No. 17-15533

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITIZENS FOR A BETTER WAY, *et al.*,

Plaintiffs-Appellants,

vs.

RYAN ZINKE, *et al.*,

Defendants-Appellees.

On Appeal From the United States District Court
for the Eastern District of California
Case No. 2:12-cv-03021-TLN-AC

ANSWERING BRIEF OF APPELLEE THE ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA

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CORPORATE DISCLOSURE STATEMENT

Intervenor-Defendant and Appellee The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California is a sovereign tribal government and is not a "nongovernmental corporate party" within the meaning of Federal Rule of Appellate Procedure 26.1.

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GLOSSARY

APA:	Administrative Procedure Act
AR:	Administrative Record
Br.:	Brief for Appellants
Citizens:	Plaintiffs and Appellants Citizens for a Better Way, *et al*.
EIS:	Environmental Impact Statement
Enterprise:	Intervenor-Defendant and Appellee The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California
ER:	Appellants' Excerpts of Record
IGRA:	Indian Gaming Regulatory Act
Interior:	Defendants and Appellees United States Department of the Interior, *et al*.
IRA:	Indian Reorganization Act
MOU:	Memorandum of Understanding
NEPA:	National Environmental Policy Act
ROD:	Record of Decision
SER:	Appellees' Joint Supplemental Excerpts of Record
Tribe:	Intervenor-Defendant and Appellee The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California

I. JURISDICTIONAL STATEMENT

Intervenor-Defendant and Appellee The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California ("Enterprise" or "Tribe") agrees with Appellants' Statement of Jurisdiction. (Brief for Appellants ("Br.") at 5-6.)

II. STATEMENT OF ISSUES

Appellants Citizens for a Better Way, *et al*. ("Citizens") have challenged two decisions by the Department of the Interior. The first is a decision to acquire in trust for the Tribe a property in Yuba County, California (the "Yuba Site") pursuant to the Indian Reorganization Act ("IRA"). The second is a decision allowing the Tribe to operate a casino at the Yuba Site pursuant to the Indian Gaming Regulatory Act ("IGRA"). This appeal presents two discrete issues:

A. Did Interior permissibly construe and apply the IRA in deciding, pursuant to 25 U.S.C. § 5108, to acquire the Yuba Site in trust for the Tribe?

B. Did Interior permissibly construe and apply IGRA in determining, pursuant to 25 U.S.C. § 2719(b)(1)(A), that the Tribe's proposed casino at the Yuba Site would be in the best interest of the Indian tribe and its citizens and would not be detrimental to the surrounding community?

An addendum containing pertinent statutes and regulations is included and bound with this brief.

III. STATEMENT OF THE CASE

A. The Tribe

Enterprise is a federally recognized Indian tribe whose Maidu ancestors have lived for thousands of years near the Feather River, an area of California that includes modern-day Yuba County. (ER 122-23, 173-74, 185, 217; SER 394, 477-79.) During the Gold Rush, the vast majority of the Tribe's ancestors were enslaved or killed. (SER 384 (Maidu population reduced from 8,000 to 900).) The survivors were forced into hiding in the most remote and inhospitable corners of the Feather River basin. (SER 477-48.)

In an effort to remedy this situation, the United States acquired two parcels of land for the Tribe. (ER 115, 207-08; SER 384-85, 393-94.) One parcel, known as Enterprise 1, turned out to be a steep, remote hillside that could not accommodate the Tribe's housing and economic development needs. (ER 115, 190, 207.) The other parcel, known as Enterprise 2, was more suitable for those purposes. (ER 208; SER 393-94.) Both parcels were supposed to be held in trust for the Tribe's perpetual use and benefit. (ER 207-208, 293-95; SER 394.)

In 1934, the United States enacted the IRA, 25 U.S.C. § 5101, *et seq*. Among other things, the IRA allowed Indian tribes to "reorganize" their governments by adopting "charters" similar to those used by business corporations. *See* 25 U.S.C. § 5124. But the IRA did not require reorganization; instead, it

instructed the Secretary of the Interior to arrange for existing tribes to hold elections at which they would decide for themselves whether to opt out of the new framework. 25 U.S.C. § 5125.

On June 12, 1935, the Sacramento Indian Agency, an administrative unit of Interior, held an IRA election for the Tribe. (ER 114-15, 336-38, 369-72.) The United States memorialized the vote in a document titled "*Revised Tabulation Of Election Returns On The Indian Reorganization Act, From The Rancherias Under The Jurisdiction Of The Sacramento Indian Agency, California*." (ER 370-72.) That document identifies the Tribe as being "under the jurisdiction of the Sacramento Indian Agency." (*Id*.)

In 1947, the United States Indian Service prepared a report examining "Ten Years of Tribal Government Under [The] IRA" (the "Haas Report"). (ER 321-68.) The Haas Report includes a chart identifying "Action By Tribes On Indian Reorganization Act." (ER 337-343.) That chart lists Enterprise as one of the tribes that took action on the IRA. (ER 338.)

In 1965, the United States transferred Enterprise 2 to the State of California for use in the construction of the California State Water Project. (ER 115, 208, 293-95.) Members of the Tribe lost their homes and their community, and they were dispersed through the Sacramento Valley. (*Id*.; SER 394.) Upon taking Enterprise 2 from the Tribe, the United States provided a small reimbursement (a

total of $12,196 for the entire 40-acre parcel) to four Tribal citizens. (*Id*.) Other citizens never received any compensation. (*Id*.) Nor did the Tribe receive any replacement land from the United States or the State of California. (*Id*.) Enterprise 2 is now submerged beneath a man-made reservoir known as Lake Oroville. (*Id*.)

