ORAL ARGUMENT NOT YET SCHEDULED

Nos. 16-5327, 16-5328

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

STAND UP FOR CALIFORNIA!, et al.,
Plaintiffs-Appellants,

PICAYUNE RANCHERIA OF THE CHUKCHANSI INDIANS,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Defendants-Appellees,

NORTH FORK RANCHERIA OF MONO INDIANS,
Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia, No. 12-cv-2039 (Howell, J.)

BRIEF FOR NORTH FORK RANCHERIA OF MONO INDIANS

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May 15, 2017

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Intervenor-Defendant-Appellee North Fork Rancheria of Mono Indians makes the following certification:

A. Parties and Amici

Plaintiffs-Appellants in No. 16-5327 are Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God – Madera, and Dennis Sylvester (collectively, "Stand Up").

Plaintiff-Appellant in No. 16-5328 is the Picayune Rancheria of the Chukchansi Indians ("Picayune").

Defendants-Appellees in both consolidated cases are the U.S. Department of the Interior ("Interior"), Ryan Zinke, in his official capacity as Secretary of the Interior; the Bureau of Indian Affairs; Michael S. Black, in his official capacity as Acting Assistant Secretary of Indian Affairs; and the United States of America (collectively, "federal defendants"). Under Rule 43(a) of the Federal Rules of Appellate Procedure, Ryan Zinke and Michael S. Black have been automatically substituted into this action as defendants-appellees in place of their predecessors.

Intervenor-Defendant-Appellee in both consolidated cases is the North Fork Rancheria of Mono Indians ("North Fork"), which intervened in the district court on January 17, 2013.

No amici appeared or participated in the proceedings below.

B. Rulings Under Review

Plaintiffs-Appellants Stand Up and Picayune appeal from the district court's order, [JA*(Doc.168_1)], and memorandum opinion, [JA*(Doc.169_1)], entered on September 6, 2016, which (a) granted in part and denied in part North Fork's and the federal defendants' motions for summary judgment, (b) denied Stand Up's and Picayune's motions for summary judgment, and (c) dismissed Stand Up's remaining claims. The district court's memorandum opinion is published at 204 F. Supp. 3d 212 (D.D.C. 2016).

C. Related Cases

The case began as separate actions by Stand Up, No. 12-cv-2039 (D.D.C.), and Picayune, No. 12-cv-2071 (D.D.C.), which were consolidated in the district court. This Court consolidated the separate appeals by Stand Up (No. 16-5327) and Picayune (No. 16-5328). This case has not previously been before this Court, any other United States Court of Appeals, or any other court in the District of Columbia. To the best of counsel's knowledge, there are no cases pending before this Court, any other United States Court of Appeals, or any other court in the District of Columbia that involve substantially the same parties and the same or similar issues.

The following cases pending before another court, however, involve substantially the same parties and the same or similar issues: *Picayune Rancheria*

of Chukchansi Indians v. U.S. Department of the Interior, No. 16-cv-950 (E.D. Cal.), and *Stand Up for California! v. U.S. Department of the Interior*, No. 16-cv-2681 (E.D. Cal.).

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GLOSSARY

APA:	Administrative Procedure Act
CAA:	Clean Air Act
EMFAC	Emissions Factor Model
EIS:	Environmental Impact Statement
Governor:	Governor of California
IGRA:	Indian Gaming Regulatory Act
Interior:	U.S. Department of the Interior
IRA:	Indian Reorganization Act
JA:	Joint Appendix
Madera Site:	Site of North Fork's Development
MOU:	Memorandum of Understanding
NEPA:	National Environmental Policy Act
North Fork:	North Fork Rancheria of Mono Indians
Picayune:	Picayune Rancheria of Chukchansi Indians
Secretary:	Secretary of the Interior
Stand Up:	Plaintiffs Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God – Madera, and Dennis Sylvester
Trust Decision:	Secretary's November 2012 decision under the IRA
Two-Part Determination:	Secretary's September 2011 decision under IGRA

INTRODUCTION

In these consolidated appeals, appellants Stand Up and Picayune challenge two decisions that the Secretary of the Interior made to enable the North Fork Rancheria of Mono Indians to develop a gaming facility in Madera County, California. The first decision—to determine that the facility would be in North Fork's best interest and would not be detrimental to the surrounding community ("Two-Part Determination")—was made under the Indian Gaming Regulatory Act ("IGRA"), which was enacted "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. §2702(1). The second decision—to take land into trust for the facility ("Trust Decision")—was authorized by the Indian Reorganization Act ("IRA"), which also was meant "'to promote economic development among American Indians,'" *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 830 F.3d 552, 556 (D.C. Cir. 2016), *cert. denied*, 2017 WL 1199528 (U.S. Apr. 3, 2017). Those decisions are essential to North Fork's efforts to bring its citizens out of poverty.

The Secretary's decisions followed six years of administrative review, reflected in an administrative record totaling more than 40,000 pages, and were faithful to IGRA, the IRA, and the statutes' implementing regulations. The district

court's 170-page opinion comprehensively dismantles the appellants' contentions. This Court should affirm in all respects.

STATEMENT OF ISSUES

1. Whether the Two-Part Determination reasonably concluded that North Fork's gaming establishment "would not be detrimental to the surrounding community," 25 U.S.C. §2719(b)(1)(A).

2. Whether the Two-Part Determination reasonably applied Interior regulations defining "nearby Indian tribes" within "the surrounding community," 25 C.F.R. §292.2.

3. Whether the Trust Decision reasonably determined that the Secretary possessed authority under the IRA to acquire land for North Fork, on the basis that North Fork is a "recognized Indian tribe" that was "under Federal jurisdiction" in 1934, 25 U.S.C. §5129.

4. Whether the Trust Decision complied with the Clean Air Act ("CAA").

5. Whether the Trust Decision was invalid because the Secretary relied on the Governor of California's concurrence in the Two-Part Determination.

RELEVANT STATUTES AND REGULATIONS

The relevant statutes and regulations are reprinted in the addendum.

STATEMENT OF THE CASE

A. Tribal Background

North Fork is a federally recognized Indian tribe composed of descendants of Mono and other Indians who for centuries lived in California's Sierra Nevada foothills and the nearby San Joaquin Valley. [JA*(NF_AR_40504-40510)]; *see* [JA*(Doc.169_8-13)]. Most of North Fork's roughly 2,000 citizens live below the poverty line, and their unemployment rate far exceeds the state and federal rates. *See* [JA*(NF_AR_40501)]. Aside from its gaming project, North Fork has no economic development activities or revenue source other than federal grants and the California Revenue Sharing Trust Fund. [JA*(NF_AR_40502)]. North Fork thus lacks resources to support its self-sufficiency, tribal government, and citizens' needs, and to sustain cultural initiatives preserving the Mono heritage. [JA*(NF_AR_40502)].

Other than the trust parcel at issue here, North Fork's existing land base cannot support economic development to pursue these goals. The North Fork Rancheria, an 80-acre parcel in Madera County, is held in trust for individual tribal citizens, not the North Fork Tribe. [JA*(NF_AR_40458-50559, 41152-41153)]. North Fork's only other land is a 61.5-acre parcel that the federal government placed in trust in 2002 for a tribal community center, a tribal youth center, and several homes. [JA*(NF_AR_40453-40454, 41147-41148)]. Neither parcel is

eligible for gaming and, in any event, both are mountainous, remote, and in an environmentally sensitive area unsuitable for commercial development. [JA*(NF_AR_40453-40454, 40458-40459, 41147-41148, 41152-41153)].

To facilitate tribal economic development and self-determination, North Fork identified 305 acres of mostly vacant land in an unincorporated area of Madera County ("Madera Site"). [JA*(NF_AR_40458, 41152)]. In 2005, North Fork requested that Interior acquire the Madera Site in trust pursuant to the IRA to develop a gaming facility. [JA*(NF_AR_NEW_132)]. North Fork also sought a two-part determination by the Secretary under IGRA to authorize gaming on the Madera Site. [JA*(NF_AR_NEW_132)].

B. Legal Background

The IRA. The IRA authorizes the Secretary to acquire land in trust for "Indians," 25 U.S.C. §5108, including when the Secretary "determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing," 25 C.F.R. §151.3(a)(3). It defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. §5129. The definition limits the Secretary's authority to acquire land to "members of tribes that were under federal jurisdiction at the time the IRA was enacted" in 1934, *Carcieri v. Salazar*, 555

U.S. 379, 391 (2009), but requires only that the tribe "be 'recognized' as of the time the Department acquires the land," *Confederated Tribes*, 830 F.3d at 561.

IGRA. IGRA regulates gaming on Indian lands. It was enacted to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. §2702(1). Although IGRA generally prohibits gaming on Indian lands acquired after its enactment in 1988, *id.* §2719(a), IGRA provides an exception if the Secretary makes a two-part determination that "a gaming establishment on newly acquired lands [1] would be in the best interest of the Indian tribe and its members, and [2] would not be detrimental to the surrounding community," and "the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination," *id.* §2719(b)(1)(A).

NEPA. The National Environmental Policy Act ("NEPA") requires agencies taking "major Federal actions significantly affecting the quality of the human environment" to include a detailed statement regarding "the environmental impact of the proposed action" and "any adverse environmental effects which cannot be avoided." 42 U.S.C. §4332(2)(C). This Environmental Impact Statement ("EIS") is "used by Federal officials in conjunction with other relevant material to plan actions and make decisions." 40 C.F.R. §1502.1.

CAA. The CAA requires agencies approving certain actions in specific areas of the country to assure that the action conforms to a state implementation plan, which aims to achieve and maintain national air quality standards. 42 U.S.C. §7506(c)(1). Implementing regulations specify the notice of the conformity determination that an agency must provide. 40 C.F.R. §93.155, 93.156.

C. The Two-Part Determination And The Trust Decision

The administrative review of North Fork's proposal lasted six years, encompassing a record longer than 40,000 pages. The environmental review included a 911-page EIS, published in 2010, with over 5,500 pages of appendices, which analyzed the project's potential impacts and the mitigation measures that North Fork agreed to undertake.

In September 2011, the Secretary (acting through the Assistant Secretary for Indian Affairs) issued a Record of Decision that made a favorable two-part determination under IGRA, 25 U.S.C. §2719(b)(1)(A). [JA*(NF_AR_40444-40538)]. The Two-Part Determination was based on "thorough review and consideration" of the administrative record, including North Fork's application materials; the EIS; and comments received from the public, from federal, state, and local governmental agencies, and from potentially affected Indian tribes. [JA*(NF_AR_40450)]. The Secretary concluded that North Fork's gaming project "is in the best interest of the Tribe and its citizens" and "would not result in

detrimental impact on the surrounding community." [JA*(NF_AR_40533-40534)]. The Secretary then requested the Governor of California's concurrence in the Two-Part Determination. The Governor concurred in August 2012.

In November 2012, the Secretary issued a Record of Decision to acquire the Madera Site in trust for North Fork under the IRA. [JA*(NF_AR_41138-41206)]. The Trust Decision concluded that the IRA authorized the Secretary to acquire land for North Fork, [JA*(NF_AR_41198)], and that acquiring the Madera Site would "promote the long-term economic vitality and self-sufficiency, self-determination, and self-governance of the Tribe," [JA*(NF_AR_41204)]. On February 5, 2013, the Secretary took the Madera Site into trust for North Fork.

D. District Court Proceedings

Stand Up and Picayune challenged the Two-Part Determination and Trust Decision. In January 2013, the district court denied Stand Up's motion for a preliminary injunction to stop the Secretary from taking the Madera Site into trust. [JA*(Doc.41_1-2)], [JA*(Doc.42_1-53)].

After the administrative record was filed, the federal defendants moved for a partial remand without vacatur to cure a potential procedural deficiency regarding compliance with a notice requirement for the CAA conformity determination. The district court granted the motion in December 2013. [JA*(Doc.77_8-9)]. The

federal defendants re-issued the conformity determination in April 2014. [JA*(NF_AR_NEW_1768-1769)].

