Case 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,
a federally recognized Indian Tribe,

Plaintiff-Appellant,

v.

United States Department of the Interior, *et al.*

Defendants-Appellees,

North Fork Rancheria of Mono Indians,

Intervenor-Defendant-Appellee

Appeal from the
United States District Court for the District of Columbia
Case No. 1:12-CV02039-BAH, Hon. Beryl A. Howell

Stand Up Plaintiffs' Reply Brief

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Regulations

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

GLOSSARY OF ABBREVIATIONS

APA:	Administrative Procedure Act
Department:	The Department of the Interior
EIS:	Environmental Impact Statement
EMFAC:	Emissions Factor Model[1]
EPA:	Environmental Protection Agency
IGRA:	Indian Gaming Regulatory Act
IRA:	Indian Reorganization Act
JA:	Joint Appendix
Madera Site:	Site of the proposed casino for the North Fork Rancheria of Mono Indians
MOU:	Memorandum of Understanding
NEPA:	National Environmental Policy Act
North Fork Tribe:	North Fork Rancheria of Mono 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
Tribe:	North Fork Rancheria of Mono Indians
Trust Decision:	November 2012 decision by the Secretary under IRA

[1] EMFAC is not technically an acronym, but is the tradename for an emissions model approved by the EPA for use in California.

SUMMARY OF ARGUMENT

1. The Section 18 election at the North Fork Rancheria does not establish that the applicant North Fork Tribe was a tribe "under federal jurisdiction" in 1934, because a Section 18 election is evidence of jurisdiction over those adult Indians voting or a reservation, but not a tribe. The alternative grounds urged as support for the Secretary's decision, but not adopted by the Secretary in the decision, may not be considered, and in any event fail to establish whether any tribe—let alone this particular tribe—existed at the Rancheria in 1934.

2. In determining that the casino would not be detrimental to the surrounding community the Secretary improperly used monetary benefits to outweigh detrimental impacts, and improperly relied on the EIS, without independent substantial evidence, to conclude that detrimental impacts from problem gambling would be fully mitigated.

3. Because the Secretary treated the Clean Air Act's notice requirement as a perfunctory exercise on remand, he undermined effective participation in the process, and his procedural error cannot be deemed harmless. Additionally, the Secretary's refusal to employ the

latest emissions model on remand is based on his misinterpretation of the governing EPA regulation.

ARGUMENT

I
The Secretary Lacked Authority to Acquire the Madera Site into Trust

A. A Section 18 election does not establish the existence of a tribe

The government sows confusion by asserting the Section 18 election was held "for North Fork" and "on North Fork's reservation." [E.g., Govt. Br. at 9, 21, 22.] In 1934, "North Fork" was a place, not a tribe. That the applicant Tribe incorporated the name of the place into its name is not relevant to whether any tribe—let alone this particular tribe—existed at the Rancheria in 1934.

The government contends that the Secretary here "appl[ied] the same interpretation of 'under Federal jurisdiction' as it did in *Grande Ronde* . . . ." [Govt. Br. at 21 (citing *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell,* 830 F.3d 552 (D.C. Cir. 2016)).] This is both irrelevant and wrong. The issue here is not the meaning of "under Federal jurisdiction," but whether those adult "Indians" voting

at the Rancheria in 1935 constituted a "tribe." In *Grande Ronde*, there was no dispute that the Cowlitz tribe existed as a tribe in 1934, and the Court did not address this issue.

Moreover, the Secretary's interpretation in *Grande Ronde* was not the same as that here. In *Grand Ronde*, the Secretary employed a "two-part inquiry," which "detailed the government's course of dealings with the Cowlitz" from 1855 through the 1900s, 1920s, 1932, and more. *Confederated Tribes of the Grand Ronde*, 830 F.3d at 563-564. Here, the Secretary's determination that the North Fork Tribe was a "tribe" under federal jurisdiction in 1934 is based on a single event—the conduct of a Section 18 election at the North Fork Rancheria for "Indians," but not for a tribe. [Stand Up Br. at 14.] As discussed in our opening brief and below, a Section 18 election conducted at a place does not mean all occupants of that place are a "tribe." [Stand Up Br. at Part II.A.]

The government relies on the 2014 Interior Solicitor's opinion that was issued two years *after* the Trust Decision here, and during the time when the Department was litigating this action. [Govt. Br. at 22] This court should afford it no weight. *See Bowen v. Georgetown Univ. Hosp.,*

488 U.S. 204, 212-213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *In re Kaiser Aluminum Corp.*, 456 F.3d 328, 345 (3d Cir. 2006) (*Chevron* deference not applicable to agency position first adopted during litigation).

Substantively, the Solicitor's opinion fails to distinguish between tribes and "Indians" who were eligible to vote in a Section 18 election. [Solicitor's Opinion M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, 21 (2014), *available at* https://go.usa.gov/x5qG7.] Anyone permitted to vote in a Section 18 election was an "Indian" under the IRA. 25 U.S.C. § 5125. But the Indians voting at a particular reservation were not necessarily a tribe. [Stand Up Br. at 17.] In 1934, the Department stated that "adult Indians" eligible to vote were those who (1) resided on a reservation and (2) had a legal interest in the reservation. [JA*(Doc. 115-1, at12-13).] Tribal affiliation was only one method of establishing a legal interest. [*Id.*]

The decisions by the Interior Board of Indian Appeals [Govt. Br. at 23] show only that some Section 18 elections were offered to recognized

tribes. *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62 (Feb. 28, 2011), involves facts indicating that the Secretary held a Section 18 election for a specific tribe. Applying *Shawano*, the Board in *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, 57 IBIA 4 (May 9, 2013), also concluded, based on facts separate from the election itself, that the election was held for a specific tribe.[2] Here, the evidence the Secretary relied on—the Haas Report—indicates *only* that adult Indians voted in an election statutorily prescribed for "adult Indians."[3] *See* 25 U.S.C. § 5125. That is insufficient to show that those Indians were a tribe.