In 1979, the United States began memorializing its existing relations with Indian tribes by publishing in the Federal Register a list of "Indian Tribal Entities" with which it had maintained a sovereign, government-to-government relationship over the years. *See* 44 Fed. Reg. 7235 (Jan. 31, 1979). The United States identified the Tribe on the very first Federal Register list, and it has continued to identify the Tribe on each and every subsequent version. *Id*.; *see also* 82 Fed. Reg. 4915, 4916 (Jan. 17, 2017) (current version).

Unfortunately, the loss of Enterprise 2 left the Tribe without a land base from which to pursue economic opportunities capable of funding essential government services. (ER 115, 207-209, 212.) As a result, the Tribe's 900 citizens have had few educational opportunities, suffer high rates of unemployment and poverty, and are disproportionately reliant on state and federal assistance programs. (*Id*.; *see also* ER 169; SER 375.) More than 50% of the Tribe's potential labor force is either unemployed or earns less than $10,000 per year. (ER 169.)

B. The Project

Congress enacted the IRA and IGRA to help address these very problems. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973) (purposes of IRA); 25 U.S.C. § 2702(1) (purposes of IGRA). As authorized by those two statutes, the Tribe sought land on which to develop a casino and pursue economic self-sufficiency. Beginning in the early 2000s, the Tribe acquired rights to the Yuba Site, a 40-acre property within its aboriginal territory, and developed plans to build a casino and resort-hotel there (the "Project"). (ER 209 (acquisition of rights); ER 173-74, 185, 190, 209 (aboriginal territory); ER 72-73, 77-79 (Project description).) Consistent with IGRA's strict requirements, revenues from the Project will be used to fund tribal government, tribal services, and employment for tribal citizens, thereby fostering economic self-sufficiency and political self-determination. (ER 130, 169-71, 212; SER 375-76.)

The Yuba Site is well-suited for the Project. Among other things, it is near an existing 20,000-seat concert venue and within a 900-acre "Sports and Entertainment Zone" approved by the voters of Yuba County. (ER 179, 229, 297; SER 369, 390-92.) The County has confirmed that the Tribe's economic development plans are "consistent and compatible with the County's general plan and zoning of the property." (SER 377.)

The Project requires that the Yuba Site be transferred from private fee ownership into federal trust for the Tribe. (ER 72-73.) Recognizing that the fee-to-trust transfer will prevent Yuba County from collecting taxes, development fees, and mitigation funds that would normally apply to a development on private fee land, the Tribe has agreed to a schedule of "in-lieu" tax and fee payments that will compensate the County for the lost amounts. (ER 116-17, 229-36, 240-43, 276-91.) The Tribe has also agreed to maintain certain environmental, health, safety, and labor standards proposed by the County. (*Id.*) These agreements between the Tribe and the County are memorialized in a Memorandum of Understanding ("MOU"). (ER 276-91; *see also* SER 377-381.) The Yuba County MOU includes a provision explicitly providing for County enforcement. (ER 286-87.)

The Tribe also entered an MOU with the City of Marysville, a municipality located approximately seven miles from the Yuba Site. (ER 181; SER 381, 240-257.) The Marysville MOU identifies and implements mitigation for the Project's potential impacts on the City. (*Id.*) Like the Yuba County MOU, the Maysville MOU includes a provision explicitly providing for enforcement. (SER 250-51.)

C. The Administrative Process

The 30,000-page administrative record memorializes Interior's thorough, decade-long administrative process addressing the requirements of the National Environmental Policy Act ("NEPA"), the IRA, and IGRA.

NEPA. NEPA requires federal agencies to identify, evaluate, and consider alternatives to the environmental consequences of their proposed actions. 42 U.S.C. §§ 4332(2)(C), 4332(2)(E). Here, the environmental review process began with the preparation of an Environmental Assessment ("EA"), a concise public document designed to briefly address environmental issues and facilitate NEPA compliance. *See* 40 C.F.R. § 1508.9. Although the EA (AR 1615-1788) identified few environmental concerns, Interior decided to prepare a more comprehensive Environmental Impact Statement ("EIS") (AR 22789-26799). Interior made both a Draft EIS and a Final EIS available for public review and comment, and the agency responded to all comments received. (ER 74-75, 131.) The Final EIS addressed a full range of environmental issues and included nearly 500 pages of environmental analysis (AR 22789-23885) and an additional 2,888 pages of expert technical reports (AR 23911-26799). One of the topics addressed in the Final EIS is mitigation—*i.e.*, measures that can be taken to avoid, minimize, rectify, or compensate for the Project's potential impacts. (SER 395-444; *see also* 40 C.F.R. § 1508.20.) The EIS found that the Project, with the implementation of

recommended mitigation measures, will not have significant adverse environmental impacts. (*Id.*; *see also* ER 81-89, 138-146.) Interior incorporated all recommended mitigation measures as binding conditions on Project approval. (ER 90-110, 146-67.)

