establish that the connection between that "band" and the applicant North Tribe is inevitable or even likely. The connection can only be made through a reasoned explanation of the relevant factors, which the Secretary did not provide.[13]

2. The Rancheria Act and *Tillie Hardwick* litigation demonstrate that the applicant Tribe did not exist prior to the Rancheria Act

The Secretary's and the Tribe's responses to plaintiffs' arguments about the import of the Rancheria Act and the *Tillie Hardwick* litigation are a confused jumble of unsupported assertions that fail address plaintiffs' arguments head on. Neither the Secretary nor Tribe refutes the fact that the Rancheria Act did not terminate tribes, nor does either respond to plaintiff's analysis of the Rancheria Act and *Tillie Hardwick* that shows how those two events do not demonstrate that the applicant Tribe is the same as any tribe purportedly under federal jurisdiction in 1934. Instead they dodge the issue by mischaracterizing plaintiffs' arguments.

[13] Plaintiffs also requested that the administrative record be supplemented to add documents related to North Band of Mono Indians, which is a separate group of Indians that also claims ties to the North Fork Rancheria and its purchase in 1916. While this Court denied plaintiffs' motion to supplement the administrative record, the North Fork Band documents, like the contemporaneous agency records, show there is a substantial issue about the identity of the applicant Tribe that the Secretary was obligated to discuss in her decision documents in order to establish her *Carcieri* trust authority.

The Tribe argues that plaintiffs misunderstand "the nature of APA review" by engaging in speculation that the applicant North Fork Tribe is not necessarily the same tribe for which the land was purchased and that voted in 1935. [Docket 111-1, p. 13.] Plaintiffs do not, however, engage in speculation. Plaintiffs merely point out that the Rancheria Act and *Tillie Hardwick* cannot alone demonstrate that the applicant Tribe is the same tribe as any tribe purportedly under jurisdiction in 1934. [Docket 106-1, pp. 14-18.] It is the Secretary who is engaging in speculation by assuming – without any support or analysis in the administrative record or the California Rancheria Act – that the applicant Tribe is necessarily the same as a "tribe" purportedly under federal jurisdiction in 1934.

Contrary to the Tribe's assertion [Docket 112-1, pp. 15.], the Department of Interior has never considered the Rancheria Act to have terminated tribes. In the Alexander Valley Rancheria litigation, the Secretary explained that tribal rolls were not prepared for Rancherias being terminated because the lands were purchased for California Indians generally. Federal Defendants' Motion for Summary Judgment, Case No. 5:09-cv-02502-EJD, (N.D. Cal., filed June 5, 2009) at 3-4. According to the Secretary, "The [Rancheria Act] only terminated the individual status of persons residing on the Alexander Valley Rancheria when the Alexander Valley Rancheria property was distributed." *Id.* at 5.

But even if the Rancheria Act did terminate the relationships between the federal government and tribes, it did not do so at the North Fork Rancheria.[14] Of this there can be no doubt. The Federal Register notice terminating the North Fork Rancheria and the named

[14] The Tribe in the past has argued that the discussion of the Alexander Valley Indians is irrelevant since they are not a federally recognized tribe and North Fork is. [Docket 88, pp. 8-9.] But this is yet another attempt at avoiding the issue. If the applicant North Fork Tribe is arguing that it was a tribe prior to the Rancheria Act that was terminated and then restored, it must offer some evidence of that. It has not. And the Rancheria Act itself is not such evidence because it did not purport to terminate tribes but rather the Indian status of the individual Indians residing at Rancherias.

individuals listed stated, "[T]his notice affects only Indians that are not members of any tribe or band of Indians . . ." 30 Fed. Reg. 2911 (Feb. 18, 1966). The language cannot be any clearer, and the Tribe's interpretation of this statement is nonsensical. According to the Tribe, this statement "merely references a provision of the 1964 law that amended the California Rancheria Act to read: 'After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who received any part of such assets, and the dependent members of their immediate families who are not members of any *other* tribe or band of Indians, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians.'" [Docket 111-1, p. 15 n.7 (emphasis in original).] The North Fork Tribe argues here that the presence of the word "other" "suggests that the residents were members of tribes that were being terminated." [*Id.*] But this completely ignores the notice itself, which, as it expressly states, considered the 1964 amendment. 30 Fed. Reg. 2911.

The notice states that the Indians listed on the notice are not members of any tribe or band.[15] It does not say that they are not members of any "other" tribe or band. Susan Johnson was not a member of any tribe or band in 1966. 30 Fed. Reg. 2911. This notice is unequivocal evidence that the federal government understood that no tribe existed at the North Fork Rancheria at its termination.[16] Consequently when the *Tillie Hardwick* stipulation restored the

[15] By contrast, the Federal Register notice terminating the Auburn Rancheria incorporates the language the Tribe points to. "[T]his notice affects only Indians who received any part of the assets of the Rancheria and the dependent members *who are not members of any other tribe or band of Indians.*" 32 Fed. Reg. 11964 (Aug. 18, 1967.) The DOI, therefore, distinguished between the situations at the North Fork Rancheria and the Auburn Rancheria, when in the North Fork notice it expressly stated that the listed Indians were not members of any tribe or band of Indians. A copy of this notice is attached to this memorandum as Exhibit 9.

[16] The Tribe's reference to section 11 of the Act which terminates any constitution at a Rancheria is irrelevant. [Docket 111-1, p. 15.] If a tribe did exist and had a constitution, such a constitution would be terminated too. This does not mean, however, that the Rancheria Act's purpose was to terminate tribes. As plaintiffs have shown, it was not. Moreover, there was no constitution at the North Fork Rancheria. There was only Susan Johnson.

distributees to the status they held prior to the Rancheria Act, that status did not include tribal status. It could not have.

The Secretary takes a different approach from the Tribe regarding the effect of the Rancheria Act and *Tillie Hardwick*. The Secretary now agrees with plaintiffs that these events do not show that the Tribe was under jurisdiction in 1934. [Docket 112-1, p. 16.] This is a complete about-face from earlier in this litigation when the Secretary stated that "[t]he *Tillie Hardwick* litigation conclusively establishes that the North Fork Rancheria was under federal jurisdiction in 1934." [Docket 89, p. 7.] Now the Secretary argues that the events surrounding the Rancheria Act and *Tillie Hardwick* somehow refute plaintiffs' claims regarding Sections 18 and 16. "The termination and restoration of the Rancheria . . . disproves Stand Up's argument that that it was necessary for the 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." [Docket 112-1, p. 16.] This argument is confused.

First, plaintiffs make no such argument. Rather, plaintiffs contend that because the Indians at the Rancheria rejected the application of the IRA and did not organize under Section 16, the mere fact of the Section 18 election cannot prove that a tribe was under federal jurisdiction in 1934. Any such determination must be the result of detailed factual inquiry. Second, in making this argument, the Secretary necessarily assumes that a tribe existed at the Rancheria when it was terminated. As discussed above, the evidence unequivocally demonstrates that a tribe did not exist. Even if it were possible to prove a tribe existed, the Secretary never made this finding in the IRA ROD. Third, this argument conflates the federal government's trust relationship with individual Indians and responsibilities regarding Indian land with jurisdiction over a tribe. The Rancheria Act terminated the Rancheria's status as Indian land and Susan

Johnson's status as an Indian. That is all. 30 Fed. Reg. 2911 (Feb. 18, 1966). These facts say absolutely nothing about a Section 18 election that rejected the IRA or a Section 16 election that was never taken. They do, however, demonstrate that there is no connection between the applicant North Fork Tribe and any tribe purportedly under jurisdiction in 1934. This finding has never been made, and even among the morass of post hoc justifications, it has been avoided.

II. The State of California Has Not Legally Entered Into a Compact With the North Fork Tribe, and Core Circumstances of the Two-Part Determination Have Changed

A. Federal approval of the compact does not render the compact effective under IGRA

The compact has been nullified, and was never validly entered into by the State of California. IGRA requires that a state must validly enter into a compact before it may be given effect under federal law. *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997). If this requirement is not met, the Secretary's approval of the compact is ineffective. The Secretary cannot, by mere approval and publication in the Federal Register, give life to a compact that has not been legally entered into by the state. *Id.* at 1558. IGRA does not and cannot mandate how a state is to enter into a legally binding compact with an Indian tribe. *Id.*; *see also Cheyenne River Sioux Tribe v. State of South Dakota*, 3 F.3d 273, 281(8th Cir. 1993) (stating that IGRA does not compel states to enter into compacts and therefore does not violate the tenth amendment). That is left entirely to state law, and neither the Tribe nor the Secretary offers any authority to the contrary. *Pueblo of Santa Ana*, 104 F.3d at 1558 ("Congress intended that state law determine the procedure for executing valid gaming compacts." (internal quotation marks omitted)).

Under California law, tribal-state compacts are binding only upon legislative ratification by statutory enactment. Cal. Gov. Code §12012.25(c). One of the most fundamental principles of California Constitutional law is the people's right of referendum to approve or reject a statute enacted by the Legislature. *AFL-CIO v. Eu*, 36 Cal.3d 687, 708 (1984). All statutes are subject to

referendum except statutes passed as urgency measures by 2/3 vote of both houses. Cal. Const., art. II, §9. AB 277, the bill ratifying the North Fork Tribe's compact, was not passed as an urgency statute and therefore under California law was properly subject to a referendum. The referendum was properly certified in this case and resulted in nullification of the North Fork compact. *See Hersh v. The State Bar of California*, 7 Cal.3d 241, 245 (1972) (The California Supreme Court has long held that "a statute has no force whatever until it goes into effect pursuant to the law relating to the legislative enactment" (quoting *People v. Righthouse*, 10 Cal.2d 86, 88 (1937)).

According to the Secretary and the Tribe, *Pueblo of Santa Ana*'s conclusion that Secretary's approval of a compact cannot vivify a compact that was never effective merely addressed a gap in IGRA that has since been filled by regulations. [Docket 111-1, pp. 42-43, 49; Docket 112-1, p. 31-32.] This is wrong. There is no such gap in IGRA. IGRA does not, indeed cannot, purport to impose on a state a method for entering into a compact, and the regulations pointed to by the Secretary and the Tribe make this clear. Under 25 C.F.R. §293.7 "[A] State should submit the compact or amendment *after it has been legally entered into by both parties*" (emphasis added). Thus, whether a compact is valid is determined by applicable state law. Both the Secretary and the Tribe are incorrect in asserting that 25 C.F.R. §293.3 defines what is required for a state to legally "enter into a compact." Section 293.3 merely authorizes the Secretary to assume the compact has been legally entered into if it has been signed by state and tribal representatives. 25 C.F.R. §293.7 ("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.") This section in no way purports to grant the Secretary the power to deem the compact legally entered into by the State. This cannot be so; otherwise the California

Secretary of State could have forwarded the compact to the Secretary after both the Tribe and the Governor signed the compacts without waiting for the Legislature to ratify it.[17] This would directly violate the California Constitution, which requires that a compact negotiated and concluded by the Governor be ratified by the Legislature. Cal. Const., art. IV §19(f). And *Pueblo of Santa Ana* refutes that argument.

