IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!; et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

Civil Action No. 1:12-cv-02039-BAH

Consolidated with:
Civil Action No. 1:12-cv-02071-BAH

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

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

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INTRODUCTION

Consistent with the Indian Gaming Regulatory Act's policy of advancing tribal self-sufficiency and self-government, the Secretary of the Interior (Secretary), with the support of the California Governor, the California Legislature, and local officials, approved North Fork's proposed gaming project in Madera County. This approval was not the product of a cursory review, but the culmination of years of fact-finding, analysis, and consultation, conducted in compliance with applicable statutory and regulatory requirements. Stand Up and Picayune disagree with the outcome of that process, as well as with Congress's underlying decision to permit off-reservation gaming by tribes like North Fork that otherwise would be unable to realize IGRA's benefits. But such disagreement provides no basis to set aside agency action. Under APA review, an agency is entitled to substantial deference when finding facts within its field of expertise, when making discretionary judgments about the weight of evidence, and when interpreting the relevant statutory and regulatory standards. Furthermore, the APA provides a vehicle only for challenging federal action; actions of state officials, even if inconsistent with state law (which they are not here), cannot render federal action arbitrary and capricious. Stand Up and Picayune's arguments should be rejected.

ARGUMENT

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

The Secretary properly determined that the North Fork Tribe is a "recognized Indian tribe" that was "under Federal jurisdiction" in 1934, and that the Tribe is thus eligible to have land acquired in trust for it under the Indian Reorganization Act. 25 U.S.C. § 479. Under settled principles governing review of agency action, the question for this Court is whether the Secretary's determination is supported by "substantial evidence." *See Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007). "'The substantial evidence test is a narrow standard of

review,' requiring only 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" and an "agency conclusion 'may be supported by substantial evidence even though a plausible alternative interpretation of the evidence would support a contrary view.'" *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992). Here, the Secretary's determination was plainly supported—indeed, compelled—by the record. Stand Up's contrary arguments ignore both the IRA's plain text and the Secretary's interpretation of that text, which is entitled to deference, and instead rely on irrelevant sources and speculation as to matters outside the administrative record.

A. The Section 18 Election On The North Fork Rancheria Demonstrates That The North Fork Were A "Tribe" "Under Federal Jurisdiction" In 1934

The IRA authorizes the Secretary to acquire land and to hold it in trust "for the purpose of providing land for Indians." 25 U.S.C. § 465. The question here, therefore, is whether the members of the North Fork Tribe are "Indians" as that term is used in the IRA. The IRA defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now [that is, in 1934, *see Carcieri v. Salazar*, 555 U.S. 379, 395 (2009)] under Federal jurisdiction." 25 U.S.C. § 479. It then defines "tribe" broadly as "any Indian tribe, organized band, pueblo, *or the Indians residing on one reservation*." *Id.* (emphasis added). Under the plain language of the IRA, the Indians residing on the North Fork Rancheria, for whom the Bureau of Indian Affairs (BIA) held an election pursuant to § 18 of the IRA, were a "tribe." And, as the Secretary determined, the § 18 election demonstrates that the North Fork Tribe was "under Federal jurisdiction" when the IRA was enacted. *See* Dkt. 111-1 at 8-13.[1]

[1] It is undisputed that the present-day North Fork Tribe is a "recognized Indian tribe," and that the Tribe need not have been "recognized" as of the enactment of the IRA in 1934. Dkt. 111-1 at 14.

1. The North Fork Were A "Tribe"

Stand Up argues that the Secretary lacked a sufficient basis to conclude that the Indians residing on the North Fork Rancheria in 1934 were a "tribe." It contends (SU R. Br. 2) that "a group of Indians residing at a … reservation" is not necessarily a "tribe." But the statute unambiguously says the opposite, and it is the IRA's definition of "tribe" that controls here. The statutory text is the beginning and the end of the analysis on this point. *See, e.g.*, *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1601 (2014). The statutory definition of "tribe" expressly includes a group of Indians residing at a reservation. Stand Up apparently believes that a "tribe" must be ethnologically homogeneous and have a formal governmental structure. But the statute imposes no such requirements.

The absurdity of Stand Up's interpretation of "tribe" is illustrated by its suggestion (SU R. Br. 4) that none of the groups of Indians living on California rancherias were a tribe in 1934, since they were not formally organized as such.[2] A major purpose of the IRA was to give tribes

[2] Stand Up cites (SU R. Br. 4) a July 24, 1934 letter from a field superintendent in the Office of Indian Affairs for the proposition that there was "only one actual reservation" in California and that the bands of Indians associated with rancherias had no "tribal business organization." SU R Br. 4. The letter is irrelevant to the interpretation of the IRA's definition of "tribe," which requires no "tribal business organization." Nor is it part of the administrative record. *Cf. Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 420 (1971) (review of agency action is limited to record before the agency); *Franks v. Salazar*, 751 F. Supp. 2d 62, 67 (D.D.C. 2010). In any event, it is well established that rancherias are Indian reservations. *Artichoke Joe's Cal. Grand Casino v. Norton*, 278 F. Supp.2d 1174, 1176 n.1 (E.D. Cal. 2003) ("Rancherias are small Indian reservations."); *see also Williams v. Gover*, 490 F.3d 785, 787 (9th Cir. 2007) (similar). Moreover, the letter states only that the rancherias were rough and sparsely populated and were not the seat of tribal business organizations. It does not address whether residents of rancherias were members of tribes.

Stand Up's citation (SU R. Br. 4) of a 1960 Interior Solicitor's memo—likewise not part of the record—for the proposition that the federal government "did not consider" the residents of the rancherias to be tribes is similarly irrelevant. It is also incorrect. The memo merely notes that, technically, a landless California Indian could occupy rancheria lands without violating federal law, and that the Government often purchased rancherias for specific bands of Indians. Pl. Br. Ex. 7, Solicitor Op. (Aug. 1, 1960) at 1883-84. In any event, the Department of the

that had not formally organized a chance to do so. Accordingly, the IRA defined "tribe" broadly to encompass bands of Indians without formal governmental structures or rules, including groups of Indians residing on one reservation. That definition reflected the reality that many, perhaps most, Indian tribes were not well-defined governmental entities before the process of reorganization that took place in the wake of the IRA's enactment. *See, e.g.*, *Cohen's Handbook of Federal Indian Law* §§ 4.04[1], 4.04[3][a][i] (2012) (before the IRA, many tribes had no formal governmental structure, constitution, or written rules).

In other words, notwithstanding Stand Up's protest (SU R. Br. 2) that it "do[es] not contend" that the Indians on the North Fork Rancheria "must have accepted the IRA or voted to organize under Section 16" of the IRA to be a "tribe," Stand Up continues to conflate the broad definition of "tribe" under the IRA with the narrower category of tribes that formally organized immediately following the IRA. *E.g.*, SU R. Br. 4-5 (arguing that groups of Minnesota Indians residing together on a reservation "could not become [tribes] until the Indians voted under Section 16 to organize"). A tribe that did not vote to reorganize under the IRA was still a tribe. Nor did a group of Indians need to have adopted a formal governmental organization prior to the enactment of the IRA to be considered a "tribe" under the IRA. The contemporaneous Solicitor's memorandum on which Stand Up relies makes the distinction perfectly plain, explaining that the definition of "tribe" under the IRA includes "the Indians residing on one reservation" and that such a tribe could organize under the IRA regardless of whether it had previously been a formally organized tribe. Solicitor's Op. (Nov. 7, 1934) at 479.

For that reason, a group of Indians residing together on a single reservation who voted in a § 18 election to accept or reject application of the IRA necessarily constitutes a "tribe" under

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Interior has subsequently made clear, in regulations worthy of *Chevron* deference, that the term "tribe" includes "any … rancheria … recognized by the Secretary." 25 C.F.R. § 151.2.

the IRA's broad definition. Stand Up argues (SU R. Br. 7, 10) that the omission of the word "tribe" in § 18 means that a group of Indians who voted against the application of the IRA were not necessarily a tribe. This argument, again, ignores the plain language of the statute. Section 18 provided that the IRA would "not apply to any reservation wherein a majority of the adult Indians … shall vote against its application." 25 U.S.C. § 478. And the Indians residing on a reservation were, by definition, a tribe under the IRA.[3]

2. The North Fork Tribe Was Under Federal Jurisdiction In 1934

The § 18 election conducted by the BIA also demonstrates that the North Fork Tribe was "under Federal jurisdiction" when the IRA was enacted. As the Solicitor of the Interior has recently and authoritatively explained: "In order for the Secretary to conclude a reservation was eligible for a [§ 18] 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 that jurisdiction." DOI, Office of the Solicitor, The Meaning of "Under Federal Jurisdiction" for Purposes of the IRA at 21 (Mar. 12, 2014). That is plainly correct: As explained above, Indians residing on a reservation were a "tribe" within the meaning of the IRA, and the BIA's action in holding a § 18 election constitutes an assertion of federal power over and responsibility for that tribe.