IRA. The IRA authorizes Interior to acquire land in trust for Indian tribes. 25 U.S.C. § 5108. In *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Supreme Court held that this authority extends only to tribes that were "under Federal jurisdiction" on June 18, 1934, the date on which the IRA was enacted. The IRA also required Interior to convene an election of the "adult Indians" on each reservation within one year of the Act's approval. 25 U.S.C. § 5125. Interior carefully evaluated and faithfully applied both the *Carcieri* decision and the statutory provisions of the IRA. (ER 74, 111-120.) In doing so, it noted that Interior held an IRA election for the Tribe in 1935. (*Id.*). Interior ultimately concluded that the election was conclusive evidence that Enterprise was "under Federal jurisdiction" at the time of the IRA. (ER 114-15.)

IGRA. Congress enacted IGRA "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). As relevant here, IGRA authorizes gaming on newly-acquired trust land if (i) Interior determines such gaming is in the best interest of the applicant tribe

and would not be detrimental to the surrounding community and (ii) the Governor of the state in which the land is located concurs in the determination. 25 U.S.C. § 2719(b)(1)(A). After reviewing the evidence and consulting with local, state, and federal stakeholders, Interior determined that the Project would be in the best interest of the Tribe and would not be detrimental to the surrounding community. (ER 124-95.) The Governor of California concurred. (ER 122-23.)

D. The District Court Proceedings

Citizens filed suit on December 20, 2102, alleging that Interior violated NEPA, IGRA, and the IRA. (ER 19.) The case was consolidated with two other challenges in the United States District Court for the Eastern District of California. (*Id.*) All three groups of plaintiffs moved for temporary restraining orders to prevent the Yuba Site from being acquired in trust for the Tribe. (*Id.*) All three motions were denied. (*Id.*)

The parties then cross-moved for summary judgment. (ER 19-20.) On September 24, 2015, the district court denied Citizens' motion for summary judgment and granted the cross-motions filed by the Tribe and Interior. (ER 18-50.) One of the plaintiffs filed a motion for reconsideration, arguing that the district court had not fully addressed all claims. (*See* ER 8-17.) The district court denied the reconsideration motion on January 23, 2017. (*Id.*) This appeal followed. (ER 1-2.)

IV. SUMMARY OF ARGUMENT

A. Interior permissibly construed and reasonably applied the IRA. The statute permits land to be taken into trust "for the purpose of providing land to Indians." It defines "Indian" as members or descendants of "any recognized Indian tribe" that was "under Federal jurisdiction" as of June 18, 1934. And it defines "tribe" as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." There is no dispute that the United States conducted an IRA election at the Tribe's reservation in 1935. Interior reasonably found that the 1935 election is conclusive evidence that the Tribe was under federal jurisdiction at the relevant time. Citizens waived its claims to the contrary by failing to raise them during the administrative process. And those claims would fail on the merits even if they were not waived.

B. Interior permissibly construed and reasonably applied IGRA. The statute permits gaming on newly-acquired tribal trust land if (i) Interior determines that such gaming is in the best interest of the applicant tribe and not detrimental to the surrounding community; and (ii) the governor of the state in which the land is located concurs in that determination. Interior properly weighed all relevant evidence and complied with both the statute and its implementing regulations. Its two-part determination is entitled to deference and should be upheld.

V. STANDARDS OF REVIEW

A. Summary Judgment

This district court's grant of summary judgment is reviewed *de novo* under the APA's deferential "arbitrary and capricious" standard, which provides that agency action must be upheld unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Arbitrary and capricious review is narrow, and does not permit courts to substitute their judgment for that of the agency. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc). Instead, judicial review is "highly deferential, presuming the agency action to be valid and affirming the action if a reasonable basis exists." *Pac. Coast Federation of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012). A reasonable basis for upholding agency action exists so long as the decision-maker has relied on "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Bear Lake Watch v. Federal Energy Regulatory Commission*, 324 F.3d 1071, 1076 (9th Cir. 2003).

B. Statutory Interpretation

Interior's interpretation of IGRA and the IRA is governed by the two-step standard set forth in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984). If Congress has "directly spoken to the precise question at issue," this Court must give effect to Congressional intent. *Chevron*, 467 U.S. at 842-43. If the statute is

silent or ambiguous on the question at issue, this Court must uphold Interior's interpretation if permissible. *Id*. An interpretation is permissible so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 843-44.

This appeal also implicates canons of construction "rooted in the unique trust relationship between the United States and the Indians." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985). The Indian law canons of construction require the IRA and IGRA to be "construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id*.; *see also Cnty. of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 269 (1992); *Citizens Exposing the Truth About Casinos v. Kempthorne*, 492 F.3d 460, 471 (D.C. Cir. 2007).

C. Regulatory Interpretation

Interior's interpretation of its own regulations is entitled to "substantial deference." *Barboza v. Cal. Ass'n of Professional Firefighters*, 651 F.3d 1073, 1079 (9th Cir. 2011); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 974 (9th Cir. 2006). The agency's regulatory interpretations "must be given controlling weight unless plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotations omitted); *see also Comm. for a Better Arvin v. Envtl. Prot. Agency*, 786 F.3d 1169, 1175 (9th Cir. 2016) (same standard).

D. Waiver

Parties must structure their participation in the administrative process so that it "alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (internal quotations omitted). Any argument not raised by a party during the administrative process is deemed forfeited. *Id*. at 764-65; *see also Buckingham v. United States Dep't of Agric*., 603 F.3d 1073, 1080-81 (9th Cir. 2010).

