No. 17-15533

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITIZENS FOR A BETTER WAY, et al.,

Plaintiffs-Appellants,

v.

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

BRIEF FOR APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

The Citizens plaintiffs and appellants have no parent companies. Nor do any publicly-held companies have a 10% or greater ownership interest in any of the Citizens plaintiffs and appellants.

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INTRODUCTION

This appeal challenges the Secretary of the Interior's ("Secretary") decision to transfer 40 acres of land in Yuba County, California (the "Yuba Site") into trust for the Estom Yumeka Maidu Tribe of Indians of the Enterprise Rancheria ("Enterprise") for an off-reservation casino. Appellants Citizens for a Better Way, Stand Up for California!, Grass Valley Neighbors, William F. Connelly, James M. Gallagher, Andy Vasquez, Dan Logue, Robert Edwards, and Roberto's Restaurant (collectively "Citizens") are neighbors, non-profits, community leaders, Native Americans, and businesses, each of which objects to the detrimental impacts the project will have on their community.

In two separate records of decision, the Secretary made legal errors that render his 2011 decision authorizing gaming at the Yuba Site ("Gaming Decision") and his 2012 decision to acquire the site in trust ("Trust Decision") arbitrary and capricious, an abuse of discretion, and contrary to law. The case thus presents two issues of statutory construction: (1) whether "members of any recognized Indian tribe" under federal jurisdiction in 1934 requires the Secretary to show that the trust applicant was a tribe in 1934 in order to satisfy the first

definition of "Indian" in Section 19 of the Indian Reorganization Act ("IRA"), and (2) whether determining that gaming on the trust land "would not be detrimental to the surrounding community" requires the Secretary to assure mitigation of the detrimental impacts he identifies in order to satisfy Section 2719(b)(1)(A) of the Indian Gaming Regulatory Act ("IGRA").

First, Section 5 of the IRA permits the Secretary to take land into trust for "Indians," thereby restricting the jurisdiction and sovereignty of the state where the land is located. 25 U.S.C. § 5108. Section 19 defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129. For years, the Secretary exercised his authority under Section 5 with little limitation until 2009 when his authority was circumscribed by the Supreme Court's construction of Section 19's first definition of "Indian." *Carcieri* v. *Salazar*, 555 U.S. 379 (2009). The Court held that "the term 'now under Federal jurisdiction' in § [5129] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in

1934." *Id.* at 395. *Carcieri* did not construe the meaning of "under federal jurisdiction."

In a subsequent trust acquisition, the Secretary construed "under Federal jurisdiction" and determined that the temporal restriction of "now under Federal jurisdiction" modifies "Indian tribe" but not "recognized." *Confederated Tribes of the Grand Ronde Cmty of Or. v. Jewell*, 830 F3d 552, 563 (D.C. Cir. 2016) accepted this construction. The D.C. Circuit allowed the Secretary to sever "recognized" from the phrase "Indian tribe now under federal jurisdiction" and upheld the Secretary's conclusion that a tribe acknowledged in 2002 qualified as a "recognized Indian tribe now [in 1934] under federal jurisdiction."[1]

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[1] Citizens believes that the plain meaning of "any recognized Indian tribe now under Federal jurisdiction" requires that an Indian tribe have been "recognized" and "under Federal jurisdiction" when the IRA was enacted, and that *Confederated Tribes* is wrongly decided. This case, however, does not involve any dispute over the meaning of "now under Federal jurisdiction." And even if one accepts the D.C. Circuit's Section 19 interpretation that a tribe could be under jurisdiction in 1934 but first recognized in 2002, that case clearly holds that the definition requires that a trust applicant constituted a "tribe" when the IRA was enacted. The record of decision in this case does not establish that the Enterprise Tribe constituted a tribe in 1934, let alone a recognized tribe.

In this case, the Secretary asks the Court to go a step further. He urges the Court to allow him to dispense with the word "tribe" entirely, so that he may acquire land in trust for any "Indians" under federal jurisdiction in 1934.

Unlike in *Confederate Tribes*, the Secretary's sole explanation that the applicant tribe meets Section 19's definition is that a special election was held at the Enterprise Rancheria for the adult Indians residing there. The Trust Decision claims that the fact of a Section 18 election establishes that there was a "recognized Indian tribe now under federal jurisdiction." This summary conclusion without establishing that the applicant tribe existed in 1934 violated the IRA and the Administrative Procedure Act ("APA").

Second, to authorize gaming at the Yuba Site, the Secretary was required under the Indian Gaming Regulatory Act ("IGRA") to determine that gaming on the site would be "in the Tribe's best interest and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The Secretary concluded in his Gaming Decision that without mitigation of detrimental impacts, the casino would be detrimental to the surrounding community. Nonetheless, he stated that

the casino would not be detrimental to the surrounding community because all impacts would be mitigated.

He did not, however, indicate precisely or even if mitigation would be implemented. Under circumstances not involving Indian tribes, permits include conditions and mitigation requirements. If a permittee fails to comply, he faces enforcement actions, fines, and revocation. Trust decisions are not so conditioned. Thus, the "mitigation" the Secretary relied on to conclude that detrimental impacts would be mitigated might never be implemented. And without implementation, the casino will be detrimental to the surrounding community. The Secretary therefore violated IGRA and the APA by relying on speculative, unreliable, and unenforceable mitigation to conclude that detrimental impacts would affirmatively be mitigated.

Accordingly, the decision below should be reversed.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, and issued a final order disposing of all claims on September 24, 2015. ER 018. Plaintiffs Citizens for a Better Way, Stand Up For California!,

Grass Valley Neighbors, William F. Connelly, James M. Gallagher, Andy Vasquez, Dan Logue, Robert Edwards, and Roberto's Restaurant (collectively, "Citizens") filed a timely notice of appeal on March 22, 2017.[2] ER 001. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The Secretary approved the acquisition of the Yuba Site to be held in trust for the Enterprise Tribe, and determined that the Yuba Site would be eligible for gaming. This appeal raises two issues:

1. Whether the Secretary violated the IRA and the APA by concluding the he had the authority to acquire the Yuba Site in trust for the Enterprise Tribe.

2. Whether the Secretary violated IGRA and the APA by relying on theoretical mitigation to conclude that detrimental impacts from casino on the surrounding community would be affirmatively mitigated.

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[2] Plaintiff Cachil Dehe Band of Wintun Indians of the Colusa Indian Community moved for reconsideration pursuant to Federal Rule of Civil Procedure 59(e) on October 22, 2015, and the district court denied the motion on January 23, 2017. ER 008. Thus the time for filing the notice of appeal did not begin to run until January 23, 2017. Fed. R. App. Proc. 4(a)(4)(A).

STATEMENT REGARDING ADDENDUM

Pertinent statutes and regulations are set forth in an addendum to the brief.

STATEMENT OF THE CASE

A. Statutory Framework

The decisions challenged implicate two separate statutes: (1) the IRA governs the acquisition of land in trust; and (2) IGRA governs gaming on Indian lands.

1. The IRA authorizes the Secretary to acquire land in trust for recognized Indian tribes that were under federal jurisdiction in 1934

Section 5 of the IRA authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. To acquire the land, the Secretary must determine that an applicant meets one of the three definitions of "Indian" in Section 19 of the IRA:

> [1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and
>
> [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and

> [3] shall further include all other persons of one half or more Indian blood.

25 U.S.C. § 5129.

The Trust Decision concluded that Enterprise qualified for trust land under definition one—members of a recognized Indian tribe "under federal jurisdiction when the IRA was enacted in June 1934." *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009).

The Trust Decision's analysis that Enterprise met the first definition rests solely on another provision of the IRA—Section 18. The IRA allowed Indians to determine whether they wanted the Act to apply to them under an opt-out procedure set forth in Section 18. Section 18 provides, "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." 25 U.S.C. § 5125. In the Trust Decision, the Secretary relied on the Section 18 special election held at the Rancheria in 1935 to conclude that Enterprise was a recognized Indian tribe under federal jurisdiction in 1934.

2. IGRA prohibits gaming on land acquired in trust after 1988, subject to narrowly circumscribed exceptions

Congress enacted IGRA in 1988 "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). IGRA allows a tribe to conduct gaming on "Indian lands" that are "located in a State that permits such gaming for any purpose by any person, organization, or entity," as long as the gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." 25 U.S.C. § 2710(d)(1)(B)-(C).

In Section 20 of the Act, Congress generally prohibited gaming on land acquired by the Secretary in trust after 1988: "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 . . . ." 25 U.S.C. § 2719(a).

The Act contains an exception to this general prohibition, if:

> 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.

25 U.S.C. § 2719(b)(1)(A) (emphasis added).

B. Statement of Facts

1. Historical Background of Enterprise Indians

In 1906, a special agent for the Office of Indian Affairs prepared a report on the status of California Indians recommending that Congress appropriate "a sufficient sum for the purchase of land . . . where the Indians live[,] to be allotted or assigned to them in small tracts." ER 391-392. Congress appropriated money for that purpose by Acts of June 21, 1906, Pub. L. No 59-258, 34 Stat. 325, 333, April 30, 1908, Pub. L. No. 60-104, 35 Stat. 70, 76-77, and August 1, 1914, Pub. L. No. 63-160, 38 Stat. 582, 589. To effectuate these Acts, the Indian Service conducted a census to identify areas in which homeless Indians lived.