Meanwhile, Stand Up amended its complaint to challenge the Secretary's October 2013 decision not to disapprove a tribal-state compact between North Fork and the State of California. The Governor had executed the compact in August 2012, and, after the California Legislature ratified it, the State submitted it to the Secretary in July 2013 for review and approval under IGRA. Because the Secretary took no action within 45 days of the State's submission, the compact was deemed approved in October 2013, *see* 25 U.S.C. §2710(d)(8)(C). Stand Up's Director later qualified a state referendum to overturn the California Legislature's ratification of the compact, and Stand Up amended its complaint to challenge the Secretary's decision not to disapprove the compact. In November 2014, the California voters overturned the Legislature's ratification. Because California refused to recognize the compact's validity or negotiate a new compact after the referendum, North Fork brought and prevailed in a lawsuit in the Eastern District of California under IGRA's remedial provision, *id.* §2710(d)(7). *See North Fork Rancheria of Mono Indians v. State of California*, 2015 WL 11438206 (E.D. Cal. Nov. 13, 2015). That litigation resulted in the Secretary issuing Secretarial Procedures in July 2016 that authorize gaming on the Madera Site and supersede the prior compact. [JA*(Doc.169_28-29)].

In this case, the parties cross-moved for summary judgment. The district court denied Stand Up's and Picayune's motions; granted the federal defendants' and North Fork's motions in part on Stand Up's claims and in full on Picayune's claims; and dismissed Stand Up's remaining claims. [JA*(Doc.168_1-3)], [JA*(Doc.169_169-170)]. The court first dismissed Stand Up's claims challenging the compact as moot in light of the Secretarial Procedures, [JA*(Doc.169_42)], and dismissed Stand Up's claims based on the purported invalidity of the Governor's concurrence for failure to join an indispensable party (the State of California), [JA*(Doc.169_43)]. The court then rejected both plaintiffs' other challenges to the Two-Part Determination and Trust Decision on the merits. [JA*(Doc.169_89, 134, 159, 169)].

SUMMARY OF ARGUMENT

I. A. The Two-Part Determination reasonably concluded that North Fork's gaming establishment "would not be detrimental to the surrounding community," 25 U.S.C. §2719(b)(1)(A). IGRA and Interior's implementing regulations require the Secretary to make a holistic determination that considers both mitigation of potential detrimental impacts and the economic benefits of North Fork's project more generally. *See id.*; 25 C.F.R. §§292.18, 292.21(a). The Secretary correctly applied the regulatory criteria. In particular, the Secretary properly considered the EIS's analysis of potential detrimental impacts, mitigation, and community

benefits; the issue of problem gambling, including North Fork's mitigation measures, which fully offset anticipated costs of treatment programs; and North Fork's memoranda of understanding (MOUs) with local governments, which were in effect at the time of the Two-Part Determination and remain in effect.

B. In considering Picayune's comments, the Two-Part Determination reasonably applied Interior regulations defining "nearby Indian tribes" within "the surrounding community" to include only tribes within a 25-mile radius of the proposed gaming establishment. 25 C.F.R. §292.2. Picayune indisputably falls outside that radius, so the Secretary was not required to consider Picayune's comments. Nevertheless, the Secretary appropriately exercised discretion to consider Picayune's comments and determined that the effects of additional competition on Picayune's casino did not create a detrimental impact on the surrounding community.

II. A. The Trust Decision reasonably determined that the IRA authorized the Secretary to acquire land for North Fork because North Fork is a "recognized Indian tribe" that was "under Federal jurisdiction" in 1934, 25 U.S.C. §5129. The IRA Section 18 election held for Indians residing on the North Fork Rancheria in 1935 conclusively establishes that North Fork was a "tribe" under federal jurisdiction, because the IRA defines "tribe" to include "the Indians residing on one reservation." *Id.* Moreover, the government's 1916 purchase of the Rancheria

for North Fork independently establishes that North Fork was a "tribe" under federal jurisdiction. In addition, North Fork is a federally recognized tribe. Although the Secretary was not required to trace the lineage of North Fork's current members to its members in 1935, substantial evidence showed that North Fork is the tribe for whom the government acquired the Rancheria and held the Section 18 election.

B. The Trust Decision complied with the CAA. Interior's conformity determination indisputably complied with the applicable public notice-and-comment provision in 2011, 40 C.F.R. §93.156, and Interior received comments from the environmental agencies most relevant to the conformity determination. Any procedural defect in Interior's initial compliance with a separate notice requirement, *id.* §93.155, was both adequately remedied on remand in 2014 and legally harmless. The conformity determination used the appropriate emissions model, which was the latest model available when the conformity determination was originally issued. Because the district court remanded the conformity determination without vacating it, the more recently issued emissions model was inapplicable to the re-issued determination.

C. The district court correctly dismissed for failure to join an indispensable party Picayune's claim challenging the Trust Decision based on the purported state-law invalidity of the Governor of California's concurrence in the

Two-Part Determination. Picayune has waived any challenge to that ruling by not raising the issue in its opening brief. In any event, on the merits, the Secretary's reliance on the Governor's concurrence does not invalidate the Trust Decision: The only state-court decision to question the validity of the concurrence has been vacated; the concurrence was facially valid when the Secretary issued the Trust Decision; and it remains valid under California law.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*, upholding the Secretary's actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. §706(2)(A), or "unsupported by substantial evidence," *id.* §706(2)(E). *Confederated Tribes*, 830 F.3d at 558. This Court accords *Chevron* deference to Interior's interpretation of statutes that Congress has authorized it to implement, including the IRA and IGRA. *Id.* Similarly, this Court gives substantial deference to the Secretary's interpretation of Interior's own regulations unless that interpretation is contrary to the regulations' plain language. *Id.* at 559-560.

ARGUMENT

I. THE SECRETARY'S TWO-PART DETERMINATION WAS LAWFUL

A. The Secretary Reasonably Determined That North Fork's Project Would Not Be Detrimental To The Surrounding Community

Stand Up's challenges (Br. 32-49) to the Secretary's Two-Part Determination fail for the reasons below.

1. The Secretary reasonably considered costs and benefits

Stand Up's argument (Br. 35-38) that the Secretary improperly considered the economic benefits of North Fork's project—including contributions to local governments and foundations that were not directly related to mitigating potential detrimental impacts of the project itself—fails under the plain text of IGRA and Interior's implementing regulations.

As an initial matter, Stand Up's construction of IGRA is incorrect. IGRA instructs the Secretary to determine whether a project, overall, would be "detrimental to the surrounding community." 25 U.S.C. §2719(b)(1)(A). As the district court explained, IGRA thus "necessarily requires a holistic evaluation of the impact of the proposed development, and properly encompasses consideration of both the anticipated benefits the gaming establishment would bring to the surrounding community and its potential adverse consequences." [JA*(Doc.169_69)].

Stand Up's assertion that Section 2719(b)(1)(A) precludes consideration of a project's benefits would effectively nullify IGRA's two-part exception, conflicting with IGRA's express purpose "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. §2702(1). *See* [JA*(Doc.169_66-67)]. This Court has recognized that goal as IGRA's "overarching intent." *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 468 (D.C. Cir. 2007) *(CETAC)* (discussing Section 2719(b)(1)(A)); *see also City of Roseville v. Norton*, 348 F.3d 1020, 1028 (D.C. Cir. 2003). And even if IGRA were ambiguous, "the Indian canon of statutory construction requires the court to resolve any doubt in favor of" North Fork. *CETAC*, 492 F.3d at 470 (applying canon to Section 2719(b)).[1]

Interior's regulations implementing IGRA, which are "due deference under *Chevron*," *CETAC*, 492 F.3d at 471, confirm the district court's understanding of IGRA. They expressly require the Secretary to evaluate both the costs and the benefits of a project—the very analysis Stand Up contends was improper. Under 25 C.F.R. §292.21(a), the Secretary must consider "[a]nticipated impacts on the

[1] Stand Up provides no support for its argument (Br. 33-35) that IGRA's overall purpose, or the Indian canon, is not relevant to all of Section 2719(b)'s provisions. As the district court explained, "the reasoning in [this Court's] cases regarding the purposes of IGRA applies equally to the two-part determination exception in §2719(b)(1)(A)." [JA*(Doc.169_67 n.23)].

economic development, income, and employment of the surrounding community," *id.* §292.18(c); "[a]nticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them," *id.* §292.18(d); and "[a]ny other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, including memoranda of understanding and inter-government agreements with affected local governments," *id.* §292.18(g). The regulations recognize that "[t]he benefits of gaming … will be for the tribe, employees, State and local government, nearby business, and local economic conditions" and that the Secretary will consider community benefits not specifically directed at mitigating particular detrimental impacts—including economic development, additional jobs, increased property and income taxes, and decreased unemployment and welfare rolls. 73 Fed. Reg. 29,354, 29,374 (May 20, 2008).

The Two-Part Determination faithfully applied Section 292.21(a). Pursuant to Section 292.18(c), the Secretary found that North Fork's project "will have a beneficial impact on the surrounding community by stimulating economic development, creating jobs, and generating income," as well as "increas[ing] tax and other revenues." [JA*(NF_AR_40514)]. Pursuant to Section 292.18(d), the Secretary found that North Fork's payments to governmental entities and nonprofit

foundations that are directly "intended to address the costs of the impacts," as well as the additional tax and other revenues generated by the project, "will be sufficient to cover the costs of the impacts of the Resort on … the surrounding community" and "mitigate any negative fiscal impacts." [JA*(NF_AR_40515)]. Pursuant to Section 292.18(g), the Secretary considered the MOUs between North Fork and local governments, noting that North Fork agreed to make payments that "are not directly associated with costs of the Resort to the County or the surrounding community, but which would provide substantial benefits to the County and the surrounding community." [JA*(NF_AR_40527)]. After considering all the required information under Section 292.21(a), the Secretary determined that the project "would not result in detrimental impact on the surrounding community." [JA*(NF_AR_40534)].

As the district court explained: "Contrary to the plaintiffs' assertion, the Secretary did not 'conclud[e] that the benefits outweigh any detriments' or 'suggest that the benefits to the surrounding community will compensate the community for any detriments.'" [JA*(Doc.169_70)] (citations omitted). Rather, he found that potential detrimental impacts would be sufficiently mitigated by North Fork's payments specifically aimed at mitigating detrimental impacts, as well as its agreement to make other payments benefiting the surrounding

community, and reasonably determined that North Fork's project would not be detrimental to the surrounding community.

2. The Secretary reasonably considered the NEPA analysis

Interior's regulations and the Two-Part Determination also refute Stand Up's argument (Br. 39-41) that the Secretary improperly relied on the NEPA analysis.

As the district court explained, "IGRA implementing regulations expressly instruct the Secretary to incorporate the NEPA process into her determination." [JA*(Doc.169_71)] (citing 25 C.F.R. §§292.18(a), 292.21(a); 73 Fed. Reg. at 29,369). Those regulations require the Secretary to rely on the NEPA analysis because "a gaming facility on after-acquired land will result in costs to the surrounding community" and the "NEPA document will address the mitigation of significant impacts." 73 Fed. Reg. at 29,374. The purposes of the NEPA analysis and the Secretary's analysis thus are directly aligned. *See* 40 C.F.R. §1505.1(d) (NEPA analysis must "accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions").

The Secretary reviewed the NEPA analysis, along with numerous other documents. [JA*(NF_AR_40450)]. The EIS concluded that there would be "no significant impacts from the Resort after mitigation," [JA*(NF_AR_40534)], and discussed substantial evidence supporting that conclusion, *see* [JA*(Doc.169_72)]. The Two-Part Determination adopted all EIS mitigation measures,

[JA*(NF_AR_40500)]; *see* [JA*(Doc.169_73 n.26)], and analyzed—over 20 pages—the Interior regulations' criteria on detrimental impacts, [JA*(NF_AR_40510-40528)] (applying 25 C.F.R. §§292.18, 292.21(a)). Based on that analysis, the Secretary concluded that the project "would not result in detrimental impact on the surrounding community." [JA*(NF_AR_40534)]. The Secretary was not required to do anything more.

3. The Secretary reasonably considered problem gambling

Stand Up argues (Br. 42-45, 47-49) that the Secretary did not adequately address the potential impact of problem gambling. Stand Up's position is foreclosed by Interior's regulations and the administrative record.

Interior's regulations require the Secretary to consider the "[a]nticipated cost, if any, to the surrounding community *of treatment programs* for compulsive gambling attributable to the proposed gaming establishment." 25 C.F.R. §§292.18(e), 292.21(a) (emphasis added). They do not require the Secretary to consider the "social costs attributable to compulsive gamblers enrolled and not enrolled in treatment programs." 73 Fed. Reg. at 29,369; *see* [JA*(Doc.169_88)].

