No. 17-15245

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY,

Plaintiff-Appellant

v.

RYAN ZINKE, Secretary of the Interior, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA (NO. 2:12-CV-03021-TLN-AC)

RESPONSE BRIEF OF THE FEDERAL APPELLEES

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TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES AND REGULATIONS:

MISCELLANEOUS:

INTRODUCTION

The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, a federally recognized tribe ("Enterprise Rancheria" or "Tribe"), asked the Secretary of the Department of the Interior ("Interior") to acquire in trust a 40-acre parcel in Yuba County, California (the "Yuba Site") for use as a casino and hotel. Plaintiff the Cachil Dehe Band of Wintun Indians of the Colusa Indian Community, also a federally recognized tribe ("Colusa"), challenges Interior's decision under the Indian Gaming Regulatory Act ("IGRA") that the proposed gaming establishment would be in the Tribe's best interest and would not be detrimental to the surrounding community. Colusa also challenges Interior's decision under the Indian Reorganization Act ("IRA") to take the Yuba Site into trust for the purpose of gaming. Both decisions were made following an extensive public process and detailed analysis of alternatives in an Environmental Impact Statement ("EIS") prepared under the National Environmental Policy Act ("NEPA"); Colusa challenges that process and analysis as well. Colusa's asserted injury is the anticipated reduction in revenue from its own casino resulting from competition from Enterprise Rancheria's proposed casino-hotel project.

The district court granted a summary judgment dismissing all of Colusa's claims.[1] As elaborated herein, that judgment should be affirmed.

JURISDICTIONAL STATEMENT

(a) The district court had jurisdiction under 28 U.S.C. § 1331, as Colusa's claims arise under federal law, namely, the aforementioned federal statutes and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. ("APA").

(b) The judgment appealed from is final because it disposed of all claims against all defendants. ER1:2-45.[2] This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court granted summary judgment to all defendants in an Order and a consequent Judgment entered on September 24, 2015. ER1:12-45. The court denied Colusa's timely motion for reconsideration on January 23, 2017. ER1:2-11. Colusa filed a notice of appeal on February 9, 2017. ER1:1. The appeal is timely under Fed. R. App. P. 4(a)(1)(B)(iii).

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[1] Pursuant to Fed. R. App. P. 43(c)(2), Ryan Zinke is automatically substituted as Secretary of the Interior (the "Secretary"), Michael Black is automatically substituted as Acting Assistant Secretary-Indian Affairs, and Weldon Loudermilk is automatically substituted as Director of the Bureau of Indian Affairs.

[2] Appellant's Excerpts of Record are referred to herein as "ER" followed by the volume number and then, after a colon, the page numbers. Appellees' Supplemental Excerpts of Record are referred to herein as "SER."

STATEMENT OF THE ISSUES

1. Whether the Final EIS ("FEIS") complies with NEPA with respect to (A) the Statement of Purpose and Need and range of alternatives; (B) the adequacy of certain data; (C) whether BIA took a "hard look" at certain impacts of the proposed action; and (D) whether the project manager retained by BIA had a conflict of interest.

2. Whether Interior complied with IGRA, including (A) whether Interior satisfied its duty to consult with nearby tribes regarding potential detriment to the surrounding community; (B) whether the district court permissibly exercised its discretion in refusing to consider extra-record evidence offered by Colusa about such detriment; and (C) whether Colusa has met its burden to show that Interior's determination that the proposed casino-hotel project would not be detrimental to the surrounding community was arbitrary and capricious.

3. Whether Interior complied with its implementing regulations under the IRA when it determined that Enterprise Rancheria had a need for the Yuba Site.[3]

[3] Colusa's Opening Brief also argued (at 59-61) that this Court should stay this appeal pending the California Supreme Court's decision in *United Auburn Indian Community v. Brown*, S238544 (review granted Jan. 25, 2017). Colusa subsequently filed a motion to stay this appeal, which the Court denied on July 3, 2017 without prejudice to a future motion for leave to file a supplemental brief. We therefore do not address the stay issue in this brief.

STATEMENT OF THE CASE

A. Statutory Background

1. Indian Reorganization Act

Congress enacted the IRA in 1934 to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The IRA "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal lands." Cohen's Handbook of Federal Indian Law 81 (2012).

Section 5 of the IRA provides in pertinent part:

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

25 U.S.C. § 5108. Interior's implementing regulations specify the criteria the Secretary must consider in deciding whether to take off-reservation land into trust for an Indian tribe, including the tribe's "need … for additional land." 25 C.F.R. § 151.11(a) (incorporating § 151.10(b)).

2. Indian Gaming Regulatory Act

Congress enacted IGRA, 25 U.S.C. §§ 2701-2721, in 1988 to regulate Indian gaming operations. IGRA's purpose is 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 prohibits gaming on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless one of the exemptions or exceptions in 25 U.S.C. § 2719 applies. The relevant exception here is commonly known as the "Secretarial Determination" or "Two-Part Determination," which allows gaming when—

> 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).