[3] The Haas Report itself confirms that the entities that voted in Section 18 elections were tribes within the meaning of the IRA. ARNEW 2000; *see also, e.g.*, *Cohen's Handbook of Federal Indian Law* § 4.04[3][a][i] (2012) (referring to voters in § 18 elections as "tribal members" and entities that rejected IRA in § 18 elections as "tribes"); *id.* § 4.04[3][b] ("Seventy-seven tribes rejected the IRA in tribally held referenda," *i.e.*, § 18 elections). Stand Up's quibbles (SU R. Br. 4-6) over whether particular groups listed in the Haas Report were "tribes" under some other definition of "tribe" are thus irrelevant.

Stand Up wrongly contends that this Court should disregard the Department's considered view of the meaning of the statute it administers, along with its previous determinations reflecting that view. Stand Up argues (SU R. Br. 9-10) that the Solicitor's 2014 Memorandum should not receive deference, because it was not promulgated as part of notice-and-comment rulemaking. But at a minimum, the Memorandum is entitled to respect—as Stand Up appears to concede—because it was "made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case." *Skidmore v. Swift*, 323 U.S. 134, 139 (1944); *see McMaster v. United States*, 731 F.3d 881, 896 (9th Cir. 2013).

Stand Up's argument that the 2014 Memorandum is merely a post hoc justification for the position taken by the Secretary in this case makes no sense. The Memorandum is the Department's authoritative interpretation of the statute, applicable to all cases, not a document prepared for purposes of this litigation. And it merely elaborates on the Secretary's reasoning here; it does not provide any new justification for the result the Secretary reached.

Moreover, contrary to Stand Up's assertions, the position articulated by the Solicitor in the 2014 Memorandum is entirely consistent with the Secretary's analysis in prior eligibility determinations under the IRA. Stand Up observes that the tribe in *Shawano County v. Acting Midwest Reg'l Dir.*, 53 IBIA 62, 71 (2011), did not have its own land but still participated in a § 18 election. But Stand Up fails to explain how this fact undermines *Shawano*'s determination that the holding of a § 18 election is "conclusive" of the *Carcieri* question. *Id.* at 71-72. Likewise, Stand Up offers no coherent reason to disregard the Secretary's determination in *Cowlitz* that "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 following the IRA's enactment,

etc.), thus obviating the need to examine the tribe's history prior to 1934." Record of Decision; Trust Acquisition of, and Reservation Proclamation for the 151.87-acre Cowlitz Parcel in Clark County, Washington for the Cowlitz Indian Tribe at 95 n.98 (April 22, 2013) ("Cowlitz ROD").[4]

B. The Secretary's Decision Was Also Amply Supported By The Purchase Of The Rancheria For The North Fork And The History Of The *Tillie Hardwick* Litigation

Stand Up concedes (SU R. Br. 15) that the North Fork Rancheria was purchased for "the North Fork band of landless Indians." *See also, e.g.*, AR 776, 41113 (the Rancheria was purchased "for the benefit of approximately 200 Indians belonging to the Northfork band.").[5] As the Tribe and this Court have noted, the purchase of a reservation for the North Fork band itself is substantial evidence that the North Fork was a tribe under federal jurisdiction before 1934. Dkt. 111-1 at 13; Dkt. 42 at 23-24. It demonstrates the federal government's "provision of federal benefits" to the North Fork, which "reflects and acknowledges federal power and

[4] Stand Up points out (SU R. Br. 12) that the above language differs from the language in a 2010 ROD, which stated that evidence of being under federal jurisdiction in 1934 would be unambiguous for "tribes that voted to reorganize under the IRA." AR 778. Stand Up argues that this change involved deliberate deception by the Secretary calculated to influence this litigation. Needless to say, there is no evidence of any such deception. The 2010 statement is not inconsistent with the 2013 statement. Rather, the 2010 statement was correct, but incomplete; there was no impropriety in changing the language to reflect the Department's consistent view that either a § 16 or a § 18 election demonstrates that the tribe for which the election was held was under federal jurisdiction.

[5] In Plaintiffs' April 3, 2015 Notice of Supplemental Authority, plaintiffs quote dicta in a footnote in *Mishewal Wappo Tribe of Alexander Valley v. Jewell*, No 5:09-cv-02502-EJD, 2015 WL 1306930 (N.D. Cal. Mar. 23, 2015), to the effect that Rancherias "were not created for the use of particular Indian tribes," *id.* at *8 n.12. This statement appears to refer to the land appropriations bills passed in the early 1900s, which did not specify particular tribes or bands of Indians, and to a source in the administrative record of the *Mishewal* case that characterizes the Alexander Valley Rancheria as not being purchased for any specific band of Indians. But nothing in the *Mishewal* opinion purports to address the evidence that the North Fork Rancheria was purchased for the Indians of the North Fork band. AR 776; AR 41113. Still less does it purport to determine that the 45 recognized California Rancheria tribes were not actually tribes for the purposes of the IRA. *See* 80 Fed. Reg. 1942 (Jan. 14, 2015) (listing recognized Rancheria tribes).

responsibility toward the tribe." *Cohen's Handbook of Federal Indian Law* § 3.02[6][c]; *see also, e.g.*, Cowlitz ROD at 94-95 (federal government actions on behalf of the tribe or its members can demonstrate the existence of a tribe under federal jurisdiction).

Stand Up's primary objection to this point is that the Secretary did not expressly state that the rancheria purchase showed the Tribe was under federal jurisdiction in 1934. The Secretary mentioned the purchase of the rancheria for the Tribe in a separate section from the discussion of the *Carcieri* issue (though on the very same page), and Stand Up argues (SU R. Br. 14-15) that it should therefore be ignored. That hypertechnical argument fails. The Secretary did expressly refer in the *Carcieri* section to the "Tribe's Reservation" that existed in 1935. AR 41198. And even if the Secretary's discussion of the Rancheria's purchase was placed in a different section on the same page, any error that the Secretary committed in not repeating it in the *Carcieri* section was minor and not prejudicial.[6]

Stand Up also repeats its claim that the Secretary erred by failing to prove to Stand Up's satisfaction that the current North Fork Tribe is the "same" tribe for which land was purchased in 1916 and that voted in the § 18 election in 1935. But the Secretary was not required to disprove Stand Up's contentions that the two entities—which share a name and location—are somehow discontinuous. The Secretary needed only to adduce substantial evidence to support her determination, and, as set out above, she did so. Stand Up's contrary arguments boil down to mere speculation, insufficient to call into question the Secretary's determination or the substantial evidence supporting it. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d

[6] "Just as the burden of establishing that the agency action is arbitrary or capricious rests with the party challenging agency action, so too must that party establish that the errors ascribed were prejudicial." *CS-360, LLC v. U.S. Dep't of Veteran Affairs*, 846 F. Supp. 2d 171, 186 (D.D.C. 2012) (citing *Jicarilla Apache Nation*, 613 F.3d 1112, 1121 (D.C. Cir. 2010)). Stand Up has failed to meet this burden with respect to the exact placement of the Secretary's acknowledgment of Congress's purchase of the North Fork Rancheria.

474, 481-82 (D.C. Cir. 1986) (mere speculation is insufficient to overturn an agency action as arbitrary and capricious); *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1225 (10th Cir. 2009); *see also U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies.").

Indeed, the record shows that, after 1934, the North Fork Tribe continued to exist officially until 1958, when it was terminated under (or at least was denied formal recognition pursuant to) the California Rancheria Act. *E.g.*, AR 41198.[7] In the 1970s, suit was brought against the United States for unlawful termination. *Id.* In 1983, the judgment issued in *Tillie Hardwick v. United States* restored the Tribe to the "same status as [it] possessed prior to … the California Rancheria Act, " which was that of a "recognized tribal entit[y]." AR 1065; *see generally* 50 Fed. Reg. 6055 (Feb. 13, 1985). In 1987 the original boundaries of the North Fork Rancheria were restored and the land was declared Indian Country. AR 41198-99.