One such census included "the Indians in and near Enterpri[s]e," ER 387, which was founded in Butte County in 1852 as a construction camp and which later became a supply center for nearby gold mining operations. Fifty-one Indians were identified living near Enterprise,

including Nancy Martin, her son George and his family, and Emma Walters. *Id.*

In October 1915, an Indian Service agent visited Mrs. Martin, who had been living on land owned by the Central Pacific Railway Company for many years. ER 385, 386. Using funds appropriated by Congress, the Indian Service agent informed Mrs. Martin on September 23, 1916, that the United States had purchased the 40-acre parcel so that "yourself, your son, George, and his entire family may have a permanent home on this land." ER 385. The land was located in Butte County. *Id.*

In November 1915, an Indian Service agent visited Emma Walters, who had been living on a separate parcel of land, also owned by the Central Pacific Railway Company and also for many years. On September 23, 1916, the Indian Service agent wrote to Emma Walters, informing her that the United States had purchased 40 acres of land so "that yourself and other Indians related to you may have a permanent home on this land." ER 384. These two parcels were commonly referred to as Enterprise 1 (land set aside for the Walters family) and Enterprise 2 (land set aside for the Martin family). ER 293.

Congress enacted the IRA in 1934. Act of June 18, 1934, Pub. L. 73-383, 48 Stat. 984 (1934). Pursuant to Section 18, the Department prepared a list of adult Indians residing at or having an interest in Enterprise Rancheria 1 and 2 to determine who would be eligible to vote in a special election to determine whether the IRA would apply at the Rancheria. ER 369. The Department held a Section 18 election at the Rancheria in June of 1935. Seventeen of the 29 Indians eligible to vote rejected application of the Act. ER 372; ER 338.

Unlike many California Rancherias, the Enterprise Rancheria was not listed for termination under the California Rancheria Act, which terminated federal supervision over 41 Rancherias. Pub. L. 85-671, 72 Sta. 619 (1958). In 1964, however, Congress enacted Public Law No. 88-453, "An act to authorize the Secretary of the Interior to sell Enterprise Rancheria numbered 2 to the State of California, and to distribute the proceeds of the sale to Henry B. Martin, Stanley Martin, Ralph G. Martin, and Vera Martin Kiras," the four surviving children of George and Sadie Martin. Act of August 20, 1964, 78 Stat. 534. The purchase was necessary for the construction of the Oroville dam. ER 115. Enterprise 2, was subsequently submerged under Lake Oroville.

Id. A Senate report stated, "When the land has been sold and the proceeds distributed, the Bureau of Indian Affairs will have terminated supervisory responsibilities over Enterprise Rancheria No. 2 and its inhabitants." ER 314.

In 1979 Enterprise was added to list of federally recognized Indian tribes. *See* 44 Fed. Reg. 7235 (Feb. 6, 1979). In 1994, descendants of the Martin family (Indians who were paid for the 1964 purchase and over whom the government had terminated any supervisory responsibilities) elected to organize as a tribe. ER 304. They adopted a tribal constitution in 1996. ER 295. As of the date of the Tribe's initial fee-to-trust application, the descendants of Emma Walters who resided at Enterprise 1—the only extant Enterprise Rancheria parcel—did not consider themselves members of the Tribe and were not enrolled. ER 294. Following a decision by the Interior Board of Indian Appeals rejecting Enterprise 1 residents' argument that they were a separate federally recognized tribe, *Edwards v. Pacific Regional Director*, 45 IBIA 42 (2007), the residents of Enterprise 1 enrolled as Tribe members. ER 207.

Under the Enterprise Constitution, Enterprise 1 "shall be held under the sole individual ownership of all heirs of said individual and shall not be owned by the Rancheria." ER 257-258. The Constitution further provides that "lands of Enterprise Rancheria No. 2 were sold pursuant to Public Law 88-453 and were owned by the descendant's [sic] of Nancy Martin; however, the Rancheria may acquire in the future an additional forty (40) acres of lands to be held under the sole ownership of all the heirs of Nancy Martin for homestead purposes, which lands shall not be utilized by the Rancheria for economic purposes." ER 258.

2. The Enterprise Tribe's proposed casino development and the records of decision

On August 13, 2002, Enterprise submitted a fee-to-trust application for a 40-acre parcel of land in Yuba County, California to develop a "tribal gaming facility." ER 292-293, 296. An environmental consultant produced an environmental assessment of the proposed project in July 2003, which BIA reviewed and adopted in July 2004. ER 262; 254. In May 2005, BIA published a notice of intent to prepare an environmental impact statement ("EIS") for the project. ER 252-253. In April 2006, Enterprise requested that BIA determine that the Yuba Site

would be eligible for gaming pursuant to the exception of 25 U.S.C. § 2719(b)(1)(A). ER 250. Enterprise amended and restated that request in March 2009. ER 203-237.

The Secretary published the final EIS for the project in August 2010. ER 196. Thirteen months later, the Secretary issued the Gaming Decision, in which he concluded that gaming at the Yuba Site would be in the Tribe's best interest and would not be detrimental to the surrounding community. ER 124-195. The Gaming Decision stated that gaming would not be detrimental to the surrounding community because "[t]he Department . . . has adopted all practicable means to avoid or minimize environmental harm, and has determined that potentially significant effects will be adequately addressed by these mitigation measures, as described in this ROD." ER 126. The Governor concurred in the Gaming Decision in August 2012. ER 122. In November 2012, the Secretary issued the Trust Decision to acquire the Yuba Site for the Tribe's casino. ER 067-121. The Trust Decision based the Secretary's authority to acquire the land in trust on a special election pursuant to Section 18 of the IRA held at the Enterprise Rancheria in June of 1935. ER 115.

3. The district court's decision

Citizens challenged the Gaming and the Trust Decisions in district court under the APA. Citizen's challenge was resolved on cross-motions for summary judgment. On September 24, 2015, the district court denied Citizen's motion for summary judgment and granted defendants' cross-motions for summary judgment. ER 018-050, 051. With respect to Citizens' IRA challenge, the court found that the Secretary had the authority to acquire the Yuba Site based on the Trust Decision's consistency with prior departmental practice: "The Court finds no reason to stray from the Department of the Interior's practice of determining federal jurisdiction." ER 046. The court affirmed the Gaming Decision, finding that Citizens "failed to provide any legal authority to support the argument that there can be no finding of 'no detriment' unless the Secretary knows that all impacts will be mitigated." ER 036-037. The district court's findings under both the IRA and IGRA were error.

SUMMARY OF ARGUMENT

1. It is arbitrary and capricious agency action to conclude that an Indian tribe was under federal jurisdiction in 1934 without

determining that the tribe actually existed in 1934. *See Confederated Tribes*, 830 F.3d at 563 (confirming that the phrase "now under federal jurisdiction" modifies "Indian tribe"). And yet that was the Secretary's conclusion in the Trust Decision. The Secretary determined that the Enterprise Tribe satisfies the first definition of "Indian" solely because the Department held a special election under Section 18 at the Rancheria in 1935. ER 115. But the plain language of Section 18 requires the Secretary to hold a special election by reservation for "adult Indians," not for tribes. 25 U.S.C. § 5125. The fact that the Department held a special election for "adult Indians" does not establish the existence of a tribe.

The Department has long recognized that Section 18 elections were conducted by reservation, not by tribe, and that reservations could consist of a single tribe, multiple tribes, or no tribes—only persons of Indian blood or descent. The Secretary has in fact conceded the point in this litigation. Accordingly, evidence that a Section 18 election was held at the Rancheria demonstrates only that "adult Indians" were under federal jurisdiction, not an Indian tribe, which the statute unambiguously requires.

The APA requires agencies to provide reasoned decisions. Courts may not substitute their analysis for that of the agency. Regardless, the administrative record does not support the conclusion that an Indian tribe resided on Rancheria 1 or 2. To the contrary, the record indicates that the Rancherias were purchased for individual Indians and their families, and the list of Indians who voted in the election does not reflect that those voting comprised a tribe. Most important, the Secretary did not include or discuss evidence of tribal existence in the Trust Decision. The Trust Decision relied solely on the occurrence of the election. Thus, any explanations beyond that provided by the Secretary must be rejected as improper post hoc justifications. *See SEC v. Chenery Corp*, 318 U.S. 80, 87 (1943).

2. The Secretary concluded in the Gaming Decision that without mitigation, the casino would be detrimental to the surrounding community. ER 126. Indeed, the Secretary found significant detrimental impacts involving automobile traffic, air emissions, flood control, and wastewater. His conclusion that the surrounding community will not be detrimentally impacted is based solely on the assertion that these impacts will be mitigated to less than significant

levels. The mitigation the Secretary relied on, however, is not a condition of the decision and its implementation is speculative. Some of the necessary mitigation did not exist, and for the specific mitigation measures identified, neither the Secretary nor any impacted party can compel the Enterprise Tribe, which is immune from suit, to implement such measures. *See Michigan v. Bay Mills Indian Cmty*, 134 S. Ct. 2024 (2014).