The North Fork Tribe argues that because Section 19 defines a "tribe" as including "Indians residing on one reservation," the Section 18 election on the North Fork Rancheria demonstrates that those

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[2] *Thurston v. Acting Great Plains Regional Director,* 56 IBIA 62 (December 18, 2012) did not address whether the Secretary adequately determined the Section 18 election there was held for a tribe because the challenger had not raised that issue in previous administrative proceedings.

[3] The government's argument under 25 U.S.C. § 2202 [Govt. Br. at 23 n.6] is irrelevant. Section 2202 provides that tribes that rejected the IRA under Section 18 may still be eligible for trust land under the IRA. This provision does not obviate the need to demonstrate that the tribe was under federal jurisdiction in 1934. *See Carcieri v. Salazar,* 555 U.S. 379, 395 (2009).

Indians who voted were a tribe. [NF Br. at 32-33.] Because the Secretary did not apply this reasoning in the Trust Decision (and does not even advance it in his brief), it cannot justify the challenged decision. *See Clifton Power Corp. v. F.E.R.C.*, 88 F.3d 1258, 1267 (D.C. Cir. 1996); *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

In any event, the Tribe's argument is contrary to contemporaneous Department interpretations of the IRA. In a 1934 opinion, the Solicitor concluded that Section 19's definition of "tribe" identified the groups that "may be recognized *as entitled* to tribal status." [JA*(Doc. 115-1, at 8); *see also* JA*(Doc. 115-1, at 13 ("[section 16] authorizes the 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 affiliations.")).] Section 19 therefore contemplates tribal organization under Section 16, but cannot, of itself, create a tribe. *See City of Sault Ste. Marie Mich. v. Andrus*, 458 F. Supp. 465, 472 (D.D.C. 1978) ("Neither Congress nor the Department of the Interior may create a tribe where none exists within the meaning of the Indian Reorganization Act."); *United States v. State Tax*

Commission of State of Mississippi, 535 F.2d 300, 306 (5th Cir. 1976) ("We see nothing in the Acts of Congress conferring authority upon the Secretary of the Interior to create Indian tribes where none had theretofore existed.")

Moreover, Section 19 provides three definitions of "Indian," one of which requires no tribal affiliation. 25 U.S.C. § 5129. The Tribe's argument also does not account for the common situations where one reservation was occupied by multiple tribes[4] or where ethnologically different Indians were granted allotments on an unrelated tribe's reservation. For example, neither the Tribe nor the government responded to Stand Up's example of the Quinault Reservation. [Stand Up Br. at 20-21.]

Finally, the Tribe's argument that all Indians residing on a reservation were necessarily a "tribe" would lead to absurd results. For example, in *Grand Ronde*, this court held that the Cowlitz tribe was an independent tribe under federal jurisdiction in 1934. *Confederated*

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[4] *E.g., Confederated Tribes of the Grand Ronde,* 830 F.3d 552 and *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation,* 425 U.S. 463 (1976).

Tribes of the Grand Ronde, 830 F.3d at 566. But in 1931, Cowlitz Indians were among those granted allotments on the Quinault Reservation where a Section 18 election was subsequently held. *Halbert v. U.S.*, 283 U.S. 753, 760 (1931); [JA*(NF_AR_NEW_0002016).] Under the Tribe's interpretation of Sections 18 and 19, the Cowlitz allottees would have become members of the Quinault Tribe because they voted in a Section 18 election on that reservation. This court should not adopt this absurd interpretation of the statute, particularly when the government is not urging it.

B. Alternative justifications are improper and without merit

The government argues that the Secretary's purchase of the North Fork Rancheria "with funds appropriated by Congress" is "'[s]ignificant' and 'likely dispositive in its own right' of whether North Fork was 'under federal jurisdiction' during the required era." [Govt. Br. at 23.] The North Fork Tribe adds that "the record showed that the Rancheria purchase was for 'the North Fork band of landless Indians.'" [NF Br. at 40.] These arguments are wrong for two reasons.

First, the Secretary did not rely on the Rancheria's purchase to determine that the North Fork Tribe was a tribe under federal jurisdiction in 1934. Considering his expertise in matters of tribal history and recognition, his decision not to rely on this evidence cannot be attributed to a lack of perfection. [JA*(Doc. 169, at 99, n.38).] *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[W]e may not supply a reasoned basis for the agency's action that the agency itself has not given."); *James v. U.S. Dep't of Health and Human Services*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) (Department's expertise in matters of tribal history and recognition).

Second, the evidence demonstrates that the Rancheria property was purchased for landless Indians in the vicinity, rather than for any specific tribe. [Stand Up Br. at 24-26.] [5] Appellees do not respond to this point, but simply assume that any record bearing the words "North

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[5] According to the Tribe, Stand Up waived any challenge to the district court's holding regarding the Rancheria's purchase by failing to raise the issue in its opening brief. [NF Br. at 36.] Nonsense. Stand Up's opening brief argues that the North Fork Rancheria was not purchased for the North Fork Tribe, and that this court should not affirm on grounds not relied on by the Secretary in making his initial decision. [Stand Up Br. at 25-26.]

Fork" refers to a tribe, rather than a place. [Govt. Br. at 23; NF Br. at 36.]

C. No evidence connects the applicant Tribe with the adult Indians at the Rancheria in 1935

The government and the Tribe fail to cite any evidence that the Indians at the Rancheria between 1934 and the termination of the Rancheria in 1966 constituted a tribe. As explained in Stand Up's opening brief (at 19-23), the Indians at the Rancheria were not members of any tribe—let alone this applicant Tribe—merely by virtue of their residence there. In preparing to terminate Rancherias, "both the Senate and the House report notes (sic) that no membership roll is required to identify the beneficiaries because 'the groups are not well defined'" and "the lands to be distributed 'were for the most part acquired or set aside by the United States for the Indians of California generally, rather than for a specific group of Indians, and the consistent practice has been to select by administrative action the *individual Indians who may use the land*.'" [JA* (Doc 115-1, at 26) (emphasis added).]