The Secretary complied with the regulations. The EIS calculated the anticipated annual cost of treatment programs attributable to the project at $63,606. [JA*(NF_AR_30197-30198)]. North Fork agreed to pay $50,000 annually for county treatment programs. [JA*(NF_AR_30198)]. North Fork further agreed to

cover the remaining $13,606 as part of its annual $1,038,310 general contribution to Madera County for fiscal impacts that had not been specifically mitigated. [JA*(NF_AR_0030210-30211 & tbl. 4.7-16)] (including difference between $63,606 and $50,000 payment in calculating $1,038,310 contribution); *see* [JA*(NF_AR_29753-29754)] (concluding that portion of $1,038,310 contribution mitigated amount $50,000 payment was short). North Fork also agreed to many mitigation measures that studies had found were effective, including training staff, implementing voluntary self-exclusion procedures, and displaying treatment information. [JA*(NF_AR_29509, 29753-29754)]. The EIS concluded that the payments and other measures would mitigate the impact from problem gambling to "less than significant." [JA*(NF_AR_30198)]. The Two-Part Determination properly relied on the EIS's conclusion and on North Fork's payments and other mitigation measures aimed at problem gambling. *See* [JA*(NF_AR_40488-40489, 40519, 40526)].

Stand Up provides no reason to overturn the district court's conclusion that the Secretary adequately considered problem gambling. *See* [JA*(Doc.169_88)]. Its argument (Br. 43) that the mitigation measures did not include the "expansion of problem gaming services" ignores North Fork's $50,000 payment specifically for treatment services. Its argument (Br. 44) that the $50,000 payment is insufficient ignores North Fork's $1,038,310 contribution, which fully covers the

shortfall of $13,606 and is among the measures that the EIS found would adequately mitigate the impact of problem gambling. [JA*(NF_AR_30198)]; *see* [JA*(NF_AR_29753-29754)].[2]

4. The Secretary reasonably considered the MOUs

Stand Up's argument (Br. 45-47) that the Secretary improperly relied on North Fork's MOUs is forfeited because Stand Up did not raise it below. *See Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1109 (D.C. Cir. 2017).[3]

Stand Up's argument also fails on the merits because Interior's regulations *require* the Secretary to consider "memoranda of understanding and inter-governmental agreements with affected local governments" in determining whether a project would be detrimental to the surrounding community. 25 C.F.R. §§292.18(g), 292.21(a). Although the MOUs provided that North Fork's contributions were contingent upon events that could occur only after the

[2] The regulations also foreclose Stand Up's arguments (Br. 48) that a study cited in the EIS was insufficient because it found only that treatment programs "may" attenuate problem gambling for the reasons above—namely, that the regulations require only evaluation of the cost of treatment programs, not the social cost of problem gambling (whether by persons enrolled or not enrolled in those programs). In any event, the Secretary considered the numerous mitigation measures that North Fork is adopting beyond funding treatment programs. [JA*(NF_AR_40488-40489, 40526)].

[3] Stand Up's argument below that the Two-Part Determination was improperly "predicated" on *the North Fork compact*, which the district court correctly rejected, [JA*(Doc.169_55-57)], is insufficient to preserve its argument that the Secretary improperly relied on *the MOUs*. Although the compact incorporated the MOUs, Stand Up never challenged the Secretary's reliance on the MOUs themselves.

Secretary's determination, such as California entering into a compact, [JA*(NF_AR_1313, 3701-3702)], that hardly distinguishes them—any MOU for a proposed gaming facility will be contingent on future developments (including, most basically, that the project proceed to construction).

Stand Up's assertion (Br. 46-47) that the Secretary, in 2011, should not have relied on North Fork's MOUs because a California election held in 2014 ultimately nullified North Fork's compact ignores that review of the Secretary's decision "is to be based on the full administrative record that was before the Secretary *at the time he made his decision*," *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (emphasis added). Events after his 2011 decision cannot invalidate that decision.

In any event, North Fork's MOUs remain in effect, and North Fork remains obligated to make mitigation contributions under the MOUs. The EIS adopted the mitigation measures provided in the MOUs, [JA*(NF_AR_29757, 29848-29859)], as did the Two-Part Determination, *see* [JA*(NF_AR_40500)]. As the district court noted, the Two-Part Determination and Trust Decision "specifically identify and adopt all mitigation measures mentioned in the []EIS and, pursuant to the [Decisions], gaming on the Madera Site is 'subject to implementation of the mitigation measures.'" [JA*(Doc.169_57)]. Moreover, the Secretarial Procedures issued for North Fork also make clear that North Fork remains obligated to make

the contributions for which the MOUs provide. *See Secretarial Procedures for the North Fork Rancheria of Mono Indians* §11.7(e) (July 29, 2016), *available at* https://www.bia.gov/cs/groups/xoig/documents/text/idc2-040007.pdf ("[T]he County MOU, the Tribe's agreement with the City of Madera …, and the Tribe's agreement with the Madera Irrigation District … satisfy the requirements for an intergovernmental agreement with the County under this section 11.7 and the Tribe accepts its obligation to implement the applicable off-reservation mitigation measures as prescribed in the [EIS] and the [Trust Decision].").

B. The Secretary's Consideration Of Picayune's Comments Was Not Arbitrary, Capricious, Or Otherwise Contrary To IGRA

Picayune's challenge to the Two-Part Determination (Br. 25-38) fails to identify any error in the district court's ruling. At bottom, Picayune is fighting Interior's regulations, which define "nearby Indian tribes" within "the surrounding community" as those within a 25-mile radius of the proposed gaming establishment—not the Secretary's application of those regulations to Picayune, which indisputably falls outside that boundary. Further, the Secretary properly weighed the potential competitive effects on Picayune's casino, and his determination that North Fork's project would not be detrimental to Picayune was supported by substantial evidence.

1. Picayune is not part of the "surrounding community"

Picayune's contention (Br. 26-29) that the Secretary should have treated Picayune as a "nearby Indian tribe" within "the surrounding community" fails under the plain language of Interior's regulations, which provide:

> *Nearby Indian tribe* means an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment ….
>
> *Surrounding community* means local governments and nearby Indian tribes located within a 25-mile radius of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.

25 C.F.R. §292.2.

Because Picayune falls outside the 25-mile radius, the Secretary properly determined that "Picayune is not a 'nearby Indian tribe' within IGRA's definition of 'surrounding community.'" [JA*(NF_AR_40534)]. Picayune cannot fault the Secretary for basing that determination "entirely on the distan[ce] the Picayune Rancheria's lands and existing casino are from the Madera Site" (Br. 26), as that is what the regulations require. And while Picayune "petition[ed] for consultation," 25 C.F.R. §292.2, neither its petition—nor the Secretary's consideration of its concerns—altered Picayune's status as a tribe outside the surrounding community.

Picayune's emphasis (Br. 28-29) that the Secretary felt "compelled" to consider its concerns leads nowhere. The regulations give the Secretary discretion to consider the concerns of a petitioning tribe without converting the tribe into a member of "the surrounding community." *See* 25 C.F.R. §292.2. That is what the Secretary did. He explained that he considered Picayune's concerns based on his "discretionary authority under IGRA and 25 C.F.R. Part 292," [JA*(NF_AR_40432 n.105)], even though "Picayune is not a 'nearby Indian tribe' within IGRA's definition of 'surrounding community' under our regulations," [JA*(NR_AR_40534)]. Even if there were any ambiguity as to the consequences of the Secretary's consideration of an outside tribe's concerns, the Secretary's interpretation of his own regulations governs. *E.g.*, *Spirit Airlines, Inc. v. U.S. Dep't of Transp.*, 687 F.3d 403, 410 (D.C. Cir. 2012).

2. The Secretary properly weighed Picayune's concerns

Picayune's challenge (Br. 29-32) to the weight the Secretary accorded its concerns is predicated on the faulty premise that it was a "nearby Indian tribe" under 25 C.F.R. §292.2 and therefore on equal footing with the entities entitled to consultation under 25 C.F.R. §292.19(a). It was not, for the reasons stated above and by the district court. *See* [JA*(Doc.169_74)] ("[T]he Secretary was not required to consider the Picayune Tribe's concerns at all.").

In any event, as the district court explained, the Secretary's discretionary consideration of Picayune's concerns did not mean "that the Secretary was compelled to afford those comments a weight that was equal to all other comments." [JA*(Doc.169_77)]. Rather, the Secretary properly accorded the comments "'some weight'" based on "the logical premise that '[t]he weight accorded to the comments of tribes and local governments outside the definition of "surrounding community" will naturally diminish as the distance between their jurisdictions and the proposed off-reservation gaming site increases.'" [JA*(Doc.169_79)] (quoting [JA*(NF_AR_40534)]).

Picayune's contention (Br. 32) that "[n]othing in the IGRA implementing regulations provides the Secretary with discretion to discount or give lesser consideration to Picayune's comments" is wrong. *First*, even for entities properly part of "the surrounding community," the regulations do not prescribe any particular weight—let alone a *uniform* weight—to be accorded each of their concerns. *Second*, the Federal Register notice accompanying the regulations explains that Interior rejected a standardized approach to evaluating detriment to the surrounding community in favor of one under which the Secretary "will evaluate detriment on a case-by-case basis." 73 Fed. Reg. at 29,373; *accord id.* at 29,356 ("The Department will consider detrimental impacts on a case-by-case basis, so it is unnecessary to include a standard."). *Third*, that notice confirms the

relevance of distance in evaluating any detriment, noting that it is "reasonable to assume" that "Congress was concerned with how a proposed gaming establishment would affect those individuals and entities living in close proximity to the gaming establishment." *Id.* at 29,357. The manner in which the Secretary weighed Picayune's concerns was thus entirely appropriate.[4]

3. The Secretary properly determined that any competitive effects on Picayune were not sufficient to preclude a two-part determination in North Fork's favor

Picayune challenges (Br. 32-38) the Secretary's conclusion that competition from North Fork's project would not "result in a detrimental impact to Picayune" sufficient to deny North Fork a favorable two-part determination, [JA*(NF_AR_40535)]. That contention fails for three reasons.

First, because Picayune was not a "nearby tribe" under 25 C.F.R. §292.2, the Secretary had no obligation to consider the impacts on Picayune at all. The preamble to the regulations explains:

> The definition qualifies a "nearby tribe" in terms of distance to a proposed gaming establishment. Thus, if an Indian tribe qualifies as a nearby Indian tribe under the distance requirements of the definition, the detrimental effects to the tribe's on-reservation economic interests

[4] Picayune's unsupported assertion (Br. 32) that the Secretary was required "to fully detail and define the amount of weight he did accord" to Picayune's comments fails because the Secretary was required only to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

> will be considered. *If the tribe is outside of the definition, the effects will not be considered.*

73 Fed. Reg. at 29,356 (emphasis added). Thus, Picayune cannot show that any error in the Secretary's evaluation could undermine the determination that the project "would not be detrimental *to the surrounding community*," 25 U.S.C. §2719(b)(1)(A) (emphasis added). That is, even if the Secretary had erred in his consideration of the effects on Picayune, any error would necessarily be harmless. *See Combat Veterans for Congress Political Action Comm. v. FEC*, 795 F.3d 151, 156-157 (D.C. Cir. 2015) (harmless error rule applies in administrative law).

Second, even if the Secretary were required to consider Picayune's concerns, Picayune misstates the relevant inquiry when it frames the issue (Br. 33) as whether the project "would be detrimental to Picayune" specifically, rather than "detrimental to the surrounding community" as a whole under 25 U.S.C. §2719(b)(1)(A). As the district court explained, IGRA "necessarily requires a holistic evaluation of the impact of the proposed development," [JA*(Doc.169_69)], and does not require the Secretary "to make any specific finding regarding the proposed casino's 'detrimental impact' on any single entity," [JA*(Doc.169_78)].

Third, the Secretary's determination was supported by substantial evidence. The applicable "'substantial evidence'" standard is "'highly deferential to the agency fact-finder,'" *Koch v. SEC*, 793 F.3d 147, 156 (D.C. Cir. 2015), and

requires only "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,'" *Wallaesa v. FAA*, 824 F.3d 1071, 1084 (D.C. Cir. 2016). As the district court explained, *see* [JA*(Doc.42_38)], the Secretary reasonably relied on the EIS analysis that projected "a market share decline of approximately 19 percent" at Picayune's casino, which is "commonplace for incumbents in expanding gaming markets." [JA*(NF_AR_30250)]. That analysis also concluded that, "even in the worst case, … all of the facilities are expected to remain open and to continue to generate sustainable profits for their tribal owners." [JA*(NF_AR_30250-30251)]; *see Earthlink, Inc. v. FCC*, 462 F.3d 1, 12 (D.C. Cir. 2006) ("'An agency's predictive judgments about areas that are within the agency's field of discretion and expertise are entitled to *particularly deferential* review, as long as they are reasonable.'"). Picayune cites evidence that purportedly supports a contrary conclusion (Br. 32-34), but 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) (internal quotation marks omitted).

