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*	)	**Case No. 1:12-cv-02039-BAH** Judge Beryl A. Howell

UNITED STATES' REPLY IN SUPPORT OF ITS CROSS-MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

The Plaintiffs, Stand Up for California ("Stand Up") and the group alleging that it is the Picayune Rancheria of Chukchansi Indians ("Picayune"), rehash the same arguments from their opening briefs, but now with more conjecture and speculation. Stand Up has confused the Indian Gaming Regulatory Act's ("IGRA") two-part determination, 25 U.S.C. § 2719(b)(1)(A), with the process for approving a compact located at 25 U.S.C. § 2710(d)(8). Stand Up continues to argue that the Secretary has allowed too many detrimental impacts to the surrounding community, but it offers no support for its argument that "state concerns must trump the general purpose of IGRA." Additionally, Stand Up continues to assert that the Governor of California and the California Secretary of State erroneously told the United States Secretary of the Interior ("Secretary") that California had entered into a gaming compact, despite conceding that the Secretary is not required to investigate state law.

Stand Up says the Secretary failed to take a hard look under the National Environmental Policy Act ("NEPA") because the Secretary did not ferret out a conspiracy to avoid selling land, did not conduct extensive, expensive, and intrusive tests to determine the exact status of an environmentally contaminated site, and failed to give up on a project because there were mixed opinions about it in the community. None of Stand Up's arguments connect with any of NEPA's legal standards.

Likewise, Plaintiffs once again attempt to conflate various provisions of the Indian Reorganization Act ("IRA") and cast doubt on the tribal identity of North Fork, but none of these arguments change the fact that the sole reason a Section 18 election was held on North Fork in 1935 was because the Tribe was under federal jurisdiction. Accordingly, the Secretary properly concluded that statutory authority exists under the IRA to acquire land for the benefit of the North Fork Rancheria. Finally, Stand Up again asserts that the Secretary's action should be

vacated on the grounds that the Secretary's conformity determination, required by the Clean Air Act ("CAA"), 42 U.S.C. § 7506, was not consistent with EPA's implementing regulations. Stand Up's arguments, however, are the same ones that the Court rejected in granting the United States' motion for voluntary remand in December 2013. Standup has failed to present any reason that the Court should reconsider its prior conclusions.

Meanwhile, Picayune argues that although it is outside of the proposed gaming facilities' 25-mile radius and therefore not part of the surrounding community, it should have been treated as part of the surrounding community merely because it filed a petition asking the Secretary to designate them as part of the surrounding community. The fatal flaw with this argument, aside from the fact that Picayune does not meet the Secretary's regulatory definition of "surrounding community," because it is outside the 25-mile radius, is that the Secretary never granted their petition. Likewise, Picayune contends that the Secretary acted inconsistently when she ensured that the proposed site would benefit the North Fork Rancheria of Mono Indians ("Tribe" or "North Fork Tribe") and its members, even though North Fork Rancheria's gaming facility would compete with Picayune's gaming operations. The Secretary's actions were consistent with IGRA's requirements, well-reasoned, and based on the administrative record.

II. ARGUMENT

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

1. The Section 18 Election, Documented in the Haas Report, Provides Conclusive Evidence that North Fork was Under Federal Jurisdiction in 1934

Section 465 of the IRA provides the Secretary with the authority to take land into trust "for the purpose of providing land for *Indians*." 25 U.S.C. § 465 (emphasis added). Therefore, in order for the Secretary to take land into trust for the North Fork Rancheria, it must meet the definition of Indian in Section 19 of the IRA. "Indians" is defined in Section 19 of the IRA as

including (1) "members of any recognized Indian tribe now under Federal jurisdiction," (2) "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." 25 U.S.C. § 479. Additionally, "[t]he term 'tribe' . . . shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." Id. Therefore, for all purposes of the IRA, a group of Indians residing on one reservation is considered a "tribe."

As this Court found in the Memorandum Opinion denying Plaintiffs' motion for preliminary injunction, the establishment of the Rancheria in 1913 "is important, and likely dispositive in its own right, regarding whether the North Fork Tribe was 'under Federal jurisdiction' in 1934." Stand Up for California v. U.S. Dept. of the Interior, 919 F.Supp.2d 51, 68 (D.D.C. 2013); see also NF_AR_0041138. Moreover, as explained in the United States opening brief, in 1935 a vote of eligible, "adult Indian" voters was conducted on the North Fork Rancheria pursuant to Section 18 of the IRA. 25 U.S.C. § 478, Stand Up, 919 F. Supp. 2d at 58. This vote is clearly dispositive of the federal government's jurisdiction over the North Fork Tribe at the time of the IRA's enactment because inherent in that decision is the understanding that a reservation was established prior to the IRA's enactment, NF_AR_0041198, and the recognition that the federal government, and Congress, had jurisdiction over that reservation, such that the reservation had to comply with the IRA's requirement that the adult Indian voters either accept or reject the application of the IRA to them.

The "election conclusively establishes that the Tribe was under federal jurisdiction for Carcieri purposes" and the Secretary's determination that the vote is dispositive and that the Tribe was under federal jurisdiction in 1934 is entitled to Chevron deference. NF_AR_0041198; see also Central New York Fair Business Ass'n v. Jewell, 2015 WL 1400384, *5-7 (N.D.N.Y.

2015) (granting deference to the Secretary's interpretation of the IRA); Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell, -- F.Supp.3d --, 2014 WL 7012707, *9-11 (D.D.C. Dec. 12, 2014) (Secretary's decision entitled to deference); Stand Up, 919 F. Supp. 2d at 67 ("[T]he Secretary's conclusion that he had the authority to acquire land for the North Fork Tribe, based solely on the IRA election, was rational because the text of the IRA establishes that the only people eligible to vote in such elections were 'adult Indians.'") (quoting 25 U.S.C. § 478).[1] Indeed, Justice Thomas acknowledged as much in Carcieri when he stated, "§ 2202 [of the Indian Land Consolidation Act] by its terms simply ensures that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478, which allowed tribal members to reject the application of the IRA to their tribe. § 478 ("This Act shall not apply to any reservation wherein a majority of the adult Indians . . . shall vote against its application")." Carcieri v. Salazar, 555 U.S. 379, 394-95 (2009); NF_AR_0041198.[2]

In their response/reply brief, Plaintiffs once again attempt to conflate various provisions of the IRA and cast doubt on the tribal identity of North Fork, but none of these arguments change the fact that the Secretary held a Section 18 election at North Fork in 1935, conclusively

[1] Contrary to Plaintiffs assertions, Pls. Resp. at 9-13, the United States did not cite the recently issued M-Opinion to supplement or support the original determination or to argue for greater deference based on the opinion, but to inform the Court that the M-Opinion was issued and that it is consistent with the North Fork decision. Nor does the M-Opinion change the fact that the Secretary's determination is entitled to Chevron Deference. Plaintiffs also imply nefarious intentions behind the revision of the Cowlitz ROD, Pls. Resp. at 12-13, to correct the mistake regarding the Section 18 elections, but the Cowlitz ROD was corrected simply because it was wrong regarding the Section 18 vote. See U.S. Cross-Motion Br. at 14-16.

[2] As discussed in the ROD and the United States Opening Brief, U.S. Cross-Motion Br. at 13 n.6, the fact that North Fork voted against the IRA is irrelevant because when Congress enacted the Indian Land Consolidation Act ("ILCA") in 1982 it extended the IRA to tribes that voted to opt out of the Act's provisions in the 1930s. 25 U.S.C. § 2202; NF_AR_0041198; Stand Up For California, 919 F.Supp.2d at 68 n.19 ("the fact that the North Fork Indians voted not to reorganize under the IRA in 1935 does not affect the Secretary's authority to acquire land into trust for the benefit of the North Fork Indians.") citing Carcieri, 555 U.S. at 394-95.

establishing that North Fork was a tribe under federal jurisdiction at that time. Accordingly, the Secretary properly concluded that statutory authority exists under the IRA to acquire land for the benefit of the North Fork Rancheria.