Stand Up's contrary argument relies on its assertion that the Department of the Interior determined in 1966 that there was no tribe associated with the North Fork Rancheria before its termination. But the notice on which Stand Up relies says nothing of the kind. The passage to which Stand Up refers states: "*This notice is issued pursuant to* the Act of August 18, 1958 (72 Stat. 619), amended August 11, 1964 (78 Stat. 390), including *the provisions in the 1964 Act* that

[7] The court in *Mishewal Wappo Tribe*, 2015 WL 1306930, concluded that the California Rancheria Act did not terminate tribes, but only their rancherias and the statuses of the individuals who received a distribution of rancheria assets, *id.* at *7-*8. This is a strange conclusion, given that the California Rancheria Act expressly calls for the termination of IRA tribal charters upon the approval of a termination and distribution plan, 85 P.L. 671; 72 Stat. 619, §§ 2(b), 11, and the *Tillie Hardwick* judgment refers to the recognition of the rancheria tribes with the same status that they possessed prior to the distribution of the rancherias under the Rancheria Act. But ultimately, whether or not the Rancheria Act terminated the North Fork's status as a tribe or merely terminated North Fork's Rancheria is irrelevant. Either way, the North Fork Tribe was a tribe prior to 1958 and was affirmed as a tribe with the same, pre-1958 status as a recognized tribe following *Tillie Hardwick*. AR 01065. Whether or not the Tribe was officially terminated between 1958 and 1983 is legally irrelevant.

this notice affects only Indians who are not members of any tribe or band of Indians and therefore not eligible to participate herein." 31 Fed. Reg. 2911 (Feb. 18, 1966) (emphasis added). The language on which Stand Up relies, therefore, merely paraphrases "the provisions in the 1964 Act," which state: "After the assets of a Rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families who are not members of any *other* tribe or band of Indians, shall not be entitled to any of the services performed by the United States for Indians." Pub. L. No. 85-671, § 10(b), 72 Stat. 619, *as amended by* Pub. L. No. 88-420, 78 Stat. 390 (emphasis added). That is, the 1964 Act makes clear that the California Rancheria Act terminates the Indian status only of dependent family members who are not members of *other*, non-terminated tribes. It does not suggest that the Indians whose status was terminated by the California Rancheria Act were not members of any tribe at all; to the contrary, the reference to such Indians' membership in "other" tribes makes clear that the Rancheria Act did terminate the tribal status of Indians on rancherias. While the notice omits the word "other," it is referring—as the notice expressly states—to that provision of the 1964 Act. The notice cannot reasonably be read as an independent determination that, prior to termination, the Indians on the North Fork Rancheria were not members of any tribe or band.

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

A. Stand Up Fails To Show That The Secretary's Two-Part Determination Was Arbitrary, Capricious, Or Otherwise Inconsistent With IGRA

1. The Secretary Properly Reviewed Whether The Development Would Be Detrimental To The Surrounding Community

Stand Up's argument that the Secretary failed to apply "heavy scrutiny" in issuing the two-part determination (SU R. Br. 31-34) reduces to a contention that the Secretary "was arbitrary and capricious in determining the benefits [of the project] outweigh the detriments" (SU

R. Br. 34).[8] That contention ignores the settled principle that "in judicial review of agency action, weighing the evidence is not the court's function." *United Steel Workers v. PBGC*, 707 F.3d 319, 325 (D.C. Cir. 2013). Rather, the court's task is only "to determine whether the agency's decisionmaking was 'reasoned,' *i.e.*, whether it considered the relevant factors and explained the facts and policy concerns on which it relied, and whether those facts have some basis in the record." *Nat'l Treasury Emp. Union v. Horner*, 854 F.2d 490, 498 (D.C. Cir. 1988). The Secretary did so here; in her IGRA ROD, she considered all the relevant factors, including mitigation, applying "heavy scrutiny," AR 40531-32, in analyzing the project's potential detrimental effects, AR 40510-36. Because the Secretary's determination considered the relevant factors and is supported by substantial evidence, it must be upheld.

2. The Secretary Properly Relied On The Final Environmental Impact Statement And Considered Mitigation Of Problem Gambling

Stand Up's argument (SU R. Br. 35-37) that the Secretary improperly relied on the FEIS misconstrues the BIA regulations. The regulations require a two-part application to include an FEIS because that is where the mitigation of significant impacts is addressed. *See* 25 C.F.R. § 292.18(a); 73 Fed Reg. 29,354, 29,374 (May 20, 2008) ("A determination that results in a gaming facility on after-acquired land will result in costs to the surrounding community …. *The NEPA document will address the mitigation of significant impacts.*") (emphasis added). The regulations do not require the Secretary independently to reassess the mitigation of significant

[8] Although Stand Up still contends that the Secretary and the Tribe somehow misconstrue IGRA, it expressly states (SU R. Br. 34) that it is not contending that the statute "requires the Secretary to find that there will be no detriment to the surrounding community whatsoever." Whatever Stand Up's current view of the proper construction of IGRA, it finds no support in the Ninth Circuit decision it cites, *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015), in which the court declined to apply the Indian canon of construction to IGRA's restored-lands exception. The D.C. Circuit has squarely held that the Indian canon applies to that very exception, *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003), and to other IGRA exceptions, *e.g.*, *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 471 (D.C. Cir. 2007).

impacts; rather, she must review the FEIS's mitigation analysis and then determine—based on that evidence and evidence of the other relevant factors in 25 C.F.R. § 292.16-19—whether the facility would be detrimental to the surrounding community. *See* 73 Fed Reg. at 29,369 (Secretary reviews "the results of the NEPA analysis in order to consider whether or not there is detriment to the surrounding community"). That is what the Secretary did here. *See* Dkt. 111-1 at 19-20.

Stand Up's argument (SU R. Br. 36-37) about problem gambling—the only detrimental impact it still maintains was not mitigated—misstates the record. The IGRA ROD discusses the cost attributable to treatment of problem gambling and its mitigation, AR 40469, 40488-89, 40519, 40526, and it concludes that the facility would not be detrimental to the surrounding community because "any financial burdens imposed upon Madera County and local units of government are sufficiently mitigated," AR 40533. The FEIS supports that conclusion. It explains that after the Tribe's $50,000 annual contribution for County treatment services, the annual residual cost to the County for problem gambling is $13,606. AR 30198. It combines every residual cost to the County from all of the facility's impacts—including the $13,606 from problem gambling—for a total of $1,038,310. AR 30211 tbl. 4.7-16; *see also* AR 30210-12. It provides that the Tribe will annually reimburse the County $1,038,310 to mitigate those residual costs fully and explains that the cost of problem gambling will be sufficiently mitigated by this contribution. AR 29753-54, 30198, 30212, 30509. The FEIS thus makes clear that $13,606 of the $1,038,310 contribution is to mitigate the residual impact of problem gambling.

Because the FEIS set forth this evidence and the Secretary considered it, Stand Up's assertion (SU R. Br. 37) that the Tribe relies on "post hoc justifications" is baseless. As this Court has observed, "the Secretary appears to have considered all aspects of the problem that

[s]he was required to consider under the IGRA, and this Court must confer significant deference to the Secretary's expertise." Dkt. 42 at 30.[9]

B. The Secretary Properly Treated Picayune's Concerns

1. Picayune's Entitlement To Petition For Consultation Did Not Make It A "Nearby Tribe" Within The "Surrounding Community"

Picayune's argument that it is "part of the surrounding community" (P R. Br. 10-12) ignores the regulations' plain text and the Secretary's controlling interpretation of them. The regulations define a "nearby Indian tribe" that is part of the "surrounding community" as one "located within a 25-mile radius of … the proposed gaming establishment." 25 C.F.R. § 292.2. The Secretary thus correctly concluded that "Picayune is not a 'nearby Indian tribe' within IGRA's definition of 'surrounding community' under our regulations," AR 40534, and is "outside the definition of 'surrounding community,'" AR 40534. The Secretary's interpretation of her own regulations governs here. *E.g.*, *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 410 (D.C. Cir. 2012). As this Court recognized, since "IGRA's implementing regulations define 'nearby Indian tribe' as any tribe within a 25-mile radius of the proposed development, *see* 25 C.F.R. § 292.2, but the Picayune Tribe indisputably falls outside that radius …, the Secretary was not required to consider the Picayune Tribe's concerns at all." Dkt. 42 at 36.

Picayune nonetheless argues that it is part of the "surrounding community" because the regulations entitle tribes outside the 25-mile radius to "petition for consultation." 25 C.F.R. § 292.2. But that means only that a tribe may ask the Secretary to consider its concerns. IGRA's "consultation process" ordinarily limits communication with the Secretary to State officials, local officials, and officials of "nearby Indian tribes" within the 25-mile radius. *Id.* § 292.19; *see* 73

[9] Stand Up has failed to address in either brief its other allegations of detrimental effects (*see* 3d Am. Compl. ¶¶ 65-68 [Dkt. 103]), and North Fork, therefore, is entitled to summary judgment on those claims as well.

Fed. Reg. 29,367-68, 29,370. The "rebuttable presumption to the 25-mile radius" means that tribes "located beyond the 25-mile radius may petition for consultation," *id.* at 29,357, allowing them to express concerns to the Secretary, who may in her discretion consider those concerns. But a tribe that successfully petitions for consultation under § 292.2 does not thereby become part of the "surrounding community," on equal footing with those within 25 miles of the proposed facility. This Court has already endorsed the logic of the Secretary's judgment that "[t]he weight accorded to the comments of tribes and local governments outside the definition of 'surrounding community' will naturally diminish as the distance between their jurisdictions and the proposed off-reservation gaming site increases." Dkt. 42 at 37.

2. Substantial Evidence Supported The Secretary's Determination

Picayune's argument that the IGRA ROD "concluded that economic harm cannot rise to the level of detrimental impact on the surrounding community" (P R. Br. 12) mischaracterizes the ROD. The Secretary concluded that the project would not economically harm governmental entities in the surrounding community, not that economic harm was categorically irrelevant. AR 40533 (project "would not result in a significant cost increase" and "any financial burdens … are sufficiently mitigated"). With respect to Picayune, she concluded that "competition from the Tribe's proposed gaming facility in an overlapping gaming market is not sufficient, in and of itself, to conclude that it would result in a detrimental impact to Picayune." AR 40535.