Interior promulgated regulations implementing 25 U.S.C. § 2719 in 2008. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354, 29355 (May 20, 2008) (codified at 25 C.F.R. Part 292). The regulations define "nearby Indian tribe" and "surrounding community" by reference to a 25-mile radius, 25 C.F.R. § 292.2, and they specify how the Regional BIA Director conducts the consultation process, *id*. §§ 292.19 and 292.20.

3. National Environmental Policy Act

NEPA requires that federal agencies prepare a detailed EIS prior to undertaking "major federal actions significantly affecting the human environment." 42 U.S.C. § 4332(2)(C). "NEPA itself does not mandate particular results." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The purpose of NEPA's procedural requirements is "to make certain that agencies will have available, and will carefully consider, detailed information concerning significant environmental impacts, and that the relevant information will be made available to the larger public audience." *N. Idaho Community Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (internal quotations and citations omitted).

The Council on Environmental Quality ("CEQ") has promulgated regulations that guide federal agencies' compliance with NEPA. 40 C.F.R. Part 1500.

B. Enterprise Rancheria and Colusa Indian Community

Enterprise Rancheria is a federally recognized Indian tribe with its headquarters in Oroville, California. Its more than 800 members are Maidu Indians whose aboriginal territory is the Feather River basin. ER3:381. They now live throughout the basin, with about 60% living in Butte County and about 26%

living in Yuba, Sutter, and Sacramento Counties. ER3:469; SER3:498 [ARN23468].[4]

In 1915, the United States purchased for Enterprise Rancheria a 40-acre parcel in Butte County, about 10 miles northeast of Oroville ("Enterprise 1"), and still holds that parcel in trust for the Tribe. ER3:469. That same year, the United States purchased for Enterprise Rancheria a second 40-acre parcel closer to Oroville ("Enterprise 2"). *Id*. But in 1965, pursuant to Congressional authorization, California purchased Enterprise 2 when creating Lake Oroville, and that parcel is now submerged. *Id*. The Yuba Site is a 40-acre parcel in Yuba County located south of Marysville near Highway 65.

The Colusa Indian Community, also a federally recognized Indian tribe, is located north of Colusa, California. Colusa currently has 84 members. http://www.colusa-nsn.gov/Government/Government.html (last visited August 15, 2017). The United States acquired some 290 acres for Colusa in 1907 and 1943 and still holds the land in trust for Colusa. *See id*; ER4:713. The Colusa Casino opened in 1984 (ER4:714) on a portion of Colusa's trust land, about 30 miles northwest of the Yuba Site (SER3:509 [ARN23479]). In 2012, the United States took an additional 225 acres in trust for Colusa. *See*

[4] "ARN" refers to the "New" version of the Administrative Record which designates each page as "EN_AR_NEW_00000X."

http://www.analyticalcorp.com/reports/2010/03/01/cachil-dehe-band-of-wintun-indians-of-the-colusa-indian-community/ (Environmental Assessment and Finding of No Significant Impact for Colusa's land-into-trust application) (last visited August 15, 2017).

C. Administrative Proceedings

1. Fee-to-Trust Application

By application dated August 13, 2002, Enterprise Rancheria requested that Interior take title to the Yuba Site so that the Tribe could build a 207,760 square-foot casino, 170-room hotel, and ancillary infrastructure with its development partner Yuba County Entertainment ("YCE"). SER1:1-76 [ARN516-750]. The Yuba Site is within the Yuba County Sports Entertainment Zone created by the County in 1998. SER1:6 [ARN521], SER2:416 [ARN23352]. The Sleep Train Amphitheatre (now called the Toyota Amphitheatre), a large outdoor music venue, is located about a mile south within the Sports Entertainment Zone. SER2:397 [ARN23333]. There is an existing wastewater treatment plant that would be upgraded for the casino-hotel project. SER2:423 [ARN23359].

The application included a December 2001 document titled "Gaming & Hotel Market Assessment: Marysville, California," prepared by The Innovation Group for YCE. SER1:13-76 [ARN687-750]. The Innovation Group evaluated 10 relevant market areas in northern California; evaluated the relevant

characteristics of the 12 existing or proposed tribal casinos within these areas, including the Colusa Casino; analyzed within each market area the relevant gaming behavior factors (propensity, frequency, and win per visit); and then determined the proposed casino's "capture rate" from each market area. Based on this analysis, The Innovation Group recommended construction of a casino with 1700 slot machines, 40 tables, three restaurants, and a bar/lounge. Based on a hotel market assessment, it also recommended a 170-room hotel. The Innovation Group estimated revenues and expenses for 2004-2008.

2. Environmental Assessment

Enterprise Rancheria retained Analytical Environmental Services ("AES"), which submitted a draft Environmental Assessment ("EA") to Interior in July 2003.[5] SER1:77 [ARN1605]. Following Interior's review and revisions (*see, e.g.*, SER1:77-84 [ARN1605-1612]), the EA was finalized in May 2004 (SER1:85-128 [ARN1615-2236]). The 622-page EA assessed the environmental impacts of the proposed action[6] and the no action alternative and explained why four other

[5] An Environmental Assessment may be prepared to determine whether an EIS is warranted. 40 C.F.R. § 1501.3.