2. Reorganization Under Section 16 of the IRA is Irrelevant to a Determination as to Whether North Fork was Under Federal Jurisdiction in 1934

In their response/reply, Plaintiffs first contend that the United States mischaracterized their arguments because they are not contending that the Indians residing at North Fork must have voted to accept the IRA and organize under Section 16 of the IRA to be under Federal jurisdiction. Stand Up's Resp. Br. in Opposition to Motion for Summ. J.("Pls. Resp"). at 2 (ECF No. 115). However, that is exactly what they argued in their opening brief: "[b]ecause Section 16 elections are tribal elections, they are dispositive of the question of whether a tribe was a 'recognized tribe now under Federal jurisdiction' as of the date of organization." Pls. Mot. for Summ. J. at 8 ("Pls. Opening Br.") (ECF No. 106). Furthermore, in their response/reply, Plaintiffs once again reference organization under Section 16 as somehow being relevant to this Court's inquiry. It is not.

Plaintiffs first cite to a November 7, 1934 Solicitor Opinion, Pls. Resp. at 3-4, that references organization under Section 16 as somehow supporting their position because the Solicitor states that organization under Section 16 is possible for, "[a] group of Indians residing on a single reservation who may be recognized as a 'tribe' for purposes of the *Wheeler-Howard Act* [IRA]." Pls. Resp. at 3 (emphasis added). But this is completely consistent with the Secretary's interpretation of Section 19 and its definitions of "Indian" and "tribe" because Section 16 references the term "tribe" and the term "tribe" is defined in Section 19 as follows, "[t]he term 'tribe' *wherever used in this Act* shall be construed to refer to any Indian tribe, organized band, pueblo, *or the Indians residing on one reservation.*" 25 U.S.C. § 479 (emphasis

added).[3] Therefore, for all purposes of the IRA a group of Indians residing on one reservation is considered a tribe, not simply after organization under Section 16. The Solicitor's Opinion Plaintiffs reference simply acknowledges that such organization is possible by virtue of the definitions in Section 19.

Plaintiffs then argue that organization under Section 16 of various other groups, Pls. Resp. at 4-6, demonstrates their point, but the fact that Indians on other reservations voted to accept the terms of the IRA and organize together under Section 16 is irrelevant to whether the North Fork Tribe was under federal jurisdiction in 1934. As Plaintiffs acknowledge, this was a choice made by those groups that was simply facilitated by the federal government pursuant to the terms of the IRA. Pls. Resp. at 4-6. North Fork made a different decision.[4] Plaintiffs again conflate the decision to accept the terms of the IRA and reorganize pursuant to Section 16 with eligibility for IRA benefits under Section 19. Those tribes chose to accept the terms of the IRA and reorganize under new constitutions, just as North Fork chose to accept the *status quo ante* and reject the IRA. See Solicitor Opinion M-27810, Wheeler-Howard Act Interpretation (December 13, 1934) ("The whole purpose of section 18 is to assure every group of Indians the fullest possible opportunity to continue the *status quo ante* if it disapproves of the purposes of the act."), available at http://thorpe.ou.edu/sol_opinions/p476-500.html#m-27810; ECF No. 115-

[3] Contrary to Plaintiffs' assertion, Pls. Resp. at 2, 4, 8, 11, 13, a group of Indians residing on a reservation did not need to be a single, unified tribe to be eligible for the IRA benefits. If that were the case, then the Act would define a tribe as such. Plaintiffs are inserting requirements into the definition that simply are not there.

[4] However, as Congress stated in the Act of June 15, 1935, "[a]ll laws, general and special, and all treaty provisions affecting any Indian reservation which has voted or may vote to exclude itself from the application of the Act of June 18, 1934 (48 Stat. 984) [the IRA], shall be deemed to have been continuously effective as to such reservation, notwithstanding the passage of said Act of June 18, 1934." An Act to Define the Election Procedure Under the Act of June 18, 1934, and For Other Purposes, 49 Stat. 378 (1935). This provision means that regardless of the Section 18 vote, North Fork remained under the jurisdiction of the federal government.

1. The unifying fact for all of these tribes is that they were all eligible for IRA benefits in 1934 and each tribe made a decision to reject or accept the terms of the Act through a Section 18 vote. The results of most of those votes are compiled in Table A of the Haas Report, which is titled, "*Indian Tribes, Bands* and *Communities* Which Voted to Accept or Reject the Terms of the Indian Reorganization Act, the Dates When Elections Were Held, and the Votes Cast" with the subtitle, "Action by *Tribes* on Indian Reorganization Act." NR_AR_NEW_0002010-0002017 (emphasis added).[5] While it is true that the votes were conducted by reservation, pursuant to the terms of Section 18, contrary to Plaintiffs' assertion that does not mean the Department did not consider those listed in Table A to be tribes, as evidenced by the headings. Plaintiff also takes issue with the fact that Table A does not distinguish between groups based on how they organized under Section 16, but that is because Table B actually compiles the information for "Tribes *Organized* Under the Indian Reorganization Act." NF_AR_NEW_0002018-002019 (emphasis added).

Plaintiffs next cite to a July 24, 1934, letter from the Sacramento Superintendent to the Commissioner on Indian Affairs, which states that there was only one reservation in the Sacramento Indian Agency jurisdiction (Plaintiffs incorrectly assert that the letter states there is only one reservation in California, but the Superintendent is only referencing his jurisdiction). Pls. Resp. at 3-4. Regardless of how the Superintendent viewed the rancherias, this does not diminish the status of the rancherias for purposes of the IRA because the Department treated reservations and rancherias identically for Section 18 votes under the IRA. NF_AR_NEW_0001995; 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.") (citing Duncan v. United

[5] While participation in a Section 18 election conclusively establishes under federal jurisdiction, participation in a Section 18 election is not required to establish such status.

States, 667 F.2d 36, 38-39 (Ct. Cl. 1981) ("Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government . . . for Indian use.").[6]

Plaintiff also claims that the Secretary's interpretation of the Section 18 is contrary to its purpose of, "protect[ing] and safeguard[ing] 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 [IRA] might be modified at the last moment so as to work injury to some group of Indians" and that it actually harms tribes. Pls. Resp. at 7 (quoting Sol. Op.). Plaintiffs' claims could not be further from the truth. Section 18 was inserted precisely for situations such as North Fork where Congress endeavored to give the Indians a choice to keep the *status quo ante – i.e.*, their existing rights – and Congress was particularly sensitive to the fact that the Act might be further amended in a way that was unfavorable to tribes and thus it provided a mechanism for the tribes to opt out of the Act's application. However, Plaintiffs argue that by allowing every Indian that was resident on a reservation to vote on the application of Section 18, the Secretary was somehow interfering with tribal membership. Pls. Resp. at 7. This argument is specious because Indians residing on a reservation were entitled to vote based on having an interest in the reservation by virtue of tribal membership or the grant of an interest. See M-27810, Question 3 (construing the right to vote under Section 18 "as comprising in its scope those Indians who reside on the reservation and at the same time have some legal interest in the affairs of the reservation."), ECF No. 115-1 at 11-13.