The purpose of the rule is to avoid unnecessary judicial intervention by ensuring that the agency has an opportunity to "exercise its expertise over the subject matter." *Buckingham*, 603 F.3d at 1080. Thus, to avoid waiver, a party must raise objections "with sufficient clarity to allow the decision maker to understand and rule on the issue raised." *Id*. (quoting *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002)). This requirement is strictly enforced. As the Supreme Court has admonished,

> [A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that "ought to be" considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters "forcefully presented."

Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553-54 (1978); *see also Great Basin Mine Watch*, 456 F.3d at 967 (same).

VI. ARGUMENT

A. Interior Complied With The IRA

In the decades prior to the IRA, federal Indian policy focused on removing tribes from their aboriginal lands, forcing assimilation of individual Indians into mainstream society, and actively suppressing tribal identity and culture. *See* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, 41-79 (2012 ed.) ("*Cohen's Handbook*"). For example, the General Allotment Act of 1887, 28 Stat. 388, provided a mechanism by which communal tribal lands could be "allotted" to individuals and pass out of Indian ownership. *Id.*; *see also Cnty. of Yakima*, 502 U.S. at 254. The purpose of the allotment policy was to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Cnty. of Yakima*, 502 U.S. at 254. The results were devastating for Indian tribes: Between 1887 and 1933, the allotment policy led to the loss of approximately 100 million acres, roughly 72% of all tribal land in the United States. *Cohen's Handbook* at 73-74.

Congress enacted the IRA in 1934 to reverse the loss of tribal lands. The Act was "meant to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies." *Confederated Tribes of the Grand Ronde Cmty. of Ore. v. Jewell*, 830 F.3d 552, 556 (D.C. Cir. 2016) (internal quotations omitted). Thus,

the IRA represented a fundamental shift in federal policy from one of forced assimilation to one "encourag[ing] economic development, self-determination, cultural plurality, and the revival of tribalism" through the preservation and restoration of tribal lands. *Cohen's Handbook* at 81; *see also Mescalero Apache Tribe*, 411 U.S. at 151-52; *Confederated Tribes*, 830 F.3d at 556.

Central to this shift was Section 5 of the IRA, which grants Interior broad discretion to acquire and hold land in trust for Indian tribes:

> [t]he Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in land, 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 lands to Indians.

25 U.S.C. § 5108. Interior exercised that discretion to take the Yuba Site into trust for the Tribe. (ER 74.) In doing so, it permissibly construed and reasonably applied Section 5 (Part VI.A.I, *infra*). Citizens waived its arguments to the contrary by failing to present them with specificity during the administrative process (Part VI.A.2, *infra*). And even if Citizens' arguments were not waived, they would fail on the merits (Part VI.A.3, *infra*). For each of these reasons, Interior's decision to acquire the Yuba Site in trust should be upheld and the district court's judgment should be affirmed.

1. Interior Permissibly Construed And Reasonably Applied The IRA

The IRA authorizes Interior to acquire land in trust "for the purpose of providing land to Indians." 25 U.S.C. § 5108. The statute defines "Indians" as members or descendants of "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129. The term "tribe" is defined to include "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id*. Thus, the IRA broadly authorizes Interior to take land in trust for "any recognized Indian tribe, organized band, pueblo, or Indians residing on one reservation" that is "now under Federal jurisdiction." 25 U.S.C. §§ 5108, 5129.

In *Carcieri v. Salazar*, the Supreme Court held the phrase "now under Federal jurisdiction" refers to June 18, 1934, the date on which the IRA was enacted. *Carcieri*, 555 U.S. at 391. In other words, *Carcieri* imposes a temporal limit on the IRA's land acquisition authorization: Section 5 of the IRA only authorizes Interior to acquire land for tribes that were "under Federal jurisdiction" when the statute was enacted. *Id*.

But *Carcieri* does not address what it means to have been "under Federal jurisdiction." *Id.* at 395-96. Nor does the IRA itself provide any relevant definition. 25 U.S.C. §§ 5129, 5130. And "jurisdiction" is "a term of extraordinary breadth" which, by its nature, is capable of a variety of meanings in the context of federal-tribal relations. *Confederated Tribes*, 830 F.3d at 564.

Indeed, the legislative history of the IRA suggests a contemporaneous awareness that "under Federal jurisdiction" was "likely to provoke interminable questions of interpretation." *Id*. The phrase is therefore ambiguous for purposes of *Chevron* analysis. *Id*.; *see also Cnty. of Amador v. United States Dep't of the Interior*, 136 F. Supp. 3d 1193, 1207-08 (E.D. Cal. 2015); *No Casino in Plymouth v. Jewell*, 136 F. Supp. 3d 1166, 1184-85 (E.D. Cal. 2015). Accordingly, Interior's construction of "under Federal jurisdiction" must be upheld so long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44.

Interior's interpretation easily clears that bar. The agency carefully evaluated the statutory provisions of the IRA and explicitly addressed *Carcieri*. (ER 114-16.) In a 55-page Record of Decision ("ROD"), Interior accurately explained that (i) its authority to acquire land in trust for Indian tribes pursuant to Section 5 of the IRA only extends to those tribes that were under federal jurisdiction on June 18, 1934 (ER 114); (ii) Section 18 of the IRA required the Secretary to convene an election of the "adult Indians" on each reservation within one year (ER 114-15); and (iii) on June 12, 1935, Interior held a Section 18 election for the Tribe on the Enterprise reservation (*Id*.). Interior found the Section

18 election to be conclusive evidence that Enterprise was "under Federal jurisdiction" at the time of the IRA.[1] (ER 114-15.)