[6] The proposed action was the transfer of the Yuba Site into federal trust status for the construction of the proposed casino-hotel project, and a Secretarial Determination under IGRA that gaming would be in the best interest of Enterprise Rancheria and would not be detrimental to the surrounding community. SER1:93

potential casino sites — Enterprise 1, a parcel on Highway 65 near the Yuba Site, and parcels on Highway 99 and on Highway 162 in Butte County — were eliminated from further consideration. SER1:118-128 [ARN1648-1658].

BIA made the EA available for public review and comment by publishing a Notice of Availability in a Marysville newspaper in July 2004, and mailing the EA to federal, state, local, and tribal governments, including Colusa, the United Auburn Indian Community ("Auburn"), and Rumsey Rancheria (now known as Yocha Dehe Wintun Nation). SER1:129-132 [ARN2308-2311]. Government agencies, organizations, and individuals submitted comments. SER2:164 [ARN3114]. Auburn retained an environmental consultant and submitted to BIA the consultant's report critiquing the EA and recommending preparation of an EIS. SER2:165-175 [ARN3192-3202]. Colusa, however, did not comment on the EA.

3. Agreement with AES

On consideration of these comments, BIA decided to prepare an EIS to further analyze the environmental effects of the proposed project. SER1:142 [ARN2976]. BIA entered into a "Professional Services Third-Party Agreement" with AES and Enterprise on January 6, 2005. Under that agreement, BIA as the lead agency would "provide the technical direction, review, and quality control for

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[ARN1623]. At that time, however, Enterprise Rancheria had not yet submitted its request for a Secretarial Determination.

the preparation of the Scoping Report, EIS, technical studies, and other NEPA-related documents"; AES would act as "the project manager on behalf of BIA"; and Enterprise Rancheria would be responsible for the payment of AES's fees. ER5:906-908.

4. Scoping

Through the EIS scoping process, the responsible agency solicits input on "the range of environmental issues to be addressed, the types of project effects to be considered, and the range of project alternatives to be analyzed." SER1:142 [ARN2976]. BIA published a Notice of Intent to prepare an EIS in the Federal Register, 70 Fed. Reg. 29363 (May 20, 2005) (SER1:149-150 [ARN3042-3043]), and in Marysville and Sacramento newspapers (SER2:151-154 [ARN3046-3049]), inviting written comments on the EIS's scope and announcing a June 9, 2005 scoping meeting. As explained in the April 2006 Scoping Report, numerous comments were submitted in writing and at the public meeting. SER2:164 [ARN3114]. Mooretown Rancheria of Maidu Indians, which operates the Feather Falls Casino in Oroville, and Strawberry Valley Rancheria argued that Enterprise Rancheria should undertake gaming on its existing trust land northeast of Oroville (Enterprise 1) or on nearby land. SER2:161-163, 176-185 [ARN3058-3060, ARN3203-3204, ARN3208-3215]. Colusa did not comment. BIA determined that

the EIS would assess effects on other area casinos. SER1:146-148 [ARN3031-3033].

5. Draft EIS

BIA then directed and supervised AES's preparation of a Draft EIS ("DEIS"), completed in February 2008. SER2:243-257 [ARN11782-11796]. The 3,414-page DEIS (ARN11782-15195) analyzed five alternatives in detail: (A) Enterprise Rancheria's proposed casino-hotel facility on the Yuba Site, (B) a smaller casino without a hotel on the Yuba Site, (C) a water park on the Yuba Site, (D) a small casino on Enterprise 1, and (E) no action. It explained why three other potential casino sites — Highway 65, Highway 99, and Highway 162 — were eliminated from further consideration.

Among other impacts, the DEIS analyzed "potentially adverse impacts to competing Indian casinos in the local market." SER2:277 [ARN12337]. The analysis was based on Appendix M, an in-depth "Socio-Economic, Growth Inducing and Environmental Justice Impact Study" by Gaming Market Advisors ("GMA") from June 2006. SER4:802 to SER5:1019 [ARN24680-24897].[7] The DEIS projected that the gaming revenue the proposed casino would capture from the 12 other existing and proposed tribal casinos in the northern California market

[7] Identical copies of the GMA Study were included as Appendix M in both the DEIS and FEIS. The FEIS Administrative Record designations are used herein.

"likely represents a small percentage of each operation's gross gaming revenue, and would have a nominal impact on the operation of the casinos." SER2:278 [ARN12338]. Thus, the DEIS concluded that, since all the casinos would continue to operate, "a disproportionate and adverse effect to Tribes would not occur (although a nominal impact would occur) and a less than significant impact would result." *Id*.