The lack of enforceable mitigation violates IGRA, which the Secretary interprets to require him to apply "*heavy scrutiny . . . to ensure*" the casino would not be detrimental to the surrounding community. ER 189 (emphasis added). The Secretary cannot ensure that the casino will not be detrimental to the surrounding community if the Secretary cannot conclude that mitigation will—in fact—be implemented. The Secretary did not do this, and the result is that the substantive determination required under the statute was reduced to a speculative assertion. Thus the Secretary's conclusion that the casino would not be detrimental to the surrounding community is arbitrary and capricious and violated IGRA and the APA.

STANDARD OF REVIEW

This Court's review of Citizens' claims under the APA is *de novo*: the Court reviews agency decisions "from the same position as the district court." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995). "A decision of an administrative agency must be set aside if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law or if the action failed to meet statutory, procedural or constitutional requirements." *Id.*; *see also* 5 U.S.C. § 706(2).

ARGUMENT

I

The Secretary Lacked Authority to Acquire the Yuba Site in Trust for Enterprise

The Secretary's authority to acquire land in trust is set forth in Section 5 of the IRA. *See* 25 U.S.C. § 5108. That provision authorizes him to acquire land for "Indians," which is separately defined in Section 19. *See* 25 U.S.C. § 5129. To determine whether he could acquire the Yuba Site in trust for Enterprise, the Secretary had to find that Enterprise satisfied a definition in Section 19. 25 C.F.R. § 151(a). The Secretary failed to do this. With respect to the meaning of Section 19,

the Secretary said nothing. And to conclude that Enterprise met the first definition of "Indian," the Secretary recited a single fact:

> As indicated in the report prepared in 1947 by Theodore H. Haas, Chief Counsel for the United States Indian Service, a majority of adult Indians residing at the Tribe's Reservation voted to reject the IRA at a special election duly held by the Secretary on June 12, 1935. The calling of a Section 18 election at the Tribe's Reservation conclusively establishes that the Tribe was under federal jurisdiction for *Carcieri* purposes.

ER 115.

That explanation falls far short of what the law requires and is wrong as a matter of law and fact. The court below erred by relying on the Secretary's impermissible post hoc justifications. "[R]eview of an agency's decision is limited to the reasoning articulated by the agency." *Love Korean Church v. Chertoff*, 549 F.3d 749, 755-56 (9th Cir. 2008) (citing *SEC v. Chenery Corp*, 318 U.S. at 87). A court should not consider after-the-fact explanations of counsel nor provide a reason the agency has not given. *See e.g.*, *U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983); *Fed. Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 397 (1974).

Moreover, the Secretary's conclusion is contrary to the plain language of the statute and the record evidence. Accordingly, the Secretary's decision to acquire the land in trust was arbitrary and capricious and an abuse of discretion.

A. The first definition of "Indian" in Section 19 requires tribal existence in 1934

Section 5 of the IRA permits the Secretary to take land into trust for "Indians." 25 U.S.C. § 5108. Congress limited "Indian" in Section 19 to "three discrete definitions." *See Carcieri*, 555 U.S. at 391-392. The first definition, relied on here, defines "Indian" to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129.

In 2009, the Supreme Court held that "the term 'now under Federal jurisdiction' in [Section 19] unambiguously refers to those tribes that were under the federal jurisdiction of the United States when the IRA was enacted *in 1934*." *Carcieri,* 555 U.S. at 395 (emphasis added). In response to *Carcieri's* holding, in a 2013 trust decision for the Cowlitz Tribe, the Secretary announced that Section 19 of the IRA is ambiguous, and that the phrase "now under federal jurisdiction" only

modifies "Indian tribe," not "recognized Indian tribe." The D.C. Circuit affirmed the Secretary's conclusions and held the Secretary did not err in finding a landless and treaty-less tribe that was not acknowledged until 2002 was, nonetheless, an Indian tribe under federal jurisdiction in 1934. *Confederated Tribes*, 830 F.3d at 563.

In the Enterprise Trust Decision, the Secretary has dispensed with the requirement that applicant actually be an "Indian tribe" in 1934. The first definition in Section 19, however, cannot be read to exclude the "Indian tribe" requirement from the temporal restriction. Accordingly, the Secretary must at least establish that there was an "Indian tribe" in existence in 1934 to invoke the first definition of "Indian" in Section 19.

The Secretary did not make any such finding. It cannot be reasonably concluded that "adult Indians" voting under Section 18 necessarily constituted a "tribe" under federal jurisdiction in 1934 without evidence that they existed as a tribe at that time. A Section 18 election held at a particular place for an unidentified group of "Indians" does not, of itself, demonstrate that an Indian tribe was under federal jurisdiction in 1934.

B. The Secretary did not establish that the Section 18 election was called at the Enterprise Rancheria for an Indian tribe

1. By its plain language, Section 18 applies the IRA to "reservations" based on the votes of "adult Indians," but says nothing about any tribal affiliation

Section 18 states, "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."[3] 25 U.S.C. § 5125 (emphasis added). The IRA expressly and unambiguously applies to a "reservation" unless the "adult Indians" opt out. *See Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 64 F.3d 1250, 1257 (9th Cir. 1994) ("The plain meaning of legislation should be conclusive, except in rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters.").

Because Section 18 elections were held by "reservation" without reference to a "tribe," the mere fact that "adult Indians" voted does not establish the existence of a tribe. "Adult Indians" that voted at a reservation might have been "members of a[] recognized tribe" in 1934,

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[3] California Rancherias are considered "Indian Reservation[s] and 'Indian Country' within the meaning of 18 U.S.C. § 1151." *Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008, 1012 (9th Cir. 2007).

but they might also have met another definition of "Indian" as "descendants of such members who were on June 1, 1934, residing within the present boundaries of any Indian reservation" or "persons of one-half or more Indian blood . . ." 25 U.S.C. § 5129. Under the plain language of the statute, it is impossible to conclude that a "tribe" voted in a Section 18 election solely on the basis of an election statutorily prescribed for "adult Indians."

In fact, in 1934, both Congress and the Department understood that members of two or more tribes or "Indians" with no tribal affiliation often occupied a single reservation. *See* I.B.2, infra. In regard to California Rancherias, the Interior Solicitor concluded in 1960 that the Indians of California who resided on Rancherias were generally not members of any tribe. The Rancherias were purchased for the homeless Indians of California generally and Indians living nearby were permitted to occupy Rancheria lands. ER 316. Likewise, in 1978, a BIA official concluded that "[i]n the majority of cases . . . the rancheria lands [we]re occupied by Indian people without regard to the tribal affiliation of their ancestors." ER 306, 308. Regardless of a reservation's demographics, however, Section 18 required the Secretary to conduct a

single election for the reservation as a whole, not for any particular group or tribe residing there.

If the adult Indians at a reservation accepted application of the IRA in a Section 18 election, Section 16 of the Act provided that those Indians residing on a reservation could vote to organize as a tribe and adopt a constitution and bylaws. 25 U.S.C. § 5123. As originally enacted, Section 16 provided,

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the *adult Indians residing on such reservation, as the case may be*, at a special election authorized by the Secretary of the Interior . . . .

Pub. L. 73-383, 48 Stat. 984, 987 (1934), § 16 (emphasis added). If the "adults Indians" residing on a reservation automatically qualified as a tribe on the basis of a Section 18 election, the phrase "the adult Indians residing on such reservation, as the case may be" in Section 16 would be

superfluous. The original text of Section 16 shows that the use of "adult Indians" in Section 18 was intentionally broad.[4]

Thus, a Section 18 election did not confirm the existence of a tribe, nor did it create one. *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."). Indians were not required to accept the IRA under Section 18, and adult Indians living on a reservation were not obligated to organize under Section 16.

Under Section 18, the Secretary was required to call the election at the Enterprise Rancheria because "adult Indians" resided there. In the absence of other evidence demonstrating that those Indians

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[4] Congress chose broad language in Section 18 because the primary purpose of the IRA was to protect tribal land. Most of the IRA's provisions are designed to protect and rebuild tribal land and assets by prohibiting allotment, 25 U.S.C. § 5101, freezing trust periods and restricting alienation, 25 U.S.C. § 5102, restoring surplus lands to tribal ownership, 25 U.S.C. § 5103, acquiring new trust lands, 25 U.S.C. § 5108, and protecting natural resources on trust lands, 25 U.S.C. § 5109. Indians were permitted to vote, by reservation, to determine whether the Act should apply to their land. 25 U.S.C. § 5125. And Indian tribes, "residing on the same reservation," had the right to organize. 25 U.S.C. § 5123.

constituted a tribe, the plain language of Section 18 demonstrates only that the Secretary asserted jurisdiction over a reservation, and the adults residing there met at least one of the definitions of "Indian" in Section 19.