Interior's interpretation of "under Federal jurisdiction" was perfectly permissible. It follows the clear statutory definitions of "Indian" and "tribe." 25 U.S.C. § 5129. It furthers the purposes of the IRA and is in harmony with the Indian law canons of construction. *See Confederated Tribes*, 830 F.3d at 556 (purposes of IRA); *Cnty. of Yakima*, 502 U.S. at 269 (Indian law canons). It is supported by contemporaneous documentary evidence explicitly stating that the Tribe was under the jurisdiction of the federal government at the time of the Section 18 election. (*See, e.g.*, ER 369-72.) And it is consistent with common sense—logically, the United States could not have convened a Section 18 election at Enterprise unless the voters there were "Indians" who were under federal jurisdiction. 25 U.S.C. § 5125. In short, Interior's interpretation of "under Federal jurisdiction" was neither arbitrary nor capricious nor otherwise contrary to statute. Therefore, it must be upheld. *Chevron*, 467 U.S. at 842-43.

[1] The Tribe ultimately elected to opt out of the IRA. (ER 114.) That fact does not affect Interior's authority to acquire land in trust for the Tribe pursuant to Section 5 of the Act. *See* 25 U.S.C. § 2202.

2. Citizens Waived Its IRA Arguments

Perhaps recognizing that the law, the administrative record, and the standard of review all favor the appellees, Citizens has attempted to confuse the issue with a series of convoluted arguments about the administration of IRA voting. (Br. at 24-42.) Citizens' fundamental point seems to be that the Tribe is not a "tribe" within the meaning of *Carcieri* because IRA elections were administered on a reservation-by-reservation basis, not a tribe-by-tribe basis. (*Id*.).

Citizens waived these arguments by failing to raise them during Interior's administrative process. In that process, Citizens appears to have mentioned *Carcieri* on just two occasions:

- A March 6, 2009 letter stating "[i]n the view of many, the Pacific Regional Office of the [Bureau of Indian Affairs] misconstrued the List Act Statute of 1994" and "[a]s a result the Enterprise Tribe and several others are vulnerable to the recent Carcieri v. Salazar ruling" (SER 289.)
- A March 13, 2009 letter stating "[o]n February 24, 2009 the Supreme Court Carcieri decision put even further concern over the validity of Enterprise Rancheria attempt for a casino" (SER 299.)

Neither comment identifies Citizens' arguments about reservation-by-reservation voting "with sufficient clarity to allow the decision maker to understand and rule on the issue raised." *Buckingham*, 603 F.3d at 1080; *see also Great Basin Mine Watch*, 456 F.3d at 967 (general comments about groundwater insufficient to alert agency to detailed water rights claim arising from decades-old executive order).

Therefore, the arguments have been waived. *Id*. at 1080-81; *see also Public Citizen*, 541 U.S. at 764, *Vt. Yankee*, 435 U.S. at 553-54.

3. Citizens' IRA Arguments Would Fail Even If They Were Not Waived

Citizens' IRA arguments would fail even if they were not waived. Citizens pretends that the Section 18 election is the only evidence relevant to Interior's determination that the Tribe was "under Federal jurisdiction" in 1934. (Br. 15, 20-21.) But Interior's determination is reviewed on the basis of the record as a whole. *See Confederated Tribes*, 830 F.3d at 566 (reviewing "the record in its entirety" to determine whether tribe was "under Federal jurisdiction"); *see also Cnty. of Amador*, 136 F. Supp. 3d at 1213 (reviewing "the evidence [Interior] has provided to support its conclusions, along with other materials in the record"). And, when viewed as a whole, the record demonstrates that (i) the Tribe has been recognized by the United States since at least 1915 (ER 174); (ii) the United States acquired land for the Tribe beginning in 1915 (ER 115, 174-75); (iii) the Tribe is comprised of descendants of the Maidu Indians who resided on that land (ER 217; SER 394, 572, 639-40); (iv) the official record of the Section 18 election identifies the Tribe as being "under the jurisdiction of the Sacramento Indian Agency," a federal administrative entity (ER 370); (v) the Haas Report lists Enterprise as among the "tribes" that took action on the IRA (ER 337-38); and (iv) the United States has

consistently recognized—and never terminated—its government-to-government relationship with Enterprise (ER 208). Citizens fails to address this evidence.

Instead, Citizens focuses on the notion that IRA elections were administered on a reservation-by-reservation basis. (Br. 24-35.) In doing so, it ignores the IRA's broad definition of "tribe." *Id*. That definition confirms that "the Indians residing on one reservation" are a "tribe" for purposes of the IRA. *See* 25 U.S.C. § 5129. Thus, even if IRA elections were organized on a reservation-by-reservation basis, the fact that the United States convened a Section 18 election at the Enterprise reservation supports Interior's determination that Enterprise was a recognized "tribe" that was "under federal jurisdiction" during the relevant time period. *Id*.

Citizens further suggests that Interior's decision to acquire the Yuba Site in trust for the Tribe cannot be reconciled with a separate trust acquisition completed for the Cowlitz tribe. (Br. 34-35.) Not so. Interior found that the course of dealings between the Cowlitz tribe and the United States was sufficient to establish federal jurisdiction despite the *absence* of a Section 18 election. *See Confederated Tribes*, 830 F.3d at 564. But that finding does not undermine Interior's determination that the *existence* of a Section 18 election was evidence of federal jurisdiction over Enterprise. After all, "sometimes one federal action in and of itself will be sufficient to show federal responsibilities toward a tribe, and at other

times a variety of actions when viewed in concert will show such responsibilities." *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 278 (D.D.C. 2016) (quoting *Confederated Tribes*, 830 F.3d at 564-65) (internal quotations omitted).