While the Secretary is not required to investigate the vagaries of California State law and – under normal circumstances – can reasonably conclude that the proper signatures were evidence of a legally binding compact, the compact was forwarded with an explanation that the compact would not take legal effect under California law until January 1st, 2014, if at all. [NF_AR_GC_000015.] Based on this representation, the Secretary was required to reject the compact because it was sent in violation of 25 C.F.R. §293.7; *see also Amador County v. Salazar*, 640 F.3d 373, 381 (D.C. Cir. 2011) (stating that the Secretary is required to disapprove a compact that would violate one of the provisions of IGRA). The California Secretary of State also informed the Secretary that the statute ratifying the compact may never become law at all if the referendum succeeded. This is the situation that occurred. Therefore, the compact is invalid. *Pueblo of Santa Ana*, 104 F.3d at 1557.[18]

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[17] The compact in the administrative record was signed by the parties in August of 2012. [NF_AR_GC_000226.] The Legislature did not pass AB 277 until almost a year later. Thus the signatures of the parties cannot be conclusive evidence in California that that the compact has been legally entered into.

[18] The Secretary and the Tribe rely on an earlier Louisiana district court case to distinguish the Tenth Circuit's very thorough analysis in *Pueblo of Santa Ana. See Langley v. Edwards*, (1995) 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, because a contrary rule would be compel the Secretary to consider state law before approving a compact.") The Tenth Circuit expressly rejected the reasoning in *Langley*. *Pueblo of Santa Ana*, 104 F.3d at 1555. It held that IGRA "imposes an independent requirement [that] the compact must be validly entered into by a state before it can go into effect, via Secretarial approval, under IGRA." *Id.* The Tenth Circuit went on to reject the idea that such a rule would require the Secretary to inquire into state law. Indeed, the Court agreed that the Secretary is not required under IGRA to make such an inquiry and may rely on the compact's validly. Nonetheless,

The Secretary's and the Tribe's reliance on the so called "retrocession cases" for the proposition that the compact remains valid because the Secretary is entitled to rely on the validity of state actions – apparently even when a state informs the Secretary that the compact is not final – is meritless. [Docket 112-1, p. 32; Docket 111-1, pp. 45-46.] These cases held that the Secretary's acceptance of retrocession jurisdiction from the state to the federal government occurred despite the invalidity of the Governor's actions under state law. *See United States v. Lawrence*, 595 F.2d 1149 (9th Cir. 1979); *Omaha Tribe of Nebraska v. Village of Walthall*, 334 F.Supp 823 (D. Neb. 1971); *United States v. Brown*, 334 F.Supp 536 (D. Neb. 1971). The Tenth Circuit, however, distinguished these same retrocession cases as inapplicable to the policies behind tribal gaming and IGRA. *Pueblo of Santa Ana*, 104 F.3d at 1556 n.12. Although defendants rely on *Oliphant v. Schile*, 544 F.2d 1007 (9th Cir. 1976), that case makes clear that the question of retrocession "is one of federal law, not state law." *Id*. at 1012. "The federal government, having plenary power over the Indians, had the power to prescribe any method or event desired to trigger its own re-assumption of control over Indian affairs within a state. In fact, the triggering event could have been devoid of any mention of state action at all." *Id.* By contrast, whether a compact has been validly executed is a question of state law, *see Pueblo of Santa Ana*, 104 F.3d at 1557, making the retrocession cases inapplicable to the validity of the compact.

B. IGRA does not preempt the California electorate's rejection of the compact

The Tribe argues that the referendum has no effect on the status of the compact because it conflicts with and is preempted by IGRA. [Docket 111-1 at 52-55.] There is no support for this argument. As discussed above, IGRA leaves it up to the state to determine how it legally enters

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where the compact is determined not to have been legally entered into under state law, its approval by the Secretary is invalid. *Id.* at 1548.

into a compact. The compact cannot become effective under federal law until the "entered into" requirement is independently met. While the state is required to negotiate in good faith with tribes who request negotiation, IGRA does not compel states to enter into compacts. *See Cheyenne River Sioux Tribe v. State of S.D.*, 830 F.Supp. 523, 527 (D.S.D. 1993) (forcing a state to approve a compact would violate the 10th amendment) aff'd, (8th Cir. 1993) 3 F.3d 273 (8th Cir. 1993).

Thus, contrary to the Tribe's assertion, there is no conflict between IGRA and California law, nor does the referendum frustrate the purpose of IGRA. If a referendum approves of the Legislature's statutory ratification of a compact, on the day following the referendum, the statute takes effect, and the Secretary's approval of the compact is valid. If a referendum rejects the Legislature's ratification, the status of the compact is the same as though the Legislature never ratified it in the first instance. The compact is not entered into according to California law, and the Secretary cannot validly approve it. Indeed, the Tribe fails to offer any cogent explanation as to how rejection by referendum is any different, as a matter of law, from refusal to ratify by the Legislature, an action well within the Legislature's prerogative under the California Constitution. Cal. Const., art. IV, §19(f).

Nonetheless, the Tribe contends that "[a]llowing the referendum . . . would frustrate and wreak havoc on the governing statutory and regulatory regime for the negotiation, submission, approval, and effectuation of tribal-state gaming compacts by leaving federally approved compacts exposed to collateral attack under state law." [Docket 111-1, p. 54.] But this position cannot be maintained. The referendum can in no way be a collateral attack of a federally approved compact under state law because a compact cannot be federally approved until it is

legally entered into under state law. *Pueblo of Santa Ana*, 104 F.3d at 1557; *see also* 25 C.F.R. §293.7. The Tribe gets it exactly backwards.

The Court should construe California law and IGRA in a way to avoid conflict. *See F & L Farm Co. v. City Council of Lindsay*, 65 Cal.App.4th 1345, 1353 (1998) (stating that to avoid violating the U.S. Constitution's Supremacy Clause, California law must be construed to avoid any conflicts with federal law or frustration of the purpose of federal law). And in this case, it is easy. IGRA does not define "entered into"; therefore, the Court should construe "entered into" in the same manner that *Pueblo of Santa Ana* does – i.e., under the applicable laws of the state involved. California Government Code section 12012.25(f) requires the California Secretary of State to forward a ratified compact to the Secretary of the Interior "[u]pon receipt of a statute ratifying tribal-state compact . . . ." Here, however, the California Secretary of State never received a statute. There is no statute in California that ratifies the compact. AB 277 could never have taken effect until January 1, 2014 at the earliest. And under the circumstances, it never took effect at all. Thus, her submission was improper under both California law and federal law. *See* 25 C.F.R. §293.7 (requiring that states submit compacts after they have been "legally entered into"). The California Secretary of State should not have submitted the compact until the statute took effect. The Secretary's subsequent publication of an invalid compact in the Federal Register did not, nor could it, have any legal effect.

IGRA cannot preempt state law where Congress expressly intended state law to apply. Therefore, the court must reject the Tribe's argument.

C. The core circumstances of the two-part determination have changed making remand to agency to reconsider the decision appropriate

The compact is a legal nullity, and as a result, the legitimacy of two-part determination and ultimately to the fee-to-trust acquisition has been eroded for reasons plaintiffs have already

discussed. [Docket 106-1, pp. 18-21.] Yet the Tribe simultaneously argues that core circumstances have not changed but "circumstances are still in flux." [Docket 111-1, p. 56.] The Tribe's claim that circumstances are in "flux" is effectively a concession that there is no valid, final agency decision. While, as plaintiffs have demonstrated, the two-part determination was analyzed under the assumption that gaming under the compact was the probable result, the Tribe now concedes that class III gaming at the Madera site is only "possible . . . under either a new compact or Secretarial procedures." [*Id.*] But this possibility is nothing more than speculation and will face high legal and political hurdles.

The Tribe's claim that the referendum merely sends the State and the Tribe back to the negotiation table, ignores both the political reality and the fundamental change in circumstances the referendum wrought on any negotiation that would occur. A new compact will still be subject to legislative approval under the California Constitution. Cal. Const., art IV, §19(f). California legislators are free to reject a new compact and will undoubtedly have a difficult time justifying an approval that renders the vote of their constituents moot. While it may have been reasonable to assume the State would ratify the compact upon which the two-part determination was based, it is now speculative to assume a new compact would be ratified – particularly one which provides the same or similar mitigation.

Any future negotiations will necessarily occur under fundamentally different core circumstances if the Madera site remains in trust and purportedly eligible for gaming. This was not the situation when either Governor Schwarzenegger or Governor Brown negotiated the previous compacts. Because the Madera site was not under tribal or federal jurisdiction prior to the trust acquisition and because of the absolute veto power of the State, through the Governor's concurrence, the Governor was able to negotiate for an off-reservation casino that would provide

broad statewide benefits and not just benefits to a single tribe and local community. Indeed, the Governor expressly granted his concurrence for such broad statewide benefits.[19] This strong bargaining position of the State was clearly intended by Congress in granting the governor the unfettered veto power.[20] Congress considered state interests paramount where tribes have no legal right to gaming off-reservation unless the state agrees that such off-reservation gaming should occur. *Confederated Tribes of Siletz Indians v. U.S.*, 841 F. Supp. 1479, 1491-92 (D. Or. 1994), *aff'd on other grounds*, 110 F.3d 688 (9th Cir. 1097); *see also Lac Courte*, 367 F.3d at 653 (stating that the Wisconsin Governor declined to concur because Wisconsin would not benefit from another Indian casino).

Under new negotiations proposed by Tribe, however, the State would not have the veto power Congress intended for it to have. If the land remains in trust, the Tribe will have no incentive to agree to share funds with the Wiyot Tribe, Chukchansi Tribe, or other non-gaming tribes. Moreover, the Tribe will have no incentive to make the same large payments to Madera County or the City of Madera to secure support for the fee-to-trust acquisition. This is a fundamental change in the core circumstances.

The Tribe's failure to consider these new circumstances is clear in its citation to *Gambling Opposition v. Norton (MichGO)*, 477 F. Supp. 2d 1 (D.D.C. 2007) for the proposition

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[19] Governor Brown expressly ratified the concurrence based on North Fork's agreement to share revenues with the Wiyot tribe and other California tribes. [NF_AR_0040988-89.] Moreover, the preamble to the compact also states that the Governor's concurrence was granted in exchange for the Tribe's agreement to make such payments. [NF_AR_NEW_GC_000340.]

[20] The Tribe will likely argue that the Governor is limited in concurring to whether gaming will be in the best interest of the Tribe and not detrimental to the surrounding community. But there is no support for such an argument. When the Governor concurs, he acts under state law. *Confederated Tribes of Siletz Indians of Oregon v. United States*, 110 F.3d 688, 693 (9th Cir. 1997). IGRA does not apply to the land at the time of the concurrence because it is still under state jurisdiction. *Lac Courte Oreilles Band of Superior Chippewa Indians of Wisconsin v. United States*, 367 F.3d 650, 657 (7th Cir. 2004) ("[B]efore the land is taken into trust, it is within the jurisdiction of a state and is not yet subject to federal regulation under IGRA . . . .").

that "it is proper for the Secretary to take land into trust even when the compact has been invalidated." [Docket 111-1, p. 58.] That case, however, involved a trust acquisition pursuant to IGRA's initial reservation exception, not a two-part determination. No concurrence is required under the initial reservation exception.[21] The land at issue is not land upon which a state can, for any reason, refuse to authorize gaming. Therefore, the state has no ability to bargain for any statewide benefits in exchange for agreeing to authorize off-reservation gaming.