Picayune's remaining arguments are unavailing. Picayune mischaracterizes (Br. 35-36) the Secretary's position to suggest that, under the Secretary's reasoning, "detriment resulting from competition cannot be a 'detrimental impact'" and that "the source of [the] injury, not the injury itself," determines whether there

is detrimental impact. That is not what the Secretary stated. The Secretary reasoned that *competition alone*, in an overlapping market, is insufficient—not that competitive effects cannot be considered at all or that some other injuries must determine the detrimental impact.[5] And the Secretary's reasoning is correct as a matter of law. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000) ("[I]t is hard to find anything in [IGRA] that suggests an affirmative right for nearby tribes to be free from economic competition."); *cf. Citizens for a Better Way v. U.S. Dep't of Interior*, 2015 WL 5648925, at *15 (E.D. Cal. Sept. 24, 2015) ("[S]ome costs are inevitable and precluding … new gaming establishments entirely would conflict with the overall intent of the IGRA."), *appeal docketed*, No. 17-15533 (9th Cir. Mar. 24, 2017).

Relatedly, Picayune is wrong (Br. 38) that if "competition, by itself, cannot constitute a detrimental impact, it would be nearly impossible for any nearby Indian tribe to ever show [detrimental impact]." To the contrary, "nearby Indian tribes," 25 C.F.R. §292.19(a)(2)—which Picayune is not—are solicited to provide comments on, among other areas, "environmental impacts," "[a]nticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns," and "[a]nticipated costs … of treatment programs for

[5] *See* [JA*(NF_AR_40535)] ("[C]ompetition 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.").

compulsive gambling attributable to the proposed gaming establishment," which the Secretary considers in evaluating any detrimental impact. *Id.* §292.20(b).

II. THE SECRETARY'S TRUST DECISION WAS LAWFUL

A. The Secretary Reasonably Determined That North Fork Is Eligible To Have Land Acquired For It

As the district court held, the Secretary reasonably determined that North Fork is a recognized Indian tribe that was under federal jurisdiction in 1934 and thus eligible to have land acquired in trust for it under the IRA, 25 U.S.C. §§5108, 5129.[6] *First*, the Secretary properly concluded that the IRA Section 18 election held for the Indians residing on the North Fork Rancheria in 1935 establishes that North Fork was a tribe then under federal jurisdiction. [JA*(Doc.169_102-112)]. *Second*, "[i]n any event, substantial evidence in the record shows that the North Fork Tribe 'existed as a tribe independent of the IRA's enactment.'" [JA*(Doc.169_112)]. Stand Up's challenge to the first rationale ignores IGRA's plain text, and Stand Up ignores altogether the second, independently sufficient rationale.

[6] When title 25 of the U.S. Code was renumbered in 2016, section 479 was transferred to section 5129, and section 465 was transferred to section 5108.

1. The Secretary reasonably concluded that the Section 18 election held for Indians residing on the North Fork Rancheria establishes that North Fork was a "tribe" "under federal jurisdiction" in 1934

The IRA's plain text refutes Stand Up's contention (Br. 13-23) that the Secretary could not reasonably conclude that North Fork is a "tribe" under the IRA based on the Section 18 election held on the North Fork Rancheria in 1935.

The IRA authorizes the Secretary to acquire land in trust for "Indians," 25 U.S.C. §5108, whom it defines to include "all persons of Indian descent who are members of any recognized Indian *tribe* now [that is, in 1934, *see Carcieri*, 555 U.S. at 395] under Federal jurisdiction," 25 U.S.C. §5129 (emphasis added). The IRA defines the "term 'tribe' wherever used in this Act" as "any Indian tribe, organized band, pueblo, *or the Indians residing on one reservation*." *Id.* (emphasis added). "Indians residing on one reservation" thus constitute a "tribe" under the IRA. [JA*(Doc.169_102-107)]. The Indians residing on the North Fork Rancheria, for whom Interior held an election under Section 18, were therefore a "tribe." [JA*(Doc.169_104)]. The Secretary thus reasonably concluded that "[t]he calling of a Section 18 election at *the Tribe's Reservation* conclusively establishes that *the Tribe* was under federal jurisdiction for *Carcieri* purposes." [JA*(NF_AR_41198)] (emphasis added).

Stand Up first objects (Br. 13-14) that the Secretary did not make a two-part finding under the standard that Interior applied in *Confederated Tribes*. The

Section 18 election establishes that North Fork was "under Federal jurisdiction" under the reasoning of *Confederated Tribes*. As the district court noted, the election reflects federal obligations to and authority over the tribe when the IRA was enacted. [JA*(Doc.169_97] (citing *Confederated Tribes*, 830 F.3d at 563-564).

Stand Up's argument (Br. 15-16) that the Section 18 election is not evidence that North Fork was a "tribe" because Section 18 provides for elections at a "reservation," 25 U.S.C. §5125, without using the word "tribe," ignores Section 19 of the IRA, *id.* §5129. *See* [JA*(Doc.169_104)]. The Section 18 election shows that there were Indians residing on the North Fork "reservation" over whom the federal government exercised jurisdiction, and Section 19 establishes that those "Indians residing on one reservation"—the group voting in the election—were a "tribe." "[T]he fact that Section 18 does not contain the word 'tribe' … does not undercut the plain text of" Section 19, as the district court concluded. [JA*(Doc.169_107)].

Moreover, Stand Up's argument ignores that Section 18 authorized voting by "Indians," 25 U.S.C. §5125, who, by statutory definition, were "members of any recognized Indian tribe now under Federal jurisdiction," *id.* §5129. As Interior has recently explained: "In order for the Secretary to conclude a reservation was eligible for a vote [under Section 18], a determination had to be made that the

relevant Indians met the IRA's definition of 'Indian' and were thus subject to the Act." Department of Interior, Office of the Solicitor, M-37029, Mem. on The Meaning of "Under Federal Jurisdiction" for Purposes of the [IRA], p. 21 (Mar. 12, 2014), *available at* https://www.bia.gov/cs/groups/webteam/documents/text/idc1-028386.pdf. As the district court explained, because the Secretary called a Section 18 election at the North Fork Rancheria, it follows that the Indians residing on the North Fork Rancheria who voted in that election were "'members of a[] recognized Indian tribe' that was 'under Federal jurisdiction'" in 1934. [JA*(Doc.169_105)]. Indeed, "*Carcieri* itself refers to those Indians who voted in a Section 18 election as '*tribal* members' with the ability 'to reject the application of the IRA to their *tribe*.'" [JA*(Doc.169_106)] (quoting 555 U.S. at 395).

Stand Up cites (Br. 16-19) two Solicitor's opinions from 1934 supposedly demonstrating that a Section 18 election did not show "tribal affiliation." Those sources cannot override the IRA's plain text and, in any event, do not support Stand Up's argument. Stand Up apparently believes that the IRA required a "tribe" to be ethnologically homogenous and possess a formal governmental structure. The IRA imposed no such requirement, as the district court stated. *See* [JA*(Doc.169_111-112)]. A major purpose of the IRA was to give tribes that had not yet organized a chance to do so; accordingly, it defined "tribe" broadly to encompass not only "organized" bands but also "Indians residing on one

reservation." 25 U.S.C. §5129. Indeed, the Solicitor's opinions that Stand Up cites explain that the IRA permits "residents of a single reservation (who may be considered a tribe for purposes of this act, under Section 19) to organize without regard to past tribal affiliation," [JA*(Doc.115-1_13)], and that a "group of Indians residing on a single reservation … may be recognized as a tribe … regardless of former affiliations," [JA*(Doc.115-1_8)].[7]

Stand Up next argues (Br. 19-22) that the Haas Report, which records North Fork's Section 18 election, "does not show tribal affiliation." But as the district court explained, the IRA did not require that members of a "tribe" share a prior unified "tribal affiliation." [JA*(Doc.169_108-112)]. The Haas Report itself indicates that each Section 18 voting entity constituted a "tribe" under the IRA. [JA* NF_AR_NEW_2000] ("In this balloting, 181 tribes (representing 129,750 Indians) voted to accept the law and 77 tribes (86,365 Indians) rejected it.").

Stand Up's historical examples are not to the contrary. Instead, they show that Stand Up conflates federal *jurisdiction* over a tribe and federal *recognition* of a tribe, as the district court noted. *See* [JA*(Doc.169_109)]. For example, Stand Up notes (Br. 20) that the Lower Sioux Indian and Prairie Island Indian Communities voted in a Section 18 election, even though a Solicitor's opinion did not recognize

[7] Stand Up's out-of-context citation (Br. 19) to a 2013 government brief is irrelevant, as the district court explained. *See* [JA*(Doc.169_104-105 n.41)].

either as a "historical tribe." [JA*(Doc.115-1_22)]. But the Solicitor's opinion explains that both were permitted to organize under Section 16 "on the basis of a reservation," [JA*(Doc.115-1_22)], which they could not have done if they were not "tribes" under the IRA, *see* 25 U.S.C. §5123(a). Their reservation, not recognition as a "historical tribe," determined their status as a "tribe" and eligibility for benefits under the IRA.

Stand Up similarly conflates being a "tribe" and organizing under the IRA in arguing (Br. 23) that the Secretary's construction of the IRA would override the "specific statutory method" for organizing as a tribe—Section 16—and "tribal choice and autonomy." An entity could organize under Section 16 only if it was already a "tribe" under the IRA. *See* 25 U.S.C. §5123(a). A tribe that chooses not to organize under Section 16—as North Fork once did—preserves its tribal autonomy without altering its status as a "tribe" under the IRA.

Finally, Stand Up is wrong (Br. 22-23) that this Court should disregard the district court's statutory analysis because the Secretary did not conduct the same lengthy analysis in the Trust Decision. The district court did not provide a new basis for the Secretary's action; rather, it analyzed whether the basis given by the Secretary—the Section 18 election—was "in accordance with law" and correctly found that it was. [JA*(Doc.169_101)].

2. Independent of the IRA election, substantial evidence shows that North Fork existed as a "tribe" in 1934

As the district court noted, "a Section 18 election is sufficient, but not necessary, to establish the existence of a 'tribe now under federal jurisdiction' within the meaning of the IRA." [JA*(Doc.169_105 n.41)]. Here, it explained, "substantial evidence in the record shows that the North Fork Tribe 'existed as a tribe independent of the IRA's enactment.'" [JA*(Doc.169_112)]. In particular, the federal government's 1916 purchase of the Rancheria for North Fork "establishes that the North Fork people are 'Indians' within the meaning of the IRA." [JA*(Doc.169_113)]; *see also* [JA*(Doc.169_96-97, 112)] (confirming earlier finding that Rancheria purchase is "likely dispositive in its own right[]"). Stand Up does not challenge that holding in its opening brief and has therefore waived its right to do so. *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002).

The Rancheria purchase provides an independent basis for the conclusion that North Fork was a tribe under federal jurisdiction at the time of the IRA's enactment. It demonstrates the government's "provision of federal benefits" to North Fork, which "reflects and acknowledges federal power and responsibility toward the tribe." *Cohen's Handbook of Federal Indian Law* §3.02[6][d], at 150 (Newton ed., 2012); *see Confederated Tribes*, 830 F.3d at 565 (noting that sometimes "one action … in and of itself will be sufficient" to establish federal

jurisdiction over a tribe). Indeed, in *Confederated Tribes*, this Court found that documentation that "the government … took the Cowlitz [Indians'] land" after failed negotiations, 830 F.3d at 565, granted Cowlitz Indians allotments on another tribe's reservation, *id.* at 566, and ordered that Cowlitz Indians be placed on the census roll of that reservation, *id.*, adequately evidenced federal jurisdiction. This Court noted that federal jurisdiction over a tribe under the IRA "can be shown in more ways than" a tribe's possession of a reservation. *Id.* It surely follows that the federal government's establishment of the North Fork Rancheria in 1916 demonstrates that North Fork was a tribe under federal jurisdiction by the time of the IRA's enactment. *See* [JA*(Doc.169_113)].