Ultimately, Susan Johnson received the sole assignment of the Rancheria land at its termination. [JA*(Doc. 106-2, at 34).] Both Congress and the Department determined prior to termination that Susan Johnson was not a member of any tribe.[6] [*Id.*; 31 Fed. Reg. 2,911 (Feb. 18, 1966).]

Unable to establish a connection between any tribe that may have existed in 1934 and Susan Johnson—and then ultimately to the current applicant North Fork Tribe—both the government and the Tribe resort to the *Hardwick* Stipulation. The government contends that Stand Up's *Hardwick* arguments are an indirect attack on the Tribe's federal recognition. [Govt. Br. at 28-34.] But Stand Up has not sought a declaration that the North Fork Tribe was improperly recognized; it has only argued that the North Fork Tribe does not qualify for trust land under Section 5 of the IRA.

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[6] The Tribe claims the notice of termination "did not state that they were not members of a tribe . . . *before* termination." [NF Br. at 41 (emphasis added).] But the notice itself states that it "affects only Indians who are not members of any tribe or band of Indians . . . ." *See* 31 Fed. Reg. 2,911 (Feb. 18, 1966).

The *Hardwick* Stipulation does not establish the necessary connections from the six adult Indians who voted in 1935 to those living on the Rancheria prior to its termination, and then ultimately to the current applicant North Fork Tribe. The *Hardwick* Stipulation sheds no light on the questions of (i) whether any tribe existed at the Rancheria in 1934, or (ii) whether the tribe, if any, that existed in 1934 is the same as the applicant North Fork Tribe. [*See* Stand Up Br. at 28-32.]

The Tribe argues that the 1983 recognition necessarily satisfies the Part 83 acknowledgment criteria and therefore establishes that the Tribe existed in 1934. [NF Br. at 39.] But the Secretary made no such finding, and the Tribe did not obtain recognition through the Part 83 process. The Tribe's argument contradicts its own contention that its recognition was restored by the *Hardwick* Stipulation [NF Br. at 38], which limits any historical inquiry to the period immediately preceding termination—the Indians were restored to whatever status they had before termination. [Stand Up Br. at 31-32.] Inclusion on the list of federally recognized tribes is not limited to tribes that have demonstrated the criteria under the Part 83 process. *See, e.g., City of Roseville v. Norton*, 219 F. Supp. 2d 130, 135 (D.D.C. 2002), aff'd, 348

F.3d 1020 (D.C. Cir. 2003) (United Auburn recognized by Congress); *see also* Auburn Indian Restoration Act, H.R. 4228, 103rd Congress (1994) (extending recognition to United Auburn and Mowa Band of Choctaw Indians). Additionally, 25 C.F.R. § 83.11(g) and the preamble to the final rule, 43 Fed. Reg. 39,361 (Sept. 5, 1978), expressly state that the Part 83 process does not apply to "terminated groups, bands or tribes," which the Tribe claims it was. [NF Br. at 38.]

II

The Secretary's Determination That Gaming Would Not Be Detrimental to the Surrounding Community Violated IGRA

A. IGRA does not permit the Secretary to use monetary benefits to outweigh detrimental impacts

The government argues that there is no "legal or factual basis" for Stand Up's contention that "the Secretary may not rely on economic benefits to the communities as mitigation unless the benefits are connected with the detrimental impacts of gaming." [Govt. Br. at 42.] The Tribe argues the regulations "expressly require the Secretary to evaluate both the costs and the benefits of a project." [NF Br. at 14.] These arguments ignore the statute's language and contradict the Department's own previously stated understanding.

Section 2719(b)(1)(A) requires two distinct determinations—one involving the tribe's best interests and one involving detrimental impacts to the community. Congress could have required the Secretary to determine only that gaming would be in the best interest of both the tribe and the surrounding community. It did not.

Moreover, the Department regulations preserve the distinction between the "best interest of the Indian tribe" determination and the "would not be detrimental to the surrounding community" determination. 25 C.F.R §§ 292.16(e)-(f). Section 292.17 interprets the "best interest" inquiry to address "benefits and impacts of the proposed gaming establishment to the tribe and its members." Section 292.18, by contrast, is limited to "information on detrimental impacts of the proposed gaming establishment."

Section 292.17's "best interests" determination requires a balancing of benefits against adverse impacts. 25 C.F.R. § 292.17(a)-(f). Section 292.18, by contrast, does not mention or imply any consideration of benefits to the surrounding community, let alone benefits unrelated to detrimental impacts. The regulations

appropriately confine consideration of benefits to the "best interest" inquiry. *See* 25 C.F.R. § 292.17.

It was, therefore, improper for the Secretary to weigh the monetary benefits of the casino against the acknowledged detriment under 292.18(c). Although section 292.18 uses the term "impact," the section's heading, preface, and section 292.18(g) indicate that the term "impact" is limited to detrimental impacts. Nowhere does section 292.18 refer to "beneficial impacts." [7]

The Secretary was wrong to invoke section 292.18(g) to consider payments by the North Fork Tribe "to provide benefits to the surrounding community which are not directly associated with costs of the casino to the County or the surrounding community." [JA*(NF_AR_0040527).] Relying on benefits unrelated to acknowledged detrimental impacts would establish a regime under which the two-part

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[7] The Tribe's citation to the Department's publication of the final rule in the Federal Register [NF Br. at 15] is misplaced because "[t]he benefits of gaming" referred to in the publication are benefits of the rule itself, which are required to be evaluated in a cost-benefit analysis required for rulemaking. 73 Fed. Reg. 29,354, 29,373-74 (May 20, 2008).

determination can always be satisfied if a tribe agrees to pay the community enough money. [Stand Up Br. at 35-38.]