Furthermore, Plaintiffs example of Quinault and Cowlitz is not only irrelevant, but also wrong both factually and as a matter of law. It is true that several bands of Indians were living

[6] The history of the Rancheria system is discussed in Duncan v. Andrus, 517 F.Supp. 1 (Dist. C.Cal. 1977).

on the Quinault Reservation at the time of the IRA. This is because the Quinault Reservation was set aside, "for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast." Halbert v. United States, 283 U.S. 753, 758 (1931).[7] As such, members of those tribes were entitled to allotments on the Quinault Reservation, including members of the Cowlitz Tribe. Id. at 760. Plaintiffs argue that because Cowlitz Indians residing on the Quinault Reservation voted under Section 18, the Cowlitz Tribe would not be considered a tribe for purposes of the IRA. Pls. Resp. at 7-8.[8] However, Plaintiffs once again conflate IRA provisions in an attempt to confuse the issues. Under Section 19 of the IRA, Indians residing on a reservation are considered a tribe for all purposes of the IRA, but the definition of tribe also, "refer[s] to any *Indian tribe*, organized band, pueblo, or the Indians residing on one reservation," 25 U.S.C. 479 (emphasis added), so while an individual Cowlitz Indian may be eligible for membership in Quinault, this does not negate the existence of the Cowlitz Tribe[9] for purposes of the IRA or otherwise.

None of Plaintiffs arguments regarding Section 18 or Section 16 explain why the term "Indians" that appears in both Section 5 and Section 18 should have a different interpretation. Because a Section 18 election was held on the North Fork Rancheria in 1935, North Fork

[7]Similarly, the Rancherias were purchased for landless California Indian, rather than a specific tribe, but the definitional section of the IRA recognizes this possibility by defining the terms "Indian" and "tribe" to include a group of individual Indians residing on a reservation. Plaintiffs claim that the Secretary ignored this "uncertainty" and relied exclusively on the evidence of the Section 18 vote. Pls. Resp. at 4. But despite what Plaintiffs may want, the question at the time of the Section 18 vote was not a matter of who was eligible for residence on the North Fork Rancheria, but who was actually residing on the Rancheria by the will of the Federal government and therefore, required to vote on the application of the IRA to the Rancheria.

[8]Indeed, individual Cowlitz Indians were eligible for membership in Quinault. See Tarabochia v. Deputy Assistant Secretary-Indian Affairs, 12 IBIA 269, 274 (June 6, 1984).

[9]Interior's regulations for acknowledging Indian tribes, under which Cowlitz was successfully acknowledged, account for instances when members of a petitioning tribe also have membership in a federally recognized tribe. See 25 C.F.R. § 83.7(f). Furthermore, Plaintiffs argument runs afoul of their point in the previous paragraph regarding tribal membership.

inherently meets the first definition of Indian in the IRA because Section 19 of the IRA defines "tribe" to include "the Indians residing on one reservation." Therefore, the adult Indians residing on the North Fork Rancheria who were eligible to vote in a Section 18 election also constituted a tribe under federal jurisdiction for purposes of the IRA. As the United States notes in its opening brief, U.S. Cross-Motion Br. at 13-14 (ECF No. 112), Plaintiffs conceded that the Section 18 vote establishes that North Fork consisted of "Indians" under Section 19 of the IRA, Pls. Opening Br. at 9-10, US Cross-Motion Br. at 14, and that concession alone is enough to end this inquiry because the common thread in Sections 5 and 18 of the IRA is that both refer to "Indians" as defined in Section 19. So if Plaintiffs concede that North Fork meets one of the definitions of Indian, as they must by virtue of the Section 18 vote held for the North Fork "Indians," it is irrelevant that they disagree with the Secretary regarding which definition is applicable because regardless, the Secretary has the authority to acquire land into trust for North Fork under the IRA. This is not a concession by the United States that the Section 18 vote is not conclusive, rather, it is an acknowledgment that the parties are wasting this Court's time if everyone agrees that North Fork meets the definition of Indian in Section 19.

3. The Section 18 Vote Reflects a Contemporaneous Determination that North Fork was Under Federal Jurisdiction

Plaintiffs next make a series of arguments related to North Fork's status as a "tribe" and argue that the Secretary was required to re-examine this history in order to take the land into trust. However, Plaintiffs fail to grasp that the Department already made a decision regarding North Fork's status and that decision was made in 1935 when the vote was called. The "Department's contemporaneous construction [of a statute] carries persuasive weight." Watt v. Alaska, 451 U.S. 259, 272-273 (1981). As the Secretary concluded, the Department's prior determination is sufficient to demonstrate that North Fork was "under Federal jurisdiction" in 1934.

Plaintiffs argue that the Secretary had to establish that North Fork was a preexisting tribe for all purposes, Pls. Resp. at 13-21, but cite to no authority for this proposition. The inquiry here is whether Section 5 provides the Secretary with the authority to acquire land into trust for the Tribe, based on the language of the IRA. It was reasonable for the Secretary to conclude in the Record of Decision ("ROD") that North Fork fell within the first definition of "Indian" in the IRA because as discussed above, when the IRA was enacted the North Fork Indians were living on one reservation, and thus constituted an Indian tribe under the IRA. Residence on the reservation coupled with the Department's determination that the IRA applied to North Fork such that the Department would commit to undertake a Section 18 vote pursuant to the IRA demonstrates that North Fork was under federal jurisdiction in 1934.[10]

Plaintiffs also restate their rejected argument that the Secretary cannot rely on a single historical event to find that a tribe was "under Federal jurisdiction" in 1934, and that the Secretary must engage in a lengthy evaluation of the "under Federal jurisdiction" question. This argument was rejected in the context of the PI Motion and should be rejected again. Stand Up for California, 919 F. Supp.2d at 68-69. As the Secretary's interpretation of "under Federal jurisdiction" provides, "under Federal jurisdiction" can be demonstrated by a single action or a series of actions taken for the benefit of the Tribe. An example of a single action is the calling of a Section 18 election. That there is additional evidence supporting a finding of "under Federal jurisdiction" does not undercut reliance on the Section 18 election alone, and the Court has already rejected Plaintiffs' argument that supporting evidence located elsewhere in the ROD or

[10] To the extent that Plaintiffs are suggesting that North Fork must meet the modern concept of federal recognition, Plaintiffs are misreading the statute, as "now" modifies "under Federal jurisdiction" not "recognized." See Confederated Tribes of Grand Ronde, 2014 WL 7012707 at *9.

the administrative record cannot be used to further demonstrate "under Federal jurisdiction" status. Id.

There is simply no requirement in the IRA or in Carcieri for the Secretary to draw familial or other connections among the individuals that comprised North Fork when the Rancheria was acquired in 1916, with the individuals that comprised North Fork in 1935, the individuals that comprised North Fork at the time of termination and restoration, and the individuals that comprise the Tribe today. That membership in a tribe may have changed over time, and that North Fork did not formally organize a tribal government pursuant to Section 16, is not dispositive of the Secretary's authority to acquire land in trust for them. And it certainly cannot trump the Department's recognition in 1983 that North Fork was improperly terminated and should be restored to its tribal status and added to the official Federal Register list of federally recognized Indian tribes. NF_AR_0001063-1076. The determination that North Fork was a recognized Indian tribe with a government-to-government relationship with the United States was established then and cannot be challenged by Plaintiffs now.[11]

Finally, Plaintiffs again misconstrue the United States' argument regarding the Tillie Hardwick litigation. There is a statement in the United States' opposition to the motion to supplement the record that the Tillie Hardwick litigation establishes that North Fork was "under federal jurisdiction." U.S. Opp. Br. to Mot. to Supp. AR at 7 (ECF No. 89). However, the

[11] Plaintiffs make general statements concerning other unidentified California tribes and statements concerning Alexander Valley, none of which "prove" anything about North Fork's history or status. Plaintiffs insist on some rigid concept of "tribe" and tribal membership and then assert that changes in such membership over time means that North Fork did not have a continuous existence as a single entity. That membership changed does not mean there are multiple "North Fork Rancherias" in existence. There is one entity known as the North Fork Rancheria whose membership changed over time. Plaintiffs' contentions to the contrary — going so far as to refer to material the court has already struck from the record — should be rejected. Order Granting in Part and Denying in Part the Plaintiffs' Motion to Supplement the Administrative Record and Compel Production of a Privilege Index, ECF No. 94 at 9-18.