In *MichGO*, the Michigan Legislature declined to ratify the proposed compact. *Id.* at 20. "[D]efendants recognize that Class III gaming can only be conducted 'in conformance with a TribalState compact.' Defendants maintain, however, that intervenor will operate a class II facility on the site [] if a TribalState compact is not negotiated and signed by the State of Michigan." *Id*. In Contrast to *MichGO*, here, the Governor – if he had the authority under State law – had the absolute right to condition his approval of gaming at the site to only the development of a class III casino that would contribute revenues to the Wiyot Tribe and other California tribes. The State did not intend to authorize class II gaming at the site from which the state would receive no benefit.

Finally, the Tribe's contention that gaming can possibly occur under Secretarial procedures not only fails to ensure the Tribe will be held to the agreement under which the concurrence was granted, but is equally as speculative. As *MichGO*, the case upon which the Tribe relies, states, "'[A]n Indian tribe may conduct [Class III] gaming activities only in conformance with a valid compact between the tribe and the State in which the gaming activities are located.'" *Id*. at 19 (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996)). Indeed, both the federal defendants and the intervenor tribe in *MichGO* recognized that because the

[21] Similarly, *Citizens Exposing Truth About Casinos v. Norton*, 2004 WL 5238116 (D.D.C. Apr. 23, 2004) also deals with the fee-to-trust acquisition under IGRA's initial reservation exception, not a two-part determination. *Id.* at *2.

Legislature had declined to ratify the compact, class II gaming was the only viable option. *Id.* at 20.

The Tribe proposes that Secretarial procedures are an alternative mechanism under which class III gaming can occur at the site. The only federal court of appeals to address this contention has rejected it. In *Texas v. U.S.*, 497 F.3d 491 (5th Cir. 2007), the Kickapoo Tribe petitioned the State of Texas to enter into a class III gaming compact. The State of Texas refused and under *Seminole Tribe* asserted eleventh Amendment immunity from the Tribe's lawsuit challenging Texas's refusal to negotiate in good faith. The Kickapoo Tribe then submitted a proposal to the Secretary. The Secretary proposed procedures and allowed the State of Texas to comment. The Fifth Circuit held the Secretary lacked the authority to develop procedures, stating that the Secretary cannot enact procedures to circumvent the judicial remedy required by IGRA. *Id*. at 500. As to the judicial remedy provided in IGRA, secretarial procedures can only result from a legal determination that the State failed to negotiate in good faith. *Id*. IGRA "allows the Secretary to step in only at the end of the process, and then only to adopt procedures based upon the mediator's proposed compact. The Secretary may not decide the state's good faith . . . and may not pull out of thin air the compact provisions that he is empowered to enforce." *Id*. at 502.

Contrary to the Tribe's assertion, secretarial procedures are not an independent mechanism for conducting class III gaming at the Madera site. While it is true that the State of California has waived its eleventh amendment immunity, it is also true that the State has already negotiated and concluded a compact in good faith.[22] That compact, however, was rejected by the

[22] The Indians of the Enterprise Rancheria recently brought an action under IGRA against the State of California for failing to negotiate in good faith. State of California's Memorandum of Points and Authorities in Opposition to the Estom Yumeka Maidu Tribe of the Enterprise Rancheria's Motion for Judgment on the Pleadings, Case No 2:14-cv-01939-TLN-CKD (E.D. Cal. filed February 12, 2015).While the Governor negotiated and concluded a compact with the Tribe, the Legislature declined to ratify the compact. The State has argued that declining to ratify a compact does not fall within IGRA's negotiation requirement because under California law negotiating a compact is the

electorate and the State cannot be compelled to enter into a compact with the Tribe. Because class III gaming may be conducted only pursuant to a valid tribal-state compact, claiming that class III gaming is still "possible" at the Madera site is entirely speculative. What is not speculative is that, with the land in trust, the North Fork Tribe may conduct class II gaming at the site without a compact. Such gaming, however, offends California's sovereign right to limit off-reservation gaming under a two-part determination. California expressly limited that gaming to class III gaming pursuant to a compact that included revenue sharing with the Wiyot Tribe – in exchange for that tribe's agreement to forgo gaming on its own land – and other California tribes and mitigation funding to local government agencies. Therefore, circumstances have fundamentally changed, and the court should order the Secretary to rescind the transfer and remand to the agency for further determinations.

III. The Secretary's Determination That Gaming at the Madera Site Would Not Be Detrimental to the Surrounding Community Was Arbitrary and Capricious

A. The Secretary's failed to apply "heavy scrutiny" within the meaning of Section 2719(b)(1)(A)

An exception "must be read in the context of IGRA's general prohibition against gaming on lands acquired after 1988." *Rancheria v. Jewell*, No. 12-15817, 2015 WL 235754, at *3 (9th Cir. Jan. 20, 2015). Both the Secretary and the Tribe seek to reverse this basic principle by adopting the contrary stance that gaming is authorized if "requirements are met." [Docket 112-1, p. 18.] This frames the inquiry so as to improperly allow the exception to swallow the rule.

In defense of their overbroad approach to Section 2719(b)(1)(A), the Secretary and the Tribe first contend that the Secretary's interpretation of no detriment to the surrounding

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exclusive power of the Governor; the Legislature has no role in negotiations whatever. *Id.* at 5. "Because IGRA does not require states to alter their constitutionally-based ratification procedures, there is no legal support or precedent for [the Tribe's] request." *Id.* Although this case is still pending, the State has demonstrated its position that where the Governor has negotiated and concluded a compact, the State has negotiated in good faith.

community gets deference under *Chevron*. But *Chevron* deference is inappropriate because the Secretary has not defined "detrimental" as a term in Section 2719(b)(1)(A). *See Mead*, 533 U.S. at 226-227 ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.").

Second, the Tribe and the Secretary contend that the statute should be construed liberally in accordance with the so-called Indian canon of construction, which states that any ambiguities in a statute should be interpreted in favor of the Tribe's interests. [Docket 111-1, p. 17; Docket 112-1, p. 22.] The Ninth Circuit recently held, however, that the Indian canon should not be applied "when tribal interests are adverse." *Rancheria v. Jewell*, 2015 WL 235754 at *5. Because under section 2719(b)(1)(A) the "surrounding community" includes nearby Indian tribes, those tribes interests may be adverse to the interests of the applicant tribe, and the Indian canon cannot be used to favor one tribe over another. *See id.*

Third, the Tribe argues that the presumptive bar against gaming on after-acquired land should be interpreted narrowly and the exceptions broadly because of IGRA's purpose of promoting tribal self-sufficiency and economic development. [Docket 111-1, p. 17.] But none of the cases relied on for this proposition deal with the specific exception at issue in this case. *See Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for Western Div. of Michigan*, 369 F.3d 960, 971(6th Cir. 2004) (restored lands exception); *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003) (restored lands exception); *Citizens Exposing the Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007) (initial reservation exception).

The problem with the Tribe's argument is clearly addressed in *Citizens Exposing Truth*. According to the D.C. Circuit, the initial reservation exception should be broadly construed "[b]ecause IGRA was designed primarily to establish a legal basis for Indian gaming as part of fostering tribal economic self-sufficiency, *not to respond to community concerns about casinos*." *Citizens Exposing Truth*, 492 F.3d at 469 (emphasis added). The express language of section 2719(b)(1)(A) is contrary to this statement, however. The statute's purpose is to allow the community to express concerns about a casino development and requires the Secretary to address those concerns and find that no detriment will result from casino. Moreover, through the Governor's concurrence provision, the state is granted an absolute veto power over the proposed casino. Thus, in construing section 2719(b)(1)(A), state concerns must trump the general purpose of IGRA, and the exception must be construed narrowly. Otherwise, the requirement that the casino must be in the best interest of the Tribe will be accorded undue weight, a balancing that Congress in no way intended.

While the Tribe argues that benefits to the surrounding community may be considered and there is no standard for determining detriment [Docket 111-1, pp. 19-20], it cannot be that benefits outweighing detriments is the standard. Had Congress intended for this to be the standard, the language would have reflected that. Such a standard, however, would eviscerate the general prohibition. *See State Farm,* 463 U.S. at 43 (stating that agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider"). Indeed, a larger casino project that potentially creates more detrimental impact on the surrounding community – more traffic, more pollution, and more problem gamblers – is more likely to be approved than a smaller one for the sole reason that it will generate more income and provide more benefits. But as the Innovation Group's Socioeconomic Assessment determined,

"generally the greater the positive impact, such as new jobs and revenue to the County, the larger the negatives, such as costs to the County." [NF_AR_0034245.] Thus a finding of no detriment to the surrounding cannot be made by claiming the benefits outweigh the detriments.

The Secretary's overly broad interpretation of what constitutes detrimental impacts to the surrounding community demonstrates that she did not apply "heavy scrutiny" to the North Fork Tribe's application and was arbitrary and capricious in determining the benefits outweigh the detriments.

B. The Secretary's mere references to and blanket adoption of mitigation measures listed in the FEIS cannot support a finding of no detriment

Both the Secretary and Tribe mischaracterize plaintiffs' position as requiring the Secretary to find that there will be no detriment to the surrounding community whatsoever.[23] This is not plaintiffs' position.[24] Rather, plaintiffs argue that the Secretary misconstrued her duty by relying IGRA's general purpose of promoting tribal economic development rather than section 2719's purpose of limiting the expansion of gaming on new lands. Plaintiffs further argue

[23] Such a narrow view, however, is not unprecedented. Former Secretary of Interior Gail Norton has expressed her opinion that the discretionary approvals of off-reservation gaming through two-part determinations should be severely scrutinized. "While I do not intend to signal an absolute bar on off-reservation gaming, I am extremely concerned that the principles underlying the enactment of IGRA are being stretched in ways Congress never imagined." *Wyondotte Nation v. National Indian Gaming Com'n*, 437 F.Supp.2d 1193 (2006).

[24] The two-part determination granting the off-reservation gaming application of the Fort Mojave Indian Tribe of California provides a useful counterexample to the North Fork application and determination. The Fort Mojave Tribe had tribal land within the City of Needles, California. The land was located next to homes, schools, churches and local businesses. But as Indian land, it was eligible for gaming. The Tribe and the City, however, reached an agreement that the Tribe's proposed casino would better serve everyone's needs if it were located on a piece of vacant desert land approximately three miles outside of the City. Local government officials agreed to the proposal, as did the residents through a favorable advisory vote of the electorate. Also, there were no other Indian tribes within a forty mile radius of the proposed site. Tribal-State Gaming Compact Between the Fort Mohave Indian Tribe and the State of California, *available at* http://www.cgcc.ca.gov/documents/compacts/fort_mojave_compact.pdf. The Fort Mojave example demonstrates that off-reservation gaming was proposed to avoid detriment to the surrounding community. Applying the exception to the general prohibition was warranted because applying the exception could not swallow the rule as it has in North Fork's favorable two-part determination.

that the Secretary failed to find no detrimental impact by merely adopting the FEIS and relying on unanalyzed mitigation measures.