Because the government's and Tribe's interpretation is contrary to the statutory language and the Department's regulations, the Court should not defer to the Secretary or apply the Indian Canon of construction to his interpretation. The Indian Canon is not a "license to disregard clear expressions" of congressional intent. *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 447 (1975). Congress's primary intent in IGRA was to prohibit gaming on lands acquired after 1988. The two-part determination exception takes into account the effects on the surrounding community, and prohibits gaming facilities where the results would be "detrimental." 25 U.S.C. § 2719(b)(1)(A). Thus, the statute privileges state and local interests in avoiding detrimental impacts over tribal interests in off-reservation gaming. *Confederated Tribes of Siletz Indians of Oregon v. United States*, 841 F. Supp. 1479, 1490 (D. Or. 1994), *aff'd on other grounds*, 110 F.3d 688 (9th Cir. 1997).

Additionally, the Indian Canon is inapplicable where "such application would adversely affect" the interests of another tribe.

Confederated Tribes of Chehalis Indian Reservation v. State of Washington, 96 F.3d 334, 340 (9th Cir.1996). Under the two-part determination, nearby Indian tribes are included within the definition of "[s]urrounding community." 25 C.F.R. § 292.2.

As discussed in Stand Up's opening brief (at 34-35), courts have broadly interpreted exceptions to the general prohibition against gaming on newly acquired land only when they involved the "equal footing" exceptions. The equal footing exceptions are read broadly because IGRA was designed to ensure newly recognized tribes are not disadvantaged relative to long-established tribes, and "*not to respond to community concerns about casinos*." *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d at 469 (D.C. Cir. 2007) (emphasis added). The two-part determination, by contrast, is specifically designed to respond to a casino's potential detriments to the surrounding community.[8]

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[8] The government argues (at 41) that this court rejected Stand Up's argument in *City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003). But *Roseville* involved an equal footing exception, not the two-part determination. The government obscures this by misquoting this court's opinion. In *Roseville*, the court rejected an argument against applying the Indian Canon because that argument "overlook[s] the role

In sum, the government's reading of 25 U.S.C. § 2719(b)(1)(A) to eclipse the general prohibition on gaming ignores Congress's intent and is arbitrary, capricious, and an abuse of discretion.

B. The Secretary's finding that the project would not be detrimental is arbitrary, capricious, and an abuse of discretion

Appellees contend that the Secretary properly relied on the EIS and the MOUs for mitigation because the regulations require such reliance.[9] [Govt. Br. at 43; NF Br. at 17.] Not so. NEPA "does not require agencies to discuss any particular mitigation plans that they might put in place," nor does it "require agencies—or third parties—to

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that IGRA's exceptions in § 20(b)(1)(B) play in the statutory scheme, namely to confer a benefit onto tribes that were landless when IGRA was enacted." *Id.* at 1032. Subsection (b)(1)(B) provides, of course, the equal footing exceptions. In quoting this portion of the opinion, the government substitutes the Court's citation to subsection (b)(1)(B) for a bracketed citation to subsection (b) generally, which makes it appear that the Court was referencing *all* exceptions including the two-part exception at issue here. [Govt. Br. at 41.] That the government must resort to rewriting this court's opinion to support its arguments shows the strength of Stand Up's point.

[9] The Tribe argues that Stand Up failed to "challenge the Secretary's reliance on the MOUs" below. [NF Br. at 20 & n.3.] But Stand Up argued that the mitigation measures in the MOUs cannot be considered as a basis for the Secretary's finding of no detriment because those MOUs were contingent on a nonexistent compact. [JA*(Doc. 106-1 at 22-24.]

effect any." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991). Accordingly, while the Secretary is required to evaluate information regarding environmental impacts in an EIS, *see* 25 C.F.R. § 292.18(a), those environmental documents are a starting point, not an ending point because they do not provide a plan to ensure detrimental impacts will be mitigated. [Stand Up Br. at 41.]

The North Fork Tribe relies on 25 C.F.R. § 292.18(g) to argue the Secretary may consider MOUs. [NF Br. at 20.] But the decision to rely on the MOUs for mitigation *here* was arbitrary and capricious because those MOUs were contingent upon a compact that never became effective. [Stand Up Br. at 46-47.]

Appellees attempt to circumvent this problem by arguing that the MOUs apply to the recently prescribed Secretarial Procedures. [NF Br. 21-22; Govt. Br. 47.] This post hoc justification should be rejected because the information before the Secretary at the time of the decision showed the MOUs were contingent upon an effective compact. [JA*(NF_AR_0001313), (NF_AR_0003701-2).] *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (holding review is limited to administrative record at time of decision).

Appellees also argue that the regulations did not require the Secretary to consider the social costs of problem gambling, but only the actual costs of treatment programs, even if those treatment programs will not reach all the problem gamblers created by the new casino. [Govt. Br. at 46; NF Br. at 18.] True, subdivision (e) of section 292.18 only requires the Secretary to consider the cost of treatment programs. But subdivision (b)—which is the subdivision the Secretary invoked in addressing problem gambling in the record of decision [JA*(NF_AR_0040511)]—requires the Secretary to consider "impacts on the social structure . . . of the surrounding community." 25 C.F.R. § 292.18(b). Thus, the Secretary's analysis of problem gambling impacts was required to address more than merely costs of treatment programs. And, although the Secretary acknowledged "[p]roblem gambling disorders can result in a host of social ills" [JA*(NF_AR_0030197)], the Secretary did not implement mitigation measures that would fully compensate for those ills. [Stand Up Br. at 42-44]

Appellees do not respond to Stand Up's demonstration that even if the mitigation measures identified are enforced and even if the shortfall in the costs of services is addressed, "Madera County will still be stuck

with more than 400 new gamblers and the attendant increase in 'bankruptcy, suicide, divorce.'" [Stand Up Br. at 45.] Because this undisputed detrimental impact was not addressed or remedied by the Secretary's mitigation measures, the Secretary's determination that there would be no detriment to the surrounding community cannot stand.[10]

III

The Secretary Violated the Clean Air Act

A. The Secretary failed to comply with required notice procedures

There is no dispute the Secretary was required to provide a 30-day notice to certain entities before adopting a final conformity determination. 40 C.F.R. §§ 93.155(a), 93.150(b). There is no dispute that the Secretary gave the required notice here nearly three years late—after he had taken the land into trust.