3. The Secretary was not required to trace the lineage of North Fork's members to the members of the tribe in 1934

Either of the above rationales is sufficient to sustain the Secretary's Trust Decision. The IRA did not require the Secretary to address Stand Up's speculation (Br. 24-32) that the current North Fork Tribe is not the same North Fork Tribe that existed when the IRA was enacted. Even if the IRA did require such an inquiry, substantial evidence in the record refutes that speculation.

The IRA required the Secretary to conclude only that North Fork was a "[1] recognized Indian tribe [2] now under Federal jurisdiction [*i.e.*, in 1934]." 25 U.S.C. §5129; *see Confederated Tribes*, 830 F.3d at 556. The record showed that North Fork was a tribe under federal jurisdiction in 1934, *supra*, Section II.A.1-2;

it continued to exist officially until 1958, when it was terminated (or denied formal recognition) under the California Rancheria Act, [JA*(NF_AR_41198)]; it was restored to the "same status as [it] possessed prior to … the California Rancheria Act," which was that of a "recognized tribal entit[y]," in 1983 by the judgment in *Tillie Hardwick v. United States*, [JA*(NF_AR_1065)]; *see* [JA*(NF_AR_41198)]; and it was a recognized tribe at the time of the Secretary's decision, 77 Fed. Reg. 47,868, 47,870 (Aug. 10, 2012); *see also* 82 Fed. Reg. 4915, 4917 (Jan. 17, 2017) (recognized today). North Fork therefore meets the IRA's two requirements.

As the district court held, the IRA did not require the Secretary to trace familial or other connections from the individual members of North Fork in 1916 when the Rancheria was acquired or in 1935 when the Section 18 election occurred; to the individual members when North Fork was terminated or restored; to the individual members today. [JA*(Doc.169_133-134)]. Changes in tribal membership over time do not change the entity's status as a tribe. The IRA did not require the Secretary to disprove Stand Up's speculation that the North Fork tribe over which the federal government exercised jurisdiction in 1934 is somehow discontinuous with the North Fork tribe recognized today.

In any event, the *Hardwick* judgment conclusively establishes North Fork's continuing existence. The judgment provided that the Secretary "shall recognize the Indian Tribes, Bands, Communities, or groups of the seventeen Rancherias

listed," including the North Fork Rancheria, "as Indian entities with the same status as they possessed" before the California Rancheria Act, "entitled to any of the benefits or services provided or performed by the United States for Indian Tribes." [JA*(NF_AR_1065)]. It also required the Secretary to include North Fork on the "Federal Register list of recognized tribal entities pursuant to 25 CFR, Section 83.6(b)." [JA*(NF_AR_1065)]. Inclusion on that list required a tribe to establish that it had been "identified from historical times until the present on a substantially continuous basis"; that it was "distinct from other populations in the area"; that it was "an autonomous entity throughout history until the present;" and that its members descended "from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity." 25 C.F.R. §§83.6, 83.7, 83.9(i) (1983). The *Hardwick* judgment should therefore be dispositive of each of those elements; at a minimum, it is substantial evidence that North Fork is the tribe for whom the government acquired the North Fork Rancheria in 1916 and held the Section 18 election in 1935.

Stand Up's arguments (Br. 28-32) challenging the *Hardwick* judgment are baseless. Its assertion (Br. 29) that there was no North Fork tribal entity when the California Rancheria Act took effect contradicts the judgment's stipulation that the affected tribes, including North Fork, would be restored "as Indian entities with the same status as they possessed" before that legislation. [JA*(NF_AR_1065)]. The

time to challenge the stipulation has long expired. [JA*(Doc.169_133)]. And Stand Up's discussion (Br. 30-32) of *Williams v. Gover*, 490 F.3d 785 (9th Cir. 2007), is wholly irrelevant. *Williams* involved an individual Indian's tribal membership rights, not a tribal entity's status, and held simply that "an Indian tribe has the power to decide who is a member of the tribe." *Id.* at 787. Indeed, *Williams* recognized that terminated-and-restored tribes should be treated equally to other tribes. *Id.* at 789.

Other substantial evidence also shows North Fork's continuing existence. *See* [JA*(Doc.169_117-25)]. Stand Up incorrectly asserts (Br. 25-26) that the "Secretary did not conclude [North Fork] Rancheria was purchased for the North Fork Tribe"; in fact, the Secretary found that the Rancheria was "the Tribe's." [JA*(NF_AR_41198)]. And the record showed that the Rancheria purchase was for "the North Fork band of landless Indians." [JA*(NF_AR_776)]; *see also* [JA*(NF_AR_41039)] ("Northfork and v[i]cinity band"). Stand Up quibbles (Br. 25) that the sources did not affirmatively describe the Indians as "Mono" but provides no evidence that they were not. Regardless, tribal status does not depend on ethnological homogeneity.

The record also does not support Stand Up's speculation (Br. 26-27) that North Fork "dissipated" after 1916. Stand Up observes that the North Fork Rancheria had only a few residents, but most North Fork Indians did not live on

the Rancheria. The sources that Stand Up cites explained that "North Fork is credited with the largest Indian population" in the area but could not occupy the Rancheria because it was "poorly located and absolutely worthless as a place to build homes on." [JA*(NF_AR_41092)]. As the district court explained: "Given the Rancheria's uninhabitable condition, the low number of residents at the North Fork Rancheria at any given time cannot be in any way indicative of the number of Indians belonging to the North Fork band of Mono Indians for whose use the land was purchased." [JA*(Doc.169_124-25)]. Stand Up also misreads (Br. 27) the 1966 notice of termination, which simply gave notice that the Indians of the terminated Rancherias "are no longer entitled to any of the services performed by the United States for Indians" because—their tribes being terminated—they would no longer be members of a tribe. [JA*(NF_AR_1062)]. The notice did not state that they were not members of a tribe entitled to government services before the termination. In any event, North Fork's termination is irrelevant because it was restored as a tribe by the *Hardwick* judgment. [JA*(NF_AR_1065)]. In sum, Stand Up has not demonstrated that it was unreasonable for the Secretary to conclude that North Fork satisfied the IRA's two requirements.

B. The Trust Decision Complied With The Clean Air Act

The district court correctly rejected Stand Up's "scorched earth effort to undermine the legitimacy of the [Trust Decision] by raising challenges to the

defendants' CAA conformity determination." [JA*(Doc.169_169)]. Stand Up's challenges (Br. 50-67) are meritless—and, even if correct, would not warrant vacatur of the Trust Decision.

1. The conformity determination complied with required notice procedures, and any earlier error was harmless

Stand Up's argument (Br. 50-58) rests on inapposite cases in which agencies issued rules without complying at all with the Administrative Procedure Act ("APA") notice-and-comment requirement for rulemaking. Here, the conformity determination was not subject to that APA requirement, and Interior complied fully with the applicable public notice-and-comment regulation, receiving and considering comments before issuing the conformity determination that Stand Up now challenges. Any procedural defect in Interior's initial compliance with a separate notice requirement was both adequately remedied and legally harmless.

A conformity determination assesses whether anticipated emissions from a specific federally approved project, after mitigation, will meet the region's air quality standards. *See* [JA*(Doc.169_160-61)]. Implementing regulations require an agency making a conformity determination to provide for public notice and comment on the determination, 40 C.F.R. §93.156 ("Public participation"), and, separately, to report the proposed action and determination by providing notice to certain specific governmental and tribal entities in the region, *id.* §93.155 ("Reporting requirements").

When Interior issued the conformity determination in 2011, it complied fully with the public notice-and-comment regulation. [JA*(Doc.77_4)]. Moreover, at least three entities required to be notified under the specific notice regulation, including Picayune and the two environmental agencies "most likely to have substantive comments," received notice. [JA*(Doc.77_3, 5)]. During this litigation, however, Interior could not determine whether it had provided specific notice to other entities included in Section 93.155 and moved for a remand, without vacatur of the conformity determination, to provide that notice. [JA*(Doc.77_3-4)]. The district court granted Interior's motion. [JA*(Doc.77_8)]. It found that "public notice and comment is not at issue" and that "[t]he procedural defect, if present at all, only pertains to a small number of governmental entities, not including those most likely to have substantive comments." [JA*(Doc.77_5)]. The court rejected Stand Up's request to require Interior "to perform the entire Clean Air Act conformity determination again," [JA*(Doc.77_7)], and instead remanded the determination "WITHOUT VACATUR to allow [Interior] to undertake the notice process required by 40 C.F.R. §93.155," [JA*(Doc.77_8)].

On remand in 2014, Interior provided the specific notices and received comments only from Stand Up (which is not an entity even entitled to notice), Picayune (which already received notice and commented in 2011), and one other

tribe. [JA*(Doc.169_162)]. As the district court explained, Interior "cured any notice deficiency" by providing the specific notices, reviewing and responding to the only three comments received, finding that no revision to the 2011 conformity determination was warranted, and reissuing that determination. [JA*(Doc.169_162)]. The district court determined that "the agency's mistake, if any," was remedied and harmless. [JA*(Doc.169_162-163)].

Stand Up's challenge to the district court's holding fails at the starting gate because its premise is misplaced. Stand Up asserts (Br. 55) that courts are not hospitable to harmless error claims when an agency fails to give "notice required by the APA," but the conformity determination was not a rule subject to APA notice-and-comment procedures, *see* 5 U.S.C. §§551(4), 553. "[C]onformity determinations are not rules, but case-by-case-assessments of whether a plan or program meets specific criteria. Therefore, APA rule-making requirements do not apply." *Hall v. Bellard*, 157 F. App'x 992, 994 (9th Cir. 2005). Courts thus reject claims that "conformity determinations are invalid because the [agency] did not comply with the APA's notice and comment requirements." *Id.*; *e.g.*, *Sierra Club v. Atlanta Reg'l Comm'n*, 255 F. Supp. 2d 1319, 1344 (N.D. Ga.), *aff'd*, 54 F. App'x 491 (11th Cir. 2002).

Stand Up's challenge also fails because, as the district court found, "public notice and comment is not at issue." [JA*(Doc.77_5)]; *see* [JA*(Doc.169_162)]

("the §93.155 notice defect did not affect public participation"). The record showed—and Stand Up does not dispute—that Interior complied with the regulations' public notice-and-comment requirement in 2011 and considered comments from the entities "most likely to have substantive comments." [JA*(Doc.77_5)] Stand Up argues only that Interior failed to provide specific notice to other entities—none of which includes Stand Up itself—under a different regulation. Stand Up's argument (Br. 55) that "'an utter failure to comply with notice and comment'" cannot be harmless is irrelevant because there was no "utter failure" here; any failure concerned—at most—a failure to provide specific notice to certain parties (not including Stand Up).

The cases Stand Up cites (Br. 55-58) are all inapposite because they involve rulemakings with substantial notice-and-comment deficiencies. In *Alabama Power Co. v. FERC*, this Court vacated a rule where the agency failed to provide any notice or opportunity to comment in violation of a statute requiring it to do so "'before prescribing any *rules*.'" 160 F.3d 7, 10 (D.C. Cir. 1998) (emphasis added by Court, quoting statute). In *Weyerhaeuser Co. v. Costle*, the agency violated the APA's rulemaking requirements by denying the public "the opportunity to comment on a significant part of the Agency's decisionmaking process as required by [5 U.S.C.] 553." 590 F.2d 1011, 1030 (D.C. Cir. 1978). The other cases are similar. *See Allina Health Servs. v. Sebelius*, 746 F.3d 1102, 1110 (D.C. Cir. 2014)

(rulemaking error not harmless where final rule was "abrupt departure from a proposed rule"); *Sugar Cane Growers Coop. v. Veneman*, 289 F.3d 89, 96-97 (D.C. Cir. 2002) ("utter failure to comply with notice and comment" in issuing policy that "is simply absurd to call … anything but a rule"); *Utility Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 755 (D.C. Cir. 2001) ("failure to engage in notice and comment rulemaking").