The Secretary and the Tribe argue that Secretary's findings of no detriment are compelled by federal regulations. According to Secretary, "the Departments regulations specifically allow for mitigation." [Docket 112-1, p. 22 (citing 25 C.F.R. §292.18(a).] This is not so. Section 292.18 merely provides for what information must be submitted with an application for a two-part determination. One such requirement is that the application must contain "[i]nformation regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), and Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA)." 25 C.F.R. §292.18(a). This regulation, contrary to the assertions of the Secretary and the Tribe, does not authorize the Secretary to simply adopt the findings of the FEIS. It requires that the applicant Tribe demonstrate its NEPA compliance.

Once the information is submitted, "[t]he Secretary will consider all the information submitted under §§292.16-292.19 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." 25 C.F.R. §292.21 (emphasis added). Thus the issue is not whether the Secretary should consider and evaluate the FEIS; it is whether she did consider and evaluate the FEIS. The Secretary and the Tribe are wrong in claiming that the wholesale adoption of mitigation measures in the FEIS without discussion or analysis constitutes "evaluating whether [the proposed casino] would or would not be detrimental to the surrounding community."

The IGRA ROD is unequivocal in showing that the Secretary merely identifies impacts and then states that such impacts would be mitigated to a less than significant level.

[NF_AR_0040534.] She does not discuss those impacts but cites the mitigation measures in the FEIS, which as plaintiffs have already discussed provides nothing more than a list. The finding of no detriment in the IGRA ROD is an empty exercise. Indeed, the Secretary, in her brief, provides no citations to the IGRA ROD showing that she did anything beyond adopting the unexamined mitigation measures in the FEIS [Docket 112-1, p. 23.] The IGRA ROD provides no more information than the FEIS, which fails to discuss how the significant impacts will be mitigated by the measures proposed. Most importantly it fails to evaluate whether there will be detriment to the surrounding community. It merely assumes that unexamined mitigation measures will suffice.

As plaintiffs have already pointed out, the most egregious rubber-stamping of the FEIS without any independent analysis or evaluation is related to the FEIS's finding of significant impact in the creation of problem gamblers and the inadequacy of the mitigation measures proposed. [Docket 106-1, pp. 27, 44-45.] In fact, in the Secretary's official conclusion on the issue in the IGRA ROD, where the Tribe states that she "herself determined that based on the evidence . . . the facility would not be detrimental to the surrounding community" [Docket 112-1, pp. 20-21], the Secretary fails to even mention problem gamblers, a detrimental impact which the FEIS found significant and merely listed mitigation measures without analysis. [NF_AR_0040533-34.] As far as the acknowledged $13,606 shortfall making the Tribe's contributions insufficient to fund treatment for problem gamblers, the Tribe points to another payment listed in the FEIS and contends that "[t]he FEIS makes clear that $13,606 of the $1,038,310 contribution is for the anticipated costs of treatment programs that remains after the $50,000 contribution." [Docket 111-1, p. 21.] The FEIS, however, does not make this clear. Table 4.7-16, to which the Tribe points, simply acknowledges the shortfall. [NF_AR_0030211.]

The FEIS, in fact, does not consider the $1,038,310 contribution as mitigating the shortfall: "The Tribe has agreed in the County MOU to contribute $50,000 per year to compensate these service programs, which is $13,606 less than the amount needed to fund the above treatment programs and would result in a potentially significant impact. Mitigation measures in section 5.26 would mitigate this effect to a less than significant level."[25] [NF_AR_0030198.] That is the extent of the discussion in the FEIS. There is no mention of any other financial contributions intended to mitigate the shortfall. There is only the unexamined list of mitigation measures.

This new argument emphasizes two issues that are pervasive in the approvals at issue and the dispute thus far: (1) post hoc justifications of decisions that were not made by the Secretary in the first instance, and (2) large payments extracted from the Tribe to "mitigate" in ways that seem little more than payoffs to garner a favorable two-part determination.[26] The Secretary's and Tribe's contention that unencumbered payouts to the County to use at its own discretion hardly qualifies as a defense of the "heavy scrutiny" the Secretary purports to have applied – under any definition of "heavy scrutiny."

C. The invalidity of the Governor's concurrence renders the two-part determination entirely invalid

Plaintiffs argue that the Secretary's two-part determination is invalid because the concurrence was void ab initio. Plaintiffs take the position that the California Court of Appeal is

[25] While the FEIS lists the payment to mitigate any fiscal impacts generally with the measures to mitigate problem gambling, this same list also contains the requirement that the Tribe pay its share of traffic mitigation. [NF_AR_0040488-89.] It is therefore not clear what the $1,038,310 contribution is precisely for and there is no requirement for how it will be used by the County. While it is deemed "mitigation," it is a payout to the County for the County to use at its discretion.

[26] The Secretary claims that the County's resolution in support of the casino "state[s] that the contributions are sufficient to mitigate impacts of the gaming development." But the resolution does not mention problem gambling specifically. "The MOU provides in excess of $87,000,000.00 in mitigations and funding for various charitable foundations, public schools and facilities over a twenty year period." [NF_AR_0034386.] In response to plaintiffs' arguments about the failure to analyze specific mitigation measures, the Secretary can only point to "extensive discussion" in the FEIS of the "fiscal reimbursement." [Docket 112-1, p. 23.]

the proper court to address plaintiffs' challenge to the validity of the concurrence under state law. Nonetheless, plaintiffs must seek ultimate relief in federal court because the Secretary has already taken the land into trust based upon the Governor's invalid concurrence, and only a federal court may order the Secretary to take the land out of trust.[27] Because this court may address issues of state law necessary for this relief, plaintiffs have raised the related state-law arguments in support of their claim for relief under federal law. *See Bryant v. Civiletti*, 663 F.2d 286, 292 n.15 (D.C. Cir. 1981) ("[W]hile federal courts give 'proper regard' to decisions of lower state trial courts they are not required to follow them." (citing *C.I.R. v. Bosch's Estate*, 387 U.S. 456, 465–67 (1967)).

1. The concurrence is an independent authorization of gaming under state law, and its validity is a matter of state law

As they do with the compact's approval, the Secretary and the Tribe rely on the untenable argument that IGRA somehow makes state law irrelevant. This ignores that IGRA is contingent legislation – that is, Congress conditioned federal approvals upon the independent actions of states. *Confederated Tribes of Siletz*, 110 F.3d at 696 ("The power delegated to the Secretary to acquire Indian trust lands for gaming purposes is . . . *limited by a contingent requirement of state approval.*" (emphasis added)). Congress in no way intended that federal determinations could somehow override required state action. Quite the opposite. Where Congress conditioned Secretarial actions such as approval of a compact and the two-part determination on state

[27] Contrary to the Secretary's assertion [Docket 112-1, p. 26], in this litigation plaintiffs do not directly challenge the Governor's action as unlawful. There is no cognizable reason why plaintiffs were required to join the Governor under Rule 19 of the Federal Rules of Civil Procedure. Governor Brown has no legal interest in the challenge to the Secretary's approval of the compact. *See Pyramid Lake Paiute Tribe v. Burwell*, No. 1:13-CV-01771 (CRC), 2014 WL 5013206, at *4 (D.D.C. Oct. 7, 2014). And even if he did have such an interest, he is not necessary and indispensable because the Secretary can adequately represent that interest here. *See Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996), *amended* (Aug. 6, 1996).

approval, IGRA requires that the state approvals be in place before the Secretary can take any action under federal law.

The Tribe is wrong when it argues that "under IGRA, the Secretary's determination is not dependent on the Governor's concurrence, and necessarily comes before the Governor even has a chance to concur." [Docket 111-1, pp. 59-60.] This interpretation violates the plain meaning of section 2719(b)(1)(A) because even though the Secretary makes the two-part determination prior to requesting the concurrence, the Secretary has no authority to issue a final decision or give legal effect to the two-part determination unless and until the governor concurs. 25 U.S.C. §2719(b)(1)(A); *Lac Courte,* 367 F.3d at 656 ("Unless and until the appropriate governor issues a concurrence, the Secretary of the Interior has no authority under §2719(b)(1)(A) to take land into trust for the benefit of an Indian tribe for the purpose of the operation of a gaming establishment."). Thus, contrary to the Tribe's assertion, the two-part determination is totally dependent upon the concurrence. The concurrence is nothing less than an independent approval of off-reservation gaming under state law. And surely IGRA imposes the requirement that the Secretary obtain a valid concurrence. The Secretary's authority to consider the concurrence valid in order to give it effect under federal law, does not affect the validity or invalidity of action under state law. *See Pueblo of Santa Ana,* 104 F.3d at 1557.

The Tribe is equally wrong when it asserts that IGRA "grants the governor . . . the power to concur." [Docket 111-1, p. 60.] As the Seventh Circuit stated in *Lac Courte*, IGRA does not apply at all to a governor when he concurs. When a governor's concurrence is requested, the land at issue is not Indian land subject to IGRA, but state land subject to the laws of the state. *Lac Courte,* 367 F.3d at 657. IGRA provides no outline or guidance for the governor's concurrence. While the Secretary must find that the gaming will be in the best interest of the tribe and not

detrimental to the surrounding community, IGRA places no limits on the governor at all. Indeed, in *Lac Courte*, the Wisconsin Governor declined to concur for reasons unrelated to the two-part determination, citing "Wisconsin's general disapproval of off-reservation gaming" and his belief that the "public interest would not be served by the addition of another major casino gaming facility . . . ." *Lac Courte*, 367 F.3d at 653. Similarly, Governor Brown, as discussed above, granted North Fork's concurrence for reasons based on broad statewide interests.

As plaintiffs have stated – and both the Secretary and the Tribe have ignored – while the Governor's concurrence is required for the Secretary to approve off-reservation gaming and is thus "given effect under federal law, . . . [t]he [Governor's] authority to act is provided by state law." *Confederated Tribes of Siletz*, 110 F.3d at 696 ("If the Governor concurs, or refuses to concur, it is as a State executive, under the authority of state law."). Therefore, it follows that if the Governor lacks authority under state law to concur, the concurrence is invalid and there is no merit to the Secretary's assertion that that "the validity of the concurrence is matter of federal law." [Docket 112-1, p. 24.]

Because a concurrence cannot be determined to have been validly issued under federal law, the Secretary and the Tribe really argue here that the Secretary's acceptance of an invalid concurrence may cure any defects. Both assert that because the Secretary has no duty to inquire into whether the concurrence is or is not valid under state law, IGRA has been satisfied. [Docket 111-1, p. 60; Docket 112-1, p. 24.] According to the Tribe, "That should end the matter." [Docket 111-1, p. 60.] But it does not. Effectively, this makes the validity of the concurrence irrelevant and provides that it can never be challenged. The Tribe, for instance argues, that the ability for parties to invalidate a concurrence under state law would be "unworkable" because the Secretary has relied on the presumed validity of state actions. [Docket 111-1, p. 61.] But the

Tribe offers no explanation for how such a challenge is fundamentally different from a challenge to the two-part determination under the APA. If the determination is arbitrary and capricious, it must be rescinded. Similarly, if the concurrence upon which the Secretary relied is determined to have been invalid, the determination must be rescinded. This is far from unworkable. It is provided for under the APA. To insulate the Secretary's determination from judicial review because of her reliance on invalid state action, however, is not only unworkable but contrary to the APA and IGRA. 5 U.S.C. §706(2)(A) (stating that an agency action that is "otherwise not in accordance with the law" shall be set aside).