BIA made the DEIS available for public review and comment through publication of a Notice of Availability in the Federal Register, 73 Fed. Reg. 15191 (Mar. 21, 2008), and in Chico, Marysville, Oroville, and Sacramento newspapers. SER4:772-777 [ARN23919-23924]. The notice explained multiple ways to review the DEIS, including online (www.EnterpriseEIS.com). A public hearing was held on April 9, 2008 in Marysville. Numerous government agencies, organizations and individuals submitted written comments or spoke at the public hearing or both, but Colusa did neither. SER5:1020.1-1020.4 [ARN26412-26415]. The North Fork Rancheria of Mono Indians and the Ione Band of Miwok Indians supported Enterprise Rancheria's proposed project. SER5:1027-1030 [ARN26567-26570]. The Picayune Rancheria of the Chukchansi Indians expressed its view that tribes should only build casinos on their rancherias or nearby within their historic homelands. SER5:1020.5-1020.6 [ARN26425-26426].

6. IGRA's Two-Part Determination Process

Enterprise Rancheria requested a Secretarial Determination on April 13, 2006 (SER2:186-205 [ARN3344-3363]), and amended its request on March 17, 2009 (SER2:286-362 [ARN22964-23040]) following Interior's specification of the contents of such applications, 25 C.F.R. §§ 292.16, 292.17, 292.18.

Pursuant to 25 C.F.R. §§ 292.19 and 292.20, Interior commenced consultation on January 16, 2009 by sending letters to State and local officials within a 25-mile radius of the Yuba Site and soliciting their input on the proposed casino's impacts on their communities in writing within 60 days. SER2:281-285 [ARN22793-22797]. Auburn wrote BIA on March 12, 2009, asserting that it was entitled to be consulted because it is located 20 miles away, and requesting an extension. SER5:1052-1055 [ARN27999-28003]. BIA agreed, and Auburn submitted its comments opposing the proposed casino on May 11, 2009.[8] SER5:1065-1080 [ARN29316-29372].

Colusa sent a letter to BIA on June 23, 2009, asserting that a casino on the Yuba Site would affect it even though it is "just over 25 miles" away, and

[8] Auburn argued, *inter alia*, that Enterprise Rancheria could use Enterprise 1 for gaming and that Auburn has stronger historical ties to the Yuba Site than Enterprise Rancheria. Auburn also submitted comments on the DEIS but did not take issue with the analysis or conclusions relating to the projected revenue reductions of its casino or other tribal casinos. SER5:1079-1082 [ARN29330-29333]. As allowed by 25 C.F.R. § 292.19(c), Enterprise Rancheria responded to Auburn's comments. SER5:1089-1097 [ARN29373-29381].

requesting that BIA provide it with Enterprise Rancheria's application materials and a 60-day comment period. ER5:848. BIA responded in July 2009 by sending Colusa Enterprise Rancheria's "fee-to-trust application, the two-part determination request and supplemental documents." ER3:267. The transmittal letter advised Colusa that it did "not qualify as a nearby tribe" under 25 C.F.R. Part 292, but that it could "submit comments and/or documents that establish that your governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment." ER3:267. Colusa did not respond.

7. FEIS

The 3,554-page FEIS (ARN23208-26761) retained the same alternatives for analysis. SER2:410 to SER3:458 [ARN23346-23394]. It incorporated the DEIS's analysis of the casino alternatives' effects on other tribal casinos without material change (SER3:503-509, 600-602 [ARN23473-23479, ARN23673-23675]), including Appendix M (SER4:802 to SER5:1019 [ARN24680-24897]). BIA made the FEIS available for public review and comment (with a September 7, 2010 deadline) by publishing a Notice of Availability in the Federal Register, 75 Fed. Reg. 47618 (Aug. 6, 2010), and in newspapers in Chico, Oroville, and Marysville (ER4:477-481).

Colusa submitted a comment letter dated September 7, 2010. ER3:523-532. As explained below, Colusa criticized various analyses of the FEIS but did not clearly state that the proposed casino would have a significant impact on its casino's revenue or its ability to fund government programs. Auburn similarly offered numerous criticisms of the FEIS, though none directed at Appendix M. ER3:497-512. BIA responded to all comments. *See* ER3:483 to ER4:604.

8. IGRA Record of Decision

On September 1, 2011, then-Assistant Secretary-Indian Affairs Larry Echo Hawk issued Interior's Record of Decision under the Indian Gaming Regulatory Act ("IGRA ROD"). The decision concluded under 25 C.F.R. Part 292, Subpart C, that the proposed casino-hotel project on the Yuba Site "is in the best interest of the Tribe and its members," and "would not be detrimental to the surrounding community, including nearby Indian tribes." ER3:396-401. The IGRA ROD further concluded that "Alternative A [the proposed action] is the alternative that best meets the purpose and need of the Tribe and BIA while preserving the natural resources of the Yuba Site," and it adopted all mitigation measures identified in the FEIS as part of the decision. ER3:355-375.