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[10] While the Tribe asserts that "[t]he EIS concluded that the payments and other measures would mitigate the impact from problem gambling to 'less than significant'" [NF Br. at 19], the conclusions of an EIS cannot constitute substantial evidence without independent substantial evidence in the record because NEPA does not require that an EIS's conclusions be supported by substantial evidence. *Friends of the River v. F.E.R.C.*, 720 F.2d 93, 105 (D.C. Cir. 1983).

1. Stand Up preserved its arguments for appeal

The government asserts that Stand Up has waived its argument regarding notice by "fail[ing] to identify the order as a basis for its appeal" and "fail[ing] to cite the pertinent case law about whether remand without vacatur is appropriate . . . ." [Govt. Br. at 55.]

First, it is axiomatic that "a party is entitled to a single appeal, to be deferred until final judgment has been entered, in which claims of district court error at any stage of the litigation may be ventilated." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996). By appealing the final judgment, Stand Up preserved its right to challenge the district court's order allowing remand for the Secretary to give notice. Moreover, Stand Up's notice of appeal included "all interlocutory orders." [JA*(Doc. 172 at 2).] And, the deficiency of the republished notice is encompassed in Stand Up's statement of issues. [Stand Up Br. at 2.]

Finally, Stand Up devoted an entire subsection of its opening brief to argue that "[t]he post-approval notice procedure failed to comply with the Clean Air Act" [Stand Up Br. at 54], and that belatedly providing

notice and treating that notice as perfunctory was improper. [*Id.* at 55-58.] Nothing more was required for Stand Up to preserve its arguments.

2. The Secretary improperly treated the notice provisions as a perfunctory exercise that could be performed after making his decision

In defending the Secretary's belated notice, the government and the Tribe rely on cases allowing a trial court to remand to provide notice without vacating an agency's decision. [Govt. Br. at 55-56; NF Br. at 47.] But this argument misses Stand Up's point. Even if the district court could properly remand without vacating the Secretary's initial decision, the Secretary's actions on remand—which treated the notice as perfunctory and simply rubber-stamped his earlier decision—were inadequate to meet the Clean Air Act's requirements.

The cases cited by appellees illustrate the point. In *Fertilizer Inst. v. US EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991), the court held that the EPA improperly issued exemptions without adequate notice and comment, but "allow[ed] the exemptions to stay in place until the EPA conducts a new round of notice and comment." The court emphasized, however, that it was "not relieving the EPA of its burden to conduct notice and comment rulemaking *ab initio, i.e.,* without giving preference

to the exemptions left in place in the interim." *Ibid*. Likewise, in *Rodway v. U.S. Dep't of Agric.*, 514 F.2d 809 (D.C. Cir. 1975), the court allowed regulations to stay in effect only "until validly promulgated regulations can take their place." *Id*. at 817.

These cases make clear that the Secretary was required—even after remand—to give the required notice *and* to conduct his decisionmaking "*ab initio*." The Secretary did not do so. Rather, the Secretary issued a "Reissued Notice of Final Conformity Determination" stating that he was making no changes to his earlier decision. [JA*(NF_AR_NEW_0001768-69).] That the Secretary did not engage in *ab initio* decisionmaking is demonstrated by his decision not to republish notice of a draft conformity decision in the newspaper or to republish notice of its final conformity decision as required by 40 C.F.R. § 93.156.[11]

[11] The government argues that providing post-decision notice was sufficient because the Secretary was still free to "examine matters afresh." [Govt. Br. at 56.] That may be true in the abstract, but the procedure adopted by the Secretary here made clear that he did not consider the matter afresh.

The Secretary's failure to give the required notice in the first instance cannot be so easily remedied by the perfunctory process the Secretary adopted here.

3. The Secretary's failure to provide notice was not harmless

According to the Tribe, this court's inhospitality toward harmless error claims where an agency fails to provide notice is inapposite because "the conformity determination was not a rule subject to APA notice-and-comment procedures." [NF Br. at 44.] The Tribe again misses the point. While conformity determinations are not subject to the APA's notice-and-comment procedures, they *are* subject to the Clean Air Act's notice-and-comment procedures. As this court has held, "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure" under the APA. *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 96-97 (D.C. Cir. 2002). There is no rational justification for a different rule under the Clean Air Act's notice requirements.

Here, it is impossible to conclude that other interested parties would not have responded to the notice if that notice were not presented as a *fait accompli*. [Stand Up Br. at 56-57.] The Third Circuit explains:

> If a period for comments after issuance of a rule could cure a violation of the APA's requirements, an agency could negate at will the Congressional decision that notice and an opportunity for comment must precede promulgation. *Provision of prior notice and comment allows effective participation in the rulemaking process while the decisionmaker is still receptive to information and argument. After the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decisionmaker is likely to resist change.*

Sharon Steel Corp. v. E.P.A., 597 F.2d 377, 381 (3d Cir. 1979) (emphasis added).

The Tribe argues that the Secretary's procedural defect "only pertains to a small number of governmental entities, not including those most likely to have substantive comments" [NF Br. at 43], and that "Stand Up does not dispute" that the Secretary considered comments in 2011 from the entities "most likely to have substantive comments." [NF Br. at 45.] These assertions are false. When the Secretary belatedly issued the notice in 2014, notice was sent to 45 entities. [JA*(NF_AR_NEW_0001286-1333).] The Table Mountain

Tribe—which should have, but did not receive notice in 2011—offered evidence that it "would have submitted comments on the draft conformity determination had it received notice." [JA*(Doc. 71-1-2).] Table Mountain then raised new issues in response to the belated 2014 notice. [JA*(NF_AR_NEW_0001573-1585).]