Under the reasoning of the Tenth Circuit's opinion in *Pueblo of Santa Ana*, the Secretary cannot retroactively validate a governor's ultra vires action by approving that action under federal law. *Pueblo of Santa Ana*, 104 F.3d at 1548. While *Pueblo of Santa Ana* did not address the concurrence issue, it did address ultra vires state action by the Governor. Prior to the Tenth Circuit's decision, the New Mexico Supreme Court held that the New Mexico Governor lacked the authority under state law to enter into compacts with Indian tribes. *Id*. at 1550-51. Based on that ruling, the Tenth Circuit held that because the compacts were invalid under state law, the Secretary's subsequent approval of the compact could not cure the defect. *Id*. at 1557. It made no difference that the Secretary was not required to investigate whether the compact had been legally entered into under state law. *Id*. The Secretary "cannot, under [IGRA], vivify that which was never alive." *Id*. at 1548.

Under section 2719(b)(1)(A), the Secretary lacks any authority to authorize gaming without a valid concurrence. If that concurrence is invalid, therefore, the Secretary never had the authority to execute the two-part determination, and the determination must be rescinded.

2. The concurrence is invalid under California law

The Tribe argues that "the concurrence is part of the Governor's express constitutional authority to negotiate and conclude compacts . . . ." [Docket 111-1, p. 61.] This argument ignores the fact that the concurrence power is not mentioned in the constitutional provision authorizing the Governor to negotiate and conclude compacts. Cal. Const., art IV, §19(f). It also ignores, as plaintiffs have already discussed, that the concurrence and the negotiation powers are vastly different powers for different purposes and the narrow nonbinding negotiation power cannot contain the much broader and binding concurrence power. [Docket 106-1, pp. 31-35.]

According to the Tribe, the power to concur lies within "California policy embodied in the state constitution and statutes that authorize compacts for all Indians land in accordance with IGRA." [Docket 111-1, p. 62.] This is a muddled statement of California law. While the Constitution provides for compacts to regulate gaming on Indian land in accordance with federal law, (1) at the time of the concurrence a tribe does not have Indian land eligible for a compact, and (2) a concurrence is not governed by federal law. *Lac Courte*, 367 F.3d at 657. The concurrence in no way implicates Article IV, Section 19(f) of the California Constitution.

Contrary to the Tribe's view, the Governor's authority to negotiate compacts does not also contain the power to create Indian lands upon which gaming can occur.[28] Rather, the existence of Indian land on which gaming can occur is the precondition to the Governor's authority to negotiate a compact pursuant to which gaming on that land would be regulated. Nothing in Section 19(f) purports to give the Governor the authority to create that precondition. *Cf. Zack v. Marin Emergency Radio Authority*, 118 Cal.App.4th 617, 630 (2004) (holding that

[28] Plaintiffs acknowledge that only the Secretary may take land into trust under Section 5 of the IRA. Where a two-part determination is necessary, however, the Secretary lacks authority to take land into trust for gaming without first obtaining the governor's concurrence. Thus, absent the concurrence, the land will never become Indian land upon which gaming can occur.

the "power to construct and operate an emergency communications system or service was the "precondition," not the result, of the "statutory power to issue bonds for that purpose").

Attempting to alleviate this problem the Tribe relies on the idea that the concurrence power is an implied power necessary for the Governor to exercise his constitutional duty. The Tribe states, "For the governor to effectuate his power to negotiate a valid compact authorizing gaming on Indian lands for which federal law requires a Secretarial Determination and the Governor's concurrence in that decision . . ., the Governor must have the power to concur." [Docket 111-1, p. 62.] This argument has no merit. The Governor does not need the power to concur to "effectuate" his power to negotiate compacts. He has effectuated this power over 70 times in the State of California.[29] California Gambling Control Commission, Ratified Tribal-State Gaming Compacts, http://www.cgcc.ca.gov/?pageID=compacts (last visited Mar. 4, 2015). In fact, both Governor Schwarzenegger and Governor Brown negotiated and concluded compacts with the North Fork Tribe before Governor Brown concurred. Governor Schwarzenegger fulfilled his prescribed duty four years before the concurrence: "[I]n April 2008, the State and the Tribe *executed a tribal-state gaming compact* but agreed to wait for the Legislature to consider ratification of that compact until the Secretary made a final determination to take the 305-Acre Parcel into trust . . . ." [NF_AR_GC_000118 (emphasis added).] Nowhere is there mention of the Governor needing to concur in order to effectuate his duty to negotiate. He negotiated before he concurred. Moreover, the Governor lacks power even to "effectuate" a compact. Any compacts the Governor negotiates must be ratified by the Legislature. Cal. Const., art IV, §19(f). The concurrence has nothing to do with his role in negotiating compacts.

[29] As discussed above, the Fort Mojave Tribe had land taken into trust under a two-part determination in which the Governor concurred. But no legal challenge was brought against the concurrence in that instance.

For the Tribe, the Governor's concurrence is indeed necessary. Without it, the Secretary cannot take the land into trust for purposes of gaming, the current non-Indian land will not become Indian land on which gaming can occur subject to a compact negotiated under Section 19(f), and the Tribe cannot compel the Governor to negotiate a compact. 25 U.S.C. §2710(d)(3)(A). Also, obtaining a concurrence is necessary for the Secretary to exercise her authority under IGRA. 25 U.S.C. §2719(b)(1)(A). But none of this leads to the conclusion that the Governor's compact power includes the power to concur. Indeed, the Tribe offers no authority for the proposition that Section 19(f)'s authorization to negotiate compacts also empowers the Governor to create the precondition for those negotiations – that is, to create the existence of Indian land on which gaming can be conducted under IGRA. Such a broad interpretation of Section 19(f) is simply unwarranted.

The Tribe also argues that concurrence power is inherent in the Governor's "constitutional and statutory role as the State's chief executive . . . ." [Docket 111-1, p. 62.] Notably, however, the Tribe neglects to cite or distinguish any relevant California precedent on this issue.[30] Nor does the Tribe mention that the California Supreme Court has expressly rejected this argument. In *Professional Engineers*, the Governor argued that his authority to institute a two-day-a-month furlough program for executive branch employees derived from Article V, §1,

[30] The Tribe's citation to *Picayune Rancheria of Chukchansi Indians v. Brown* 229 Cal.App.4th 1416 (2014) is inapt. The issue in *Picayune Rancheria* concerned only whether the Governor's concurrence was the act of a "public agency" subject to the requirements of the California Environmental Quality Act ("CEQA"). In finding that the concurrence was not subject to CEQA, the court recognized that "under the federal provision at issue here (25 U.S.C. §2719(b)(1)(A)), the power to concur in the Secretary of the Interior's two-part determination is vested in 'the Governor of the State in which the gaming activity is to be conducted,' and it is also the individual who holds the office of the Governor in whom our state constitution vests the 'supreme executive power' of the state." 229 Cal. App. 4th at 1425. Thus, the court held that "it is the Governor – not his office – who took the action" of concurring in the Secretary's determination. *Id.* at 1425. In context, the court was merely stating that federal law looks to the Governor himself as the source of the concurrence, and under state law the Governor acts as an individual, not as an "office" or "agency" for purposes of CEQA. That court did not even purport to speak to the question of whether federal law created the concurrence authority or whether that authority is somehow "executive" in nature.

of the California Constitution, which gives the Governor the power to "see that the law is faithfully executed." *Professional Eng'rs in Cal. Gov't v. Schwarzenegger*, 50 Cal.4th 989, 1015 (2010). The Supreme Court disagreed, holding that "(1) [u]nder the California Constitution it is *the Legislature*, rather than the Governor, that generally possesses the ultimate authority to establish or revise the terms and conditions of state employment through legislative enactments, and (2) *any authority* that the Governor . . . is entitled to exercise in this area emanates from the Legislature's delegation of a portion of its legislative authority . . . through statutory enactments."[31] *Id*. (emphasis added).

As discussed above, because the Secretary has no authority to take land into trust for the purpose of gaming without first obtaining the governor's concurrence, the concurrence is an independent authorization of gaming under state law. California's gaming policy is expressed in Article IV, Section 19 of its Constitution, which expressly limits gaming in the State and in so doing places any powers to authorize gaming in the hands of the Legislature, not the Governor. "The Legislature may provide for the regulation of horse races and horse race meetings and wagering on the results." Cal. Const. art. IV §19(b). "The Legislature by statute may authorize cities and counties to provide for bingo games, but only for charitable purposes." *Id*. §19(c). The Legislature may ratify compacts for the conduct of class III gaming on Indian land. *Id*. §19(f). "[T]he Legislature may authorize private, nonprofit, eligible organizations . . . to conduct raffles

[31] The California Supreme Court in *Professional Engineers* also rejected the Tribe's argument about the Governor having implied powers. Despite the Governor's authority to hire executive branch employees, and despite statutes authorizing the Governor to adjust their work weeks, work days, hours, time, and attendance, Cal. Govt. Code §§19851(a), 19852, 19853, 19849, and to lay them off, *id*. §19997, that was not enough in the Supreme Court's view to authorize the Governor to implement the two-day-a-month furloughs. *Professional Eng'rs*, 50 Cal.4th at 1025-1035. Moreover, the court similarly rejected the idea that the Governor's actions could be authorized because they were necessary under the circumstances. *Id.* at 1025 (rejecting the trial court's finding that a fiscal emergency, which the Governor had declared under his express constitutional authority, authorized the furlough program to ensure state agencies would not be "unable to meet their statutorily mandated functions"). To the extent the Tribe cites any California authority on these arguments, [Docket 111-1, p. 61 n.41] it refuses to address *Professional Engineers* at all.

as a funding mechanism . . . ." *Id.* §19(f). Also, where the Constitution prohibits gaming in any form, it directs the prohibitions at the Legislature, not the Governor. "The Legislature has no power to authorize lotteries . . . ." *Id.* §19(a). "The Legislature has no power to authorize, and shall prohibit, casinos of the type currently operating in Nevada and New Jersey." *Id.* §19(e).

Section 19 makes clear that authorizations of gaming, binding on the state and its citizens, are under the ultimate control of the Legislature. The Governor has no power to authorize gaming under any circumstances and his role is limited to negotiating compacts subject to approval by the Legislature.[32] There is simply no sleight of hand that can turn this limited negotiation power into an independent authorization of gaming that must come from the Legislature. The California Constitution provides that class III gaming is allowed on Indian lands under tribal-state compacts. The Constitution has not authorized the conversion of non-Indian land to Indian land for the purpose both class II and class III gaming.[33] Therefore, under California law, the Governor may concur only if the Legislature has expressly delegated that power to the Governor. *Professional Eng'rs*, 50 Cal.4th at 1015. The Legislature has enacted no statute delegating this authority.