The IGRA ROD addressed the potential impact on Auburn as a "nearby Indian tribe" under 25 C.F.R. § 292.2, explaining that "IGRA does not guarantee that tribes operating existing facilities will continue to conduct gaming free from

both tribal and non-tribal competition." ER3:400 (citing *Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941 (7th Cir. 2000)). The IGRA ROD concluded that Auburn had not demonstrated that competition with its successful casino in Lincoln would result in detrimental impact on Auburn. *Id*.

That same day, the Assistant Secretary requested the concurrence of California Governor Jerry Brown. ER3:405-419. Governor Brown concurred by letter dated August 30, 2012. SER5:1063-1064 [ARN29207-29208]; *see also* ER3:426.

9. IRA Record of Decision

On November 21, 2012, then-Assistant Secretary Kevin Washburn, pursuant to 25 U.S.C. § 465 (now § 5108), issued a Record of Decision under the Indian Reorganization Act ("IRA ROD'), deciding to take the 40-acre Yuba Site into trust for the purpose of gaming for the benefit of Enterprise Rancheria. ER3:421 to ER4:604. The IRA ROD similarly reviewed the FEIS and BIA's responses to comments, and it adopted the FEIS's mitigation measures. ER3:429-464. Interior concluded that the proposed action "would allow the Tribe to implement the highest and best use of the property," that it better meets the purpose and need for the proposed action than the other alternatives, and that its environmental impacts "are adequately addressed by the mitigation measures adopted in this ROD." ER3:444.

Interior also evaluated Enterprise Rancheria's request based on the criteria in 25 C.F.R. Part 151. ER3:465-475. The IRA ROD concluded that the Tribe needed additional land for economic development (ER3:469) and that the proposed casino on the Yuba Site provided the best opportunity for "a long-term sustainable revenue stream" to fund tribal government and provide tribal and local employment (ER3:474).

Interior published notice of this decision, 77 Fed. Reg. 71612 (Dec. 3, 2012), and published an amended notice correcting the legal description, 78 Fed. Reg. 114 (Jan. 2, 2013). Interior tool the Yuba Site into trust on May 15, 2013.

D. District Court Proceedings

Colusa filed its Complaint in the Eastern District of California on December 14, 2012, seeking declaratory and injunctive relief under the APA. ER4:711-727. Colusa claimed that the FEIS violated NEPA, that the IGRA ROD violated IGRA and the IRA, and that the legal description in the December 3, 2012 Federal Register notice was different from that in the application. An action filed by Auburn and a second action filed by Citizens for a Better Way and other advocacy groups and local residents were transferred from the District of Columbia and then consolidated with Colusa's action on January 23, 2013. ER1:87-89. The district court denied Colusa's motion for a preliminary injunction, along with motions by the other plaintiffs for preliminary relief. ER1:74-86.

All parties then filed cross-motions for summary judgment. Colusa supported its motion with the declaration of its consultant, Alan Meister, regarding the impact of the Enterprise Rancheria casino on Colusa's casino revenue. ER3:268-273. Defendants moved to strike the declaration on the ground that review of the challenged decisions was limited to the administrative record. D.Ct. Docs. 115 and 121 (filed July 24, 2014). The district court granted the motion to strike. ER1:46-58.

In a 33-page order issued on September 24, 2015, the district court granted summary judgment to all defendants, denied plaintiffs' motions for summary judgment, and entered judgment. ER1:12-45. On January 23, 2017, the district court denied Colusa's motion for reconsideration. ER1:2-11.

SUMMARY OF ARGUMENT

Colusa's central concern is that a casino on the Yuba Site will draw patrons from its own casino 30 miles away, thereby reducing its casino revenue. Even though Colusa did not comment on the EA in 2004 or participate in the EIS scoping process in 2005, BIA analyzed the proposed casino's effect on the revenues of tribal casinos in northern California in response to comments of other tribes. With the assistance of two gaming industry consultants, BIA analyzed in the DEIS and FEIS the effect of competition from the proposed casino (and two alternative casino scenarios) on revenues of 12 existing and proposed tribal

casinos, including Colusa's, and concluded that the proposed Yuba Site casino would have a "less than significant" effect on these casinos. Colusa did not comment on the DEIS in 2008 and even in its 2010 comments on the FEIS, Colusa did not recommend a materially different methodological approach or squarely dispute the FEIS's conclusion that the proposed casino would not have a significant impact on its own casino's revenue.

Colusa waived many of its NEPA arguments by failing to make them during the administrative proceedings, and the NEPA arguments that were not waived lack merit. In particular, Colusa faults the FEIS for not considering additional casino sites in Butte County, a location that would likely reduce competition with its own casino (but likely increase competition with the two other tribal casinos in that county). But Colusa has not carried its burden to show that the range of alternatives analyzed in the FEIS was an inadequate basis for a reasoned choice by Interior. Colusa's other NEPA challenges mischaracterize the record or fail to raise any serious question about the validity of the comprehensive NEPA process.