2. Contemporaneous Department interpretations of the IRA confirm that Section 18 elections were held for Indians residing on a reservation, not for tribes

The Department's contemporaneous understanding of who was eligible to vote in a Section 18 election and the effects of such an election establish that a Section 18 election alone says nothing about the existence of a tribe. *See Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (holding that courts must give "great weight" to "the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement").

In an opinion instructing the agency on the implementation of the IRA, the Interior Solicitor in 1934 concluded that an Indian must both reside on and hold legal interest in the reservation to vote in a Section 18 election. ER 375. Residency was established by the maintenance of a home on the reservation. *Id.* Under the second criterion, the Solicitor identified three ways an Indian could establish a sufficient legal

interest: (1) ownership of restricted property within the reservation, (2) entitlements to participate in tribal elections or tribal affairs on a reservation, or (3) receipt of benefits from the Department representatives stationed on a particular reservation. *Id.* Two of the three criteria did not require tribal affiliation to establish a legal interest in the reservation. ER 376 ("Tribal affiliation may still be one indication of the right to reside on a given reservation; but other proofs of such right are possible."). Thus, the Department's contemporaneous construction shows that eligibility to vote in a Section 18 election did not require tribal affiliation.

In another 1934 opinion, the Solicitor addressed the question of how to determine tribal membership at a reservation under Section 4 of the IRA, which "prohibits all transfers of restricted Indian lands except such as are specifically sanctioned by the terms of the section." Solicitor of the Department of the Interior, M-27796, IRA Interpretation Regarding Devisee Questions—Definition of Tribe as Political Entity, (November 7, 1934), *reprinted in* 1 Opinions of the Solicitor Relating to Indian Affairs, 1917-1974, at 478, *available at*

https://archive.org/details/opinionsofsolici01unit.[5] The terms of the section required interpretation of the phrase "the Indian tribe in which the lands are located." *Id.* (emphasis added). The Solicitor interpreted the phrase to mean the "tribe which has some jurisdiction over the lands in question." *Id.* at 479.

In addressing how to determine which tribe had jurisdiction over land at any particular reservation, the Solicitor concluded that Section 19's definition of "tribe" identified the groups that "may be recognized as entitled to tribal status," and that the IRA "permits the organization as a tribe of any of the following groups":

> (a) A band or tribe of Indians which has only a partial interest in the lands of a single reservation;
>
> (b) A band or tribe which has rights coextensive with a single reservation;
>
> (c) A group of Indians residing on a single reservation who may be recognized as a "tribe" for purposes of the Wheeler-Howard Act [the IRA] regardless of former affiliations; and

[5] For the Court's convenience, Citizens has reproduced a copy of this document as Attachment 1 in the addendum to this brief.

> (d) A tribe whose members are scattered over two or more reservations in which they have property rights as members of such tribe.

Id. at 479. Any of these groups of Indians could therefore have resided at a reservation where a Section 18 election was held, but only group (b) represents a situation under which all Indians residing on a reservation were members of the same tribe. Accordingly, the Solicitor further concluded that in the absence of a Section 16 election, determining tribal affiliation at a reservation "is a matter of some uncertainty" requiring historical inquiry. *Id.*

In the Trust Decision, the Secretary did not inquire into this uncertainty but relied on the arbitrary assumption that the adult Indians who voted in the Section 18 election were necessarily members of a recognized tribe and not Indians falling under one of the other definitions. This was contrary to the plain language of Section 18 and the demographic realities of reservations in 1934.

3. The Department's record of the Section 18 election on the Enterprise Rancheria does not show any tribal affiliation

In 1934, the Enterprise Rancheria was a place, not a tribe. This point is demonstrated by the sole document on which the Secretary

relied as evidence of the Section 18 election at the Rancheria—the Haas Report. Table A of the Haas Report contains no information regarding the tribal makeup or ethnology of Indians at the various reservations where Section 18 elections occurred. It lists the *reservation* at which the election was held; the total population of eligible voters; the number of Indians voting for and against application of the IRA; and the date on which the election was held. ER 338.

For the Enterprise Rancheria, the Haas Report shows only that out of the 29 adult Indians eligible to vote on June 12, 1935, seven voted for application of the IRA, and 17 voted to reject application of the IRA. *Id.* The Haas Report shows nothing more. It therefore provides no basis for concluding that the 29 adult Indians eligible to vote at the Rancheria comprised a tribe.

In listing the elections by reservation rather than by tribe (according to Section 18's requirement), the Hass Report does not distinguish among the varied Indian groups residing on reservations in 1934. Thus in relying solely on the Haas Report, the Secretary failed to account for the common situation where one reservation was occupied

by multiple tribes[6] or where ethnologically different Indians were granted allotments on an unrelated tribe's reservation.

Table A of the Haas Report, for example, also shows that at the Quinault Reservation in Washington State, 184 "adult Indians" voted to accept application of the IRA under Section 18. ER 342. Prior to the IRA's enactment, the Supreme Court recited the fact that Indians of Chehalis, Chinook and Cowlitz descent were among those granted allotments on the Quinault Reservation. *See Halbert v. U.S.*, 283 U.S. 753, 760 (1931). Thus, it is clear that Indians identified with at least three other historical Indian groups resided on their allotted land within the Quinault Reservation in 1934 and were not members of the Quinault Tribe.[7]

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[6] For example, *Confederated Tribes of the Grand Ronde Cmty of Or. v. Jewell*, 830 F.3d 552 (D.C. Cir. 2016), and *Moe v. Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463 (1976).

[7] Subsequent disputes and litigation related to the status of the Indians at the Quinault Reservation also confirm the Secretary's improper use here of Table A. The "Indians of the Quinault Reservation," as an undifferentiated group, has never been considered a tribe. The Interior Board of Indian Appeals specifically rejected the notion. *Brown v. Commissioner of Indian Affairs*, 8 IBIA 183, 188 (1980) (finding that the "Indians of Quinault Reservation" that voted on the IRA under Section 18 were not "one and the same" with the present-day

If the reasoning in the Enterprise Trust Decision were correct, the Chehalis, Chinook, and Cowlitz Indians residing on the Quinault Reservation would have become members of a Quinault Reservation tribe—a tribe that has never existed—solely because they voted under Section 18. This perverse result not only renders the Secretary's conclusion in the Trust Decision unreasonable and contrary to Section 18's clear intent, but it would also mean that the Secretary has the power to create tribes (by calling a Section 18 election), a power he does not possess. *See U.S. v. State Tax Commission of State of Miss.*, 535 F.2d 300, 306 (5th Cir. 1976).

The Department has, in fact, conceded the point. In the *Confederated Tribes* litigation the Department argued that the Cowlitz Tribe was under federal jurisdiction in 1934 despite not having a reservation of its own where a Section 18 election was held. In support of the argument, the Department asserted that "[n]owhere in [Section 18] is there mention of a 'recognized tribe' voting on the IRA because

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federally recognized Quinault Tribe.). The D.C. Circuit also recognized that in 1934, members of the Cowlitz Tribe lived on the Quinault Reservation. *Confederated Tribes*, 830 F.3d at 561.

votes were conducted *by reservation*," not by tribe.[8] ER 065 (emphasis added).

In the proceedings below, however, the Secretary attempted to distinguish the concession in *Confederated Tribes* as inapplicable to Enterprise. ER 057-058. But absent specific facts demonstrating that Enterprise was a tribe in 1934, no attempt at distinguishing Enterprise from Cowlitz can overcome the simple fact that Section 18 elections were not conducted by tribe and thus cannot be used to conclude that a tribe existed. The Secretary cannot have it both ways such that the Cowlitz Indians who voted under Section 18 at the Quinault Reservation did not become members of the Quinault Tribe, but the adult Indians who voted at the Enterprise Rancheria became members of an Enterprise Tribe by virtue of the same election. *See Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1100 (9th Cir. 2013) (stating that an agency decision is arbitrary "when the agency treats some parties before it one way while treating others, similarly situated, differently").

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[8] The Secretary's argument was in response to the assertion that that the list of tribes that voted constituted the universe of tribes that would be subject to the IRA. The Secretary rebutted the contention, as Citizens do here, with the plain language of Section 18: The election was by reservation, not by tribe.

C. There is no evidence that the Indians living on the Enterprise Rancheria in 1934 constituted an Indian tribe

The Trust Decision states that the Section 18 election was held "at the Tribe's reservation," ER 115, but this conclusion is merely assumed. The Secretary did not make this finding, and there are no facts in the record to support it. Without more, this conclusion cannot be affirmed. *See Sierra Club v. EPA*, 671 F.3d 955, 963 (9th Cir. 2012) (requiring an explanation of a decision that includes a "rational connection between the facts found and the choice made.")