Picayune misstates the relevant inquiry when it asserts (P R. Br. 12) that it will suffer a detrimental impact. The relevant question is whether the project would be "detrimental to the surrounding community" as a whole, not whether the project would be detrimental to any particular member of the community. 25 C.F.R. § 292.21. That makes good sense, since otherwise any potential adverse effect on a particular member of the community might block a project that could be highly beneficial to the community as a whole.

In any event, this Court has already correctly recognized that the Secretary's conclusion that competition alone is not sufficient to show detrimental impact "was supported by the evidence in the record." Dkt. 42 at 36-37.[10] Picayune argues (P R. Br. 13, 14) that the Secretary "simply ignored" evidence of an adverse impact on Picayune and failed to make a determination regarding that impact. Not so. The FEIS discussed the projected revenue decline at Picayune's casino, but it explained why "even in the worst case" the casino would be "expected to remain open and continue to generate sustainable profits for [its] tribal owners," AR 30251; *see also* AR 30250-51, 34265-66. Based on the FEIS, AR 40540, the Secretary explained that Picayune's casino "has proven to be a successful operation in a highly competitive gaming market." AR 40535. And she expressly concluded that Picayune's concerns from competition were not sufficient "to conclude that [the project] would result in a detrimental impact to Picayune," AR 40535, and the project "would not be detrimental to the surrounding community, or the Picayune Rancheria," AR 40533.

Picayune also argues (P R. Br. 13) that the "level of harm" here would be too high and suggests (P R. Br. 14) that the Secretary used an improper "threshold for detrimental effect." But weighing the evidence is for the agency, not a court. *See supra* pp. 10-11. Here, the FEIS amply supported the Secretary's explanation that Picayune's casino "has proven to be a successful operation in a highly competitive market" and that the prospect of additional competition did not rise to the level of detrimental impact. AR 30250-51, 40535.

Finally, Picayune contends (P R. Br. 13-14) that the Innovation Group's study included in the FEIS was outdated. But Picayune has not shown that more recent data would change the

[10] Picayune asserts (P R. Br. 13) that the Secretary's conclusion was "without citation to any authority whatsoever," but, in addition to reviewing the FEIS, the Secretary cited *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941 (7th Cir. 2000), for the proposition that competition does not provide a basis to issue a negative two-part determination.

analysis; nor does it dispute (P R. Br. 14) the study's conclusion that "a 19 percent decline in market share 'is not one that jeopardizes the casino's ability to remain open.'" In any event, as explained above, *supra* pp. 11-12, agency guidance makes clear that the FEIS provides the evidence of detrimental impacts and their mitigation that the Secretary must consider in making her two-part determination. *See* 25 C.F.R. § 292.18(a); 73 Fed Reg. at 29,369, 29,374; *see also* Dkt. 111-1 at 19-20. Picayune has not shown that the Secretary unreasonably relied on the FEIS.

In sum, there is no basis to doubt this Court's earlier conclusion that the record evidence supported the Secretary's determination as to Picayune's concerns. *See* Dkt. 42 at 37.

3. The Secretary's Reasoning Was Not Internally Inconsistent

Picayune no longer presses many of the consistency-related arguments the Tribe rebutted in its prior brief (Dkt. 111-1 at 29-33) and now argues (P R. Br. 15-17) only that the Secretary's decision was inconsistent in its treatment of competitive effects and distances. But Picayune still fails to appreciate the two separate inquiries called for in the two-part determination.

As this Court has already explained (Dkt. 42 at 42), it was rational for the Secretary to consider the effect of competition on North Fork in determining whether potential alternative sites would meet the proposed project's purpose and need. The Secretary's refusal to eliminate a potential site because it would have some competitive impact on Picayune's casino is fully consistent with that reasoning. The Secretary was entitled to give different weight to the reduced benefits that would flow from locating North Fork's project near competing casinos and the potential detriment to Picayune that might be created by competition with Picayune's casino. The two inquiries are distinct: The question whether an alternative site would adequately serve the project's purpose is entirely different from the question whether gaming at the proposed site would have a detrimental impact on the surrounding community. The Secretary's conclusion

that the effect on Picayune's casino would not be sufficient to constitute a detrimental impact thus did not require her to ignore the potential effects of competition on North Fork's project.[11]

Picayune makes a similar, and similarly incorrect, argument (P R. Br. 16-17) about the Secretary's treatment of distances. The Secretary relied on the Madera Site's distance from Picayune's land in determining that Picayune fell outside the 25-mile radius of the "surrounding community." AR 40526, 40530, 40534-35. She also relied on the Madera Site's distance from the Tribe's headquarters and its members' residences in determining that the Madera Site facility was likely to benefit the Tribe through greater employment, job training, and career development, AR 40501; *see* 25 C.F.R. § 292.17(b), and was in the best interest of the Tribe and its members, AR 40532-33; *see* 25 C.F.R. § 292.21(a). Those are distinct inquiries, governed by distinct regulations. There is no inconsistency in the Secretary's analysis.

Finally, Picayune argues (P R. Br. 17) that the ultimate issue is "the ability of each tribe's casino to provide for the tribe." But substantial evidence showed that Picayune's casino was already profitable—that the casino "reaches capacity constraints during the summer tourism season," that Picayune was enlarging its facility, and that it gives per capita payments to its citizens—and that the net economic effect of North Fork's entry into the gaming market would not jeopardize the casino's profitability. AR 34265-66, 40535. Substantial evidence also showed that North Fork has none of the benefits from gaming that Picayune enjoys, and that it is not economically or environmentally feasible for North Fork to build a casino on the HUD Tract

[11] In any event, contrary to Picayune's assertion (P R. Br. 15), the Secretary did not eliminate the HUD Tract, the Avenue 7 and Avenue 9 sites, and the North Fork Rancheria site only because of competition; rather, she explained that those alternatives would not meet the project's purpose and need for other, independent reasons as well, including their sensitive environmental features, topography, incompatibility with existing land use, limited access, expensive construction costs and limited returns making it difficult to finance a casino project. *See, e.g.*, AR 40454, 40457-58, 40533.

or the North Fork Rancheria. *See, e.g.*, AR 40453-54, 40457-58, 40533. The Secretary reasonably determined that development on the Madera Site would allow the North Fork to use gaming revenue to provide for its people, without impeding Picayune's ability to do the same.

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

Picayune concedes (P R. Br. 17) that the BIA regulations require the Secretary only to "consider" evidence of significant historical connection to the land, if any, and that whether a connection exists is "not determinative." That should end the matter. "[S]ignificant historical connections" can be shown either through evidence of occupancy or subsistence use, or through treaty evidence. 25 C.F.R. § 292.2. The Secretary considered both types of evidence, AR 40504-10, and therefore complied with the regulation. Picayune's contentions (P R. Br. 17-19) that she improperly considered that evidence are incorrect.

First, Picayune overstates what "occupancy or subsistence use in the vicinity of the land," 25 C.F.R. § 292.2, means. It does not require "uninterrupted connection" or "historically exclusive use," 73 Fed. Reg. at 29,360, or "that the occupancy and use be 'long term' or that the tribe claim any ownership or control, exclusive or otherwise, over the land," *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, No. CV 13-849, 2014 WL 7012707, at *16 (D.D.C. Dec. 12, 2014). Rather, it includes use of land to hunt, trade, and gather resources. *Id.* at *18. Thus, contrary to Picayune's argument (P R. Br. 18-19), it encompasses North Fork's regular, longstanding, seasonal use of the San Joaquin Valley to herd sheep, drive hogs, pick grapes, farm crops, and secure work. That evidence showed that tribal members did not merely pass through the land but instead relied on it to sustain their food supply, livestock, and livelihood.

Second, Picayune ignores ample additional evidence the Secretary considered showing North Fork's occupancy and use of the land. For example, tribal ancestors settled and had children on the land, AR 40504-05; were reported by Federal treaty commissioners to have used

the land, AR 40505; were made the beneficiaries of a reservation on the land, AR 40506; lived on the land at the Fresno River Farm, recognizing it as their home, AR 40506-08; and shopped, socialized, and worked in several industries on the land, AR 40508-09.

Third, Picayune ignores that "occupancy or subsistence use" need only be "in the vicinity of the land." 25 C.F.R. § 292.2. As the Secretary previously determined in another matter, this can include land "'38 miles from the tribal headquarters and not in an area of exclusive use by the tribe.'" *Confederated Tribes of Grand Ronde Cmty.*, 2014 WL 7012707, at *19. The record shows that North Fork's tribal headquarters are only 36 miles from the Madera Site (AR 40503).