Even if rulemaking precedents were relevant to conformity determinations, Stand Up cannot demonstrate prejudice. Notice-and-comment rulemaking errors under the CAA are harmless unless they are "'so serious'" that "'there is a substantial likelihood'" the result "'would have been significantly changed if such errors had not been made.'" *Husqvarna AB v. EPA*, 254 F.3d 195, 203 (D.C. Cir. 2001) (quoting 42 U.S.C. §7607(d)(8)).[8] The remand process here demonstrates that any notice error did not change the result. After the remand, Interior issued new notices, considered the comments it received, and determined that *no revision* to the conformity determination it had issued was warranted. There is no likelihood that any additional notice in 2011 would have resulted in any change to the conformity determination. Even now, Stand Up does not point to any issue that

[8] Similar harmless-error analysis applies under the APA to the substantive conclusions in conformity determinations. *See County of Rockland v. FAA*, 335 F. App'x 52, 57 (D.C. Cir. 2009); *e.g.*, *City of Olmsted Falls v. FAA*, 292 F.3d 261, 271-272 (D.C. Cir. 2002).

a commenter would have presented in 2011 but did not or allege that Interior made any substantive error in 2011.

Finally, even if the notice error had been prejudicial, Interior remedied it. When an agency's notice-and-comment error is prejudicial, vacatur is not categorically required but instead "depends on 'the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed.'" *Sugar Cane*, 289 F.3d at 98 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993)). Applying that standard, the district court determined that the notice error could be remedied without vacating the conformity determination. [JA*(Doc.77_6-8)]. Stand Up does not challenge the district court's application of that standard. Interior complied with the district court's order and thereby remedied any notice error it made in 2011.[9]

2. The conformity determination used the appropriate emissions model

Stand Up's argument (Br. 58-65) that the conformity determination was not based on the latest emissions model fails because its premise contradicts the district court order remanding the conformity determination *without vacatur*.

[9] Stand Up's references (Br. 54, 58) to 40 C.F.R. §§93.150(b) and 93.154 are derivative of its Section 93.155 argument and fail for the same reasons, as the district court correctly held. *See* [JA*(Doc.169_161 n.54)].

The conformity determination that Interior issued in 2011 was based on the latest emissions model in effect at that time, which was EMFAC2007. [JA*(NF_AR_NEW_1109, 1113)]. Stand Up does not dispute that. Instead, Stand Up argues (Br. 59) that the conformity determination should have used the EMFAC2011 model, but the Environmental Protection Agency did not approve that model's use until 2013. *See* 78 Fed. Reg. 14,533 (Mar. 6, 2013). In remanding the conformity determination to Interior, the district court rejected Stand Up's argument that Interior should "perform the entire Clean Air Act conformity determination again." [JA*(Doc.77_7)]. Instead, it ordered that "the conformity determination at issue in this matter is REMANDED to [Interior] WITHOUT VACATUR to allow [Interior] to undertake the notice process required by 40 C.F.R. §93.155." [JA*(Doc.77_8)]. Therefore, the conformity determination was correctly based on the latest emissions model available in 2011, when the determination was made.

Sierra Club v. EPA, 762 F.3d 971 (9th Cir. 2014), on which Stand Up relies (Br. 60-61), is consistent with that conclusion. *Sierra Club* involved a permit that had been issued based on outdated air quality standards that no longer applied when the permit was issued; the Ninth Circuit required the agency to reconsider the permit under the current standards. *Id.* at 981-982. In contrast, the conformity determination was issued in 2011 based upon "the latest and most accurate

emission estimation techniques available" at the time of its issuance, just as 40 C.F.R. §93.159(b) required. Because the district court did not vacate the already issued conformity determination, it was based upon the model in effect in 2011 when it was issued.

Stand Up's related argument (Br. 61) that Interior's decision not to use EMFAC2011 was arbitrary and capricious fails because it is not arbitrary to comply with a court order. Nor does Stand Up's discussion of 40 C.F.R. §93.159(b)(1)(ii) (Br. 61-63) help its argument because the conformity determination not only began but also was completed before EMFAC2011 became available. Finally, Stand Up's argument also fails because it has not demonstrated that applying EMFAC2011 would have changed the conformity determination's ultimate result. *See City of Olmsted Falls v. FAA*, 292 F.3d 261, 271-272 (D.C. Cir. 2002) (plaintiffs failed to meet burden of showing conformity determination's "'ultimate conclusions are unreasonable'" when they argued that agency's alleged errors "*might* undermine" the analysis, "*not* that they necessarily will"); *accord County of Rockland v. FAA*, 335 F. App'x 52, 57 (D.C. Cir. 2009).

3. Even if the conformity determination were remanded again, vacatur of the trust decision would be unwarranted

Even if Stand Up's challenges had merit, Stand Up is wrong (Br. 66) that the Trust Decision should be vacated. As the district court noted, "the conformity determination is only a small piece" of "the entire trust determination."

[JA*(Doc.169_162)]. When a court remands all or part of agency action, it determines whether vacatur is warranted based on "two factors: the likelihood that 'deficiencies' in an order can be redressed on remand, even if the agency reaches the same result, and the 'disruptive consequences' of vacatur." *Black Oak Energy, LLC v. FERC*, 725 F.3d 230, 244 (D.C. Cir. 2013) (quoting *Allied Signal*, 988 F.2d at 150-151). Those factors weigh strongly against vacatur.

First, Stand Up has not identified any error in the conformity determination or Trust Decision that could not be fixed on remand. Its notice argument does not involve any substantive error, and it has not provided any reason to believe that if EMFAC2011 had been used instead of EMFAC2007, anticipated emissions from North Fork's project, as mitigated, could not still meet the region's air quality standards. If there were any defect in the conformity determination (and there is not), it could be fixed—and did not affect the substance of the Trust Decision.

Second, vacating the Trust Decision during the pendency of any remand would be unduly disruptive. Vacatur would serve Stand Up's strategic goal of delaying North Fork's project, without curing any defects in the Secretary's decisionmaking or serving the interests of administrative and judicial efficiency.[10]

[10] The cases Stand Up cites do not support its argument because they involve very different actions and do not apply the *Allied-Signal* factors. *See Sierra Club v. Johnson*, 436 F.3d 1269, 1280 (11th Cir. 2006) (agency wrongly failed to exercise nondiscretionary duty to object to permit); *Anchustegui v. Department of*

C. Picayune's Arguments Regarding The Secretary's Trust Decision Fail

Picayune argues (Br. 39-52) that the Secretary's Trust Decision was unlawful because it relied on two actions that Picayune contends were themselves invalid: (i) the Secretary's Two-Part Determination, and (ii) the California Governor's concurrence in that determination, which Picayune contends was invalid under state law. The first argument fails for the reasons stated in Section I.B; the second argument fails for the reasons below.

1. The district court correctly dismissed claims relating to the Governor's concurrence under Rule 19

While Picayune acknowledges that the district court dismissed its concurrence-related claims for failure to join the State of California as an indispensable party under Federal Rule of Civil Procedure 19 (Br. 5, 41), it does not challenge that ruling in its opening brief. Accordingly, it has waived its right to challenge that ruling on appeal. *See American Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008) ("[E]xplaining the factual basis in the opening brief for an argument not made until the reply brief is insufficient to raise the claim.").

To the extent the Court reaches the joinder issue, it should affirm for the reasons stated in the district court's opinion. [JA*(Doc.169_47-53)]. The district

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Agriculture, 257 F.3d 1124, 1129 (9th Cir. 2001) (agency failed to provide statutorily required notice and opportunity to cure before revoking permit).

court correctly applied Rule 19's three-part test for determining whether Picayune's claims could proceed. *See Kickapoo Tribe of Indians of Kickapoo Reservation v. Babbitt*, 43 F.3d 1491, 1494 (D.C. Cir. 1995). *First*, California is a required party to the suit. *See* Fed. R. Civ. P. 19(a)(1)(A)-(B). As the district court explained, California "unquestionably has an interest in its Governor's authority, under its own law, to comply with federal law, as well as in the continuing validity … of its Governor's concurrence." [JA*(Doc.169_50)]. Moreover, California's interests would be directly affected by the relief that Picayune seeks because of its impact on "the propriety and continuing viability of Governor action," which "significantly affect[s] the State's statutory obligations, relationship with its citizens and federally-recognized Indian tribes, and fiscal interests with respect to regulating Indian gaming within its borders under the IGRA." [JA*(Doc.169_50)]; *see also Kickapoo Tribe*, 43 F.3d 1495 (State of Kansas is necessary party to suit concerning validity of tribal-state compact).

Second, California cannot be joined because, as a state sovereign, it is immune from suit absent consent or waiver. *See Kickapoo Tribe*, 43 F.3d at 1495-1496. California has neither waived its sovereign immunity to Picayune's claims nor consented to be joined in this litigation.

Third, Picayune's claims cannot "in equity and good conscience" proceed without the State.[11] This Court has observed that where a necessary party under Rule 19 is immune from suit, the "equity and good conscience" inquiry is "more circumscribed" because immunity is "one of those interests 'compelling by themselves.'" *Kickapoo Tribe*, 43 F.3d at 1496-1497 (quoting *Wichita & Affiliated Tribes of Okla. v. Hodel*, 788 F.2d 765, 777 n.13 (D.C. Cir. 1986)). And a court may dismiss a claim based on immunity "without consideration of any additional factors." *Id.* at 1498; *see also Wichita & Affiliated Tribes*, 788 F.2d at 777-778. Therefore, the Court should affirm the district court's dismissal of Picayune's concurrence-related claims under Rule 19.

2. The Fifth District Court of Appeal's decision has no force and effect under California law

Picayune's tactical decision to base its argument about the validity of the Governor's concurrence entirely on the fractured decision of an intermediate state court of appeal provides this Court with another threshold basis on which to affirm. On March 22, 2017—eight days after Picayune submitted its opening brief here—the California Supreme Court granted review of the California Court of Appeal for the Fifth District's decision upon which Picayune exclusively relies. *See Stand Up for California! v. State of California*, 390 P.3d 781 (Cal. 2017) (granting review of

[11] This Court reviews the district court's application of the "'equity and good conscience'" test for abuse of discretion. *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 465 (D.C. Cir. 2017).

Stand Up for California! v. State of California, 211 Cal. Rptr. 3d 490 (Ct. App. 2016)). As a result, the Fifth District's decision has "no binding or precedential effect" under California law. Cal. R. Ct. 8.1115(e)(1). There is, accordingly, nothing left of Picayune's contention (Br. 44) that the Fifth District's decision is "fully in force" and "the law in California." And Picayune has waived any other argument in support of its claim that the Governor's concurrence was invalid by failing to make it in its opening brief. *World Wide Minerals*, 296 F.3d at 1160.

3. The Secretary properly relied on the Governor's concurrence

In the event the Court reaches the merits of the concurrence issue, Picayune's challenge fails under federal law for two reasons. *First*, it is a fundamental principle of administrative law that "review is to be based on the full administrative record that was before the Secretary *at the time he made his decision*." *Citizens to Preserve Overton Park*, 401 U.S. at 420 (emphasis added). Thus, subsequent state-law developments regarding the validity of the Governor's concurrence provide no basis to challenge the Secretary's prior Trust Decision. *See San Luis & Delta-Mendota Water Auth. v. Dep't of Interior*, 624 F. Supp. 2d 1197, 1212 (E.D. Cal. 2009), *aff'd*, 672 F.3d 676 (9th Cir. 2012).

Second, courts have long recognized that federal officials are entitled to rely on the facially valid actions of state officials within federal regimes that depend upon state involvement—and, relatedly, that federal officials should not be put in

the position of looking behind the actions undertaken by their state counterparts to assess their legality under state law. This principle originated in the context of state ratification of constitutional amendments under Article V of the Constitution and has been applied more recently in cases concerning state retrocession of jurisdiction over Indian lands to the federal government under 25 U.S.C. §1323.[12]

The retrocession cases arose after the Secretary accepted gubernatorial proclamations of retrocession under 25 U.S.C. §1323, which ceded state jurisdiction over certain matters in Indian Country back to the federal government, and gave effect to the retrocession by publishing notice. In disposing of federal challenges to the gubernatorial proclamations' validity under state law, courts held that state-law validity of gubernatorial proclamations was irrelevant to the effect of retrocession under federal law because "'[t]he acceptance of the retrocession by the Secretary … made the retrocession effective, whether or not the Governor's proclamation was valid under [state] law.'" *United States v. Lawrence*, 595 F.2d 1149, 1151 (9th Cir. 1979); *see also, e.g.*, *Oliphant v. Schlie*, 544 F.2d 1007, 1012 (9th Cir. 1976), *rev'd on other grounds*, 435 U.S. 191 (1978); *United States v. Brown*, 334 F. Supp. 536, 540-541 (D. Neb. 1971). As one court explained:

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[12] In the earlier cases, the Supreme Court and this Court's predecessor rejected challenges based on the putative invalidity of steps taken by states to ratify the Eighteenth and Nineteenth Amendments. *See Leser v. Garnett*, 258 U.S. 130, 137 (1922); *U.S. ex rel. Widenmann v. Colby*, 265 F. 998, 999-1000 (D.C. Cir. 1920), *aff'd*, 257 U.S. 619 (1921).