The record facts establish that an agent of the U.S. Indian Service took a census in 1915 of the "Indians in and near Enterpri[s]e in Butte County, California." ER 387. The census documented 51 Indians living in the vicinity, but did not identify those individuals as members of any tribe. *Id.* In 1916, the United States purchased two 40-acre parcels of land near Enterprise, which became known as Enterprise 1 and Enterprise 2, or collectively the Enterprise Rancheria. The United States established Enterprise 1 as the "permanent home" of Emma Walters and her relations, ER 384, and Enterprise 2 as the "permanent home" of Nancy Martin and her family. ER 385. There is no mention in the record that either purchase was for a tribe.

The record facts further establish that the Tribe has not likely ever held an interest in the Rancheria lands. Consistent with the purchase of Enterprise 1 for Emma Walters, the Enterprise Tribe's Constitution provides that Enterprise 1 "shall be held under the sole individual ownership of all heirs of said individual and shall not be owned by the Rancheria." ER 258. With respect to Enterprise 2, the Constitution authorizes the Tribe to acquire a 40-acre replacement parcel, but limits any ownership interests in the parcel to the heirs of Nancy Martin for homestead purposes. *Id.*

The purchase of the Rancheria is not mentioned in the Trust Decision's discussion of the Secretary's authority to acquire the Yuba Site, but is noted in passing in a discussion regarding the Tribe's need for additional land. ER 115. That discussion does not state that the purchase was for a particular tribe or cite any of the record documents associated with the purchase. *Id.* Nor does it state or even suggest that the Rancheria was the applicant Tribe's reservation in 1934. There is simply no connection drawn in the Trust Decision between the Tribe's current need for more land and any possessory interest the Tribe had in the Rancheria in 1934.

The focus of the discussion regarding the Tribe's need for additional land is on the current status of the Rancheria land. ER 115. The Trust Decision states that Enterprise 1 "has only been used for limited residential purposes" and "is not sufficient for tribal housing needs, tribal government or economic development." *Id.* The decision also notes that Enterprise 2 was sold to the State of California and then submerged under Lake Oroville; no additional land was ever acquired to replace it. *Id.* Based on the Tribe's limited land holdings, the Trust Decision concluded that "[t]he Tribe needs the subject parcel held in trust in order to better exercise its sovereign responsibility to provide economic development to its tribal citizens." *Id.*

Without evidence that the Enterprise Rancheria was the Tribe's reservation in 1934, the Trust Decision must stand or fall on the sole rationale provided by the Secretary: the Section 18 election held at the Rancheria for "adult Indians." Moreover, the Court should defer to the Secretary's decision not to include the purchase of the Rancheria in support of his claimed trust authority. *See James v. U.S. Dep't of Health and Human Services*, 824 F.2d 1132, 1138 (D.C. Cir. 1987) (recognizing Department's expertise in matters of tribal history and recognition).

D. The district court's post hoc rationales cannot save the Secretary's decision

The district court offered a number of post hoc justifications in support of the Secretary's decision, none of which were considered by the Secretary in the Trust Decision. Moreover, these justifications are either factually inaccurate or legally irrelevant to determining whether the applicant Tribe existed as an Indian tribe in 1934.

The district court concluded that the Secretary's decision was reasonable because it was "consistent with the Department of Interior's practice," although the Trust Decision neither cited nor acknowledged any Departmental practice. As evidence of this alleged consistency, however, the district court cited "the Department's most recent M-Opinion." ER 045. But the cited M-Opinion was issued two years *after* the Trust Decision and was therefore not relied on in the Trust Decision, and it should not be considered now. *See Southwest Center for Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996) ("[P]ost decision information . . . may not be advanced as a new rationalization either for sustaining or attacking an agency's decision."). Moreover, as the *Carcieri* opinion obviously establishes, the Department's past practice may not have been lawful.

In any case, the M-Opinion itself is inaccurate and inconsistent with the Department's prior interpretations. In the Opinion, the Solicitor contends that "an eligibility determination [under Section 18] would include deciding the tribe was under federal jurisdiction . . . ." Solicitor's Opinion M-37029, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act (2014), at 21, *available at* https://go.usa.gov/x5qG7. The Solicitor cites no authority for this contention, and it conflicts with the plain language of Section 18 and the Department's understanding in 1934 that eligibility determinations were based on residence and holding a legal interest in the reservation, neither of which required tribal affiliation. ER 375. The Solicitor's contention also conflicts with the Department's concession in *Confederated Tribes* that Section 18 elections were conducted by reservation, not by tribe.

Prior to the 2012 Trust Decision, the Department addressed the relevance of a Section 18 election to the 1934 jurisdiction requirement only once. *See Shawano County, Wisconsin v. Acting Midwest Director*, 53 IBIA 62 (2011). The Trust Decision, however, did not find *Shawano* applicable authority for the Trust Decision. The district court, therefore,

improperly relied on *Shawano* as evidence of the Department's supposed practice regarding Section 18 elections.

In *Shawano*, the Interior Board of Indian Appeals determined that the calling of a Section 18 election for the Stockbridge Indian Tribe was evidence that the Tribe was under federal jurisdiction in 1934. This Section 18 election, however, was unique because the Stockbridge Tribe did not have a reservation in 1934. "Notwithstanding the lack of a tribal land base and pursuant to § [5125], the Secretary *held an election for members of the Tribe* on December 15, 1934, on the question of whether the Tribe would accept or reject the terms of the IRA." 53 IBIA at 64 (emphasis added).

For Stockbridge, unlike Enterprise, it was reasonable to conclude that the Secretary, under Section 18, asserted jurisdiction over an Indian tribe. But such a conclusion necessarily depended on evidence, unrelated to Section 18, establishing that the Secretary did, in fact, exercise jurisdiction over a tribe by holding the election for the tribe, and not merely "adult Indians" at a reservation as was generally the case.

Finally, the district court concluded that Citizens' Section 18 arguments "conflate[d] being a 'recognized Indian tribe' under the IRA with being a federally recognized tribe." ER 046. The Secretary in the Trust Decision, however, made no such distinction as a basis for determining that the Section 18 election was conclusive of whether the Tribe was under federal jurisdiction in 1934. Moreover, any distinction between being a "recognized Indian tribe" and a "federally recognized tribe" is irrelevant to the question because Section 19's first definition of "Indian" unequivocally requires that a "tribe" be under federal jurisdiction in 1934, not that "Indians" be under federal jurisdiction. And the Secretary made no finding in the Trust Decision that the Enterprise tribe existed in 1934. There is no evidence in the administrative record that an Enterprise Tribe existed in 1915 or 1934. The census and purchase documents speak only of Indians and Indian families, not an Indian tribe.

II

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

Gaming is prohibited at the Yuba Site unless the Secretary determines that gaming "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The Secretary concluded in the Gaming Decision that gaming would not be detrimental because "the Department has considered all potential effects to the environment, including potential impacts to local governments and other tribes" and "has determined that potentially significant effects will be adequately addressed by . . . mitigation measures . . . ." ER 126. Indeed, in his decision to implement the preferred alternative, the Secretary concluded that mitigation of detrimental impacts was "necessary." ER 193 (stating that the preferred alternative would best fund "necessary mitigation for the development of economic ventures").

To provide this necessary mitigation, the Secretary adopted all mitigation measures listed in the final EIS (ER 167) and identified further measures he deemed necessary to ensure gaming would not be detrimental to the surrounding community. *See e.g.,* ER 179, 180, 182

(requiring the Tribe to enter additional agreements with third parties for mitigation). The Secretary did not, however, determine how these necessary mitigation measures would be implemented or enforced. Because the Secretary did not know whether mitigation measures will actually be implemented, he could not reasonably conclude that the casino will not be detrimental to the surrounding community, as IGRA requires.

It is a fundamental principle of administrative law that an agency must "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Here, the Secretary failed to connect his finding that mitigation was necessary with his decision to authorize gaming because he did not provide any explanation for how that mitigation would implemented or enforced. He merely listed mitigation measures. *See, e.g.*, ER 162-163 (stating that the Tribe will pay its fair share of traffic mitigation, but providing no means for enforcing that commitment). Accordingly, the Secretary's decision to authorize gaming

at the Yuba Site under the two-part determination was arbitrary and capricious and violated IGRA.

A. It was arbitrary and capricious for the Secretary, after concluding that mitigation is necessary to avoid detriment, to rely on mitigation he knew to be unreliable and unenforceable

The Secretary selected the casino at the Yuba Site as the preferred alternative "*subject to implementation of the mitigation measures* identified in Chapter 2 [of the EIS]." ER 193 (emphasis added). The Gaming Decision was, in fact, contingent upon implementation of mitigation, which the Secretary deemed necessary to avoid detrimental impacts to the surrounding community. ER 191 (stating that because "the Tribe has worked with the local communities to identify and mitigate any environmental impacts of the [casino,] . . . I find that development of the Resort would not result in a detrimental impact to the environment in the area").[9] Thus, pursuant to 25 U.S.C. § 2719(b)(1)(A), the Secretary concluded that without mitigation of

[9] It is undisputed that without mitigation gaming would be detrimental to the surrounding community. Even Yuba County, an ardent supporter of the Tribe's casino, commented that "if agreed upon mitigation measures identified in the MOU or the EIS are not implemented, locating a gaming establishment on newly acquired land will have a detrimental impact on Yuba County." ER 243.

detrimental impacts, the casino *will* be detrimental to the surrounding community.