In addition to the opportunities in the NEPA process to present evidence and argument regarding the impact of competition on its casino's revenue, Colusa had another opportunity to do so in 2009 through IGRA's Secretarial Determination consultation process. Colusa's assertion that BIA refused to consult with it mischaracterizes the record, and its argument that BIA impermissibly imposed a

burdensome threshold requirement to consultation misconstrues the applicable regulations implementing IGRA. Colusa simply failed to avail itself of the opportunity for consultation.

Only after Interior decided to take the Yuba Site into trust in November 2012 did Colusa present specific evidence and argument regarding reduced casino revenue through filings made in this action. But these submissions came too late. Enterprise Rancheria has been diligently proceeding with the IGRA, IRA, and NEPA review processes since 2002. The record for review under the APA is presumptively limited to the administrative record, and no relevant exceptions permitting expansion of the record apply. The district court thus did not abuse its discretion by striking the declaration of Colusa's consultant Alan Meister. Even if the Meister Declaration were considered, however, Colusa has still failed to demonstrate that Interior's determination in the IGRA ROD that the proposed casino would not be detrimental to the surrounding community is arbitrary and capricious.

Similarly, Colusa's argument that Enterprise Rancheria has no need for any additional land for economic development mischaracterizes the record, and its argument that the Tribe has no need for this particular parcel of land above all other parcels misconstrues the applicable regulations implementing the IRA. The IRA ROD permissibly determined that taking the 40-acre Yuba Site into trust for

gaming and other purposes, as requested by Enterprise Rancheria, furthered the Tribe's economic development objective and thus complied with Interior's regulations.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Aguayo v. Jewell*, 827 F.3d 1213, 1221 (9th Cir. 2016).

Agency compliance with NEPA, IGRA, and the IRA is reviewed under the APA's judicial review provisions, 5 U.S.C. §§ 701-06. *Jamul Action Committee v. Chaudhuri*, 837 F.3d 958, 962 (9th Cir. 2016) (IGRA and NEPA); *Aguayo*, 827 F.3d at 1223 (IRA). Agency decisions may be set aside only if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency's decision will be overturned only if the agency relied on factors that Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *McFarland v. Kempthorne*, 545 F.3d 1106, 1110 (9th Cir. 2008) (citations and internal quotation marks omitted). This standard of review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Nw. Ecosystem Alliance v. U.S. Fish &*

Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007) (citation and internal quotation marks omitted).

District court rulings denying requests to supplement the administrative record are reviewed for abuse of discretion. *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1451 (9th Cir. 1996).

ARGUMENT

I. The Final EIS Complies With NEPA

"NEPA requires federal agencies to take a hard look at the environmental consequences of their actions." *Ground Zero Center for Non-Violent Action v. U.S. Dep't of the Navy*, 860 F.3d 1244, 1251 (9th Cir. 2017) (internal quotations and citations omitted). An EIS should be upheld if the agency has presented a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (citation omitted). "The reviewing court may not 'fly speck' an [EIS] and hold it insufficient on the basis of inconsequential, technical deficiencies." *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1184 (9th Cir. 1997) (citations and internal quotation marks omitted). Colusa may disagree with Interior's substantive decision to approve the casino-hotel project on the Yuba Site, but it has not demonstrated that the FEIS was inadequate.

A. The Statement of Purpose and Need Was Sufficiently Broad and the Range of Alternatives Was Reasonable

NEPA review is triggered by a proposed federal action. 42 U.S.C. § 4332(2)(C); 40 C.F.R. §§ 1500.2(e), 1501.4(b), 1502.10. The proposed action here is Enterprise Rancheria's 2002 application asking Interior to take the 40-acre Yuba Site into trust for the purpose of constructing and operating a casino-hotel facility under IGRA.[9] SER1:1-76 [ARN516-750]. NEPA requires analysis of the proposed action and reasonable alternatives. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1500.2(e), 1502.1, 1502.14. In order to identify reasonable alternatives, the purpose and need for the proposed action must be articulated. 40 C.F.R. § 1502.13 (EIS's statement of purpose and need "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action"). "Courts review purpose and need statements for reasonableness giving the agency considerable discretion to define a project's purpose and need." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013). The statement must be shaped by "the statutory context of the federal action at issue," and must be broad enough to allow for

[9] Colusa notes (Brief 28) that Enterprise Rancheria's proposed action did not change materially from its 2002 application. That is neither surprising nor in any way improper. The casino-hotel project was designed based on The Innovation Group's recommendations in its 2001 market analysis.

consideration of more than one alternative. *HonoluluTraffic.com v. Federal Transit Admin.*, 742 F.3d 1222, 1230 (9th Cir. 2014).

Alternatives should be chosen to illuminate whether an alternative to the proposed action "would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. An EIS's range of alternatives is evaluated under a "rule of reason." *Block*, 690 F.2d at 767. This Court has interpreted CEQ's instruction to "evaluate all reasonable alternatives," 40 C.F.R. § 1502.14, to mean enough alternatives "to permit a reasoned choice." *Pacific Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1100 (9th Cir. 2012). "'An agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives.'" *HonoluluTraffic.com*, 742 F.3d at 1231 (quoting *Seattle Audubon Soc'y v. Mosely*, 80 F.3d 1401, 1404 (9th Cir. 1996)).