The Secretary's re-issuance of the final conformity determination without change demonstrates that he treated the notice as perfunctory. By giving notice three years after making the conformity determination, and without having set aside that conformity determination, the Secretary signaled he was likely to resist change, and undermined effective participation in the process. *Sharon Steel Corp.,* 597 F.2d at 381.

B. The Secretary's 2014 final conformity determination was not based on the latest emissions model

Clean Air Act section 176(c)(1) requires that the "latest and most accurate emission estimation techniques available" be used in conformity analyses. 42 U.S.C. § 7506(c)(1); 40 C.F.R. § 93.159(b). There is no dispute that the Secretary's 2014 reissued final conformity determination was not based on the then-current emissions model. [Govt. Br. at 58; NF Br. at 48.]

1. The re-issued final conformity determination was a separate, final agency action

The government asserts that the Secretary simply "republished the same final notice without any changes," implying that the "final notice" was actually issued in 2011. [Govt. Br. at 54] But the Secretary's 2014 decision was a new agency action—however perfunctory—and not simply a republication of the prior agency decision. [12] [JA*(NF_AR_NEW_0001768-1769).] As a new decision, it was required to be based upon the latest emission model. 40 C.F.R. § 93.159(b).

2. The conformity analysis was required to use the newer emissions model

The parties agree that the EPA's announcement of the new emissions model on March 6, 2013, established a six-month grace period running to September 6, 2013, during which the Secretary could continue to use the old model on any analyses *begun* during that time. The Secretary's analysis here, however, began in 2010 and does not fall within that grace period. [JA*(Doc. 112-1 at 72).] The government argues that the EPA's announcement extends the grace period

[12] If the government is suggesting that the 2014 decision was not a new decision, then the notice provided was a sham. Even as a new action, the Secretary's decision was perfunctory and insufficient for the reasons stated in Part III.A.

"indefinitely into the past" because the announcement states that "[a]nalyses that begin before or during the grace period may continue to rely on [the older model]." [Govt. Br. at 57-58.] This argument ignores the governing regulation and mischaracterizes the EPA's announcement.

First, the regulation governing emissions models has two parts.[13] The first part establishes a "grace period" of 3 months running from the time the EPA announces a new emissions model, but also gives the EPA authority to "announce[] a longer grace period." The second part establishes that conformity analyses that are "begun" either "during the grace period or no more than 3 months before" the Federal Register's notice that the new model is available may still use the older model.

The government's argument that the EPA extended the grace period "indefinitely into the past" misconstrues the regulation. The

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[13] "A grace period of 3 months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used unless EPA announces a longer grace period in the Federal Register. Conformity analyses for which the analysis was begun during the grace period or no more than 3 months before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA." 40 C.F.R. § 93.159(b)(1)(ii).

regulation's text makes clear the grace period is *forward looking*. Otherwise, there would have been no need to state that analyses begun during the grace period "*or no more than 3 months before*" the notice of availability could use the old model.

The government also misconstrues the EPA's announcement. The quote cited by the government was in response to the question: "Can areas use any other models *during the grace period*?" *See* 78 Fed. Reg. 14,533, 14,535 (Mar. 6, 2013) (emphasis added). The EPA responded: "Yes, the conformity rule provides some flexibility for regional emissions analyses that are started before the end of the grace period. Analyses that begin before or during the grace period may continue to rely on [the older model] . . . ." *Ibid*. This isolated and ambiguous statement cannot supersede 40 C.F.R. § 93.159(b)(1)(ii), which specifies that the earlier emissions model may be used only if it was commenced "no more than 3 months before the Federal Register notice of availability of the latest emission model . . . ." *M. A. S., Inc. v. Van Curler Broad. Corp.*, 357 F. Supp. 686, 688 (D.D.C. 1973) (a "more specific mandate" prevails over general language).

The government also misquotes the EPA notice by asserting that "*[o]nly those analyses* 'started after the end of the 6-month grace period must be based on [the new model].'" [Govt. Br. at 57 (emphasis added).] In fact, the notice states that "[i]n general, this means that all new [hydrocarbon, nitrogen oxide, particulate matter and carbon monoxide] regional conformity analyses and [carbon monoxide and particulate matter] hot-spot analyses started after the end of the 6-month grace period must be based on [the new model]." 78 Fed. Reg. at 14,535. Saying that all new analyses started after the grace period must use the new model is not the same as saying—as the government insists—that "*only those analyses*" started after the grace period are required to use the new model.

3. Stand Up need not demonstrate that applying the new model would change the result

The Tribe argues that this court should affirm the Secretary's project approval despite improper use of an outdated emissions model because Stand Up "has not demonstrated that applying [the new model] would have changed the conformity determination's ultimate result." [NF Br. at 49.] According to the Tribe, the Secretary's decision is insulated from review unless ordinary citizens like Stand Up run the

complex, data-driven emissions model that the Secretary refused to perform, and demonstrate that the outcome would be different under the new model. As explained in Stand Up's opening brief (at 64-65), this would effectively insulate Clean Air Act violations from review, and is not the law.[14] Rather, to avoid a finding of harmless error, the law requires only that Stand Up show "[i]t is entirely possible that" a different result would be reached on remand. *E.g., PDK Laboratories Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004).

The tribe's reliance on *City of Olmsted Falls, OH v. FAA*, 292 F.3d 261, 271-72 (D.C. Cir. 2002) does not require a different result. That case involved the Federal Aviation Administration's finding that emissions from a runway development would be de minimis. The City challenged that determination, arguing that the FAA failed to consider certain construction projects in the air quality analysis. In affirming the FAA's decision not to consider those projects, this court held that the City had not shown that the FAA's "overall determination" was unreasonable. This court did not require the City to demonstrate that the result would be different if those projects were considered. Rather,

[14] Notably, the government has not endorsed the Tribe's argument.

this court gave detailed reasons why those projects were unlikely to change the result and concluded that in light of those reasons "we cannot say that the FAA's determination was arbitrary and capricious." *Id.* at 272.