Secretary does not make this statement in the ROD and the United States did not make this argument in briefing the merits of the IRA issue in opposition to motion for a preliminary injunction or in the United States' cross-motion for summary judgment/response to summary judgment. The Tillie Hardwick litigation simply provides the Court with factual information regarding the history of North Fork and its termination and restoration as a federally recognized Indian tribe. Plaintiffs quibble with the statement in the Tillie Hardwick stipulation that the "Tribes, bands, Communities and groups [restored] shall be included on the Bureau of Indian Affairs' Federal Register list of recognized tribal entities pursuant to 25 C.F.R. Section 83.6(b)" and the Secretary's restoration of North Fork's tribal status, but if Plaintiffs wanted to challenge the Tillie Hardwick stipulation, North Fork's restoration, or the Secretary's decision to place North Fork on the Federal Register list of federally recognized tribes in 1985 and thereafter, the time for doing so has long since passed.

Plaintiffs' arguments are nothing more than an attempt to confuse the issues. The question for the Court is: does the Secretary have authority under Section 5 of the IRA to acquire land in trust for North Fork? That answer is yes, as confirmed by the language of the IRA, ILCA, and the Carcieri decision. It was reasonable for the Secretary to conclude in the ROD that, in light of the language of the IRA, the ILCA amendment to the IRA extending Section 5 to "all tribes" 'notwithstanding Section 18," and the Carcieri decision itself, which states "that tribes may benefit from § 465 even if they opted out of the IRA pursuant to § 478, which allowed tribal members to reject the application of the IRA to their tribe," Carcieri, 555 U.S. at 394-95, that North Fork fell within the first definition of Indian in the IRA. That North Fork may have fallen into other definitions of "Indian" – which Plaintiffs appear to concede – only further supports the Secretary's conclusion that she has authority to acquire land in trust for North Fork under the Act.

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

1. The Secretary Applied the Appropriate Scrutiny Under IGRA and Stand Up Misunderstands Chevron deference

Stand Up has failed, again, to offer any support for its propositions that "state concerns must trump the general purpose of IGRA," and that the Secretary must find that "no detriment will result from [a] casino." Pls. Resp. at 33. Stand Up has not cited a single provision of law or any case where a court adopted this approach. And there is no such case, because such a case would be a judicial usurpation of Congress's express language and the intent of IGRA. As Stand Up acknowledges, this Circuit has held that "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 about Casinos v. Kempthorne ("CETAC"), 492 F.3d 460, 469 (D.C. Cir. 2007); Stand Up for California, 919 F. Supp. 2d at 74. Stand Up also argues that the Indian canon should not apply, because another Tribe has sued the Secretary. That argument misses the mark, because the two-part determination's examination of "surrounding community," 25 U.S.C. § 2719(b)(1)(A), cited by Stand Up does not involve adverse tribal interests or apply equally to two tribes in this case. It involves only the Tribe and the "surrounding community" as defined by IGRA and the Secretary's regulations. The two-part determination's examination of surrounding community applies only to the surrounding area within a 25 mile radius, and any ambiguity should be interpreted in favor of the tribes it was meant to benefit.

The Secretary has used her rule-making authority to define what constitutes detrimental impacts to the surrounding community, 25 C.F.R. § 292.18, 292.21, and has applied her considerable expertise to explain that the proposed casino will not have a detrimental impact on the community. NF_AR_0029705-812. The Secretary considered a vast range of impacts,

comments for and against the proposed gaming facility, and examined significant mitigation measures. Id. Stand Up has not shown any particularized evidence that indicates the Secretary's action was arbitrary or capricious. The Secretary's determination that the Casino is in the interest of the Tribe and its members and not detrimental to the surrounding community is reasonable, and entitled to deference.

Stand Up admits that the statute cannot be reasonably construed as requiring a finding that there will absolutely be no detriment to the surrounding community whatsoever, Pls. Resp. at 34, but stops short of admitting that the Secretary already defined detrimental impacts when she promulgated 25 C.F.R. 292.18. Instead, Stand Up contends that the Secretary did not "consider and evaluate the FEIS." Pls. Resp. at 35. Stand Up specifically claims that "the Secretary merely identifies impacts and then states that such impacts would be mitigated to a less than significant level." Id. The Secretary did not "merely" do this — the Secretary devoted considerable expertise, to identify, in detail, each potential impact, to discuss those impacts at length, and then to propose mitigation to account for those impacts. This discussion is included in the Final Environmental Impact Statement ("FEIS"), NF_AR_0029670-0036137, which in its entirety contains thousands of pages of analysis. Stand Up states this "is nothing more than a list," Pls. Resp. at 36, but this contention merely demonstrates that Stand Up has failed to look at the thousands of pages of documentation and analysis surrounding that list.

Stand Up cites to only a few pages of the administrative record to support its claim that the Secretary did not properly evaluate problem gamblers. Pls. Resp. at 33, 36, 52. But the Secretary's discussion was not so limited. The FEIS discussed several studies concerning problem gamblers and cited a study that found "problem gambling may be attenuated, or possibly reversed, through the expansion of problem gambling services." NF_AR_0030198. The FEIS then stated that, in light of the findings in the FEIS regarding problem gambling, the

Tribe entered into an agreement with the county to contribute $50,000 annually to be used to increase services for problem gamblers. Id. The FEIS also described other mitigation measures to further mitigate any impact, NF_AR_0030508-10, and provided other funds for additional fiscal impacts. NF_AR_0029848-59, 0030204-05, 0030207-12. The record itself, and the Secretary's explanation in the ROD, NF_AR_0040511, 0040517, 0040525-6, defy any claims that Secretary's opening brief was a post hoc justification, because the potential impact of the proposed gaming operation and the appropriate mitigation was carefully explained.

Stand Up's argument that the Record of Decision "fails to even mention problem gamblers," Resp. Br. at 36, ignores the numerous references and discussion of "problem gamblers" in the FEIS. The Record of Decision discusses "problem gamblers" at four points. NF_AR_0040511, 0040517, 0040525-6. The FEIS, which the Secretary relied upon in the Record of discussion, also includes a thorough discussion of problem gamblers. NF_AR_00030196-99. Nevertheless, Stand Up claims that the Record of Decision is "the most egregious rubber-stamping of the FEIS," but it is not apparent that Stand Up has even reviewed the record of decision (if Stand Up has reviewed the Record of Decision then its statement that the Record of Decision "fails to even mention problem gamblers," Resp. Br. at 36, is misleading), as evidenced by its failure to note the multiple references to problem gamblers in that document. The Record of Decision, FEIS, and the administrative record exhaustively examine every issue the Secretary was required to consider. The Secretary's conclusion that there was no detrimental impact to the surrounding community was reasonable, supported by the administrative record, and entitled to deference.

2. The Plaintiffs Have Ignored Plain Statutory Language and Conflated the Secretary's Process for Approving Compacts with the Secretary's Two-Part Determination

Stand Up erroneously argues that the "core circumstances of the two-part determination have changed" because it has challenged the Compact. Pls. Resp. at 26. Setting aside, for now, arguments concerning the Compact, Stand Up has confused the compact approval process with the two part-determination. Congress was not, however, confused, and specifically described two different processes.