Citizens also devotes substantial attention to Opinion M-27810 of the Solicitor of the Department of the Interior, a 1934 document addressing Section 18 elections. (Br. 28-29). But nothing in that Opinion casts doubt on Interior's IRA analysis in the instant case. In fact, the Opinion M-27810 confirms that the Indians who voted in Section 18 elections were those who had a legal interest in "the property or tribal affairs of the reservation." (ER 375.) In contrast, those who were physically present on a reservation but lacked a legal interest in "tribal affairs" were not entitled to vote. (*Id*.) Thus, Opinion M-27810 *supports* Interior's conclusion that the Section 18 election held at Enterprise is evidence of federal jurisdiction over the Tribe.

Citizens cites a second Solicitor's Opinion, numbered M-27796, for the proposition that determining the tribal affiliation of an Indian reservation "requires historical inquiry." (Br. 31.) Opinion M-27796 addressed the question of whether the IRA permits lands within a reservation to be devised to individual members of a tribe. (Citizens Addendum, Attachment 1.) It has nothing to do with the question of whether a Section 18 election evidences federal jurisdiction. (*Id*.)

And, in any event, the record demonstrates that Interior *did* conduct a thorough "historical inquiry" regarding the Tribe and its reservation. (*See, e.g.*, ER 114-15, 173-75, 207-08, 217, 293-95; SER 1, 362, 382-85, 387-89, 563-64, 589-90, 623.) Nothing in Solicitor's Opinion M-27796 casts doubt on Interior's decision-making.

Indeed, the Solicitor's Office recently gave its full and explicit endorsement of the reasoning Interior used when taking the Yuba Site into trust. In Opinion M-37029, the Solicitor explained that

> tribes that voted whether to opt out of the IRA in the years following enactment (regardless of which way they voted) generally need not make any additional showing that they were under federal jurisdiction…because such evidence unambiguously and conclusively establishes that the United States understood that the particular tribe was under federal jurisdiction…

See Opinion M-37029, *The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act* (March 12, 2014) 2014 WL 988828, *20. Thus, there is no basis to conclude that Interior's decision to acquire the Yuba Site in trust for the Tribe was contrary to the Solicitor's interpretation of the IRA.[2]

In the end, Citizens' arguments boil down to speculation that Enterprise might have participated in the IRA election in some capacity other than a tribe.

[2] Citizens argues that the district court erred in citing Opinion M-37029 because the Opinion post-dates Interior's decision to acquire the Yuba Site in trust. (Br. 39-40.) But the District Court did not treat Opinion M-37029 as binding authority. (*See* ER 45-46.) Rather, it cited the Opinion as one of several examples of decision-making which, when taken together, demonstrate consistent agency interpretation and application of the IRA. (*Id.*)

But there is no need to speculate. The administrative record shows that the Tribe did, in fact, vote as a tribe. The Haas Report, a definitive historical account of IRA voting, lists Enterprise as among the *tribes* that acted on the IRA. (ER 337-338 (emphasis added)); *see also Stand Up for California!*, 204 F.Supp. 3d at 279, 285 (relying on Haas Report); *Confederated Tribes of the Grand Ronde Cmty. v. Jewell*, 75 F. Supp. 3d 387, 401 n.7 (D.D.C. 2014) (same). Citizens has not presented any specific evidence to the contrary. Therefore, Interior's determination that the Tribe was "under Federal jurisdiction" at the time of the IRA's enactment must be upheld.

B. Interior Complied With IGRA

Congress enacted IGRA 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). As explained above, it authorizes gaming on newly-acquired tribal trust land if (i) Interior determines that such gaming is "in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community"; and (ii) the governor of the state in which the land is located concurs in Interior's determination. 25 U.S.C. § 2719(b)(1)(A). This is commonly known as a "two-part determination."

The statute does not define the term "detrimental to the surrounding community." However, Interior has promulgated regulations defining and implementing key elements of the two-part determination process. *See* 25 C.F.R. part 292. As explained below, Interior's two-part determination permissibly construed and reasonably applied both the statute and its implementing regulations (Part VI.B.I, *infra*) and Citizens' claims of error do not withstand scrutiny (Part VI.B.II, *infra*).

1. Interior Permissibly Construed And Reasonably Applied IGRA And Its Implementing Regulations

IGRA's implementing regulations provide that any tribe seeking a two-part determination must submit a detailed application containing seven categories of information. 25 C.F.R. § 292.18. One of the seven categories consists of "[i]nformation regarding environmental impacts and plans for mitigating adverse impacts, including an…Environmental Impact Statement (EIS)…." 25 C.F.R. § 292.18(a). The regulations require Interior to consider this information when determining whether a proposed gaming project would be "detrimental to the surrounding community." 25 C.F.R. § 292.21(a).