[32] The Tribe references a number of federal statutes that also require the governor's consent and argues that provisions would "be unworkable if private parties could challenge the concurrences under state law after the federal government has acted in reliance on them." [Docket 111-1, p. 61.] Plaintiffs have not analyzed all of these other federal statutes. IGRA, however, requires the state to authorize off-reservation gaming in order for a two-part determination to be given effect. Since the California Constitution expressly places any authority to authorize gaming in the hands of the Legislature, any power the Governor may have in this area can only emanate from an express statutory delegation of that authority on the Governor. *Professional Eng'rs*, 50 Cal.4th at 1015. Notably, while the Tribe points to federal statutes and cases from other jurisdictions, it fails to even cite the definitive California Supreme Court case that defines the limits of the Governor's authority under California law.

[33] Plaintiffs recognize that Section 19(f) does not distinguish between types of Indian land or when that land was acquired. Once the land is Indian land, it is eligible for gaming under California law. For all other exceptions to Section 2719(a), the State lacks any input into whether such land will become Indian land. Under Section 2719(b)(1)(A), however, the State has absolute control, through the governor's concurrence requirement. Because the Constitution has not provided for this power and the Legislature has not delegated its authority by statute, the Governor cannot unilaterally make this determination.

The Tribe offers no statutes or California precedent for finding the Governor has been delegated the authority to authorize gaming at the Madera site. Rather, the Tribe relies on cases regarding different statutory schemes from different jurisdictions. [Docket 111-1, p. 62.] The Tribe also relies on dicta from *Lac Courte*, in which the Seventh Circuit concluded without analysis that the Wisconsin Governor likely had the power to concur.[34] [*Id.*] But California is not Wisconsin, and both the California Constitution and the California Supreme Court require that an express statutory delegation of the concurrence power is required for the Governor to exercise it.

Finally, the Tribe argues that even if the Governor lacked the authority to concur the Legislature's subsequent ratification of the compact ratified the concurrence. [*Id*.] This argument fails. While the Legislature may ratify the Governor's ultra vires actions by subsequently enacting a statute, no such statute has been enacted. The electorate rejected the Legislature's enactment of AB 277. AB 277 is dead. Even by the terms of the case relied on the Tribe, no ratification occurred because no statute was enacted. *Hoffman v. City of Red Bluff*, 63 Cal.2d 584, 592 (1965) ("If the thing wanting or omitted which constitutes the defect is something the necessity for which the legislature might have dispensed with by prior statutes, or if something has been done, or done in a particular way, which the legislature might have made immaterial, the omission or irregular act *may be cured by a subsequent statute*." (emphasis added)).

IV. Defendants Violated NEPA

The overarching problem with the NEPA analysis, which defendants and the Tribe fail to address, is the defendants' contradictory and unsupported conclusions, and their failure to

[34] The Seventh Circuit in *Lac Courte* addressed whether the concurrence provision violated the federal Constitution. Nothing in the case is inconsistent with plaintiffs' argument that the concurrence is a function of state law, not federal law. Indeed, this is why the provision was not violative of the federal Constitution. Nonetheless, in dicta, the Seventh Circuit stated that it believed that the Governor of Wisconsin likely has the power to concur under Wisconsin gaming policy. This, however, has no bearing on whether California gaming law and policy authorizes the California Governor to concur. The Seventh Circuit did not address California law at all.

scrutinize many of the factual findings. The record demonstrates that defendants did not take a "hard look" at the issues, and that their analysis was intended to merely justify a foregone conclusion in violation of NEPA. *See National Audubon Society v. Department of the Navy*, 422 F.3d 174, 187 (4th Cir. 2005) ("The deficiencies in each area of the Navy's analysis would not, on their own, be sufficient to invalidate the EIS. But a review of the various components of the EIS taken together indicates that the Navy did not conduct the 'hard look' that NEPA requires."); 40 C.F.R. §§1502.2(g) (EIS must not be used to "justify[] decisions already made"), 1502.14(a) (alternatives analysis must "rigorously explore and objectively evaluate" the alternatives); *National Audubon Society v. Department of the Navy*, 422 F.3d at 199 ("NEPA of course prohibits agencies from preparing an EIS simply to 'justify[] decisions already made. . . . Where an agency has merely engaged in post hoc rationalization, there will be evidence of this in its failure to comprehensively investigate the environmental impact of its actions and acknowledge their consequences.").

The defendants' reasoning is facially contradictory. On one hand they summarily dismiss Picayune's concerns about the unfair competitive advantage the North Fork Tribe will enjoy with an off-reservation casino in the heart of the valley [NF_AR_0040531], while on the other hand they justify their rejection of an alternative site out of concern for the competition that the alternative site would pose to Picayune.[35] [NF_AR_0029901-03.] Likewise, defendants cite

[35] The Tribe, though not the federal defendants, contends that Stand Up waived any objection to the Secretary's exclusion of the SR-41 and Avenue 7 sites from further evaluation. [Docket 111-1, p. 65.] The Tribe misconceives Stand Up's complaint, however, which is with the Secretary's use of a double standard – invoking the project's competitive impacts on nearby tribal casinos as grounds to reject alternative sites, while disregarding competitive impacts when they were raised in opposition to the Madera site. Notably, the Secretary's disregard of the competitive impact of the Madera site appeared in the IGRA ROD, which was adopted on November, 2012 – years after the adoption of the FEIS. [NF_AR_0029681.] Thus, plaintiffs had no opportunity to raise this contradiction during the administrative process. *See Etelson v. Office of Personnel Management*, 684 F.2d 918, 923 (D.C. Cir. 1982) (reversing summary judgment based on failure to exhaust administrative remedies because plaintiff could not have raised the claim in its present form before the agency).

community opposition to a casino in the North Fork area as a justification for rejecting those alternatives [NF_AR_0029899, 0029910], but make no mention of community opposition to the Madera site despite abundant evidence of it in the record. [NF_AR_0000011-0000012, 0000028-0000029, 0000790-91, 0000804-08, 0000823-24, 0000826-31, 0035257-59, 0035260-61, 0038401-08, 0038429.]

Defendants' NEPA analysis is also plagued with conclusions that are either entirely unsupported or have not been subjected to even a reasonable degree of scrutiny. Defendants reject the Old Mill site based in part on the unquantified presence of hazardous substance contamination. [NF_AR_0029909.] Although "[i]t is believed the removal of affected soils would allow for unrestricted use of the site" [NF_AR_0029909], defendants made no inquiry into how much that would cost, or whether it is even necessary for commercial use of the site as a casino. Their failure to conduct even the most basic follow up demonstrates that defendants did not want to know the answers, but instead simply cited to the potential for environmental contamination as a pretense to reject the Old Mill site as an alternative. 40 C.F.R. §1502.1 (Statements shall be "supported by evidence that the agency has made the necessary environmental analyses.").

The same is true for defendants' repeated invocation of the "environmentally sensitive" and "scenic" foothills with their "steep" terrain. [NF_AR_0029899-901.] The record contains no data or other evidence to assess these factors. Defendants merely take it as a given that the foothills are more "environmentally sensitive" and difficult to develop than the valley, without addressing how it is that other development (including other tribal casinos) have managed in these foothills. *See* 40 C.F.R. §1500.2(b) (Environmental impact statements "shall be supported by evidence that agencies have made the necessary environmental analyses.").

Defendants further reject alternatives based on their alleged inability to generate sufficient jobs and revenues to meet the Tribe's purpose and need. [NF_AR_29899-900, 0029909, 0029911.] But they never define how much the Tribe needs. [NF_AR_0029822-24.]

It is also apparent that defendants blindly accepted the CDC's statement that it would not sell the Old Mill site for gaming purposes, without any scrutiny of the Tribe's influence over that decision given its position on the CDC board. [NF_AR_0009399.] CDC's report that there was no support for a tribal casino in the North Fork community – the Tribe's own community – should have set off alarm bells. [NF_AR_0009413.] Instead, defendants accepted the statement without question. [NF_AR_0029909-10.]

Nor did defendants articulate any rational basis for the conclusion that the project will not have a significant impact on crime. Despite the fact that "[e]ach local law enforcement agency contacted reported an increase in law enforcement service demand as a direct result of the opening of a casino within its jurisdiction" [NF_AR_0030196], defendants find that this casino will have no significant impact by relying on comparisons of crime at other tribal casinos with crime throughout the entirety of their host counties. [NF_AR_0030197.] These comparisons are meaningless given the size of the counties.[36] Crime resulting from a new tribal casino will undoubtedly be a minor portion of the crime committed on a county-wide basis, and evaluating it on a county-wide basis obscures the casino's impact on crime in the locality of the casino. The county-wide analysis dilutes the impact and thereby avoids a "hard look" at the impact on the local community surrounding the casino. 40 C.F.R. §1508.27(a) ("the significance of an action

[36] The counties used by defendants in their analysis are Placer County (1,407 square miles), Santa Barbara County (2,735 square miles), San Diego County (4,206 square miles), and Riverside County (7,206 square miles). U.S. Census Bureau, Quick Facts, available at http://quickfacts.census.gov (last visited March 5, 2015). [NF_AR_0030195.]

must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.").

The Tribe further cites the National Opinion Research Center study, which it asserts found no link between casinos and crime. [Docket 111-1, pp. 69-70.] This misstates the study's finding, which is that "*insufficient data exists* to quantify or determine the relationship between casino gambling within a community and crime rates." [NF_AR_0030197 (emphasis added).] This means that the study was inconclusive – not that it concluded there is no link between casinos and crime. In this respect, defendants supported their decision not with evidence, but with the absence of evidence. An agency may rely on experts, but it cannot mischaracterize their findings.

The evidence of the project's impact on crime is right in front of them.

> Each local law enforcement agency contacted reported an increase in law enforcement service demand as a direct result of the opening of a casino within its jurisdiction. All reported the typical crimes and/or calls for service that have increased are, but are not limited to: driving under the influence, personal robbery, credit card fraud, auto thefts, disorderly conduct, and assault. [NF_AR_0030196.]

> While several studies found an increase in crime within an area after the opening of a new casino, the amount was not much different than from the opening of any other type of tourist attraction.[37] [NF_AR_0030197.]

By downplaying the project's impact and finding "no significant impact" based upon diluted, county-wide crime statistics and a study that drew no conclusion on the issue, defendants failed to take the "hard look" that NEPA requires. *See National Audubon Society v. Department*

[37] Irrespective of whether the increase in crime is attributable to the nature of casino gambling, it is still an increase in crime. Even if the increase is not attributable to the nature of casino gambling, that does not support a finding of "no significant impact."

of the Navy, 422 F.3d at 187 ("The hallmarks of a 'hard look' are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms.").

Finally, defendants and the Tribe fail to justify the failure to adequately mitigate the project's impacts on problem gamblers. First, and most significantly, they completely fail to account for the roughly 400+ gambling addicts who will not even seek treatment from the County. [NF_AR_0030198.] Second, with regard to the 85 gambling addicts expected to seek help from the County, they fail to address the funding shortfall of the County's behavioral health services. They now contend that there is no funding shortfall due to an annual $1,038,310 payment to the County for fiscal impacts. [Docket 111-1, pp. 20-21, 71; Docket 112-1, at p. 56.] But that contradicts the FEIS statement that "[t]he Tribe has agreed in the County MOU to contribute $50,000 per year to compensate these service programs, which is $13,606 less than the amount needed to fund the above treatment programs and would result in a potentially significant impact." [NF_AR_0030196.] If, as the defendants and Tribe now argue, there is no funding shortfall, then the FEIS would not conclude that a funding shortfall results in a potentially significant impact.