Not only did the Secretary conclude that gaming would be detrimental to the surrounding community without mitigation, but he also identified specific detrimental impacts that required mitigation. *See e.g.*, ER 162 (transportation and traffic); ER 140-141 (air emissions); ER 139-140 (flood control); ER 140 (wastewater).

There is a fundamental distinction between considering mitigation in an EIS and affirmatively stating that detrimental impacts will be mitigated in the Gaming Decision under IGRA. The National Environmental Policy Act ("NEPA"), which governs the EIS, is procedural only. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). It does not require mitigation to be implemented. *Id.* at 352 ("There is a fundamental difference between a requirement that mitigation be discussed in sufficient detail to ensure environmental consequences have been fairly evaluated . . . and a substantive requirement that a complete mitigation plan be actually formulated and adopted . . . ."). By contrast, IGRA requires the Secretary to conclude that gaming "would not be detrimental to the surrounding community."

25 U.S.C. § 2719(b)(1)(A). That is a substantive determination, and for that determination to be meaningful, it cannot be based on theoretical mitigation.

The distinction is apparent when the EIS is compared to the Gaming Decision. The EIS demonstrates, for example, that the proposed casino will have detrimental impacts on traffic, a major concern for the rural, agricultural community involved here. ER 199-200 (stating that the project would cause certain roads and intersections to operate at unacceptable service levels); ER 201-202 (detailing traffic mitigation measures needed). Traffic impacts from the casino broadly include congestion, decreased safety, increased pollution (including noise and light), upgrade costs, and incompatibility with existing agricultural traffic activities. *See e.g.*, ER 238-239 (comments from Sutter County); ER 240-243 (comments from Yuba County); ER 244-249 (comments from Wheatland). The EIS discusses measures that would mitigate impacts, as NEPA regulations expressly require. 40 C.F.R. §§ 1502.14(f), 1502.16(h).

In the Gaming Decision, however, the Secretary states that for traffic impacts, "[m]itigation measures in [the EIS] would ensure a less

than significant impact." ER 145. The Tribe, for example, would pay its "fair share" for traffic mitigation, ER 162-163, and the Tribe "intends to pay Yuba County for any traffic impact fees and to contribute its fair share" for road, intersection, and pedestrian improvements. ER 182. Thus, the Secretary concluded the casino "would not result in a significant cost increase for . . . adjacent local units of government." ER 190.

Whether this necessary mitigation will occur, however, is purely speculative. The Gaming Decision does not include any enforcement mechanism to ensure the Tribe will pay its fair share of mitigation costs or implement the mitigation measures described in the EIS. The Secretary has not required the Tribe to do so. Nor can the affected jurisdictions compel that result. *See Michigan v. Bay Mills Indian Cmty*, 134 S. Ct. 2024 (2014) (holding that tribes enjoy sovereign immunity from suit for on- and off-reservation activities). Indeed, some of the mitigation may not even be possible. The EIS states that specified traffic mitigation measures are, "by necessity," only recommended measures. ER 201. The EIS acknowledges that the Tribe has no jurisdiction over off-site roadways and intersections. *Id.*

To the extent that the Secretary relies on the MOU Enterprise negotiated with Yuba County in 2002, ER 277, the MOU does not address all of the mitigation needed to prevent the project from detrimentally impacting the surrounding community. Yuba County commented that payments for road improvements contained in the outdated MOU would only partially mitigate traffic impacts. ER 243. Yet the Secretary concluded that "any financial burdens imposed upon Yuba County . . . are sufficiently mitigated by provisions contained in separate MOUs . . . ." ER 190. And at the same time, the Secretary acknowledged that mitigation in the MOU may be insufficient and directed the Tribe to "pay the County a traffic impact fee, to the extent that equivalent fees are not paid for under a MOU with the County." ER 162.

Other government entities raised cost concerns as well. *See* ER 238-239 (Sutter County); ER 244-245 (Wheatland). Since the only extant MOUs are between the Tribe and Yuba County and the Tribe and Marysville, it is unclear how payments, already deemed insufficient under those MOUs, will mitigate financial impacts to Wheatland and Sutter County. The Secretary offers no explanation.

Finally, to mitigate traffic and other detrimental impacts, the Secretary required the Tribe to negotiate mitigation agreements with third parties, including agreements addressing fire safety and traffic, but those agreements have not been negotiated. *See* ER 179-180, 182. The Tribe is also supposed to "enter into MOUs or other agreements with various additional government entities, such as the California Department of Transportation and other nearby towns that would be impacted by the development," to cover "the cost of impacts on such government entities not covered by the MOU." ER 183-184. The Secretary further stated that in negotiating these agreements, "the Tribe and the Government will estimate the cost of impacts on such government entities not covered by the MOU." *Id.* Thus, the Secretary acknowledged not only the need for mitigation agreements beyond the MOU, but also that detrimental impacts to the surrounding community were currently unmitigated.

Despite deeming this mitigation necessary to finding that gaming at the Yuba Site would not be detrimental to the surrounding community, none of these agreements exist. Once the land is in trust, the Secretary has no authority to compel the Tribe or third parties to

negotiate agreements, nor does the Secretary have any ability to predict the terms the parties would negotiate or whether those terms would be sufficient to mitigate impacts.

In the Gaming Decision, the Secretary conditioned his finding that gaming would not be detrimental to the surrounding community on mitigation, ER 193 (concluding that "potential negative environmental impacts" will be mitigated, and deciding to implement the preferred alternative as the best option to fund "necessary mitigation"), but failed to consider whether the necessary mitigation would actually be implemented and failed to offer any reasoning or explanation in support of his conclusions. Basing his determination upon mitigation that does not exist and cannot be compelled was arbitrary and capricious.

B. It was arbitrary and capricious for the Secretary to fail to include an enforceable mitigation plan

Because the Secretary determined that impacts must be mitigated so that gaming at the Yuba Site would not be detrimental to the surrounding community, his determination necessarily required that the cited mitigation exist and be implemented. The only reasonable way to ensure that mitigation will be implemented is if it is capable of being

enforced. Without extant and enforceable mitigation, the Secretary could not rationally conclude that the casino will not be detrimental to the surrounding community. *See Sierra Club v. EPA*, 671 F.3d at 963 (requiring an explanation of a decision that includes a "rational connection between the facts found and the choice made.")

In the proceedings below, the Secretary argued that neither NEPA nor IGRA requires mitigation to be enforceable. ER 060-062. While that may be true of NEPA, IGRA is a different story—at least in this case. The Secretary expressly concluded that gaming would not be detrimental to surrounding community because impacts would be mitigated. ER 193. If he does not know that impacts will be mitigated because mitigation agreements do not exist and may never be negotiated, then he had no reasonable basis for concluding that gaming will not be detrimental. The best the Secretary could say absent actual mitigation is that gaming might not be detrimental. But that is not what the Secretary concluded, nor what the statute requires.

NEPA does not require mitigation because "NEPA does not mandate particular results, but simply prescribes the necessary process." *Methow* 490 U.S. at 350; *Pacific Coast Federation of*

Fishermen's Associations v. Blank, 693 F.3d 1084, 1103-04 (9th Cir. 2012) (stating that NEPA does not require an enforceable mitigation plan, only that mitigation be discussed sufficiently to ensure environmental consequences have been considered). NEPA does not constrain "the agency . . . from deciding that other values outweigh the environmental costs." *Methow*, 490 U.S. at 350.

By contrast, IGRA does mandate particular findings. Under Section 20, the Secretary must determine that gaming is "in the best interest of the Indian tribe and its members," and that gaming "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The issue here involves an agency decision contingent not on whether detrimental impacts were properly considered or whether such impacts potentially could be mitigated, but rather on a finding that they must be mitigated in order to reach the substantive conclusion that the casino will not be detrimental to the surrounding community.

Further, NEPA may not require an enforceable mitigation plan, but the Council for Environmental Quality ("CEQ") has also warned that "[a]gencies should not commit to mitigation . . . unless they have

sufficient legal authorities and expect there will be necessary resources available to perform or ensure the performance of the mitigation." 76 Fed. Reg. 3843, 3847 (Jan. 21, 2011). Indeed, without such considerations, a "commitment" to mitigation would be meaningless. Here, the Secretary committed to mitigation as the basis for a statutorily-required finding that gaming would not be detrimental to the surrounding community, but made no effort to ensure its performance.

Further, the Secretary's claim that he can rely on illusory mitigation is belied by his own statement that 25 U.S.C. § 2719(b)(1)(A) required him to apply "heavy scrutiny to tribal applications for off-reservation gaming on lands acquired after October 17, 1988 to ensure that they do not result in detrimental impact to communities surrounding the proposed gaming site." ER 189. If applying "heavy scrutiny … to ensure that [gaming does] not result in detrimental impact to communities" means anything, it must at least mean that the mitigation the Secretary relied upon to conclude that detrimental impacts will be mitigated actually exists and will be implemented.