The two-part determination is described in IGRA, 25 U.S.C. § 2719(b)(1)(A) and in Interior's implementing regulations at 25 C.F.R. § 292. These authorities address whether Class II or Class III gaming can occur on lands acquired in trust after 1988. Only a governor has the power to concur with the Secretary's two-part determination. 25 U.S.C. § 2719(b)(1)(A) ("but only if the Governor of the State in which the gaming activity is to be conducted concurs"). Stand Up argues, in effect, that the plain language of IGRA is wrong, and that "invalidity of the Governor's concurrence renders the two-part determination entirely invalid." Pls. Resp. at 37. Stand Up's argument seems largely predicated on bizarre readings of case law and statute, as well as confusion regarding the separate process by which Compacts are approved.

Stand Up confuses the two-part determination with the entirely separate process for approving Compacts. Compacts are approved and submitted pursuant to 25 U.S.C. § 2710(d)(8) and the regulations at 25 C.F.R. Part 293. These address when a compact should be submitted, the grounds for reviewing a compact, and how a compact goes into effect. The approval process for compacts is distinct from the two-part determination, in statute, regulation, and fact. Stand Up's confusion should not be allowed to cloud review of the Governor's concurrence in the two-part determination or this Court's review of the gaming compact's validity.

3. Stand Up's Arguments About the Governor's Concurrence in the Two-Part Determination Fail to Address IGRA's Statutory Language

Stand Up fails to address IGRA's plain language that a governor may concur in the two-part determination. To wit, IGRA states that the general prohibition on gaming on after acquired trust land will not apply when the Secretary issues her two-part finding "but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination . . . ." 25 U.S.C. § 2719(b)(1)(A). Conversely, Stand Up contends that the Governor's concurrence is insufficient under state law. Stand Up insists that "Plaintiffs take the position that the California Court of Appeals is the proper court to address plaintiffs' challenge to the validity of the concurrence under state law," Pls. Resp. at 37-38, even though Stand Up lost this very issue in state court. Stand Up for California! v. California, No. MCV062850 (Superior Ct. Cal. Mar. 27, 2013). And now Stand Up asks this Court to disregard that result and delve into the complexities of state law (which are irrelevant here), all in order to avoid addressing the plain language of IGRA that says that the "Governor of the State" is who concurs in a two-part determination. There is no merit in, or legal support for, Stand Up's approach.

Plaintiffs cite Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688, 696 (9th Cir. 1977), for the proposition that the Secretary's power to acquire "Indian trust lands for gaming purposes is . . . limited by a constingent requirement of state approval." Pls. Resp. at 38. In the same paragraph of that opinion, "contingent requirement" is described as the "governor concurrence provision of IGRA." Id. at 696. IGRA states that the governor may approve the two-part determination. There is no room in IGRA's language regarding two-part determinations for an exegesis of state law, particularly on an issue that Stand Up lost in state court.

C. THE SECRETARY IS ENTITLED TO SUMMARY JUDGMENT ON STAND UP'S IGRA CLAIMS RELATED TO THE COMPACT, AS WELL AS ANY ISSUES RAISED FOR THE FIRST TIME IN PICAYUNE'S MOTION FOR SUMMARY JUDGMENT

Neither Stand Up nor Picayune have argued that the Tribal-State Gaming Compact itself violates any portion of IGRA. Picayune Resp. 1-26, Pls. Resp. 1-64. The sole basis of their argument is that the Compact was never entered into by the State of California.

1. The Compact Complied With Federal Law

The Secretary's approval of a compact is an issue of federal law. The Secretary has the authority "to approve compacts or amendments 'entered into' by an Indian tribe and a State, as evidenced by the appropriate signature of both parties." 25 C.F.R. § 293.3, and "[t]he Indian tribe or State should submit the compact or amendment after it has been legally entered into by both parties." Id. § 293.7. The parties do not contest that all the appropriate documentation, including the "Certification from the Governor or other representative of the State that he or she is authorized under State law to enter into the compact or amendment," was present in this case. Id. § 293.8. Finally, even with a potential referendum, neither the State nor the Tribe submitted a request to withdraw the Compact. Id. § 293.13.

Stand Up asserts that the State of California erred when it submitted the Compact to the Secretary for approval. The Governor of California stated that he had "entered into compact[] with the North Fork Rancheria Band of Mono Indians." NF_AR_GC00007.[12] The California Secretary of State likewise stated "I am forwarding you the Tribal-State Gaming Compacts

[12] Stand Up contends, Pls. Resp. at 23 n.17, that the Compact was signed in August 2012 but not ratified by the legislature until later and therefore, is not evidence that the Compact has been legally entered into. This argument ignores the Secretary's regulations, which focus on when a compact is submitted and what must accompany the submission, Stand Up also ignores the California Secretary of State's statement in her letter covering her July 9, 2013, submission of the Compact for review by the Secretary that the Compact was entered into because the legislature enacted a bill which was signed by the Governor that approved the Compact.

entered into by the State of California with the North Fork Rancheria of Mono Indians and the Wiyot Tribe." NF_AR_GC000015.

Stand Up claims that the Compact was "forwarded with an explanation that the compact would not take legal effect under California law," Pls. Resp. at 23, but that statement is not a quote from the letter Stand Up is citing. In fact, California's Secretary of State stated that:

> "California Government Code § 12012.2, Subdivision (f) requires me, as Secretary of State, to forward upon receipt a copy of an executed Tribal-State gaming compact and a statute ratifying the compact, passed by a majority of members of each house of the California Legislature and signed by the Governor."

NF_AR_GC000015. That is to say, the compact was, in fact, an "executed Tribal-State gaming compact." NF_AR_GC000015. California's Secretary of State noted that a referendum had been filed but that "[i]t is, of course, a question of federal law" "whether, prior to the exhaustion of the referendum process, such a compact has been entered into by the State of California within the meaning of 25 U.S.C. § 2710(d)(8)(A)." NF_AR_GC000016. California's Secretary of State had already stated, "I am forwarding you the Tribal-State Gaming Compacts entered into by the State of California with the North Fork Rancheria of Mono Indians and the Wiyot Tribe." NF_AR_GC000015. Under Federal law, the "Indian tribe or State should submit the compact or amendment after it has been legally entered into by both parties." 25 C.F.R. § 293.7. That is what happened here—according to both the Governor of California and the California Secretary of State. The California Secretary of State posed questions concerning the referendum but, despite those questions, unambiguously stated that California had entered into the compact.

Stand Up claims that 25 C.F.R. § 293.3 "merely authorizes the Secretary to assume the compact has been legally entered into if it has been signed by the state and tribal representatives," Pls. Resp. at 22, but that it "in no way purports to grant the Secretary the power to deem the compact legally entered into by the State." Id. The regulation states that a compact is entered into, as evidenced by the appropriate signatures of both parties. But Stand Up

continues, stating that if that were so, then the Compact would have been forwarded as soon as it was signed. Id. This ignores the Secretary's regulations, which also state "[t]he Indian tribe or State should submit the compact or amendment after it has been legally entered into by both parties." 25 C.F.R. § 293.7. Moreover, it also ignores the fact that the Compact was also signed by Governor Brown on July 3, 2013, after the legislature approved it. NF_AR_GC000012. When the Compact was legally entered into, the State of California submitted it to the Secretary. NF_AR_GC00005.