Finally, Picayune has failed to show that the Secretary's independent conclusion that the treaty evidence demonstrated North Fork's historical connection to the site was unreasonable. Picayune asserts (P R Br. 18) that the Madera Site falls within the Camp Belt Treaty boundaries. The record shows, however, that Native groups to which modern North Fork citizens can trace their ancestry signed three related San Joaquin Valley treaties in 1851, including the Camp Belt Treaty, that set aside contiguous land encompassing the Madera Site. AR 38504 ("Current citizens of the Tribe are able to trace their ancestry to multiple Native groups whose headsmen signed *those treaties*.") (emphasis added). Substantial evidence thus supports the Secretary's conclusion that the Madera Site was located within the unratified "reservations contemplated by the San Joaquin Valley treaties for North Fork's predecessors," including the Camp Belt Treaty. AR 40509.

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

The November 2014 referendum provides no basis to invalidate any of the Secretary of the Interior's actions, all of which were undertaken (a) *before* the referendum even qualified for the ballot under California law, and (b) in strict accordance with the *federal* statutory and

regulatory requirements that govern the Secretary's decision-making under IGRA. Plaintiffs' true dispute is with the California Secretary of State, who they believe submitted the compact to the Secretary of the Interior too early, setting in motion IGRA's process for federal approval of the compact. *See* SU R. Br. 26 ("The California Secretary of State should not have submitted the compact until the statute took effect.").[12] But plaintiffs cannot use the APA to mount a collateral attack on the actions of state officers on state-law grounds, and the actions of the Secretary of the Interior must be evaluated under the federal laws that govern her conduct.

And under federal law, the Secretary of the Interior's actions must be upheld. As set forth in the Tribe's opening brief (Dkt. 111-1 at 39-59), the Secretary was entitled to rely on the facially valid submission of the California Secretary of State under a long line of cases that Stand Up has failed to distinguish—and under a controlling BIA regulation (25 C.F.R. § 293.3) that specifically directs how the Secretary is to determine whether a compact has been "entered into" for purposes of IGRA's compact-approval process. Moreover, any contrary construction of the federal-state framework that allowed state law to nullify tribal-state compacts *after* they have taken effect under federal law would conflict with the federal process for compact approval and frustrate IGRA's central objective and therefore fail on preemption grounds.

[12] Stand Up's disagreement with the Secretary of State's construction of her state-law obligations is unfounded. Cal. Gov. Code § 12012.25(f) requires the Secretary of State to submit a compact for federal approval "[u]pon receipt" of a statute ratifying it, rather than after the compact takes effect under California law, as Stand Up argues. And Stand Up's assertion that "the California Secretary of State never received a statute" and that "[t]here is no statute in California that ratifies the Compact" is untrue. Under Cal. Gov. Code § 9510, a bill "becomes the official record" when signed by the Governor and deposited with the Secretary of State. Furthermore, while Stand Up may question the legal status of the Compact in light of the referendum, it cannot dispute that Cal. Gov. Code § 12012.59(a)(1) specifically provides: "The tribal-state gaming compact entered into in accordance with the federal Indian Gaming Regulatory Act of 1988 … between the State of California and the North Fork Rancheria Band of Mono Indians, executed on August 31, 2012, is hereby ratified." *See also* ARGC 6 (Secretary of State's transmission letter stating: "I am required by California law to forward a copy of a compact upon receipt of the compact and the statute ratifying it.").

Plaintiffs also argue that the referendum constitutes a "core" change in circumstances that warrants remand of the IGRA and IRA decisions. But the referendum is relevant only to the Secretary's approval of the Compact (Count V in Stand Up's Third Amended Complaint). As explained in the Tribe's opening brief, neither the IGRA two-part determination nor the IRA decision to take land into trust requires that an executed compact be in effect, making the referendum irrelevant to Counts I, II, and VI. *See* 25 C.F.R. §§ 151.11(c) (IRA decision), 292.16(k) (IGRA two-part determination); *see generally* Dkt. 111-1 at 56-57. Thus, even if the Court were to accept Stand Up's position that the referendum invalidated the compact, it does not follow that the IRA and IGRA decisions should be set aside.

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

As set forth in the Tribe's prior brief (Dkt. 111-1 at 44-46), courts have long recognized that federal officials are entitled to rely on the facially valid actions of state officials within federal regimes that depend on state involvement—and, relatedly, that federal officials should not be put in the position of looking behind actions undertaken by their state counterparts to assess those actions' legality under state law. Moreover, with respect to the particular agency action under review here, the BIA has promulgated regulations that specify precisely how the Secretary is to determine whether a compact has been "entered into" for purposes of approving the compact. In particular, 25 C.F.R. § 293.3 states: "The Secretary has the authority to approve compacts or amendments 'entered into' by an Indian Tribe and a State, *as evidenced by the appropriate signatures of both parties*" (emphasis added).[13] That alone should dispose of Stand Up's argument.

[13] The regulations also require state and tribal certifications that the signatures were authorized. 25 C.F.R. § 293.8. In requiring such certification, the BIA expressly declined to require any further proof that a compact is validly "entered into" for the purposes of federal law.

Stand Up concedes (SU R. Br. 23) that "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 contract." Nonetheless, Stand Up argues that in this case the Secretary of the Interior "was required to reject the compact" because the State's submission of the duly signed and certified compact also informed the Secretary that the ratification statute had not yet taken effect under California law and that a referendum effort was underway. But neither the regulations nor the case law—nor the Secretary's past practice in approving compacts from California—provides any foundation for such a requirement. As shown in the Tribe's prior brief, multiple compacts with California tribes have been submitted for secretarial approval before the relevant ratification statutes took effect under state law (and before the deadline for referendum had expired under state law), and the Secretary has approved them within the 45-day period that IGRA prescribes. *See* Dkt. 111-1 at 50 n.34. Stand Up has no response to that established agency practice. While Stand Up might have preferred the federal approval process to stop while it pursued its referendum campaign against the North Fork compact, the Secretary's actions here were in strict accord with federal law, which provides no basis for such a hiatus once the State has submitted a signed and certified compact.

Stand Up's reliance on *Pueblo of Santa Ana v. Kelley*, 104 F.3d 1546 (10th Cir. 1997), is foreclosed by the regulations that the BIA promulgated a decade after that decision. The Tenth Circuit's decision was predicated on the absence of any statutory language defining what it

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See 73 Fed. Reg. 74,004, 74,005 (Dec. 5, 2008) (rejecting comment that requested requiring "'proof of State [r]atification * * *, an enacted and chaptered bill or evidence of a legislative action'") (ellipsis in original); *see also id.* (in response to comment requesting "that the Indian tribe or State should submit the compact or amendment after it has been 'legally entered into' by both parties," the BIA responded that this comment is "addressed later in the rule," which "now requires documentation from both the tribe and the State certifying that their respective representatives were authorized to execute the proposed compact or amendment.").

means for a compact to be "entered into" for purposes of 25 U.S.C. § 2710(d), a statutory gap the court held should be filled by state law. *See* 104 F.3d at 1557-58 ("IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact…. IGRA's very silence on this point supports the view that 'Congress intended that state law determine the procedure for executing valid gaming compacts.'"). But that statutory gap has since been filled by the BIA through regulations adopted pursuant to notice-and-comment rulemaking. 25 C.F.R. § 293.3; 73 Fed. Reg. 74,004 (Dec. 5, 2008) (regulations promulgated following formal notice-and-comment process).[14] The BIA's regulations now control the Secretary's inquiry and this Court's evaluation of it. *See National Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967, 982-83 (2005) ("*Chevron's* premise is that it is for agencies, not courts to fill statutory gaps," and therefore subsequent agency interpretations displace prior judicial determinations unless the court determined that the statute unambiguously forecloses the agency's interpretation.").

B. IGRA Preempts The California Referendum To The Extent It Purports To Nullify The Compact After Its Submission And Federal Approval

Plaintiffs misconstrue the Tribe's preemption argument as a facial challenge to California's referendum process. The Tribe has expressly limited its argument to "the circumstances of this case," where the referendum was qualified for the ballot and voted upon *after* the Compact had been approved by the Secretary and taken effect under federal law. Dkt. 111-1 at 40; *see also Boyle v. United Technologies Corp*., 487 U.S. 500, 508, 512-13 (1988)

[14] The regulations were intended to clarify the ambiguities in IGRA, *see* Letter from Carl Artman, Assistant Secretary of Indian Affairs, to Tribal Leaders (Jan. 18, 2008), http://www.bia.gov/cs/groups/public/documents/text/idc-001855.pdf ("IGRA does not address how compacts are submitted to the Secretary for review and approval, when they are submitted, by whom, or when the 45-day timeline is triggered."), and expressly establish clear and orderly *federal* procedures that "Indian tribes and States must use when submitting Tribal-State compacts," 25 C.F.R. § 293.1(a).

(under the facts of each case, state law only preempted to the extent in conflict with federal policies). The question what role the referendum process might play *before* state officials submit a compact for federal approval and the compact goes into effect under federal law is not presented here.