Contrary to Colusa's argument (Brief 25-31), the FEIS's Statement of Purpose and Need (SER2:397, 403-404 [ARN23333, 23339-23340]) was sufficiently broad and the range of alternatives was reasonable. The Statement here appropriately identified broad objectives, including "restor[ing] trust land," "provid[ing] employment opportunities for tribal members," and "providing a new revenue source that could be utilized to build a strong tribal government" and fund

tribal housing and other tribal services. ER5:867-868. All of these objectives are consistent with the statutory purposes of the IRA and IGRA, and could be met by a number of different alternatives, including gaming and non-gaming projects and different sites. While the Statement also included some purposes specifically related to IGRA — "[f]und[ing] local government agencies, programs, and services," "[m]ak[ing] donations to charitable organizations and governmental operations," and "[e]ffectuat[ing] the Congressional purposes set out in [IGRA]" (ER5:868) — it did not preclude a non-gaming alternative. The five alternatives studied in detail satisfied the "rule of reason," *Block*, 690 F.2d at 767.

Colusa's reliance (Brief 27) on *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664, 666, 669 (7th Cir. 1997), is misplaced. There, the Corps had limited the statement of purpose and need to providing increased water supply through a single large reservoir, the project proponent's preference, which precluded consideration of supplying additional water through multiple smaller water projects as commenters had proposed. NEPA assumes that the project proponent will have a preference (the "proposed action"), but requires that other reasonable alternatives are studied, as was done here.

None of Colusa's specific attacks on the Statement of Purpose and Need or range of alternatives has merit. Colusa's suggestion (Brief 25, 27-28) that Enterprise Rancheria was solely responsible for drafting the Statement of Purpose

and Need is factually incorrect. As explained above at 10-12, AES prepared the EIS under BIA's direction. While the EA had described "[t]he purpose for taking the project site into federal trust" as "allow[ing] the Tribe to conduct Class III gaming under IGRA" (SER1:95 [ARN1625]), the FEIS broadened the Statement to articulate general objectives that allowed for consideration of a non-gaming alternative. And regardless of the drafter, the FEIS's Statement of Purpose and Need was broad enough to allow for consideration of different types, sizes, and locations of projects to provide revenue and jobs.

Colusa incorrectly argues (Brief 27-28) that the off-reservation gaming alternatives were inconsistent with IGRA. If a proposed action clearly lacks statutory authorization without regard to environmental impacts, an agency can reject the proposal on that basis without undertaking the EIS process. That was not the situation here. It is true that Congress expressed a preference for gaming on existing Indian lands through IGRA's general prohibition on gaming on lands acquired in trust after IGRA's enactment, 25 U.S.C. § 2719. For that reason, and consistent with scoping comments, the FEIS appropriately analyzed the Enterprise 1 casino alternative. But since the Secretarial Determination exception, 25 U.S.C. § 2719(b)(1)(A), permitted gaming on the Yuba Site under certain circumstances, the FEIS appropriately analyzed the proposed action and the smaller casino alternative on the Yuba Site.

Colusa's next argument (Brief 29) — that the FEIS should have analyzed a larger casino on Enterprise 1 — similarly provides no basis for invalidating the FEIS. The record demonstrates that a larger casino was not feasible there. The size of the Enterprise 1 casino alternative was determined by The Innovation Group's August 2005 market analysis (SER5:1005-1019 [ARN24883-24897]), included in Appendix M. That analysis concluded that the proper size was "a small facility which primarily caters to the local market," not "a larger facility which primarily caters to the tourist market." SER5:1018 [ARN24896]. The tourists in this "remote" Lake Oroville area were "eco-tourists" with a low propensity for gaming and the "relatively small" local population already had the Gold Country and Feather Falls competitive options, which meant that building a higher-cost large destination facility would be unlikely to generate significantly higher revenues than a small facility. *Id*. Colusa argues (Brief 29) that the statements about "lower profits" and "high expense of construction" were not quantified. But Colusa waived this argument by failing to critique the Enterprise 1 market analysis in its 2010 comments on the FEIS. ER3:524-527.

Persons challenging an agency's compliance with NEPA "must structure their participation so that it … alerts the agency to the [parties'] position and contentions, in order to allow the agency to give the issue[s] meaningful consideration." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir.

2006) (quoting *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004)). Failure to raise an issue with an agency during the NEPA process waives that issue and precludes judicial review. *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002); *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991). In any event, Colusa's criticism is unwarranted. The Innovation Group provided a quantitative basis for projected revenues and it is obvious (even without quantification) that it costs more to build a large facility than a small one.