Further, contrary to the Tribe's assertion that the list of measures intended to mitigate the funding shortfall "are based upon studies regarding the effectiveness of such measures" [Docket 111-1, p. 72, n.46], the Tribe fails to cite any reference to such studies in the FEIS or in the administrative record.

V. Defendants Violated the Clean Air Act

A. Defendants failed to comply with required procedures

Defendants' opposition leaves no doubt but that they treated the notice required under 40 C.F.R. §93.155 as an unimportant, perfunctory exercise. Instead of taking the opportunity given to them by this Court to comply with the required procedures in the correct order,

defendants incorrectly interpreted this Court's prior order as cover to disregard the letter and the spirit of the US EPA regulations. While both the government defendants and the Tribe contend that this Court's prior order already sanctioned their process, the Court did not pre-judge or prescribe any particular steps as the appropriate cure for their violation. Rather, the Court enabled defendants to determine how to cure the violation, recognizing that defendants might "remedy [their] error and reach a similar overall result on a valid basis." [Docket 77, at pp. 6-7.] Nothing in the Court's prior order authorized defendants to give the required notice in a manner inconsistent with the procedures required under the US EPA regulations, however.[38]

Defendants do not address the convoluted process that that they have employed – i.e., publishing a notice of draft conformity determination in May, 2011; then adopting the final conformity determination in June, 2011; then providing a notice of draft conformity determination in January, 2014; then "re-issuing"[39] the final conformity determination in April, 2014 – or how that process complied with the law. The regulations are clear. Defendants must comply with the requirements, including both notices under §§93.155 and 93.156, "*before* the action is taken." 40 C.F.R. §93.150(b) (emphasis added). In this case, defendants issued their Record of Decision to take the land into trust on November 26, 2012, and took the land into trust on February 5, 2013. [NF_AR_0041206; Docket 105, p. 8, ¶28] Yet they did not comply with the notice requirement under 40 C.F.R. §93.155 until after those actions were taken. Notably,

[38] In its prior order, the Court rejected plaintiffs' argument that on remand defendants should be required to perform the entire Clean Air Act conformity determination from start to finish. [Docket 77, at p. 7.] It did so based at least in part on the conclusion that defendants are not required to re-run the emissions estimations using EPA's new model, EMFAC2011. [Docket 77, at pp. 7-8.] As discussed in Section V.B, below, plaintiffs respectfully submit that the Court erred in reaching that conclusion. Moreover, the Court's refusal to require defendants to engage in any specific process does not mean that it pre-approved the process employed by defendants.

[39] Rather than rescinding their original final conformity determination, then providing the notice, then adopting a new final conformity determination, defendants allowed the original final conformity determination to remain intact throughout the process.

defendants did not withdraw the June, 2011, final conformity determination at any time prior to providing the January, 2014, notice of draft conformity determination. So when they provided the notice of draft conformity determination in January, 2014, the final conformity determination was already approved. The Court must reject the "idea . . . that too late can still be close enough for government work." *Sierra Club v. Johnson*, 436 F.3d 1269, 1275 (11th Cir. 2006); *see also Bennett v. Spear*, 520 U.S. 154, 172 (1997) ("It is rudimentary administrative law that discretion as to the substance of the ultimate decision does not confer discretion to ignore the required procedures of decisionmaking.").

Defendants' initial violation was to fail to provide the notice under §93.155 entirely. Although they have now provided the notice, they provided it out of the required order, and thus still have not complied. 40 C.F.R. §93.150(b); *see Sierra Club v. Johnson*, 436 F.3d at 1275 (mailing notices after issuing permit does not comply). Where, as here, the regulations prescribe clear procedures, the agency has no discretion to ignore those procedures, and the Court must set aside the agency's action. *Sierra Club v. Johnson*, 436 F.3d at 1280; *Hawaii Longline Ass'n. v. National Marine Fisheries Service*, 281 F.Supp.2d 1, 26 (D.D.C. 2003) (regardless of whether an agency action is substantively unlawful or procedurally flawed, the APA provides the same remedy: "The reviewing court shall . . . hold unlawful and set aside [the] agency action." 5 U.S.C. §706).

The Tribe, though not the federal defendants, contends that even if defendants violated the Clean Air Act, plaintiffs must demonstrate prejudicial error. [Docket 111-1, at p. 88.] The Tribe is wrong because defendants' decision to re-issue the final conformity determination in this case is not covered by the Clean Air Act's express harmless error rule. 42 U.S.C. §7607(d)(1). Had Congress intended for conformity determination violations to be covered by the harmless

error rule, it could have easily added conformity determinations to the lengthy list of covered actions. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (citation and internal quotation marks omitted)). Moreover, the cases cited by the Tribe in support of its contention are not applicable in this case. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C. Cir. 2012) and *Husqvarna AB v. EPA*, 254 F.3d 195 (D.C. Cir. 2001) were rulemaking cases that, unlike this case, were covered by the Clean Air Act's express harmless error rule. *Coalition for Responsible Regulation, Inc*., 684 F.3d at 124; *Husqvarna AB*, 254 F.3d at 199, 202-203; *see* 42 U.S.C. §§7607(d)(8), (d)(9)(D)(iii).

In *American Coke & Coal Chem. Inst. v. EPA*, 452 F.3d 930 (D.C. Cir. 2006), cited by the Tribe, the issue was not whether the agency had given notice properly. Instead, the issue was whether the final rule adopted by the agency was a logical outgrowth of the Notice of Proposed Rulemaking ("NOPR"). *Id.* at 938. The court found that the final rule was a logical outgrowth of the NOPR, and therefore there was no violation of the APA. *Id.* at 939. No issue of prejudice arose, and the court merely cited in dicta to the APA's prejudicial error requirement under 5 U.S.C. §706(2). *Id*.[40]

In cases such as this one, where the agency's failure to comply with required procedures makes it impossible to know what would have happened had it complied, a showing of

[40] Additionally, in the unpublished decision of *County of Rockland v. FAA*, 335 F.App'x 52 (D.C. Cir. 2009), also cited by the Tribe, the court rejected the petitioner's challenge to the FAA's determination that it was exempt from performing a conformity determination. Although the FAA had not calculated the emissions resulting from the project, the court found it was not required to do so because the FAA "relied upon a fuel burn analysis that showed the redesign will 'reduce fuel consumption by just over 194 metric tons per day' in the study area. Because reducing fuel consumption reduces aircraft emissions, the FAA concluded the redesign will reduce emissions in the study area." *Id*. at 56. Thus, the court's statement regarding lack of prejudicial error did not involve a notice violation, and was dicta.

prejudicial error is not required. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031, n.27 (D.C. Cir. 1978) ("[I]f we cannot be sure that under the correct procedures the Agency would have reached the same conclusion, we cannot characterize the defect as harmless"); *see also Sierra Club v. Johnson*, 436 F.3d at 1280 (vacating and remanding EPA order based upon failure of notice requirement, without requiring showing of prejudicial error); *Hawaii Longline Ass'n. v. National Marine Fisheries Service*, 281 F. Supp. 2d 1, 26 (D.D.C., 2003) (vacating regulations and biological opinion based upon procedural error without requiring showing of prejudicial error).

Here, by 2014 defendants had already made their decision and committed themselves to it by taking the land into trust. The administrative process and regulatory attention to this project had been complete for over a year. Defendants were plainly committed to defending a decision already made, a fact that undermines any reliance on defendants' 2014 decision as proof of how it would have acted before the decision had been made. Under these circumstances, there is no basis to assume that responses from government agencies and tribes in response to the notice, or the even the defendants' own decisions in light of those responses, would have been the same had the notice been given in conformance with the required procedures.

Accordingly, defendants violated the Clean Air Act by failing to follow its procedures, and their decision must be set aside. 5 U.S.C. §706(2)(A), (D).

B. Defendants failed to use the required emissions model

That the outcome of defendants' 2014 decision was predetermined is underscored by their use of emissions estimates from the EMFAC2007 model approved in 2008, rather than the EMFAC2011 model approved in 2013. Defendants' only opposition is to contend that they were entitled to do so, because their analysis began in 2010, prior to the adoption of EMFAC2011. [Docket 112-1, pp. 61-62.] Their argument relies on an incorrect reading of 40 C.F.R.

§93.159(b)(1)(ii), and a reading out of context of the US EPA Notice of Availability that approved EMFAC2011.

The regulation upon which defendants rely, 40 C.F.R. §93.159(b)(1)(ii), provides as follows:

> A grace period of 3 months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used unless EPA announces a longer grace period in the Federal Register. *Conformity analyses for which the analysis was begun during the grace period or* ***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. 40 C.F.R. §93.159(b)(1)(ii) (emphasis added).

According to defendants, their analysis began in 2010. [Docket 112-1, at p. 62]. The Federal Register notice of availability for EMFAC2011 was published on March 6, 2013. 78 Fed. Reg. 14,533-01 (Mar. 6, 2013). Under section 93.159(b)(1)(ii), a 3-month grace period applied, from March 6, 2013, to June 6, 2013.[41] Because defendants' conformity analysis began more than three months before the Federal Register notice of availability, they may not avail themselves of the grandfathering under section 93.159(b)(1)(ii). Accordingly, they have no excuse from section 93.159(b)'s requirement to base their analysis "on the latest and most accurate emission estimation techniques available. . ." 40 C.F.R. §93.159(b)(1)(ii).

[41] Although the US EPA's notice of availability specifies a six-month grace period, that six-month grace period is applicable to only (i) "[a]ll new HC, NOx, PM10, PM2.5, and CO *regional emissions analyses* (e.g., supporting transportation plan and [transportation improvement program] conformity determinations)"; and (ii) "[a]ll new CO, PM10 and PM2.5 hot-spot analyses supporting *project-level* conformity determinations." 78 Fed. Reg. 14,533-01 (Mar. 6, 2013) at Part II.F (emphasis added). In this case, the conformity determination was a project-level analysis for NOx and reactive organic gases, and thus does not fit into either category. Accordingly, the six-month grace period prescribed by US EPA in the notice of availability does not apply to this project. Instead, the three-month grace period under 40 C.F.R. §93.159(b)(1)(ii) applies. Irrespective of whether a three-month or six-month grace period applies, however, the result is the same. Defendants began their analyses years before the Federal Register notice of availability, and thus their conformity analysis is not grandfathered under section 93.159(b)(1)(ii).

Relying on this Court's prior order [Docket 77, at pp. 7-8], defendants contend that they were not required to use the EMFAC2011 model in conducting their conformity analysis, because it was begun prior to September 6, 2013. [Docket 112-1, p. 62; Docket 77, at pp. 7-8.] Plaintiffs respectfully submit that defendants' and the Court's prior interpretation is incorrect. As support for this interpretation, defendants and this Court cite to the Federal Register notice of availability, which states as follows:

> When the grace period ends on September 6, 2013, EMFAC2011 will become the only approved motor vehicle emissions model for all new regional and CO, PM10 and PM2.5 hot-spot transportation conformity analyses across California. In general, this means that all new HC, NOX, PM10, PM2.5, and CO regional conformity analyses and CO, PM10 and PM2.5 hot-spot analyses started after the end of the 6-month grace period must be based on EMFAC2011, even if the SIP is based on an earlier version of the EMFAC model. 78 Fed. Reg. 14,533-01 (Mar. 6, 2013) at Part II.F.