On the merits, Stand Up's position suffers from multiple defects. *First*, it is premised on the mistaken view that "IGRA cannot preempt state law where Congress expressly intended state law to apply." SU R. Br. 26. Preemption, of course, need not be express. Rather, state law is preempted to the extent of any conflict with any federal statute or regulation, including "when the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Hillman v. Marietta*, 133 S.Ct. 1943, 1949-50 (2013). That is so here. As explained in the Tribe's prior brief (Dkt. 111-1 at 53-55), IGRA's statutory regime ensures that tribes have a reliable and expeditious path to class III gaming in States that do not prohibit it outright, and the statutory scheme—as clarified and supplemented by the 2008 regulations—leaves no room for efforts to rescind or invalidate a compact under state law after it has been placed into effect under federal law.

Second, Congress did not "expressly intend" for state law to define what it means for a state to "enter into" a compact—as Stand Up effectively concedes, *see* SU R. Br. 26 ("IGRA does not define 'entered into.'"). Indeed, Congress expressly intended for IGRA to have a broad preemptive effect, and any state authority granted by IGRA is entirely subject to its limits. *See* S. Rep. No. 446, 100th Cong. 2d Sess. 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076 (Congress "intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed").

Third, Stand Up asks (SU R. Br. 26) the Court to turn preemption principles on their head by construing California law to take precedence over the federal regime. The Constitution's Supremacy Clause requires state law to yield in the face of any federal conflict. *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); Dkt. 111-1 at 52-53 (setting forth applicable preemption principles). Stand Up's invocation of the "fundamental principle[] of … the people's right of referendum" (SU R. Br. 21) and the "Legislature's prerogative under the California Constitution" to ratify compacts (SU R. Br. 25) thus fails. Considerations of state sovereignty do not shield state law from federal preemption. For example, in *Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993), a state agency withheld paychecks from employees until a state budget had been approved, as required by state law. *Id.* at 1538. The Ninth Circuit upheld a challenge to the withholding under the federal Fair Labor Standards Act, reasoning that "[t]o the extent compliance with the FLSA interferes with the state budgetary process, that interference is caused by state law, not federal law." *Id.* at 1543. Here, any interference between IGRA and California's referendum process was created by state law subjecting Tribal-State compacts to the ordinary legislative process. Although IGRA allows States to determine their internal processes for approval of gaming compacts, it does not allow those procedures to undermine its text and purpose—which is precisely what the November 2014 referendum would do.

C. Even If The Referendum Invalidated The Compact, The Court Should Not Disturb The Two-Part Determination Or The Trust Decision

Even if the referendum had invalidated the compact, it would not constitute a change in "core" circumstances that would require the Court to remand the Secretary's IGRA or IRA decisions. Neither decision depends on a ratified compact, making any subsequent un-ratification irrelevant. *See* 25 C.F.R. §§ 151.11(c) (IRA decision), 292.16(k) (IGRA two-part determination). Both decisions rely on projections and estimates from the unratified 2008

compact, and both decisions were made well before the Legislature even ratified the 2012 compact in the summer of 2013. Subsequent developments in the compacting process thus cannot render the IGRA and IRA decisions arbitrary and capricious.[15]

Stand Up's speculation (SU R. Br. 27-30) regarding how the negotiating dynamics between the Tribe and Governor might change if Stand Up succeeds in invalidating the compact provides no basis for setting aside the IGRA or IRA decisions. Stand Up argues both that the Tribe would be in a stronger negotiating position than it was beforehand (SU R. Br. 27-29) and that the Tribe would face "high legal and political hurdles" (SU R. Br. 27) that make a new compact unlikely. Even if Stand Up's speculation about the "political reality" in California were internally consistent, it would not justify remanding the Secretary's IGRA and IRA decisions. *See Cleveland Television Corp. v. FCC*, 732 F.2d 962, 973 n.13 (D.C. Cir 1984) (denying remand where subsequent development "cast[] only a speculative shadow of doubt" on reliability of agency decision). If the Tribe is unable to game on the Madera Site under the 2012 Compact or a new compact negotiated with the State, IGRA's remedial provision provides a means for the Tribe to game on terms imposed by the Secretary of the Interior. *See* 25 U.S.C. § 2710(d)(7)(B)(vii). The Tribe's suit under this remedial provision is pending in the Eastern District of California. *See North Fork Rancheria of Mono Indians v. State of California*, No. 1:15-cv-00419-AWI-SAB (E.D. Cal.).[16]

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[15] Stand Up's attempts (SU Br. 28-30) to distinguish *Michigan Gambling Opposition v. Norton (MichGO)* fail for the same reasons. As with the Secretary's IGRA and IRA decisions, the Governor's concurrence preceded ratification and is not dependent on an enforceable compact. As a result, although the initial reservation exception (at issue in *MichGO*) and two-part exception do differ in the need for a gubernatorial concurrence, once the Governor did concur, North Fork's position was not meaningfully different from the tribe's position in *MichGO*.

[16] Stand Up filed a highly misleading Notice of Related Cases (Dkt. 118) regarding this parallel litigation, in which it contends that the "North Fork Tribe asserts that the gaming

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

As explained in Part III.A and North Fork's prior brief (Dkt. 111-1 at 44-46), federal officials are entitled to rely on the facially valid actions of state actors. This principle applies to the Governor's concurrence just as it did to the Secretary of State's submission of the executed compact. Indeed, Stand Up has conceded as much. *See* Dkt. 106-1 at 31 ("[T]he Secretary was not bound at the time to inquire [in]to the legality of the concurrence in authorizing gaming at the Madera site[.]"). The Secretary of the Interior has no authority to intrude into the validity of the Governor's decision-making process under state law, and this Court has no occasion to do so here. The proper forum in which to challenge the Governor's authority on state-law grounds is in state court, as Stand Up acknowledges (SU R. Br. 37-38). Stand Up brought precisely such a suit there, though it did so only after the land had been taken into trust, and the suit was dismissed on the merits following the Governor's demurrer and briefing by the California Attorney General and the Tribe. *See Stand Up for California! v. State of California*, Case. No. MCV062850 (Cal. Super Ct. Madera Cnty. Mar. 3, 2014), *appeal docketed*, Case No. F069302 (Cal. App. Dist. 5).[17]

Stand Up's argument that this Court should resolve its state-law grievance is particularly weak here, where "not one of the three branches of the [state government] recognized the

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compact with the State of California is invalid and not in effect[.]" In fact, North Fork's Complaint in that case makes clear that it is challenging the State's refusal either to honor the 2012 Compact or negotiate a new one in the wake of the referendum, and has not questioned the validity and effectiveness of the compact. Complaint ¶ 9, No. 1:15-cv-00419-AWI-SAB (E.D. Cal. March 17, 2015) ("By refusing to honor the existing compact and refusing to negotiate to enter into a new tribal-state gaming compact, the State has breached its obligation under IGRA to 'negotiate with the [Tribe] in good faith to enter into such a compact.' 25 U.S.C. § 2710(d)(3)(A).").

[17] Stand Up has appealed the adverse ruling, but the California Court of Appeal has yet to schedule oral argument on the appeal.

possible problem with the [Governor's concurrence]." *United States v. Brown*, 334 F. Supp. 536, 540 (D. Neb. 1971). The Legislature ratified the Governor's actions by approving the 2012 compact without questioning the Governor's concurrence authority, the California Attorney General has taken the position in litigation that the Governor was authorized to concur, and a California state court has upheld the Governor's concurrence. This is in stark contrast to *Pueblo of Santa Ana*, where the New Mexico Supreme Court, the State of New Mexico, and the Secretary of the Interior all took the position that the compact was unenforceable. Stand Up's narrow reading of the Governor's authority is inconsistent with state law, *see* Dkt. 111-1 at 61-62, and provides no basis for setting aside the Secretary's reasonable reliance on the Governor's concurrence.

V. Defendants Complied With NEPA

In its summary judgment briefing, Stand Up ignores and has abandoned many of its NEPA allegations.[18] The three NEPA arguments Stand Up still asserts continue to rely on a highly selective and limited review of the record, misunderstand NEPA's requirements, and fail to show that the BIA did not comply with NEPA.

A. The BIA Considered A Reasonable Range Of Alternatives

Stand Up does not argue that the BIA violated NEPA by failing to consider a reasonable range of alternatives, 42 U.S.C. § 4332(2)(C)(iii), or failing to discuss the reasons for eliminating alternatives from detailed study, 40 C.F.R. § 1502.14(a). Stand Up instead challenges the

[18] *See* Third Am. Compl. ¶ 70 (improper purpose and need statement and failure to prepare Supplemental EIS); ¶¶ 71, 77-79 (failure to take a hard look at socioeconomic impacts, including impact to the Picayune Rancheria); ¶¶ 72 & 74 (failure to adequately mitigate impacts aside from problem gambling and related hard look arguments); ¶ 73 (failure to consider cumulative impacts); ¶¶ 75-76 (failure to justify placing land into trust or evaluating related impacts on local communities); and ¶¶ 80-82 (procedural defects in the NEPA process). Defendants are entitled to summary judgment on these claims.

rationale the BIA used to eliminate certain alternatives from further evaluation. In evaluating such a challenge, courts owe "considerable deference to the agency's expertise and policy-making role." *City of Alexandria v. Slater*, 198 F.3d 862, 867 (D.C. Cir. 1999). Stand Up fails to show *any* flaw in the BIA's alternatives analysis, let alone demonstrate that the BIA exceeded its considerable discretion.