Otherwise, he cannot satisfy the obligation he interprets IGRA to impose.

If detrimental impacts requiring mitigation are identified and not mitigated as a matter of fact, they remain, by definition, detrimental impacts. The conclusion must therefore be that gaming, in light of those impacts, will be detrimental to the surrounding community. IGRA does not authorize the Secretary to rely on other values to outweigh detrimental impacts. The only reasonable way to ensure that identified impacts requiring mitigation will not be detrimental to the surrounding community is if there is enforceable mitigation. Here, there is not.

The Part 292 regulations implementing Section 2719(b)(1)(A) are in accord with this view. The Secretary is required to consider "[i]nformation regarding environmental impacts and *plans for mitigating adverse impacts*, including an Environmental Assessment (EA), and Environmental Impact Statement (EIS), or other information required by [NEPA]." 25 C.F.R. § 292.18(a) (emphasis added); *id.* 292.21(a). In promulgating this regulation the Department was aware that 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 effect any." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 206 (D.C. Cir. 1991). Yet the regulation expressly requires the Secretary to consider mitigation plans under IGRA. Here, the Secretary did not.

In the proceedings below, as evidence of IGRA compliance, the Secretary pointed to the Mitigation Monitoring and Enforcement Program ("MMEP") in the final EIS, which identifies the proposed mitigation measures and the party responsible for monitoring and reporting on the mitigation. ER 054. Based on MMEP, the Secretary argued that Citizens' argument about enforcement involves "speculation about whether Enterprise and other parties will carry out their mitigation commitments," a position which is "foreclosed under NEPA." *Id.* But under IGRA, the Secretary has it exactly backwards. The MMEP does not provide for any enforcement and fails to address how the Tribe or third parties can be compelled to fulfill the mitigation obligations, upon which the Secretary's decision was conditioned. Thus, it was the Secretary who engaged in speculation when he concluded that gaming will not be detrimental to the surrounding community because detrimental impacts will be mitigated.

The Secretary's argument that neither NEPA nor IGRA requires enforceable mitigation not only ignores the Secretary's findings in the Gaming Decision, but also makes the determination that gaming will not be detrimental to the surrounding community meaningless. If the Secretary can find that a casino will not be detrimental to the surrounding community by merely citing a long list of mitigation measures that may never be implemented, then the statutory requirement that gaming will not be detrimental means nothing.

CONCLUSION

For the foregoing reasons, this Court should hold that the Secretary had no authority to take land into trust for the Enterprise Tribe because the record of decision does not show that the Tribe was an Indian tribe under federal jurisdiction in 1934. *See* 25 U.S.C. §§ 5108, 5129; *Carcieri*, 555 U.S. at 382. The Court should also hold that the Secretary's finding that the Tribe's casino would not be detrimental to the surrounding community on the basis of speculative, unreliable and unenforceable mitigation was arbitrary, capricious, and an abuse of discretion.

Accordingly, the district court's order granting summary judgment in favor of defendants should be reversed, and this Court should direct the district court to grant Citizens' motion for summary judgement.

Respectfully submitted.

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STATEMENT OF RELATED CASES

Also before this Court is *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Salazar*, No. 17-15245. Appellant Colusa filed its opening brief on May 22, 2017. As appellants Citizens do here, Colusa appeals the district court's grant of summary judgment affirming the Secretary's decision to acquire the Yuba Site in trust for the Enterprise Tribe and his decision to authorize gaming at the site.

June 30, 2017

s/Brian Daluiso
Brian Daluiso

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-15533

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Signature of Attorney or Unrepresented Litigant: s/ Brian Daluiso

Date: June 30, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

STATUTORY AND REGULATORY ADDENDUM

STATUTORY AND REGULATORY ADDENDUM

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Statutes

5 U.S.C. § 706. Scope of review

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

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

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

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

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

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

(D) without observance of procedure required by law;

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

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

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

25 U.S.C. § 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. Declaration of policy

The purpose of this chapter is--

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

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

to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

25 U.S.C. § 2710(d)(1). Tribal Gaming Ordinances

. . .

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

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

(A) authorized by an ordinance or resolution that--

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

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

(iii) is approved by the Chairman,

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

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

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. § 5101. Allotment of land on Indian reservations

On and after June 18, 1934, no land of any Indian reservation, created or set apart by treaty or agreement with the Indians, Act of Congress, Executive order, purchase, or otherwise, shall be allotted in severalty to any Indian.

25 U.S.C. § 5102. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are extended and continued until otherwise directed by Congress.

25 U.S.C. § 5103. Restoration of lands to tribal ownership

(a) Protection of existing rights

The Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided*, *however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation.

(b) Papago Indians; permits for easements, etc

(1), (2) Repealed. May 27, 1955, c. 106, § 1, 69 Stat. 67.

(3) Water reservoirs, charcos, water holes, springs, wells, or any other form of water development by the United States or the Papago Indians shall not be used for mining purposes under the terms of this Act, except under permit from the Secretary of the Interior approved by the Papago Indian Council: *Provided*, That nothing herein shall be construed as interfering with or affecting the validity of the water rights of the Indians of this reservation: *Provided further*, That the appropriation of living water heretofore or hereafter affected, by the Papago Indians is recognized and validated subject to all the laws applicable thereto.

(4) Nothing herein contained shall restrict the granting or use of permits for easements or rights-of-way; or ingress or egress over the lands for all proper and lawful purposes.

25 U.S.C. § 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. § 5109. Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the

estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

25 U.S.C. § 5123. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

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

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

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

(b) Revocation

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

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

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

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

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

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

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

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

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

(d) Approval or disapproval by Secretary; enforcement

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

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

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

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

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

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

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

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

(h) Tribal sovereignty

Notwithstanding any other provision of this Act--

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

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

25 U.S.C. § 5125. 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.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Pub. L. 73-383, § 16, 48 Stat. 984, 987 (1934)

Sec. 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe

shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Regulations

25 C.F.R. § 151.10 On-reservation acquisitions.

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30–day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

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

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

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

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

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

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

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

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

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

25 C.F.R. § 292.21 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.

40 C.F.R. § 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental

impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1502.16 Environmental consequences.

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and

enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

Attachment 1

Solicitor of the Department of the Interior, M-27796, "IRA Interpretation Regarding Devisee Questions--Definition of Tribe as Political Entity, dated November 7, 1934

sured that the court had authority to award it to Westheimer and that proper procedural steps were taken in that action.

I have refused to render a formal opinion, but have indicated that the Department is not disposed to question the authority of the court to award a lease to a higher bidder. A copy of my letter to Mr. Haraway is attached. I took that position principally because of the fact that if the Department formally passes on this transaction, it may be called upon to pass on all conveyances of interest in land owned by full-blood Indians heirs, which have been approved by the Oklahoma county courts under the act of January 27, 1933, supra.

A brief review of the act of January 27, 1933, suggests, however, that the department should know what procedure is not being followed by the United States tribal attorneys under this act. The statute presents some new problems as to the authority of the court and as to the procedure that is to be followed by that court in approving these conveyances. The act provides:

> "That it shall be the duty of the attorneys provided for under the Act of May 27, 1908 (35 Stat. L. 312), to appear and represent any restricted member of the Five Civilized Tribes before the county courts of any county in the State of Oklahoma, or before any appellate court thereof, in any matter in which said restricted Indians may have an interest, and no conveyance of any interest in land of any full-blood Indian heir shall be valid unless approved in open court after notice in accordance with the rules of procedure in probate matters adopted by the Supreme Court of Oklahoma in June of 1914, and said attorneys shall have the right to appeal from the decision of any county court approving the sale of any interest in land, to the district court of the district of which the county is a part."

Heretofore, the Department has taken the position that it was not disposed to question leases or conveyances of lands inherited by full-blood Indians, accepting the rule laid down in the case of *United States* v. *Gypsy Oil Company* (10 Fed. (2d) 487), where it was held that the want of approval of such a lease by the Secretary of the Interior was immaterial to its validity. Under the new act, it appears that conveyances of these interests in land are only valid if approved in the manner prescribed in the statute. It would seem to follow that if, in a given instance, the correct procedure were not followed, the validity of the lease might be questioned in a collateral proceeding. For this reason, the Department should know what procedure is being followed, and it may be interested in making some uniform regulations with respect to this procedure.

I suggest that you instruct the superintendent of the Five Civilized Tribes to make an investigation of this matter and submit a report to you. When such report is received by you, if any problems are presented which call for my further consideration, you can then make a formal request for an opinion on those points.

Solicitor.

IRA INTERPRETATION REGARDING DEVISEE QUESTIONS—TRIBAL ORGANIZATION AND JURISDICTION—DEFINITION OF TRIBE AS POLITICAL ENTITY

M–27796 *November 7, 1934.*

The Honorable,
The Secretary of the Interior.

MY DEAR MR. SECRETARY:

My opinion has been requested on the question of whether, under the provisions of the Wheeler-Howard Act (act of June 18, 1934, Public No. 383, 73d Congress), devisees other than heirs at law under wills of restricted Indians must be confined to the Indians of the same reservation without regard to original tribal blood or affiliation.