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

Omaha Tribe of Neb. v. Village of Walthill, 334 F. Supp. 823, 831-832 (D. Neb. 1971), *aff'd*, 460 F.2d 1327 (8th Cir. 1972).

The courts reached this conclusion based on "[t]he plenary power of the federal government over Indian affairs, the inescapable difficulty of requiring the Secretary to delve into the internal workings of the state government, and the reliance of the federal government upon what appeared to have been a valid state action." *Oliphant*, 544 F.2d at 1012. These courts accordingly held that "retrocession by the State" in 25 U.S.C. §1323 was fulfilled by a state's apparently valid act of retrocession, regardless of whether the act was actually valid under state law. *Oliphant*, 544 F.2d at 1012; *Omaha Tribe*, 334 F. Supp. at 831-832; *Brown*, 334 F. Supp. at 541.

Similarly, when the Secretary made the Trust Decision here, he was entitled as a matter of federal law to rely on the Governor's facially valid concurrence. As in the retrocession context, the federal government has "plenary power … over Indian affairs," *Oliphant*, 544 F.2d at 1012, including plenary authority to acquire land for Indian tribes and to authorize gaming on Indian lands, *see California v.*

Cabazon Band of Mission Indians, 480 U.S. 202, 207, 221-222 (1987). The Secretary must be able to acquire lands for tribes and to authorize gaming on those lands without state entities subsequently negating the federal action.

Moreover, it would be inappropriate to require the Secretary to inquire into the vagaries of state law before relying on a facially valid concurrence. IGRA, like the retrocession statute, "does not imply any particular procedure or action on the part of the states involved," *Oliphant*, 544 F.2d at 1012, so the Secretary has no basis to look behind the Governor's concurrence. Indeed, the Secretary had every reason to believe the concurrence was valid because the only requirement imposed by IGRA—that the *Governor* concur—was clearly satisfied. *See* 25 U.S.C. §2719(b)(1)(A); 73 Fed. Reg. at 29,367 ("Congress has implicitly rejected the need for concurrence by other officials."); *id.* at 29,371 (Section 2719(b)(1)(A) "specifically identifies the Governor and not the State," which "is distinguished from other sections of IGRA that specifically mention the State.").

Further, the need for finality is particularly strong with respect to a gubernatorial concurrence because it is a one-time act removing a restriction on federal land use. Interior's regulations require the governor to concur within one year, with the possibility of only one 180-day extension, to ensure that the trust decision will be made reasonably promptly. 25 C.F.R. §292.23(b). It would be contrary to the federal scheme and entirely inappropriate to unwind multiple

federal agency actions based on subsequent state-law developments years after the actions in question.

4. The Governor's concurrence is valid under California law

In the event the Court decides that the validity of the Secretary's Trust Decision depends on the validity of the Governor's concurrence under California law, it should rule that the Governor acted in accordance with state law for the reasons stated by the California Court of Appeal for the Third District. *See United Auburn Indian Cmty. of the Auburn Rancheria v. Brown*, 208 Cal. Rptr. 3d 487 (Ct. App. 2016), *review granted*, 387 P.3d 741 (Cal. 2017). That decision unanimously held that California law vests the Governor with inherent executive authority to concur. *See id.* at 499-500.

The California Supreme Court has granted review of the Third District's and the Fifth District's conflicting decisions, and there are good reasons to believe that it will adopt the Third District's unanimous reasoning and reverse the Fifth District's fractured decision. *See West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) (federal court may disregard a state intermediate court's ruling if there is "persuasive data that the highest court of the state would decide otherwise"). None of the three Fifth District justices garnered a majority for his or her respective position, and the court thus failed to produce a coherent or controlling rule on the Governor's concurrence authority. And the State of California itself

has urged the California Supreme Court to affirm the Third Circuit's decision and reverse the Fifth District's decision. *See* Petition for Review, *Stand Up for California! v. State of California*, No. S239630 (Jan. 20, 2017). Accordingly, if this Court were to reach the merits of the Governor's concurrence under state law, it should follow the Third District's decision and find the concurrence valid.[13]

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted.

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[13] This case is distinguishable from *Waremart Foods v. NLRB*, cited by Picayune (Br. 46), because there the two intermediate courts agreed on the issue with no conflict, and this Court relied on them only after the California Supreme Court refused the Court's certification. 354 F.3d 870, 871, 874, 876 (D.C. Cir. 2004).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 12,982 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font.

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May 15, 2017

CERTIFICATE OF SERVICE

I certify that on May 15, 2017, I filed a copy of this brief using the Court's case management electronic case filing system, which will automatically serve notice of the filing on registered users of that system.

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May 15, 2017

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TITLE 5. GOVERNMENT ORGANIZATION AND EMPLOYEES

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CHAPTER 5. ADMINISTRATIVE PROCEDURE

5 U.S.C. § 551. Definitions

For the purpose of this subchapter—

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * *

5 U.S.C. § 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

* * *

CHAPTER 7. JUDICIAL REVIEW

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

* * *

TITLE 25. INDIANS

CHAPTER 15. CONSTITUTIONAL RIGHTS OF INDIANS

25 U.S.C. § 1323. Retrocession of jurisdiction by State

(a) Acceptance by United States

The United States is authorized to accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both, acquired by such State pursuant to the provisions of section 1162 of Title 18, section 1360 of Title 28, or section 7 of the Act of August 15, 1953 (67 Stat. 588), as it was in effect prior to its repeal by subsection (b) of this section.

(b) Repeal of statutory provisions

Section 7 of the Act of August 15, 1953 (67 Stat. 588), is hereby repealed, but such repeal shall not affect any cession of jurisdiction made pursuant to such section prior to its repeal.

* * *

CHAPTER 29. INDIAN GAMING REGULATION

25 U.S.C. § 2702. Declaration of policy

The purpose of this chapter is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming

Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

* * *

25 U.S.C. § 2710. Tribal gaming ordinances

* * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection—

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to—

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that—

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over—

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that—

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court—

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures—

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) 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 Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

* * *

25 U.S.C. § 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when—

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

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that

such interests are part of the reservation of such Tribe under sections 5108 and 5110 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Title 26

(1) The provisions of Title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

* * *

CHAPTER 45. PROTECTION OF INDIANS AND CONSERVATION OF RESOURCES

25 U.S.C. § 5108 (formerly codified as 25 U.S.C. § 465). Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be

appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

* * *

25 U.S.C. § 5123 (formerly codified as 25 U.S.C. § 476). Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section—

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall—

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe

prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act—

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and

(2) nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

* * *

25 U.S.C. § 5125 (formerly codified as 25 U.S.C. § 478). Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

* * *

25 U.S.C. § 5129 (formerly codified as 25 U.S.C. § 479). Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The 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. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

* * *

TITLE 42. THE PUBLIC HEALTH AND WELFARE

CHAPTER 55. NATIONAL ENVIRONMENTAL POLICY

42 U.S.C. § 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of

the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * *

CHAPTER 85. AIR POLLUTION PREVENTION AND CONTROL

42 U.S.C. § 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables

for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or

instrumentality for the implementation of any plan provision, the State has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it implements or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas);

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of

any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action), until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C.A. § 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof)

promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d) of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e) of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d) of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, or

(B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan

or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub.L. 101-549, Title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub.L. 101-549, Title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title, as in effect before August 7, 1977, or section 7413(d) of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10 of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d) of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

(l) Plan revisions

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of

section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State—

> **(A)** in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or
>
> **(B)** in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a

permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(o) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem necessary to assess the development effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

* * *

42 U.S.C. § 7506. Limitations on certain Federal assistance

* * *

(c) Activities not conforming to approved or promulgated plans

(1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it

has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of Title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means—

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not—

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

* * *

42 U.S.C. § 7607. Administrative proceedings and judicial review

* * *

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of

this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsection applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation;

and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments, criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and

related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

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CODE OF FEDERAL REGULATIONS

TITLE 25. INDIANS

CHAPTER I. BUREAU OF INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

PART 151. LAND ACQUISITIONS

25 C.F.R. § 151.3. Land acquisition policy.

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

(2) When the tribe already owns an interest in the land; or

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or

(2) When the land is already in trust or restricted status.

* * *

PART 292. GAMING ON TRUST LANDS ACQUIRED AFTER OCTOBER 17, 1988

25 C.F.R. § 292.2. How are key terms defined in this part?

For purposes of this part, all terms have the same meaning as set forth in the definitional section of IGRA, 25 U.S.C. 2703. In addition, the following terms have the meanings given in this section.

Appropriate State and local officials means the Governor of the State and local government officials within a 25–mile radius of the proposed gaming establishment.

BIA means Bureau of Indian Affairs.

Contiguous means two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point.

Former reservation means lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe.

IGRA means the Indian Gaming Regulatory Act of 1988, as amended and codified at 25 U.S.C. 2701–2721.

Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community of Indians that is recognized by the Secretary as having a government-to-government relationship with the United States and is eligible for the special programs and services provided by the United States to Indians because of their status as Indians, as evidenced by inclusion of the tribe on the list of recognized tribes published by the Secretary under 25 U.S.C. 479a–1.

Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:

(1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;

(2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and

(3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

Legislative termination means Federal legislation that specifically terminates or prohibits the government-to-government relationship with an Indian tribe or that otherwise specifically denies the tribe, or its members, access to or eligibility for government services.

Nearby Indian tribe means an Indian tribe with tribal Indian lands located within a 25–mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25–mile radius of its government headquarters.

Newly acquired lands means land that has been taken, or will be taken, in trust for the benefit of an Indian tribe by the United States after October 17, 1988.

Office of Indian Gaming means the office within the Office of the Assistant Secretary–Indian Affairs, within the Department of the Interior.

Regional Director means the official in charge of the BIA Regional Office responsible for BIA activities within the geographical area where the proposed gaming establishment is to be located.

Reservation means:

(1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;

(2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;

(3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or

(4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

Secretarial Determination means a two-part determination that a gaming establishment on newly acquired lands:

(1) Would be in the best interest of the Indian tribe and its members; and

(2) Would not be detrimental to the surrounding community.

Secretary means the Secretary of the Interior or authorized representative.

Significant historical connection means the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can

demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land.

Surrounding community means local governments and nearby Indian tribes located within a 25–mile radius of the site of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25–mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.

* * *

25 C.F.R. § 292.18. What information must an application contain on detrimental impacts to the surrounding community?

To satisfy the requirements of § 292.16(f), an application must contain the following information on detrimental impacts of the proposed gaming establishment:

(a) Information regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA);

(b) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(c) Anticipated impacts on the economic development, income, and employment of the surrounding community;

(d) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(e) Anticipated cost, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment;

(f) If a nearby Indian tribe has a significant historical connection to the land, then the impact on that tribe's traditional cultural connection to the land; and

(g) Any other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments.

* * *

25 C.F.R. § 292.19. How will the Regional Director conduct the consultation process?

(a) The Regional Director will send a letter that meets the requirements in § 292.20 and that solicits comments within a 60–day period from:

(1) Appropriate State and local officials; and

(2) Officials of nearby Indian tribes.

(b) Upon written request, the Regional Director may extend the 60–day comment period for an additional 30 days.

(c) After the close of the consultation period, the Regional Director must:

(1) Provide a copy of all comments received during the consultation process to the applicant tribe; and

(2) Allow the tribe to address or resolve any issues raised in the comments.

(d) The applicant tribe must submit written responses, if any, to the Regional Director within 60 days of receipt of the consultation comments.

(e) On written request from the applicant tribe, the Regional Director may extend the 60–day comment period in paragraph (d) of this section for an additional 30 days.

* * *

25 C.F.R. § 292.20. What information must the consultation letter include?

(a) The consultation letter required by § 292.19(a) must:

(1) Describe or show the location of the proposed gaming establishment;

(2) Provide information on the proposed scope of gaming; and

(3) Include other information that may be relevant to a specific proposal, such as the size of the proposed gaming establishment, if known.