Another critical flaw in Stand Up's arguments is demonstrated by its assertion that the "Secretary was required to reject the compact because it was sent in violation of 25 C.F.R. § 293.7." Pls. Resp. at 23. IGRA is quite clear about when "the Secretary may disapprove a compact." 25 U.S.C. § 2710(d)(8)(B). The Secretary "may disapprove a compact . . . only if such compact violates — (i) any provision of this chapter, (ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or (iii) the trust obligations of the United States to the Indians." 25 U.S.C. § 2710(d)(8)(B)(i)-(iii).[13] The plaintiffs in this case have not identified any such violation. Stand Up states its argument clearly--that the California Secretary of State allegedly submitted the compact for approval too soon, thus triggering the statutory 45-day period for the Secretary's review that cannot be tolled absent a written withdrawal request signed by both the State and the Tribe. See 25 CFR § 293.13. But even if Stand Up were right, under the very terms of IGRA, Stand Up cannot get the remedy it seeks. The Secretary is not required to conduct an inquisition into the internal politics of the State of California, and IGRA does not include the outcome of an inquiry into state law as a reason for

[13] In Amador County v. Salazar, 640 F.3d 373, 381 (D.C. Cir. 2011) the Court held that a "deemed approved" gaming compact was reviewable, and in dicta determined that "the Secretary may disapprove a compact," 25 U.S.C. 2710(d)(8)B), should be more accurately read as "the Secretary shall." Amador County is therefore not applicable here because Stand Up has not alleged that any of the actual terms of the Compact violate IGRA.

rejecting a compact. The submission met all of the Secretary's regulatory requirements — (i) the compact was signed by the appropriate parties, and was thus entered into, and (ii) the Governor of California and California Secretary of State both stated the compact had been "entered into by the State of California."

Stand Up concedes 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 compact . . ." Pls. Resp. at 23. These were normal circumstances. The California Secretary of State, following her long-standing practice, submitted the North Fork gaming compact for review, as she had done for over 60 compacts since 2000.[14] Every requirement listed in IGRA and the Secretary's regulations were satisfied. The Department of the Interior should not be required to presume that a constitutional officer of the State of California was somehow acting *ultra vires* when she submitted the Compact for review under IGRA. Because the California Secretary of State's submission complied with Secretary's regulations, 25 C.F.R. §§ 293.1-.16, IGRA's statutory 45-day review period was triggered. 25 U.S.C. § 2710(d)(8)(C). Only a request to withdraw the compact by both parties could have stopped the 45-day review process. 25 C.F.R. § 293.13. No such request was made.

2. Plaintiffs' Reliance on Pueblo of Santa Ana v. Kelly is Misplaced

The Plaintiffs' reliance on Pueblo of Santa Ana v. Kelly, 104 F.3d 1546 (10th Cir. 1997) is sorely misplaced. The facts in that case are inapposite of those here. In Pueblo of Santa Ana, New Mexico's governor signed the compacts even though Class III gaming was not authorized under New Mexico law. Id. at 1548. The compacts he submitted to the Secretary were affirmatively approved, not deemed approved, and published in the Federal Register. Id. at 1550. Following this approval of the compact, the New Mexico Supreme Court ruled that the

[14] *See generally* http://www.bia.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm#California.

"Governor of New Mexico, who had signed the compacts, lacked the authority to do so and at least suggested that New Mexico law did not permit the kind of gambling they were conducting." Id. at 1548. The affected Tribe sued in federal court, seeking declaratory relief that the United States Attorney for New Mexico could not prosecute them for conducting Class III gaming.

At the outset—unlike Pueblo of Santa Ana, there is no state supreme court ruling that the State of California did not lawfully enter into a gaming compact. Both the California Secretary of State and Governor of California stated that the Compact had been entered into. In Pueblo of Santa Ana, the New Mexico Supreme Court had ruled that the Governor lacked authority to enter into such a compact. Here, there is no such ruling from any state authority. And the Court in Pueblo of Santa Ana did not reach the question of whether it was required to rely on the State Court to determine whether the State law was valid, or whether it could forge its own path. Id. at 104 F.3d 1559.

Unlike Pueblo of Santa Ana, Class III gaming is legal in California. Cal. Const. art. IV, § 19(f). The parties in that case argued that compacts, in New Mexico were approved with the consent of the legislature and there had never been a Class III gaming compact in New Mexico. Since 2001, as noted above, the California Secretary of State has submitted over 60 gaming compacts for approval. The situations are not at all similar.

Finally, since the Pueblo of Santa Ana decision, the Secretary has promulgated regulations governing the compact submission process. Stand Up asserts that the regulations cannot close a gap because there is no gap in IGRA. Resp. Br. at 30. Stand Up's approach relies on its own conclusion that the State of California acted without authority and did not validly enter into the Compact. However, the Secretary reasonably determined that the requirements of IGRA and the Department's compact submission regulations at Part 293 were met. Both the Governor of California and the California Secretary of State stated that the compact was entered

into. NF_AR_GC_000007, 000015. Unlike Pueblo of Santa Ana, Class III gaming is legal in California and no California state court has said that the Governor and California Secretary of State acted inappropriately. And under federal law, which is the only relevant standard here, the Secretary's deemed approval was compliant with IGRA.

3. Stand Up's Assertion that "Federal Approval of the Compact, Does Not Render the Compact Effective Under IGRA" is Contradicted by IGRA

Stand Up asserts that "Federal approval of the compact does not render the compact effective under IGRA." Pls. Resp. at 22. This is incorrect. First, Plaintiffs have not cited any authority in support of their proposition, which ignores the plain language of IGRA that "[t]he Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this [IGRA]." U.S.C. § 2710 (d)(8)(D). Second, IGRA unambiguously states that a "compact shall take effect only when the notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." 25 U.S.C. § 2710(d)(3)(B). Once a compact has been published in the Federal Register and is in effect, IGRA provides no authority for the Secretary to revisit a compact approval or disapproval, nor does IGRA provide any authority to somehow delay the effective date of a compact once it is published.

D. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT ON PICAYUNE RANCHERIA'S CLAIMS

1. The Plain Language of the IGRA Regulations Demonstrates that Picayune is Not a Nearby Indian Tribe

Picayune asserts that the definition of surrounding community, which excluded them, is a "rebuttable presumption." Picayune Resp. at 10. This argument is rebutted by the fact that Picayune requested that the Secretary consult with Picayune as if it were within the 25-mile radius and the Secretary never granted that petition. NF_AR_0040534, 25 C.F.R. § 292.2

(defining "surrounding community" to include "local government and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment").

Picayune's claim that the administrative record shows that Picayune "successfully rebutted the 25-mile presumption," Picayune Resp. at 11, is undermined by the fact that the Secretary never granted Picayune's petition for consultation, even though the Secretary afforded Picayune's comments "some weight." NF_AR_0040534-535. This Court found that the Secretary "only meant that the Secretary was required to consider the Picayune Tribe's comments at all, not that the Secretary was compelled to afford those comments a weight that was equal to all other comments." Stand Up for California, 919 F. Supp. 2d at 51 (D.D.C. 2013). The fact that the Secretary reviewed Picayune's comments "in a manner consistent with the definition of 'Surrounding community' under 25 C.F.R. § 292.2," NF_AR_0040530, in no way establishes that the Secretary granted Picayune's petition. 25 C.F.R. § 292.2. Picayune claims that the Secretary fails to cite "any support for the concept that some sort of formal approval is necessary," Picayune Resp. at 12, but Picayune's opening brief cited 25 C.F.R § 292.2, which states that an entity "located beyond the 25-mile radius may petition for consultation." The simple fact is the Secretary never stated that such a petition was granted. The Secretary merely afforded "some weight" to Picayune's comments. There was no requirement to do so.

Picayune argues that the Secretary ignored the alleged serious harms that would be inflicted on Picayune in concluding that "competition from the [North Fork's] proposed gaming facility in an overlapping gaming market is not sufficient, in and of itself, to conclude that it would result in a detrimental impact to Picayune." NF_AR_0040535. The Secretary's decision is entitled to deference and the Secretary determined that the alleged harms to Picayune would not result in a detrimental impact to Picayune. Picayune is entitled to disagree. But asserting that "*this* level" of harm is enough, Picayune Resp. at 13, is not Picayune's role, but the

Secretary's. The Secretary relied on evidence and her expertise to make her decision, including reliance on a gravity model impact analysis which stated that the Madera Site would not jeopardize Picayune's casino's ability to operate profitably. NF_AR_0030250-51. Picayune cites to no authority to support its argument that IGRA and its regulations prohibit any form of competition and there is no such authority.