With respect to the SR-41 and Avenue 7 sites, Stand Up admits that it never argued, and clarifies that it is not now arguing, that the Secretary wrongfully excluded those sites from further evaluation. SU R. Br. 48 & n.35. Rather, Stand Up claims to be highlighting what it characterizes as a "double standard" because the BIA considered the competitive impact of those sites in the FEIS for NEPA purposes but allegedly did not consider the Madera Site's competitive impact in the IGRA ROD. *Id*. This is not a NEPA argument, but instead reformulates the failed IGRA argument that the BIA did not appropriately consider detrimental impact. *See* Section II.B.2, *supra*. For that reason alone, Stand Up's NEPA challenge here is without merit. In any event, the record includes myriad reasons for excluding the SR-41 and Avenue 7 sites. Dkt. 111-1 at 63-68. [19]

With respect to the North Fork site, Stand Up argues (SU R. Br. 49) that the FEIS mistakenly excluded the site based on community opposition while not discussing community opposition to the Madera site. But the FEIS evaluated the North Fork site as a potential

[19] Stand Up raises (SU R. Br. 49) a new argument on reply challenging some (but not all) of the other bases for eliminating the SR-41 sites when it argues that the "record contains no data or other evidence to assess" the references to "environmentally sensitive," "scenic," or "steep" terrain. Stand Up has waived any argument about these descriptions by not presenting that comment or argument during the NEPA process or any of the prior briefing. Moreover, Stand Up does not identify any error in these descriptions. Instead, Stand Up tries to suggest that since development has occurred elsewhere in the Sierra foothills (without specifying any particular location), the Tribe's project would present no environmental concerns. That is nonsense. The fact that a similar development might have occurred does not eliminate a new project's environmental consequences.

alternative, which is all that NEPA requires. The BIA did not select the North Fork site as the preferred alternative for a number of reasons, including, as the Court previously noted, "the fact that the 'particularly varied and steep topography' would inflate construction costs in that area, leading to the conclusion that a casino development in that area 'could not be successfully financed.'" Dkt. 42 at 42; *see also* AR 40457-58, 40533. Further, unlike the North Fork site, the Madera Site had significant community support for the project, demonstrated by, for example, the Madera County and the City of Madera memoranda of understanding, AR 30632-64, 38151-76, and numerous comments received in the NEPA process.

With respect to the Old Mill site, Stand Up argues (SU R. Br. 49-50) that environmental contamination and the inability to acquire it for gaming are not sufficient reasons to exclude it from further evaluation. Again, the BIA identified a number of other concerns with the Old Mill site, including its similarity to other alternatives evaluated in detail in the FEIS, AR 9661-9662, and that its remote location would prevent the project from meeting job creation and revenue objectives, AR 29909. Moreover, as this Court explained earlier, environmental contamination and the inability to acquire the land both present valid bases to exclude the Old Mill site. *See* Dkt. 42 at 41. The issues and concerns related to environmental contamination were discussed in detail in the FEIS. *See* AR 29908-09. Under longstanding policy, the BIA typically avoids acquiring trust lands that pose any risk of future liability from environmental contamination. AR 9409. Regarding the availability of the property, the BIA repeatedly contacted the North Fork Community Development Council (CDC) to discuss CDC's willingness to sell the Old Mill site for gaming. The CDC said "no" each time, with its final response unequivocally stating that the CDC "will not sell this land to the North Fork Rancheria of Mono Indians for the development of

a casino project." AR 9405, 9411, 9413. Stand Up has identified nothing in NEPA that would require the BIA to ignore or disbelieve such a clear statement of intent from the site's owner.

Finally, Stand Up now argues, for the first time, that it was inappropriate for the BIA to consider the Tribe's needs without quantifying specifically "how much the Tribe needs" in the FEIS. SU R. Br. 50. Stand Up has waived this argument by failing to make it in Stand Up's NEPA comments or its earlier briefing. *U.S. Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004). Moreover, Stand Up provides no authority for this argument, presumably because nothing in NEPA requires an exact quantification of need. In any event, the record includes significant detail concerning the Tribe's unmet needs. *See, e.g.*, AR 40501-02. It was not unreasonable for the BIA to consider the Tribe's significant unmet needs in identifying the purpose and need and, in turn, evaluating alternatives.[20]

As this Court stated earlier, and as the record continues to demonstrate, "the Secretary appears to have considered a reasonable range of alternatives and provided a rational and concise explanation of why each potential alternative was rejected from further consideration." Dkt. 42 at 42.

B. The BIA Took A Hard Look At Crime

Stand Up's contention that the BIA failed to take a "hard look" at the possible impacts on crime relies on a misreading of the FEIS. Stand Up continues (SU R. Br. 50-51) to focus on the FEIS's discussion that questioned the direct causal link between crime and casinos. This

[20] This is especially true when considering IGRA's purpose of "promoting tribal economic development, self-sufficiency, and strong tribal governments" in connection with the applicant Tribe's needs. 25 U.S.C. § 2702(1); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) ("an agency should always consider the views of Congress, expressed . . . in the agency's statutory authorization to act, as well as in other congressional directives" and "the agency should take into account the needs and goals of the parties involved in the application.").

discussion was proper as it relied upon the National Opinion Research Center study,[21] an analysis of other California casinos, and interviews with local law enforcement agencies in Madera County and four other California counties.

Stand Up also argues that the FEIS did not properly disclose anticipated impacts from crime on the localities. Not so. The FEIS anticipated an increased need for law enforcement services in Madera County, as would occur with any similar attraction drawing new residents, employees, and visitors to the area. AR 29756, 29772, 30196-97. It explained that although the anticipated impact on regional crime rates would be less than significant, AR 30197, the anticipated impact on Madera County law enforcement services would be "significant" *if* the impacts were not mitigated, AR 29756, 29772. But it explained that the cost would be fully mitigated by the Tribe's annual contributions to cover the cost of additional law enforcement positions and remaining fiscal impacts. *See* Dkt. 111-1 at 70.

In sum, the BIA carefully analyzed the issue of crime; disclosed that the impact of crime on law enforcement and the Madera County budget would be significant if not mitigated; and found that the impact would be fully mitigated. This was precisely the "hard look" that NEPA requires. *Theodore Roosevelt Conserv. P'ship v. Salazar*, 661 F.3d 66,75 (D.C. Cir. 2011).

C. The Problem Gambling Mitigation Discussion Complied With NEPA

Stand Up's argument regarding the FEIS's discussion of problem gambling is flawed in two key respects. First, Stand Up attempts (SU R. Br. 52) to hold the Secretary and the Tribe to an incorrect and misleading standard by arguing that the federal defendants "fail to justify the

[21] Contrary to Stand Up's contention (SU R. Br. 51), the Tribe agrees that the National Opinion Research Center study "found that insufficient data exists to quantify or determine the relationship between casino gambling within a community and crime rates." AR 30197. But in the absence of conclusive evidence, the BIA was not required to assume that there was a direct causal link.

failure to adequately mitigate the project's impacts on problem gamblers." NEPA requires only "'a reasonably complete discussion of possible mitigation measures.'" *Citizens Against Burlington*, 938 F.2d at 206. It does not require proof that the impacts on problem gamblers will be fully mitigated. *Cf. Confederated Tribes of Grand Ronde*, 2014 WL 7012707, at *26.

Second, Stand Up mischaracterizes the FEIS's analysis of the project's potential impact on problem gambling and the planned mitigation measures. The FEIS assumed that, without any mitigation measures, the number of problem gamblers in Madera County will increase by 531. AR 30198. The FEIS listed precautionary measures that the Tribe will implement on the casino's premises to mitigate problem gambling. AR 29753-54, 30509. For the problem gamblers who are expected to seek treatment, the FEIS showed that the expected cost to the County will be completely mitigated. *See* Section II.A.2, *supra*. One of the mitigation measures in Section 5.2.6 is the Tribe's annual contribution of $1,038,310, AR 29754, 30509, which will cover the County's funding shortfall for several services, including the extra $13,606 needed annually for services to treat problem gamblers, AR 30211 tbl. 4.7-16.

VI. The BIA Complied With The Clean Air Act

A. The BIA Complied With Required Notice Procedures

Stand Up's argument (SU R. Br. 52-56) that the BIA failed to comply with the notice procedures of the Clean Air Act (CAA) continues to ignore this Court's prior order, which declined to require the BIA to "perform the entire Clean Air Act conformity determination again—from start to finish," Dkt. 77 at 7, and did not vacate the 2011 Final Conformity Determination (FCD), *see id*. at 3-4, 6-8.[22] Instead, this Court granted the BIA's motion for a

[22] Stand Up has not pursued in its summary judgment briefs four CAA claims it alleged in its Third Amended Complaint. *See* Dkt. 103 at ¶¶ 91, 92, 94, and 98. Defendants are entitled to summary judgment on all of these claims.

partial remand without vacatur, requiring the BIA only "to undertake the notice process required by 40 C.F.R. § 93.155," *id*. at 8—the very process that occurred here. The BIA complied with the CAA's requirements and this Court's order by sending the reporting notices for the draft conformity determination (DCD) to the required entities under 40 C.F.R. § 93.155(a), ARNEW 1178-1221; considering and responding to the comments it received, ARNEW 1422, 1427, 1573, 1770, 1945-55; determining that a revision to the 2011 FCD was "not warranted" and reissuing the 2011 FCD, ARNEW 1768-70; and by sending the follow-up reporting notices to the same required entities under 40 C.F.R. § 93.155(b), ARNEW 1957-59.