Section 4 of the Wheeler-Howard Act prohibits all transfers of restricted Indian lands except such as are specifically sanctioned by the terms of the section. The only such provision relevant to the present question declares that:

> "restricted Indian lands may * * * be sold, devised or otherwise transferred to the Indian tribe in which the lands * * * are located * * * to a successor corporation; and in all instances such lands * * * shall descend or be devised * * * to any member of such tribe or of such corporation or any heirs of such member."

The phrase "any member of such tribe or of such corporation" clearly refers to the earlier phrase "to the Indian tribe in which the lands * * * are located * * * or to a successor corporation." It is upon the ambiguity of this phrase that the question proposed turns.

Strictly speaking, this phrase involves a misuse of language. Indian lands cannot properly be said to be located in a tribe. A tribe is not a geographical but a political entity. What may be located in

the tribe is a certain legal authority or jurisdiction with respect to the lands in question. I think it fair to infer, in the light of the general scheme of Indian community control which the Wheeler-Howard Act contemplates, that the phrase "the Indian tribe in which the lands are located" was used to designate that tribe which has some sort of *jurisdiction* over the lands in question.

It is contemplated that this matter will eventually be dealt with in the constitutions and bylaws of the various tribes, authorized by section 16 of the Wheeler-Howard Act. If a given tribe, so organized, is granted jurisdiction over an entire reservation, then any lands of the reservation may be devised to any member of the tribe, as such tribe may be defined by its own constitution, approved by the Secretary of the Interior. If, on the other hand, two organized tribes exercise authority within a single reservation, then the constitution of the two tribes will presumably define the lands over which each political entity may exercise control, and devises of such land must conform to this separation. Finally, if a given tribe, organized as a unit, exercises authority over lands in more than one reservation, then any such lands may be devised to any of the members of the tribe, regardless of their reservational affiliations.

The question of how Indian tribes should be organized, under section 16 of the Wheeler-Howard Act, is an administrative question.

Section 19 of the Wheeler-Howard Act provides:

> "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."

It is clearly the purport of this definition that any one of these groupings may be recognized as entitled to tribal status.

In my opinion the Wheeler-Howard Act permits the organization as a tribe of any of the following groups:

(a) A band or tribe of Indians which has only a partial interest in the lands of a single reservation;

(b) A band or tribe which has rights coextensive with a single reservation;

(c) A group of Indians residing on a single reservation, who may be recognized as a "tribe" for purposes of the Wheeler-Howard Act regardless of former affiliations;

(d) A tribe whose members are scattered over two or more reservations in which they have property rights as members of such tribe.

In many reservations a choice must be made among the foregoing possibilities. This choice, according to section 18 of the Wheeler-Howard Act, will be made by the vote of the Indians, subject to the approval of the Secretary of the Interior.

The foregoing considerations do not throw any light on the situation prior to tribal organization under section 16. Prior to such organization the question of what tribal organization has any jurisdiction over restricted allotted lands of individual Indians is a matter of some uncertainty.

I am of the opinion that the most significant criterion of jurisdiction, where no constitution, has been adopted, is the historical test to what band, tribe, or group of tribes did the land in question belong at the time when it was allotted? As a general rule, the owner of restricted land will have the right to devise such land to any members of that band, tribe, or group of tribes.

Thus, if the land of a given reservation was owned at the time of its allotment by a single tribe, any member of that tribe will be a qualified devisee of any allotment of such land. If the land was owned jointly by a group of tribes, any member of any of these tribes will be a qualified devisee of any allotment. If the land of the reservation was owned by a single band of some larger tribe or nation, then only members of that band will be qualified devisees. If the land was owned jointly by a group of bands, any member of any such band will be a qualified devisee. If part of the reservation was owned by one group of Indians and part of the reservation was owned by another group of Indians, land within each part of the reservation may be devised to members of the proper group.

The general rule above propounded may prove inadequate where tribes have been divided up or consolidated after the allotment of some or all of the tribal lands, e.g., where certain land was owned by tribe A until allotment and was then allotted to Band X of Tribe A, or vice versa, or where land was owned by Tribe A when allotment began and later came under the tribal ownership of some smaller band of Tribe A or of some larger nation or confederacy, or where a tribe that existed at the time of allotment has ceased to exist or become merged with other tribes. Questions of jurisdiction that may arise in these peculiar circumstances will be considered on their merits when they are presented.

It should be noted that the tribal affiliation of the testator is immaterial. Restricted land formerly occupied by Tribe A may have passed by inheritance or otherwise to a member of Tribe B. In accordance with the principles land down above, such land can be devised only to members of Tribe A. This is required by the language of section 4

and is in conformity with the purpose of consolidating Indian Lands.

Furthermore, the residence of the divisee is immaterial. All that need be shown is his continuing membership in the tribe which has jurisdiction over the lands in question.

I am of the opinion that your basic question is to be answered by an unqualified negative. Restricted lands may be devised to Indians who are members of a tribe having recognized jurisdiction over the lands in question. This may be done even though such members do not reside upon (or have any other official connection with) the reservation in which such land is included.

NATHAN R. MARGOLD,
Solicitor.

Approved: November 7, 1934.
OSCAR L. CHAPMAN, *Assistant Secretary.*

SHOSHONE—OIL LEASE—OPERATIONS

November 12, 1934.

Memorandum for the Commissioner of Indian Affairs.

I am returning your letter of October 27 regarding the application of the Hudson Oil Company for an order *nunc pro tunc* entered as of February 21, 1928, authorizing the discontinuance of the operation of the producing wells on two oil and gas leases (Nos. 850M and 2461M) covering lands allotted to Shoshone Indians, the discontinuance or suspension of operations to continue until the Secretary of the Interior shall require that the lessee resume operations, or until the lessee shall voluntarily resume operations.

You recommend approval of the application subject to the payment of rentals from February 1, 1928.

Lease No. 850M was approved September 18, 1916, for a term of ten years from the date of approval and as much longer thereafter as oil or gas shall be found in paying quantities. Lease No. 2461M was approved on November 10, 1923, for a like period. Neither lease contains any provision for extension of the fixed or primary period of ten years by mere money payment and hence the payment of rentals alone cannot operate to extend that period. *United States* v. *Brown,* 15 Fed. 2d, 565. The ten-year period on lease No. 850M expired in 1926 and on lease No. 2461M the period expired in 1933. If the leases have continued in force since then it is by reason of the provision, "and as much longer thereafter as oil or gas shall be found in paying quantities." This provision is a familiar one in oil and gas leases and is uniformly construed to mean not only that oil or gas must be discovered but that one or the other must be actually produced in paying quantities, otherwise the lease expires by its own limitations. *Murdock-West Co.* v. *Logan,* 69 Ohio St. 514, 69 N. E. 984; *Detlor et al.* v. *Holland,* 57 Ohio St. 492, N. E. 690; *Gas Co.* v. *Tiffin,* 59 Ohio St. 420, 54 N. E. 77; *Cassel* v. *Crothers,* 193 Pa. 359, 44 Atl. 446; *Anthis* v. *Sullivan Oil & Gas Co.* (Okla.) 203 Pac. 187; *Collins* v. *Mt. Pleasant Oil & Gas Co.* (Kans.) 118 Pac. 54; *United States* v. *Brown, supra, Union Gas & Oil Co.* v. *Adkins,* 278 Fed. 854, 856. Lease No. 850M was producing oil at the end of the ten-year period but production ceased in 1928, whereupon the lease terminated. Lease No. 2461M produced some oil during the ten-year period but no oil was being produced and marketed therefrom at the end of the period in 1933, nor since. This lease then terminated by its own limitations.

Section 11 of the regulations approved July 7, 1925, invoked by you as conferring authority upon the Secretary of the Interior to approve the application of the Hudson Oil Company, is without application. That section of the regulations was not in existence at the time of the execution and approval of the leases under consideration. The exercise by the Secretary of the Interior of the authority conferred by that regulation would amount to a change in the length of the term of the leases and section 8 of both leases expressly declares that no regulation prescribed by the Secretary of the Interior after the date of approval of the lease shall have that effect.

Both leases were made and approved under authority of the act of March 3, 1909 (35 Stat. 781, 783). Under the provisions of that act the authority of the Secretary of the Interior is confined to approval or disapproval of a lease made by an allottee. He cannot initiate or make a lease. See Mott v. United States (283 U.S. 747, 751). In that case the court, speaking with respect to the powers of the Secretary under a similarly worded statute said:

> "But while the Secretary is authorized to prevent improvident alienation or leasing by restricted Creek allottees, he is not authorized to alien or lease in their stead and right. This is plainly the effect of the statutory provisions which we quote in the margin. If an allottee chooses to alien or lease, the Secretary, if not satisfied that the transaction will be of benefit

CERTIFICATE OF SERVICE

I hereby certify that on the 30th of June 2017, I have caused service of the foregoing Brief for Appellants to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

DATED: June 30, 2017

s/ Brian Daluiso
Brian Daluiso