Here, unlike in *Olmsted Falls*, appellees have not given any reason to believe the outcome would be the same using the newer emissions model. Indeed, during the comment period following remand when the Department was warned that it was applying an outdated model [JA*(NF_AR_NEW_0001427), (NF_AR_NEW_0001573-1574)], the Department's environmental consultant responded to comments in writing, but did not assert that analysis under the new model would yield the same result. [JA*(NF_AR_NEW_0001945-1946).]

CONCLUSION

The judgment should be reversed, and the matter remanded with instructions to grant summary judgment to Stand Up.

June 15, 2017

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Addendum of Statutes and Regulations

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Addendum of Statutes and Regulations

Statutes

Regulations

Statutes

25 U.S.C. § 2202. Other applicable provisions

The provisions of section 5108 of this title shall apply to all tribes notwithstanding the provisions of section 5125 of this title: *Provided*, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians with respect to any specific tribe, reservation, or state(s).

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

(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.

25 U.S.C. § 5125. 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. 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.

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.

. . .

(4) Criteria and procedures for determining conformity

(A) In general

The Administrator shall promulgate, and periodically update, criteria and procedures for determining conformity (except in the case of transportation plans, programs, and projects) of, and for keeping the Administrator informed about, the activities referred to in paragraph (1).

Regulations

25 C.R.R. § 83.11 What are the criteria for acknowledgment as a federally recognized Indian tribe?

The criteria for acknowledgment as a federally recognized Indian tribe are delineated in paragraphs (a) through (g) of this section.

(a) Indian entity identification. The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900. Evidence that the group's character as an Indian entity has from time to time been denied will not be considered to be conclusive evidence that

this criterion has not been met. Evidence to be relied upon in determining a group's Indian identity may include one or a combination of the following, as well as other evidence of identification.

(1) Identification as an Indian entity by Federal authorities.

(2) Relationships with State governments based on identification of the group as Indian.

(3) 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 anthropologists, historians, and/or other scholars.

(5) Identification as an Indian entity in newspapers and books.

(6) Identification as an Indian entity in relationships with Indian tribes or with national, regional, or state Indian organizations.

(7) Identification as an Indian entity by the petitioner itself.

(b) Community. The petitioner comprises a distinct community and demonstrates that it existed as a community from 1900 until the present. Distinct community means an entity with consistent interactions and significant social relationships within its membership and whose members are differentiated from and distinct from nonmembers. Distinct community must be understood flexibly in the context of the history, geography, culture, and social organization of the entity. The petitioner may demonstrate that it meets this criterion by providing evidence for known adult members or by providing evidence of relationships of a reliable, statistically significant sample of known adult members.

(1) The petitioner may demonstrate that it meets this criterion at a given point in time by some combination of two or more of the following forms of evidence or by other evidence to show that a significant and

meaningful portion of the petitioner's members constituted a distinct community at a given point in time:

(i) Rates or patterns of known marriages within the entity, or, as may be culturally required, known patterned out-marriages;
(ii) Social relationships connecting individual members;
(iii) Rates or patterns of informal social interaction that exist broadly among the members of the entity;
(iv) Shared or cooperative labor or other economic activity among members;
(v) Strong patterns of discrimination or other social distinctions by non-members;
(vi) Shared sacred or secular ritual activity;
(vii) Cultural patterns shared among a portion of the entity that are different from those of the non–Indian populations with whom it interacts. These patterns must function as more than a symbolic identification of the group as Indian. They may include, but are not limited to, language, kinship organization or system, religious beliefs or practices, and ceremonies;
(viii) The persistence of a collective identity continuously over a period of more than 50 years, notwithstanding any absence of or changes in name;
(ix) Land set aside by a State for the petitioner, or collective ancestors of the petitioner, that was actively used by the community for that time period;
(x) Children of members from a geographic area were placed in Indian boarding schools or other Indian educational institutions, to the extent that

supporting evidence documents the community claimed; or

(xi) A demonstration of political influence under the criterion in § 83.11(c)(1) will be evidence for demonstrating distinct community for that same time period.

(2) The petitioner will be considered to have provided more than sufficient evidence to demonstrate distinct community and political authority under § 83.11(c) at a given point in time if the evidence demonstrates any one of the following:

(i) More than 50 percent of the members reside in a geographical area exclusively or almost exclusively composed of members of the entity, and the balance of the entity maintains consistent interaction with some members residing in that area;

(ii) At least 50 percent of the members of the entity were married to other members of the entity;

(iii) At least 50 percent of the entity members maintain distinct cultural patterns such as, but not limited to, language, kinship system, religious beliefs and practices, or ceremonies;

(iv) There are distinct community social institutions encompassing at least 50 percent of the members, such as kinship organizations, formal or informal economic cooperation, or religious organizations; or

(v) The petitioner has met the criterion in § 83.11(c) using evidence described in § 83.11(c)(2).

(c) Political influence or authority. The petitioner has maintained political influence or authority over its members as an autonomous entity from 1900 until the present. Political influence or authority means the entity uses a council, leadership, internal process, or other mechanism as

a means of influencing or controlling the behavior of its members in significant respects, making decisions for the entity which substantially affect its members, and/or representing the entity in dealing with outsiders in matters of consequence. This process is to be understood flexibly in the context of the history, culture, and social organization of the entity.

(1) The petitioner may demonstrate that it meets this criterion by some combination of two or more of the following forms of evidence or by other evidence that the petitioner had political influence or authority over its members as an autonomous entity:

(i) The entity is able to mobilize significant numbers of members and significant resources from its members for entity purposes.

(ii) Many of the membership consider issues acted upon or actions taken by entity leaders or governing bodies to be of importance.

(iii) There is widespread knowledge, communication, or involvement in political processes by many of the entity's members.

(iv) The entity meets the criterion in § 83.11(b) at greater than or equal to the percentages set forth under § 83.11(b)(2).

(v) There are internal conflicts that show controversy over valued entity goals, properties, policies, processes, or decisions.

(vi) The government of a federally recognized Indian tribe has a significant relationship with the leaders or the governing body of the petitioner.