Interior faithfully applied these regulatory requirements to the Tribe's request for a two-part determination. The agency carefully evaluated all relevant evidence about the potential impacts of the Project, including thousands of pages of environmental studies from the EIS. (*See* ER 131-67.) It also consulted with

officials of nearby State, local, and tribal governments. (ER 131, 186-88.) These studies and consultations demonstrated that (i) Yuba County is one of the poorest regions in the United States and has the country's third highest unemployment rate (ER 171, 180); (ii) the Project will create more than 1,900 permanent jobs and generate nearly $32,000,000 in annual wages (ER 169); (iii) the Project is consistent with local zoning (ER 179, 191); (iv) the Project is supported by Yuba County (ER 175, 186); (v) the Project is essential to the Tribe's efforts to provide economic opportunities and government services to its citizens (ER 169-70, 174-75, 189-90); (vi) with the implementation of mitigation measures proposed in the EIS, the Project will not have significant environmental consequences (ER 175-80); and (vii) the Tribe's MOUs with Yuba County and the City of Marysville will help ensure that the Project does not have a detrimental effect on the surrounding community (ER 179-85, 190-91).

After reviewing and weighing all of the evidence, Interior determined that the Project is in the best interests of the Tribe and will not adversely affect the surrounding community. (ER 188-93.) That determination is memorialized in a detailed, 71-page ROD. (ER 124-95.) Among other things, the ROD explicitly adopts and commits to the implementation of all mitigation measures identified in the EIS. (ER 146, 147-48, 167, 193.)

This thorough, transparent decision-making process was consistent with IGRA, its implementing regulations, and the Indian law canons of construction. Therefore, Interior's two-part determination must be upheld.

2. Citizens Fails To Identify Any Error In Interior's Two-Part Determination

Citizens fails to identify any error in Interior's two-part determination. It does not challenge the Project's benefits to the Tribe and the surrounding community. (Br. 43-57.) It does not dispute the analysis of potential adverse impacts presented in the EIS. (*Id.*)[3] And it does not claim that the EIS failed to proposed mitigation for those impacts. (Br. 47.) Citizens' sole contention is that Interior erred in relying on NEPA mitigation for IGRA purposes. (Br. at 43-57.) In Citizens' view, mitigation measures developed in an EIS are not sufficiently enforceable to support an IGRA two-part determination. (*Id.*) That argument must be rejected for each of the following reasons.

First, Citizens has inaccurately assumed that NEPA mitigation is unenforceable as a matter of law. (*See* Br. 46-47, 51-57.) It is true that NEPA does not require federal agencies to adopt or enforce the mitigation measures discussed in their EISs. *Robertson v. Methow Valley Citizens Council*, 490 U.S.

[3] Citizens challenged certain aspects of the EIS in the district court. (SER 744-47.) It has not pursued those claims on appeal (*see* Br. at 6), and further argument is now waived.

332, 352-53 (1989). But once an agency elects to adopt mitigation measures in a ROD, those measures become fully enforceable. *Tyler v. Cisneros*, 136 F.3d 603, 608-09 (9th Cir. 1998). Indeed, applicable guidance from the Council on Environmental Quality confirms that a ROD "can be used to compel compliance with or execution of the mitigation measures identified therein." 46 Fed. Reg. 18026, 18037 (Mar. 17, 1981).[4] Here, Interior's RODs explicitly adopted each and every one of the mitigation measures proposed in the EIS. (ER 167.) Therefore, the measures are enforceable as a matter of law.[5]

Second, Citizens' bright-line distinction between NEPA mitigation and IGRA mitigation is directly contrary to applicable regulations. As explained

[4] The Council on Environmental Quality is entitled to "substantial deference" in the interpretation of NEPA. *Andrus v. Sierra Club*, 442 U.S. 347, 357-58 (1979). The guidance document referenced here—officially titled "*Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*"—has been cited with approval on numerous occasions. *See, e.g., Cal. ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 767 F.3d 781, 792-93 (9th Cir. 2014); *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011); *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1033 (9th Cir. 2006); *Am. Rivers v. Fed. Energy Regulatory Comm'n*, 201 F.3d 1186, 1200-01 (9th Cir. 1999); *S. Ore. Citizens Against Toxic Sprays, Inc. v. Clark*, 720 F.2d 1475, 1480 (9th Cir. 1983).

[5] Contrary to Citizens' suggestion (Br. at 48), the Tribe's sovereign status does not alter this conclusion. Tribal sovereign immunity does not bar enforcement or suit by the United States. *Equal Employment Opportunity Comm'n v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1075 (9th Cir. 2001). And the Yuba County and Marysville MOUs each contain explicit provisions addressing enforcement. (ER 286-87; SER 250-51.)

above, IGRA's implementing regulations explicitly permitted—and in fact *required*—Interior's two-part determination to account for mitigation measures developed through the NEPA process. 25 C.F.R. §§ 292.18(a), 292.21(a). And NEPA's implementing regulations likewise required Interior integrate the EIS process with its IGRA decision-making. *See* 40 C.F.R. §§ 1500.2(c), 1500.4(k), 1505.1(d). Interior acted reasonably in complying with these regulatory requirements.