Picayune does not address the arguments that it has failed to state which faction it represents, leaving it in question whether it represents the faction which is recognized for some limited purpose. See Picayune Rancheria of the Chukchansi Indians v. Pacific Regional Director, IBIA Docket nos. Nor does it address the effects of the Chukchansi Casino's closure on this case. Instead, Picayune calls these "gratuitous, ad hominem attacks," but, the question of who is filing its brief and appearing in this Court is a relevant one, and one Picayune has refused to answer. If the filing party does not represent the Picayune Rancheria of Chukchansi Indians, its position in this case is precarious. It is telling that Picayune will not simply state which faction it represents.

All of Picayune's arguments ignore the fact that Secretary also considered that gaming at the Madera site would be in the interest of the North Fork Tribe. NF_AR_0040445; see 25 U.S.C. § 2719(b)(i)(A)-(B). The Secretary considered the fact that the North Fork Tribe had an unemployment rate far higher than state and national rates, NF_AR_0040501, high poverty rates, and that the proposed gaming project would alleviate the needs of the North Fork Tribe and its citizens.

2. The Secretary's Decision Explains Why Alternative Sites Were Eliminated and is Entitled to Deference; There Are No Inconsistencies

Contrary to Picayune's arguments about consistency, the two distinct inquiries called for in the two-part determination are just that: distinct. Picayune Resp. at 15-17. IGRA sets forth an inquiry to determine if the exception permitting gaming on after-acquired land is permissible.

25 U.S.C. § 2719(b)(1)(A). IGRA was not meant to prevent Tribes who are now acquiring land from engaging "in gaming on par with other Tribes." CETAC, 492 F.3d at 468. The Secretary is required by IGRA to determine whether the proposed gaming will be beneficial to the Tribe and its citizens. Picayune argues that because its casino may be exposed to competition, that the Secretary may not consider any such project because it might be detrimental to them. Picayune also claims that the Secretary's dismissal of Picayune's concerns about the unfair competitive advantage conflicts with its rejection of an alternative site out of concern for Picayune. But IGRA does not insulate Picayune from market forces. Id. The Secretary did not use inconsistent reasoning, but instead used the reasoning specified by IGRA.

Picayune also argues that the Secretary should not have rejected certain alternatives. Picayune Br. at 16. But this argument ignores the reasons given in the FEIS for why these sites were rejected and does not engage with the Secretary's reasoning. NF_AR_0041147-58. The Secretary selected the appropriate Madera site for a variety of reasons, id., and Picayune's objections, which largely stem from the fact that Picayune expects competition from the proposed casino, are simply not supported by the law or record.

3. The Tribe's Historical Connection to the Madera Site is Supported by the Record

Picayune's arguments are not substantially different from those raised in its opening brief. Picayune Br. at 21-23. Picayune has still not responded to the extensive discussion of historic witnesses, NF_AR_0040504, the Tribe's documented presence working on vineyards near the Madera Site, NF_AR_0040508-09, or the Tribe's longstanding connection to the river near the Madera site, which was the source of materials for the baskets the Tribe is famous for. NF_AR_0040509. Picayune continues to cling to its argument that its lay-opinion of a map trumps the opinion of the Secretary, who explained that map in the record. NF_AR_0039857-58. Picayune does not even engage with the Secretary's explanation. Nor does Picayune

respond to the fact that its own expert disagreed with its arguments on this point. NF_AR_0000006. Likewise, Picayune refuses to respond to reports that the Monos not only subsisted near the Madera site, but lived there as well. NF_AR_0001002. Although Picayune does not address any of these sources, Picayune does cite portions of other sources that also demonstrate the Tribe's historical connection with the Madera site. Picayune's failure to respond to the Secretary's arguments and citations to the record, except to add additional citations to the record which show the Tribe's longstanding connection to the Madera site, demonstrates that the Secretary's determination was reasonable, based on considerable expertise, and entitled to deference.

4. Picayune's Attempt to Amend Its Complaint by Adding New Claims to Its Brief Should Be Rejected

Picayune claims that it can add new claims to its complaint by adding them to a brief because the United States' cross motion for summary judgment addressed this issue in a footnote. Picayune offers no support for the proposition that it may add new claims in this fashion. Instead, Picayune cites authority that says perfunctory arguments cannot be raised for the first time in a footnote on appeal, Davis Broad. Inc. v. FCC, 63 Fed. Appx. 526, 527 (D.C. Cir. 2003), that the Court would not consider an argument in a footnote that "cited not a single authority in support of that proposition," Texas Children's Hosp. v. Burwell, — F. Supp. 3d —, 2014 Wl 7373218, at *13 n.6 (D.D.C. Dec. 29, 2014), and an argument "buried" in a footnote on summary judgment was not considered at the appellate level. To-Am Equip. Co. v. Mitsubishi Caterpillar Forklift Am. Inc., 152 F.3d 658, 663 (7th Cir. 1998). The two footnotes addressing Picayune's failure to amend their complaint were not perfunctory, contained a citation, and were apparently so deeply buried that Picayune dedicated one and a half pages of a twenty page reply brief to refuting them.

E. THE SECRETARYADHERED TO THE NATIONAL ENVIRONMENTAL POLICY ACT

The Secretary considered a vast range of impacts and alternatives under the National Environmental Policy Act. Stand Up's arguments amount to nothing more than its disagreement with the outcome of the Secretary's well-reasoned and well-supported decision. Stand Up's contentions are contradicted by explicit evidence in the record. Its arguments consist of discounting what is in the record and then proposing unsupported allegations of conspiracy theories, speculating on the appropriate manner to assess environmental contamination, and opining on how Stand Up thinks the Secretary should do her job.

Stand Up's quarrel with the Secretary's analysis of alternatives and her rejection of alternatives that were not feasible is in conflict with the applicable legal standards. "If the agency's objectives are reasonable, we will uphold the agency's selection of alternatives that are reasonable in light of those objectives." Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 73 (D.C. Cir. 2011). This inquiry demands "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).

Although the Secretary was told that the Old Mill site was not available by those who owned the site, NF_AR_0009399, Stand Up insists that the Secretary somehow erred by "blindly" accepting the owner's statement. Pls. Resp. at 50. Stand Up can provide no contradictory evidence so, instead, it proposes an outlandish scenario and demands that the Secretary ignore the evidence in front of her, that the land was unavailable. Id. Likewise, Stand Up insists that the Secretary should have quantified the presence of hazardous substances on the Old Mill site. Pls. Br. at 49. Stand Up can cite no evidence that there were not hazardous materials on the site and its assertion that the Secretary used "environmental contamination as a pretense," id., accuses the Secretary of fraud without citing a *single* piece of evidence. Stand Up

also rejects the Secretary's other reasons for rejecting that site, but offers no evidence, other than crude conjecture without citation, that would contradict the Secretary's reasoning. Stand Up's apparent response to the Secretary's citations to the record is to argue the record is not true. There is no authority anywhere that suggests that a govern agency cannot reject a potential alternative for the presence of hazardous materials without first performing an expensive and intrusive examination of just how many hazardous materials are present on a site. Council on Environmental Quality "regulations oblige agencies to discuss only alternatives that are feasible, or (much the same thing) reasonable." Citizens Against Burlington, 938 F.2d at 195 (citing 40 C.F.R. §§ 1502.14(a)-(c); 1508.25(b)(2)). In the absence of any citations to contradictory information in the record Stand Up's claims must be rejected. Moreover, Stand Up's arguments simply are not tied to any cognizable application of NEPA.