Stand Up argues (SU R. Br. 53-54) that the BIA violated 40 C.F.R. § 93.150(b), which requires the agency to "make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken." The conformity determination, however, was made in 2011, before the land was taken into trust, and, consistent with the Court's prior ruling, that determination has remained intact. Stand Up is really arguing (*e.g.*, SU R. Br. 53 n.38) that the Court erred in its prior order, but the Court's decision to remand without vacating was correct when it was issued, and Stand Up cannot collaterally attack that decision here. *See Christianson v. Colt Indus. Operating Corp*., 486 U.S. 800, 816 (1988).

Moreover, Stand Up admits that it cannot demonstrate harm from any alleged violation, claiming instead (SU R. Br. 55) that it is "impossible to know what would have happened had" the BIA provided the reporting notice earlier. The remand process shows that nothing different would have happened because, after reviewing the new comments, the BIA decided not to revise the FCD. More importantly, Stand Up's speculation fails to demonstrate any error that would undermine the BIA's FCD. *See City of Olmsted Falls v. FAA*, 292 F.3d 261, 271-72 (D.C. Cir.

2002) (plaintiffs failed to meet the burden to demonstrate that the "ultimate conclusions are unreasonable" when they argued that agency's alleged errors "might undermine" the conformity analysis, "*not* that they necessarily will").

Unable to demonstrate any prejudicial error, Stand Up tries to argue that it is need not do so. This argument also fails. First, Stand Up continues to rely on the "public notice and comment" precedent (SU R. Br. 54-56), which this Court held is "not at issue" in this case. Dkt. 77 at 5. Second, Stand Up argues (SU R. Br. 54-55) that the harmless error rule does not apply to conformity determinations, citing 42 U.S.C. § 7607(d)(1). But that CAA provision applies only to listed rulemakings and clarifies that even errors in the public notice and comment process for such rulemaking do not allow a court to invalidate the rule unless there is "a substantial likelihood that the rule would have been significantly changed if such errors had not been made," *id*. § 7607(d)(8). The provision does not limit the applicability of the APA harmless error rule in the conformity determination context. Indeed, the D.C. Circuit has repeatedly applied the rule to conformity determinations and required parties challenging such a determination to demonstrate prejudicial error. *See, e.g.*, *Olmsted Falls*, 292 F.3d at 271-72; *see also Cnty. of Rockland v. FAA*, 335 F. App'x 52, 57 (D.C. Cir. 2009) (quoting 5 U.S.C. § 706 for the proposition that "due account shall be taken of the rule of prejudicial error" when court reviews conformity determinations). Stand Up has failed to demonstrate any error, let alone a prejudicial one.

B. The BIA Used The Appropriate Emissions Model

Stand Up's contention (SU R. Br. 56-59) that the BIA used the wrong motor vehicle emissions model is based on a misreading of the EPA's conformity regulations and its Notice of Approval (NOA) for EMFAC2011, the current emissions factors model for California. When the BIA began its conformity analysis in 2010, it used the current approved EMFAC2007 model. *See* ARNEW 1921, 1946.

More than two years later, on March 6, 2013, EPA approved the newer EMFAC2011 emissions model for future use in most California conformity determinations. 78 Fed. Reg. 14,533 (Mar. 6, 2013). The NOA set a six-month grace period from March 6, 2013 until September 6, 2013 after which date only EMFAC2011 may be used for new regional emissions analysis. *Id*. at 14,533, 14, 535. However, Stand Up contends (SU R. Br. 57) based on their reading of the second sentence of 40 C.F.R §93.159(b)(1)(ii)[23] that conformity determinations begun more than three months before the EMFAC2011 model was approved also must also use the EMFAC2011 model. Under that counterintuitive interpretation, all conformity determinations begun before December 6, 2012, not just the BIA's conformity determination here, would need to be redone. This would lead to absurd results, and it is not the law. Indeed, in its NOA, EPA explicitly states that emissions analyses "*that begin before* or *during the grace period may continue to rely on EMFAC2007*." 78 Fed. Reg. at 14,535 (emphasis added). Since the BIA began its conformity analysis for the project using EMFAC2007 in December 2010, more than two years before the grace period for EMFAC2007 began on March 6, 2013, their use of EMFAC2007 in the conformity determination for the project was proper, as this Court has already concluded, Dkt. 77 at 7-8.

C. The BIA's Trip Length Calculation Is Well-Supported

Stand Up's contention (SU R. Br. 59-61) that the 12.6-mile average trip length is unsupported is based on a misreading of the record. As stated in the BIA consultant's response to comments on the re-noticed FCD, the average trip length of 12.6 miles was supported by data from both the Fresno County and the Madera County models. ARNEW 1949. Documentation

[23] "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."

for the Madera County Travel Forecasting Model also makes clear that the model incorporated data from relevant models from adjoining counties, including Fresno County. ARNEW 7-8.

Stand Up further contends (SU R. Br. 60 n.42) that the table in the BIA consultant's March 27, 2014 response to comments on the re-noticed DCD, ARNEW 1949, shows different trip lengths for various categories of casino visitors and employees, but that the model output file in Appendix S to the FEIS, AR 34299, shows the same trip length of 12.6 miles for all such trips. Actually, the model output files in the FEIS, the table in the BIA consultant's response to comments on the re-noticed DCD, and FCD all show that different trip lengths for the various categories of workers and visitors were considered. *See, e.g.*, AR 34299-300, ARNEW 1949, 1940-41. These categories included, for example, trips from home to visit or to work at the casino and from shopping to the casino. In running the model, the BIA consultant simply used the average trip length of 12.6 shown on the table.[24] Stand Up has failed to show that the BIA used an unsupported trip length in its conformity determination calculations.

VII. Even If Stand Up Were Right On The Merits, Vacatur Would Be Unwarranted

Stand Up argues (SU R. Br. 61-64) that if the Secretary's IRA and IGRA decisions are found to be arbitrary and capricious, they must be vacated and the Madera parcel taken out of trust.[25] This remedy is unnecessary and inappropriate under the circumstances. Vacatur would

[24] This average trip length was calculated from the number of casino visitors and workers in each of several categories who traveled from within the model area (chiefly Madera County) and whose one way trip lengths ranged from 6.6 miles to 16.8 miles as shown in the modeling output files, ARNEW 1940-41, or from 9.33 miles to 17.29 miles as shown on the table, ARNEW 1949, and also included a smaller number of visitors from outside the model area who had an average trip length of 59.02 miles as shown on the table. *Id*.

[25] Picayune argues that if the IGRA decision is vacated, the IRA decision must be vacated as well. But the reverse does not apply. Nor do alleged flaws in the Governor's concurrence, the Secretary of State's submission, or the Secretary's deemed approval provide a basis to undermine the IGRA decision.

serve Stand Up's strategic goal of disrupting or delaying (for as long as possible) the Tribe's ability to game, but would do nothing to cure any defects in the Secretary's decision-making or serve the interests of judicial and administrative efficiency.

To determine whether vacatur is warranted, the court must weigh both "'the seriousness of the order's deficiencies'" and "'the disruptive consequences'" of vacatur. *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993); *see also Apache Corp. v. F.E.R.C.*, 627 F.3d 1220, 1223 (D.C. Cir. 2010). Stand Up disregards the first factor entirely. "When an agency may be able readily to cure a defect in its explanation of a decision," remand without vacatur is appropriate. *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009). This is not a heavy burden for the agency to meet; as long as it is "conceivable" that the agency can support its decision, the court should leave the agency action in place. *Allied-Signal*, 988 F.2d at 151.

Stand Up also misapplies the second factor. What Stand Up characterizes as a major disruptive consequence of leaving the decisions in effect is actually a disruptive consequence of vacatur. Currently, the State has an obligation to negotiate in good faith with the Tribe over gaming at the Madera Site. 25 U.S.C. § 2710(d)(3)(A). If the decisions were vacated and the land taken out of trust by the Secretary, the State would be relieved of the obligation until the Secretary reissued the decisions, introducing unnecessary delay into an already prolonged process. By contrast, leaving the decisions in effect would be no windfall to the Tribe. Negotiations could continue, but if the Secretary determined on remand that the decisions were irreparably flawed (or a court ultimately so ruled), the land could be taken out of trust at that point, terminating the process. As Stand Up points out (SU R. Br. 62-63), there is no barrier to restoring the status quo ante to effectuate a final non-appealable judgment.

CONCLUSION

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

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Respectfully submitted,

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