(vii) Land set aside by a State for petitioner, or collective ancestors of the petitioner, that is actively used for that time period.

(viii) There is a continuous line of entity leaders and a means of selection or acquiescence by a significant number of the entity's members.

(2) The petitioner will be considered to have provided sufficient evidence of political influence or authority at a given point in time if the evidence demonstrates any one of the following:

(i) Entity leaders or other internal mechanisms exist or existed that:

(A) Allocate entity resources such as land, residence rights, and the like on a consistent basis;

(B) Settle disputes between members or subgroups by mediation or other means on a regular basis;

(C) Exert strong influence on the behavior of individual members, such as the establishment or maintenance of norms or the enforcement of sanctions to direct or control behavior; or

(D) Organize or influence economic subsistence activities among the members, including shared or cooperative labor.

(ii) The petitioner has met the requirements in § 83.11(b)(2) at a given time.

(d) Governing document. The petitioner must provide:

(1) A copy of the entity's present governing document, including its membership criteria; or

(2) In the absence of a governing document, a written statement describing in full its membership criteria and current governing procedures.

(e) Descent. The petitioner's membership consists of individuals who descend from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity).

(1) The petitioner satisfies this criterion by demonstrating that the petitioner's members descend from a tribal roll directed by Congress or prepared by the Secretary on a descendancy basis for purposes of distributing claims money, providing allotments, providing a tribal census, or other purposes, unless significant countervailing evidence establishes that the tribal roll is substantively inaccurate; or

(2) If no tribal roll was directed by Congress or prepared by the Secretary, the petitioner satisfies this criterion by demonstrating descent from a historical Indian tribe (or from historical Indian tribes that combined and functioned as a single autonomous political entity) with sufficient evidence including, but not limited to, one or a combination of the following identifying present members or ancestors of present members as being descendants of a historical Indian tribe (or of historical Indian tribes that combined and functioned as a single autonomous political entity):

(i) Federal, State, or other official records or evidence;

(ii) Church, school, or other similar enrollment records;

(iii) Records created by historians and anthropologists in historical times;

(iv) Affidavits of recognition by tribal elders, leaders, or the tribal governing body with personal knowledge; and

(v) Other records or evidence.

(f) Unique membership. The petitioner's membership is composed principally of persons who are not members of any federally recognized Indian tribe. However, a petitioner may be acknowledged even if its membership is composed principally of persons whose names have appeared on rolls of, or who have been otherwise associated with, a federally recognized Indian tribe, if the petitioner demonstrates that:

(1) It has functioned as a separate politically autonomous community by satisfying criteria in paragraphs (b) and (c) of this section; and
(2) Its members have provided written confirmation of their membership in the petitioner.

(g) Congressional termination. Neither the petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship. The Department must determine whether the petitioner meets this criterion, and the petitioner is not required to submit evidence to meet it.

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. § 292.16 What must an application for a Secretarial Determination contain?

A tribe's application requesting a Secretarial Determination under § 292.13 must include the following information:

(a) The full name, address, and telephone number of the tribe submitting the application;

(b) A description of the location of the land, including a legal description supported by a survey or other document;

(c) Proof of identity of present ownership and title status of the land;

(d) Distance of the land from the tribe's reservation or trust lands, if any, and tribal government headquarters;

(e) Information required by § 292.17 to assist the Secretary in determining whether the proposed gaming establishment will be in the best interest of the tribe and its members;

(f) Information required by § 292.18 to assist the Secretary in determining whether the proposed gaming establishment will not be detrimental to the surrounding community;

(g) The authorizing resolution from the tribe submitting the application;

(h) The tribe's gaming ordinance or resolution approved by the National Indian Gaming Commission in accordance with 25 U.S.C. 2710, if any;

(i) The tribe's organic documents, if any;

(j) The tribe's class III gaming compact with the State where the gaming establishment is to be located, if one has been negotiated;
(k) If the tribe has not negotiated a class III gaming compact with the State where the gaming establishment is to be located, the tribe's proposed scope of gaming, including the size of the proposed gaming establishment; and
(l) A copy of the existing or proposed management contract required to be approved by the National Indian Gaming Commission under 25 U.S.C. 2711 and part 533 of this title, if any.

25 C.F.R § 292.17 How must an application describe the benefits and impacts of the proposed gaming establishment to the tribe and its members?

To satisfy the requirements of § 292.16(e), an application must contain:

(a) Projections of class II and class III gaming income statements, balance sheets, fixed assets accounting, and cash flow statements for the gaming entity and the tribe;
(b) Projected tribal employment, job training, and career development;
(c) Projected benefits to the tribe and its members from tourism;
(d) Projected benefits to the tribe and its members from the proposed uses of the increased tribal income;
(e) Projected benefits to the relationship between the tribe and non–Indian communities;
(f) Possible adverse impacts on the tribe and its members and plans for addressing those impacts;
(g) Distance of the land from the location where the tribe maintains core governmental functions;

(h) Evidence that the tribe owns the land in fee or holds an option to acquire the land at the sole discretion of the tribe, or holds other contractual rights to cause the lands to be transferred from a third party to the tribe or directly to the United States;

(i) Evidence of significant historical connections, if any, to the land; and

(j) Any other information that may provide a basis for a Secretarial Determination that the gaming establishment would be in the best interest of the tribe and its members, including copies of any:

(1) Consulting agreements relating to the proposed gaming establishment;

(2) Financial and loan agreements relating to the proposed gaming establishment; and

(3) Other agreements relative to the purchase, acquisition, construction, or financing of the proposed gaming establishment, or the acquisition of the land where the gaming establishment will be located.

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.

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. § 93.155 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.

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CERTIFICATE OF SERVICE

I certify that on June 15, 2017, the document described as **Stand Up Plaintiffs' Reply Brief** was electronically filed with the Clerk of the Court using the ECF System which will distribute an electronic copy to all counsel of record.

Dated: June 15, 2017

/s/ Sean M. Sherlock

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