Stand Up also claims that the Secretary failed to account for community opposition to the Madera site. Pls. Resp. at 49. Although some in the community also supported the project, there is no requirement in NEPA that a project be completely abandoned because of the existence of some community opposition. NEPA is only a procedural statute and does not direct a particular result. Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 558 (1978) (NEPA is "essentially procedural").

Next, even though the Secretary carefully considered the project's impact on crime, Stand Up simply asserts that the Secretary is wrong and cites only a portion of the record, leaving out statements in the FEIS such as "[a]lthough instance of these crimes have increased in all of the casino communities, no [law enforcement] department could implicate the casino as the direct cause of the increase in crime." Instead, the law enforcement agencies stated that the "increased concentration of people within the local area led to the increase in crime." NF_AR_0030196. The "total number of crimes is minimal in comparison to the overall number of crimes in the

surrounding communities." Id. The same discussion also includes to multiple citations, not only to merely the single study mentioned by Stand Up. Id. In fact, the sole study Stand Up discusses "found that insufficient data exists to quantify or determine the relationship between casino gambling within a community and crime rates." NF_AR_0030197. In addition to contacting local law enforcement in counties where a casino is located, the Secretary carefully reviewed the relevant literature examining the alleged relationship between casinos and crime. NF_AR_0030196-7.

Stand Up finally retreats to its assertion that the FEIS did not adequately consider the impacts of problem gamblers. Pls. Resp. at 52. The record carefully details the mitigation measures to address problem gambling. NF_AR_0030198, 0030509. It also cites to a study which found that problem gambling may be attenuated by the expansion of problem gambling services. NF_AR_0030198. Although a fiscal impact of $13,606 was created by a shortfall of funding to counsel problem gamblers, the mitigation measures also require reimbursement to Madera County in the amount of $1,038,310 annually for fiscal impacts. These fiscal impacts are detailed in the FEIS. NF_AR_0030199-212. That table specifically details the funding shortfall. NF_AR_0030205. In short, the Secretary complied with the process detailed by NEPA.

F. THE UNITED STATES IS ENTITLED TO SUMMARY JUDGMENT ON STAND UP'S CAA CLAIMS

Stand Up's latest brief simply repeats the same arguments rejected by the Court in granting the Secretary's motion for voluntary remand. These arguments should again be rejected and the Court should grant the United States' motion for summary judgment on Stand Up's Clean Air Act ("CAA") claim. The Secretary properly determined that the Project conforms to the applicable state implementation plan if the Tribe provides sufficient mitigation, consistent with 40 C.F.R. § 93.160, to offset the projected emissions.

1. Stand Up's Procedural Complaints Are Unfounded

Stand Up again asserts that the Court must vacate the Secretary's entire fee-to-trust approval because the Secretary did not properly comply with all of the CAA notice requirements before issuing the Final General Conformity Determination for the North Fork Casino/Hotel Resort Project (June 18, 2011) ("2011 Determination"). Pls. Resp. at 52-54. As previously explained, the Secretary did not have proper documentation of compliance with 40 C.F.R. § 93.155. This provision requires that 30 days notice of the proposed action and the draft conformity determination, as well as notice of the final determination, must be provided to specific federal, state and local agencies and tribal governments. Id. § 93.155(a), (b). In granting the Secretary's motion for remand of the 2011 Determination, the Court rejected Stand Up's argument that the procedural deficiency required vacatur of the fee-to-trust approval, and the Court remanded the determination to the Secretary to complete the notice process required by section 93.155(a) and (b). Memorandum Opinion and Order (Dec. 16, 2013) ("Opinion") (citing Sugar Cane Growers Co-op. of Florida v. Veneman, 289 F.3d 89, 98 (D.C. Cir. 2002)). ECF No. 77.

Stand Up now repeats its claim that the Secretary did not give adequate consideration to its comments because the Secretary did not vacate the 2011 Determination and the fee-to-trust approval before providing the requisite notice and concluding that the determination should be reissued. Pls. Resp. at 56. Stand Up's complaints amount to nothing more than speculation. As the Court previously observed, section 93.155(a) and (b) do not provide that the designated recipients of the notice may submit comments for the Secretary's consideration. Opinion at 7. Moreover, Stand Up is not even one of those recipients.[15] The Secretary did accept comments

[15] Plaintiff Picayune has not asserted a CAA claim in its motion for summary judgment.

and prepared a response – all of which is included in the administrative record before the Court. Stand Up is not entitled to anything more.

2. The Secretary Used the Appropriate Emission Estimation Model

Stand Up further claims that the Secretary's procedural error with respect to notice could not be remedied without completely redoing the entire conformity analysis using a new emissions model approved by EPA in 2013, two years after the 2011 Determination was issued. (The Determination was premised on the model approved by EPA in 2007.) Stand Up again relies on EPA's conformity regulations, 40 C.F.R. § 93.159(b), which requires that the Secretary use the "latest and most accurate emission estimation techniques available."

Stand Up contends that the Secretary could not reissue the Conformity Determination in 2014 without redoing the entire analysis using the 2013 model (referred to as "EMFAC2011"). As the Court previously noted, Stand Up does not explain why the reopening of the notice process would require a repetition of the entire underlying analysis. The remand was tailored to allow the Secretary to remedy a specific possible deficiency in the notice process; the Court declined to require the Secretary to repeat the underlying analysis. Opinion at 7. The Secretary considered the comments received in response to the notices distributed pursuant to the Court's Opinion and reasonably concluded that a revision to the 2011 Determination was not warranted.

In any event, the question of whether the new model must be used does not depend on the date that a final determination is issued. EPA, in approving the 2013 model, expressly stated that only emissions analyses that were "*started* on or after September 6, 2013" would be required to use the model. 78 Fed. Reg. 14,533 (Mar. 6, 2013) (emphasis added). As the Court previously held, this language means that the new model is not required "for the already instituted conformity determinations at issue here." Opinion at 7-8. Thus, there would be no reason to use

the new model unless the Secretary had determined that the comments required the Secretary to begin a completely new modeling analysis in order to make a new final determination.

3. The Secretary Reasonably Estimated the Average Trip Length

Stand Up argues that the administrative record does not support the Secretary's use of an average trip length of 12.6 miles for purposes of the conformity analysis. Pls. Resp. at 59-61. Stand Up does not suggest an alternate figure that should have been used, but simply complains that the Secretary's figure is not justified. As previously explained, however, the length of trips was based on the traffic data developed from the model data from the Fresno County Council of Governments and the Madera County Transportation Commission. 2014 Response to Comments, at 5-7. NF_AR_NEW_0001949-51. See also NF_AR_NEW 000002 (Madera County model included data from Fresno County). The Secretary's reliance on local government agencies to provide information pertaining to local conditions is certainly reasonable. Stand Up does not suggest any different sources that should have been consulted or provide any reason to doubt the information received from the local governments.

Stand Up does complain that the Secretary did not include the actual models in the record,[16] but it is too late for such a claim. The content of the administrative record has been a source of lengthy, heated dispute in this matter. In Stand Up's final motion to supplement the record, on June 4, 2014, Stand Up did not renew its argument that additional modeling data should be added to the record. ECF No. 85. They cannot reopen the issue now.

III. CONCLUSION

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

[16] In fact, the Secretary included the Madera County Travel Forecasting Model: Documentation and User Manual in the Supplement to the Administrative Record filed with the Court on May 5, 2014. ECF No. 83. NF_AR_NEW_0000002.

Dated: April 22, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on April 22, 2015, the United States' Reply in Support of Its Cross-Motion for Summary Judgment was filed electronically through the Court's ECF system, which distributes an electronic copy to all counsel of record.

Dated: April 22, 2015

/s/ Karmen Miller
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