(b) The consultation letter must include a request to the recipients to submit comments, if any, on the following areas within 60 days of receiving the letter:

(1) Information regarding environmental impacts on the surrounding community and plans for mitigating adverse impacts;

(2) Anticipated impacts on the social structure, infrastructure, services, housing, community character, and land use patterns of the surrounding community;

(3) Anticipated impact on the economic development, income, and employment of the surrounding community;

(4) Anticipated costs of impacts to the surrounding community and identification of sources of revenue to mitigate them;

(5) Anticipated costs, if any, to the surrounding community of treatment programs for compulsive gambling attributable to the proposed gaming establishment; and

(6) Any other information that may assist the Secretary in determining whether the proposed gaming establishment would or would not be detrimental to the surrounding community.

* * *

25 C.F.R. § 292.21. How will the Secretary evaluate a proposed gaming establishment?

(a) The Secretary will consider all the information submitted under §§ 292.16–292.19 in evaluating whether the proposed gaming establishment is in the best interest of the tribe and its members and whether it would or would not be detrimental to the surrounding community.

(b) If the Secretary makes an unfavorable Secretarial Determination, the Secretary will inform the tribe that its application has been disapproved, and set forth the reasons for the disapproval.

(c) If the Secretary makes a favorable Secretarial Determination, the Secretary will proceed under § 292.22.

* * *

25 C.F.R. § 292.23. What happens if the Governor does not affirmatively concur with the Secretarial Determination?

(a) If the Governor provides a written non-concurrence with the Secretarial Determination:

(1) The applicant tribe may use the newly acquired lands only for non-gaming purposes; and

(2) If a notice of intent to take the land into trust has been issued, then the Secretary will withdraw that notice pending a revised application for a non-gaming purpose.

(b) If the Governor does not affirmatively concur in the Secretarial Determination within one year of the date of the request, the Secretary may, at the request of the applicant tribe or the Governor, grant an extension of up to 180 days.

(c) If no extension is granted or if the Governor does not respond during the extension period, the Secretarial Determination will no longer be valid.

* * *

TITLE 40. PROTECTION OF ENVIRONMENT

CHAPTER I. ENVIRONMENTAL PROTECTION AGENCY

SUBCHAPTER C. AIR PROGRAMS

PART 93. DETERMINING CONFORMITY OF FEDERAL ACTIONS TO STATE OR FEDERAL IMPLEMENTATION PLANS SUBPART B. DETERMINING CONFORMITY OF GENERAL FEDERAL ACTIONS TO STATE OR FEDERAL IMPLEMENTATION PLANS

40 C.F.R. § 93.150. Prohibition.

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) A Federal agency must 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.

(c) [Reserved by 75 FR 17272]

(d) Notwithstanding any provision of this subpart, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the National Environmental Policy Act (NEPA), or the Clean Air Act (Act).

(e) If an action would result in emissions originating in more than one nonattainment or maintenance area, the conformity must be evaluated for each area separately.

* * *

40 C.F.R. § 93.154. Federal agency conformity responsibility.

Any department, agency, or instrumentality of the Federal government taking an action subject to this subpart must make its own conformity determination consistent with the requirements of this subpart. In making its conformity determination, a Federal agency must follow the requirements in §§ 93.155 through 93.160 and §§ 93.162 through 93.165 and must consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency or develop its own analysis in order to make its conformity determination.

* * *

40 C.F.R. § 93.155. Reporting requirements.

(a) A Federal agency making a conformity determination under §§ 93.154 through 93.160 and §§ 93.162 through 93.164 must provide to the appropriate EPA Regional Office(s), State and local air quality agencies, any federally-recognized Indian tribal government in the nonattainment or maintenance area, and, where applicable, affected Federal land managers, the agency designated under section 174 of the Act and the MPO, a 30–day notice which describes the proposed action and the Federal agency's draft conformity determination on the action. If the action has multi-regional or national impacts (e.g., the action will cause emission increases in excess of the de minimis levels identified in § 93.153(b) in three or more of EPA's Regions), the Federal agency, as an alternative to sending it to EPA Regional Offices, can provide the notice to EPA's Office of Air Quality Planning and Standards.

(b) A Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies, any federally-recognized Indian tribal government in the nonattainment or maintenance area, and, where applicable, affected Federal land managers, the agency designated under section 174 of the Clean Air Act and

the MPO, within 30 days after making a final conformity determination under this subpart.

(c) The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations, security manuals, or executive orders concerning the use, access, and release of such materials. Subject to applicable procedures to protect restricted information from public disclosure, any information or materials excluded from the draft or final conformity determination or supporting materials may be made available in a restricted information annex to the determination for review by Federal and State representatives who have received appropriate clearances to review the information.

* * *

40 C.F.R. § 93.156. Public participation.

(a) Upon request by any person regarding a specific Federal action, a Federal agency must make available, subject to the limitation in paragraph (e) of this section, for review its draft conformity determination under § 93.154 with supporting materials which describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination.

(b) A Federal agency must make public its draft conformity determination under § 93.154 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the National Environmental Policy Act (NEPA) process. If the action has multi-regional or national impacts (e.g., the action will cause emission increases in excess of the de minimis levels identified in § 93.153(b) in three or more of EPA's Regions), the Federal agency, as an alternative to publishing separate notices, can publish a notice in the Federal Register.

(c) A Federal agency must document its response to all the comments received on its draft conformity determination under § 93.154 and make the comments and responses available, subject to the limitation in paragraph (e) of this section, upon request by any person regarding a specific Federal action, within 30 days of the final conformity determination.

(d) A Federal agency must make public its final conformity determination under § 93.154 for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination. If the action would have multi-regional or national impacts, the Federal agency, as an alternative, can publish the notice in the Federal Register.

(e) The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations or executive orders concerning the release of such materials.

* * *

40 C.F.R. § 93.159. Procedures for conformity determinations of general Federal actions.

(a) The analyses required under this subpart must be based on the latest planning assumptions.

(1) All planning assumptions must be derived from the estimates of population, employment, travel, and congestion most recently approved by the MPO, or other agency authorized to make such estimates, where available.

(2) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or other agency authorized to make such estimates for the urban area.

(b) The analyses required under this subpart must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate, the Federal agency may obtain written approval from the appropriate EPA Regional Administrator for a modification or substitution, of another technique on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program.

(1) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA and available for use in the preparation or revision of SIPs in that State must be used for the conformity analysis as specified in paragraphs (b)(1)(i) and (ii) of this section:

(i) The EPA must publish in the Federal Register a notice of availability of any new motor vehicle emissions model; and

(ii) A grace period of 3 months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used unless EPA announces a longer grace period in the Federal Register. Conformity analyses for which the analysis was begun during the grace period or no more than 3 months before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

(2) For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the "Compilation of Air Pollutant Emission Factors" (AP–42, http://www.epa.gov/ttn/chiefs/efpac) must be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from the stationary sources which are part of the conformity analysis.

(c) The air quality modeling analyses required under this subpart must be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the "Guideline on Air Quality Models." (Appendix W to 40 CFR part 51).

(1) The guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program; and

(2) Written approval of the EPA Regional Administrator is obtained for any modification or substitution.

(d) The analyses required under this subpart must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:

(1) The attainment year specified in the SIP, or if the SIP does not specify an attainment year, the latest attainment year possible under the Act; or

(2) The last year for which emissions are projected in the maintenance plan;

(3) The year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; and

(4) Any year for which the applicable SIP specifies an emissions budget.

* * *

CHAPTER V. COUNCIL ON ENVIRONMENTAL QUALITY

PART 1502. ENVIRONMENT IMPACT STATEMENT

40 C.F.R. § 1502.1. Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.

* * *

PART 1505. NEPA AND AGENCY DECISION MAKING

40 C.F.R. § 1505.1. Agency decision making procedures.

Agencies shall adopt procedures (§ 1507.3) to ensure that decisions are made in accordance with the policies and purposes of the Act. Such procedures shall include but not be limited to:

(a) Implementing procedures under section 102(2) to achieve the requirements of sections 101 and 102(1).

(b) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(c) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(d) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that agency officials use the statement in making decisions.

(e) Requiring that the alternatives considered by the decisionmaker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decisionmaker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decisionmaker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

* * *

25 C.F.R. § 83 (1983)

TITLE 25. INDIANS

PART 83-PROCEDURES FOR ESTABLISHING THAT AN AMERICAN INDIAN GROUP EXISTS AS AN INDIAN TRIBE

25 C.F.R. § 83.6 (1983). Duties of the Department.

(a) The Department shall assume the responsibility to contact, within a twelve-month period following the enactment of these regulations, all Indian groups known to the Department in the continental United States whose existence has not been previously acknowledged by the Department. Included specifically shall be those listed in chapter 11 of the American Indian Policy Review Commission final report, volume one, May 17, 1977. The Department shall inform all such groups of the opportunity to petition for an acknowledgment of tribal existence by the Federal Government.

(b) The Secretary shall publish in the FEDERAL REGISTER within 90 days after effective date of these regulations, a list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs.

Such list shall be updated and published annually in the FEDERAL REGISTER.

(c) Within 90 days after the effective date of the final regulations, the Secretary will have available suggested guidelines for the format of petitions, including general suggestions and guidelines on where and how to research for required information. The Department's example of petition format, while preferable, shall not preclude the use of any other format.

(d) The Department shall, upon request, provide suggestions and advice to researchers representing a petitioner for their research into the petitioner's historical background and Indian identity. The Department shall not be responsible for the actual research on behalf of the petitioner.

* * *

25 C.F.R. § 83.7 (1983). Form and content of the petition.

The petition may be in any readable form which clearly indicates that is it a petition requesting the Secretary to acknowledge tribal existence. All the criteria in paragraphs (a) through (g) of this section are mandatory in order for tribal existence to be acknowledged and must be included in the petition.

(a) A statement of facts establishing that the petitioner has been identified from historical times until the present on a substantially continuous basis, as "American Indian," or "aboriginal." A petitioner shall not fail to satisfy any criteria herein merely because of fluctuations of tribal activity during various years. Evidence to be relied upon in determining the group's substantially continuous Indian identity shall include one or more of the following:

(1) Repeated identification by Federal authorities;

(2) Longstanding relationships with State governments based on identification of the group as Indian;

(3) Repeated dealings with a county, parish, or other local government in a relationship based on the group's Indian identity;

(4) Identification as an Indian entity by records in courthouses, churches, or schools;

(5) Identification as an Indian entity by anthropologists, historians, or other scholars;

(6) Repeated identification as an Indian entity in newspapers and books;

(7) Repeated identification and dealings as an Indian entity with recognized Indian tribes or national Indian organizations.

(b) Evidence that a substantial portion of the petitioning group inhabits a specific area or lives in a community viewed as American Indian and distinct from other populations in the area, and that is members are descendants of an Indian tribe which historically inhabited a specific area.

(c) A statement of the facts which establishes that the petitioner has maintained tribal political influence or other authority over its members as an autonomous entity throughout history until the present.

(d) A copy of the group's present government document, or in the absence of a written document, a statement describing in full the membership criteria and the procedures through which the group currently governs its affairs and its members.

(e) A list of all known current members of the group and a copy of each available former lists of members based on the tribe's own defined criteria. The membership must consist of individuals who have established, using evidence acceptable to the Secretary, descendancy from a tribe which existed historically or from historical tribes which combined and functioned as a single autonomous entity. Evidence acceptable to the Secretary of tribal membership for this purpose includes but is not limited:

(1) Descendancy rolls prepared by the Secretary for the petitioner for purposes of distributing claims money, providing allotments, or other purposes;

(2) State, Federal, or other official records or evidence identifying present members or ancestors of present members as being an Indian descendant and a member of the petitioning group;

(3) Church, school, and other similar enrollment records indicating the person as being a member of the petitioning entity;

(4) Affidavits of recognition by tribal elders, leaders, or the tribal governing body, as being an Indian descendant of the tribe and a member of the petitioning entity;

(5) Other records or evidence identifying the person as a member of the petitioning entity.

(f) The membership of the petitioning group is composed principally of persons who are not members of any other North American Indian tribe.

(g) The petitioner is not, nor are its members, the subject of congressional legislation which has expressly terminated or forbidden the Federal relationship.

* * *

25 C.F.R. § 83.9 (1983). Processing the petition.

* * *

(i) The Assistant Secretary shall acknowledge the existence of the petitioner as an Indian tribe when it is determined that the group satisfies the criteria in § 83.7.

* * *