But when read in context with the remainder of that section (Part II.F), as well as 40 C.F.R. §93.159(b)(1)(ii), it is clear that that language in the Federal Register notice was not intended to grandfather any and all analyses begun before the end of the grace period. *First*, simply because the US EPA states that certain types of analyses begun after the end of the grace period must use the new EMFAC2011 model, does not mean that all analyses begun before the end of the grace period may use the old EMFAC2007 model. *Second*, the conformity analysis in this case was a project-level NOx and reactive organic gas analysis that does not fit into either category described by the US EPA in its statement (i.e., it is neither a "new HC, NOX, PM10, PM2.5, and CO regional conformity analys[i]s" nor a "CO, PM10 and PM2.5 hot-spot analys[i]s"). *Third*, defendants' and this Court's prior interpretation of the statement conflicts with US EPA's promulgated regulation at 40 C.F.R. §93.159(b)(1)(ii), which is clear that only conformity analyses begun "during the grace period or *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." 40 C.F.R. §93.159(b)(1)(ii) (emphasis added).

Accordingly, defendants are incorrect in relying on the outdated EMFAC2007 model when they approved the re-issued conformity determination in April, 2014. They have violated the Clean Air Act.

C. Defendants' 12.6-mile trip length assumption is unsupported

In estimating air emissions resulting from the project, defendants assumed that the average trip length to and from the casino would be 12.6 miles. [Docket 112-1, p. 62.] Although this fact was not made clear in the Final Environmental Impact Statement ("FEIS"), it was explicit in the emissions model output file. [NF_AR_0030148-49, 0034299, 0000717.] The FEIS states that the trip length was estimated from "data from the Madera County Transportation Commission (MCTC) traffic model." [NF_AR_0030418.] Likewise, the Draft Environmental Impact Statement ("DEIS") says the same. [NF_AR_0004655.]

Defendants now contend, however, that in addition to the MCTC data, the trip length assumption was also based upon data from the Fresno County Council of Governments ("FCCOG"). [Docket 112-1, p.63.] Moreover, defendants argue that because plaintiffs did not move to supplement the administrative record with the FCCOG data, plaintiffs cannot prove that the FCCOG data would not support the 12.6-mile trip length assumption. *Id.*

Defendants' argument fails for multiple reasons. First, the record is inconsistent as to whether the trip length assumption was in fact based upon the FCCOG data. Both the DEIS and the FEIS stated that the trip length assumption was based on the MCTC data, and they made no mention of any FCCOG data. [NF_AR_0030418, 00004655.] The response to comments relied upon by defendants even states: "Proposed Project average trip length was estimated using the latest and most accurate data available in the MCTC traffic model at the time of the

transportation and air quality analysis in the DEIS (2005)." [NF_AR_NEW_0001949.] Admittedly, the response to comments in 2014 does mention that the trip length assumption was determined "[u]sing the FCCOG and MCTC model data." [NF_AR_NEW_0001950.] Nevertheless, neither the MCTC data nor the FCCOG data are included in the administrative record. This despite defendants' assurance that the MCTC data would be included in the record [Docket 69, p. 1; Docket 58-2, p. 1; Docket 58-4, p. 3; Docket 58-5, p. 3; Docket 58-6, p. 2], and despite defendants having now sworn three times that the record is the "complete administrative record." [Docket 51-1, p. 2; Docket 83-1, p. 3; Docket 97-1, p. 2.]

Defendants have attempted to rationalize the 12.6-mile trip length assumption in other ways. [Docket 112-1, pp. 63-64.] But these rationalizations are bare conclusions unsupported by any data.[42] Most notably, the Tribe tries to rationalize the 12.6-mile trip length by explaining that despite the "hundreds of daily trips from locations outside Madera and Fresno Counties, the much greater number of shorter trips from within those counties" (e.g., by "its numerous employees, who are likely to live near the resort, and other local residents who would use the resort to dine or shop") "pulls down the average length to 12.6 miles." [Docket 111-1, pp. 77-78.] This explanation is demonstrably false, as can be seen from the emissions model output file, which uses the same 12.6-mile trip length for employees, shoppers, customers, and others alike.[43] [NF_AR_0034299.] There was no pulling down of the average.

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[42] In their March 27, 2014, response to comments, defendants' consultant does provide a table illustrating a calculation that results in a 12.6-mile trip length. [NF_AR_NEW_0001949.] But the underlying data supporting the assumptions in the table was not provided, and no explanation is given for those assumptions. Moreover, the table is inconsistent with the emission model output file. The consultant's table indicates that different trip lengths were used for different users – i.e., 17.29 miles for Home Base Work, 11.04 miles for Home Base Shop, 11.07 miles for Non Home Base, etc. [NF_AR_NEW_0001949.] But the model output file appended to the FEIS indicates that the same trip length – 12.6 miles – was assumed for employees, shoppers, customers, and others. [NF_AR_0034299.]

[43] The Tribe's explanation is also undermined by the table created by defendants' consultant to illustrate its calculation of the 12.6-mile trip length. In that table the consultant has assumed a trip length for

Accordingly, defendants' conformity determination, which estimates the amount of air pollutant emissions that must be offset, is based on a trip length assumption that defendants cannot support, and which is at odds with defendants' description of the project as a "destination resort," which will increase visitors to the County, stimulate the local tourist industry, and create an influx of non-resident consumers. [NF_AR_0040656, 0038498.] Had defendants used a trip length assumption consistent with this influx of non-resident consumers the analysis would have yielded a much higher emissions estimate, and the Tribe would be required to mitigate more air pollutants. 40 C.F.R. §§93.158(a)(2), 93.160(b), (d), (f). [NF_AR_0039197; NF_AR_NEW_0001111.] Because defendants' conformity determination is based upon an assumption that is unsupported in the record, it must be set aside. *See Carlton v. Babbitt*, 26 F. Supp. 2d 102, 109-110 (D.D.C. 1998) (government's use of unsupported assumption about grizzly bear mortality rate is arbitrary and capricious, and government's decision remanded).

VI. The IRA ROD and the IGRA ROD Must Be Vacated and the Madera Site Must Be Ordered out of Trust

The APA expressly mandates that a reviewing court "shall" "set aside" agency action that has been found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or that was adopted "without observance of procedure required by law." 5 U.S.C. §§706(2)(A), (D). In this Circuit, while vacatur has not been deemed mandatory in every case where a plaintiff prevails on an APA claim, it is likewise well-established that vacatur is indeed the "normal" relief for a clear APA violation. *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). To determine whether vacatur is proper, the court weighs (1) "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly)" and (2) "the disruptive consequences" of the vacatur. *Sugar Cane Growers Co-*

employees (HBW – Home Base Work) of 17.29 miles – not a value less than 12.6 miles that would pull down the average. [NF_AR_NEW_0001949.]

op. of Florida v. Veneman, 289 F.3d 89, 98 (D.C. Cir. 2002) (quoting *Allied-Signal, Inc. v. U.S. Nuclear regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993)).

In this case, plaintiffs have challenged two separate records of decision, as well as the decision to approve the compact. Though independent decisions, the trust acquisition is dependent upon each. Despite the fact that land is taken into trust under the IRA, *see* 25 U.S.C. §465, under IGRA, a trust acquisition cannot be made for gaming purposes without a valid two-part determination. *See* 25 U.S.C. §2719(b)(1)(A). This acquisition was solely for the purpose of class III gaming. As plaintiffs have shown, the Secretary lacked authority to take the land into trust, and her two-part determination under IGRA was arbitrary and capricious. Also, even if the two-part determination was not arbitrary and capricious, California voters' rejection of the compact undermined that determination and drastically altered the core circumstances such that class III gaming at the Madera site is unlikely. Consequently, the RODs should be set aside, and the land ordered removed from trust.

Plaintiffs ask for a return to the status quo prior to their initiation of this lawsuit. Indeed, prior this lawsuit, the BIA's policy was to stay the trust acquisition pending the outcome of litigation. Here, however, the Secretary chose to discontinue that long-time practice on the grounds that trust decision could be easily unwound. [Docket 30, p. 40.] At oral argument on that motion, the federal defendants assured this Court that the North Fork tribe was proceeding "with their eyes wide open." [Transcript, p. 43.[44]] In denying plaintiffs' motion for preliminary injunction, this Court noted that it "sees no cognizable limit to its jurisdiction that would preclude an order vacating the trust transfer in this case after the transfer has already been made." [Docket 42, p. 48.] Central to the Court's determination was the government's repeated assurances to the Court, "both in its briefs as well as at oral argument, that 'the Department of

[44] A copy of page 43 of the transcript from the January 23, 2013, hearing is attached as Exhibit 10.

the Interior will take the land out of trust if ordered to do so by the Court.'" [Docket 42, p. 48 (quoting the federal defendants)] Having successfully persuaded the Court that the fee-to-trust transfer was a "mere transfer of title" that could be undone, the federal defendants cannot now contend that doing so would be too burdensome or "unduly disruptive." [Docket 30, p. 40.] This is not a case, such as the one in *Sugar Cane Growers*, where "[t]he egg has been scrambled and there is no apparent way to restore the status quo ante." 289 F.3d at 97.

Furthermore, in opposing plaintiffs' motion for preliminary injunction, the Tribe assured the Court it was far from ready to break ground on the construction. [Docket 33, p. 40.] Pursuant to that assurance, this Court's January 29, 2013, order required that the Tribe "during the pendency of this case, provide all parties and the Court with a notice at least 120 days prior to any physical alteration of the Madera Site…." [Docket 41.] As of now, plaintiffs have not received any such notice, and it does not appear that construction of any sort has begun. *See also* 25 C.F.R. §559.2(a) (requiring the Tribe to notify the National Indian Gaming Commission "at least 120 days" before opening gaming facility).

In stark contrast to the negligible impact of removing the land from trust, which will merely reinstate the status quo ante, allowing the land to remain in trust will have tremendous disruptive impact. As plaintiffs have already discussed, remand without vacatur will drastically alter the negotiation positions of the State and the Tribe in ways that Congress did not intend. It will allow the Tribe to demand negotiations for a new compact under IGRA. To compel such negotiations, a Tribe must have land under its jurisdiction. *See* 25 U.S.C. §2710(d)(3)(A). It did not have this prior to the Madera site's being taken into trust. Thus, keeping the land in trust where the acquisition was improper would give the Tribe a windfall that it is not entitled to. Not only would it unfairly bolster the Tribe's bargaining position in any future negotiations for

class III gaming, but it also would allow it to pursue class II gaming in violation of the Governor's agreement to concur in exchange for a class III casino that would benefit other tribes.

CONCLUSION

For the reasons stated above and those in plaintiffs' motion for summary judgment, this Court should enter judgment in plaintiffs' favor, vacate the two records of decision, and order the land to be removed from trust.

Dated: March 16, 2015

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

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