Third, contrary to Citizens' suggestion (Br. 45-51) the record demonstrates that Interior appropriately considered how and when mitigation would be implemented. Section 4 of the EIS (AR 23592-23835) thoroughly investigates the possible impacts of the Project (and four alternatives thereto) and identifies mitigation measures for each impact having the potential to be significant. Section 5 of the EIS (SER 395-444) builds on that analysis by providing additional detail about the proposed mitigation measures, including timing and implementation considerations for each one. Among other things, Section 5 explains that some mitigation measures are incorporated into project plans, other mitigation measures are required under the terms of the Yuba County and Marysville MOUs, and still others mitigation measures are enforceable as a matter of federal, state, local, or tribal laws. (SER 396.) Interior's RODs review, summarize, and incorporate Sections 4 and 5 of the EIS (ER 81-110, 138-67, 175-84) and confirm that each

mitigation measure will be monitored and enforced (ER 90, 147-48; SER 751-783). There is no basis for Citizens' claim (Br. 44) that Interior "did not provide any explanation" for its decisions about mitigation.

Fourth, Citizens' claims regarding the Yuba County MOU (Br. at 49) are squarely contradicted by the record. Citing a single out-of-context statement pulled from a single comment letter, Citizens suggests that the County has determined the MOU to be inadequate. (Br. 49.) But *the very next sentence of that same comment letter* explicitly states Yuba County's position that the MOU fully addresses all potential Project impacts:

> The MOU between the applicant and Yuba County, as well as the requirements contained in the EIS will mitigate identified impacts so that the placement of the 40 acres into trust and development of the casino will not have a detrimental impact on Yuba County.

(ER 243; *see also* ER 186, 190-92; SER 784.)

Fifth, Citizens' concerns about traffic (Br. 47-50) are without merit. Citizens alleges that traffic from the Project will cause detriment to Sutter County and the City of Wheatland. (Br. 49-50.). But neither jurisdiction will experience meaningful Project-related traffic impacts. (SER 499, 575 (few Project-related trips in Sutter County); SER 703, 487 (trips to or from Wheatland represent less than 3% of Project total; resulting traffic would be "minimal").) And, in any event, neither Sutter County nor Wheatland nor the California Department of

Transportation (the entity with jurisdiction over the relevant roadways) has challenged Interior's two-part determination.[6]

Sixth, and most fundamentally, Citizens appears to have misconstrued the nature of the inquiry mandated by IGRA. Citizens' arguments are premised on the notion that Interior was required to find that the Project will not have any detrimental effects of any kind anywhere in the surrounding community. But IGRA does not impose such a requirement. 25 U.S.C. § 2719(b)(1)(A). The statute says only that the Secretary must determine whether "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." *Id*. This statutory language "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." *Stand Up for California!*, 204 F. Supp. 3d at 264. That is precisely what Interior did here. It carefully weighed potential benefits, potential harms, mitigation measures, and input from stakeholders before concluding that the evidentiary

[6] Indeed, the "Sutter County" comment letter cited by Citizens (Br. at 49) appears to come from a single Sutter County official, not from the County Board of Supervisors as a whole. (SER 574-76.). A separate letter from the Sutter County Community Services Department suggests that Sutter County did not take an official position for or against the Project. (*Id*.; *see also* SER 571.)

record as a whole supported a two-part determination. (ER 167-93.) Thus, even if Citizens could identify an individual instance of detriment (and, as explained above, it has not and cannot) Interior's two-part determination would not be unlawful. The determination must be upheld.

VII. CONCLUSION

For the reasons set forth above, the district court's judgment should be affirmed.

Dated: September 27, 2017

Respectfully submitted,

DENTONS US LLP

By: /s/ Matthew G. Adams

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STATEMENT OF RELATED CASE

Pursuant to Circuit Rule 28-2.6, Intervenor-Defendant-Appellee states that *Cachil Dehe Band Of Wintun Indians Of The Colusa Indian Community v. Zinke, et al.*, Case No. 17-15245, currently pending before this Court, (i) arises out of the cases that were consolidated in the district court and (ii) involves a challenge to some of the same agency actions at issue in this appeal.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 7,148 words. The text of the brief is in 14-point Times New Roman, which is proportionately spaced.

TABLE OF ADDENDA

ADDENDUM OF STATUTES AND REGULATIONS

25 U.S.C. § 2701

Title 25: Indians
Chapter 29: Indian Gaming Regulations

§ 2701. FINDINGS

The Congress finds that--

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. § 2702

Title 25: Indians
Chapter 29: Indian Gaming Regulations

§ 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. § 2719

Title 25: Indians
Chapter 29: Indian Gaming Regulations

§ 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.

25 U.S.C. § 5108

Formerly cited as 25 U.S.C. § 465

Title 25. Indians
Chapter 45. Protection of Indians and Conservation of Resources

§ 5108. 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. § 5125

Title 25. Indians
Chapter 45. Protection of Indians and Conservation of Resources

§ 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

Formerly cited as 25 U.S.C. § 479

Title 25. Indians
Chapter 45. Protection of Indians and Conservation of Resources

§ 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.

25 C.F.R. § 292.18

Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter N. Economic Enterprises
Part 292. Gaming on Trust Lands Acquired After October 17, 1988
Subpart C. Secretarial Determination and Governor's Concurrence

§ 292.20 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. § 292.20

Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter N. Economic Enterprises
Part 292. Gaming on Trust Lands Acquired After October 17, 1988
Subpart C. Secretarial Determination and Governor's Concurrence

§ 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

Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter N. Economic Enterprises
Part 292. Gaming on Trust Lands Acquired After October 17, 1988
Subpart C. Secretarial Determination and Governor's Concurrence

§ 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.

CERTIFICATE OF SERVICE

I hereby certify that on September 27, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate ECF system and that all participants in this case were served through that system.

s/ Matthew G. Adams
Matthew G. Adams

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