Colusa's attack on the range of alternatives then turns (Brief 29-31) to the three potential casino sites that were eliminated from detailed study. As required by 40 C.F.R. § 1502.14(a), the FEIS "briefly discuss[ed] the reasons for their having been eliminated." ER5:877. Colusa does not take issue with the elimination of the Highway 65 or Highway 162 sites, but argues (Brief 30-31) that the Highway 99 site should have been carried forward for detailed analysis. Colusa has likewise waived this argument by failing to include it in its 2010 comments. *See* ER3:523-532. In any event, Colusa has provided no persuasive basis for dismissing the FEIS's explanation that the Highway 99 site was rejected "because it contains numerous biologically sensitive resources, including wetlands and vernal pools," and because "it has no existing water or wastewater infrastructure and the Tribe was unable to secure investors for development on this site." ER5:877. Colusa suggests (Brief 29-30) that Enterprise Rancheria might not

have tried very hard to find an investor, but Colusa does not contest the other reasons for rejecting the site. Given the biologically sensitive resources, the Highway 99 site could not have been preferable from an environmental perspective. Moreover, Colusa failed to meet its burden to show with some detail that the Highway 99 alternative was feasible. *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) (upholding Army Corps of Engineers' decision not to explore alternative advanced by plaintiff where plaintiff had not "offered a specific, detailed counterproposal" during the NEPA process); *accord Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 576-77 (9th Cir. 1998).

Colusa's final argument (Brief 30-31) is that the FEIS should have analyzed two additional sites in Butte County: (1) a 63-acre parcel in Oroville purchased by Enterprise Rancheria in 2006 with HUD funding, and (2) unspecified federal land near Enterprise 1. But Colusa waived this argument by failing to propose these additional casino sites in its 2010 comments. Moreover, Colusa's current assertion (Brief 30) that the 63-acre Oroville parcel is "the most logical alternative" for a casino is flatly contradicted by its 2010 comments acknowledging that the parcel would be "use[d] for tribal member housing purposes" (ER3:525), as Enterprise Rancheria represented in its 2009 Secretarial Determination application (SER2:291-292 [ARN22969-22970]). Colusa argued in 2010 that the FEIS should address housing construction on the 63-acre parcel as an indirect and cumulative

impact of the proposed action because it would likely be financed by casino revenues. *Id*. Moreover, the parcel is in a residential area near a school, and it lacks frontage on any public road. SER5:1020.7-1020.8 [ARN26484]. The FEIS cannot be faulted for not developing a casino alternative for this parcel.

Colusa's second proposal — building a casino on an unspecified site on federal land near Enterprise 1 — is too vague to require analysis even if it had been timely made. *City of Angoon*, 803 F.2d at 1022.

In sum, the district court correctly concluded that BIA satisfied its obligation to evaluate a reasonable range of alternatives. ER1:5-6; ER1:18-21.

B. The Data Analyzed in the Final EIS Were Not Stale or Otherwise Inadequate

1. Biological Data

Colusa first launches (Brief 32) a broadside attack on the "biological data" in the FEIS Appendices as stale. Colusa waived this argument by failing to raise it during the administrative process.[10] In any event, the listed appendices were generally compiled in 2006 and later, which was not more than two and four years, respectively, before the 2008 DEIS and 2010 FEIS. Colusa assigns a 2003 date to

[10] Colusa observed in its 2010 comments that "the state of knowledge concerning endangered species in the area has greatly expanded [from 2005 to 2010], particularly with respect to the delta smelt" (ER3:529), but Colusa does not press any argument on appeal that turns on this recent data. Colusa's different argument about delta smelt is addressed in Part I.C.2 below.

Appendix L, but it contains an updated 2007 letter from the State Historic Preservation Officer. ER5:890-891. The one listed appendix with an earlier date — Appendix E (ER5:882-883) — is a 2000 declaration that the Yuba Site's proposed wastewater treatment plant could not have a significant effect on the environment. That historical declaration is not subject to updating. Colusa notes (Brief 32) that the Appendices were "compiled prior to the recently ended drought," but does not identify any specific data called into question by the drought.

2. Appendix M

Colusa similarly argues (Brief 33) that the analysis of socio-economic impacts in Appendix M, prepared in 2006, "relied on stale data" that "were at least several, and in many cases more than six, years old," citing ER5:893, an irrelevant page from the IRA ROD (*see* ER3:426). But Colusa's 2010 comments on the FEIS did not argue that Appendix M's data were stale in 2006. Colusa instead argued that the analysis had to be updated in light of the subsequent 2008 economic downturn. ER3:526. BIA responded to this argument in the IGRA and IRA RODs by explaining that "it is impossible to estimate future economic conditions with perfect certainty," that Appendix M's "economic projections … were accurate at the time," and that "revising the analysis to reflect current conditions in the spring of 2011 might be incorrect if economic conditions

improve." ER4:595. Colusa has not shown that the relevant economic conditions have not improved since 2011.[11]

Colusa also briefly suggests (Brief 34) that Appendix M must be updated to address gas prices. Colusa waived this argument by not raising it in its 2010 comments. Moreover, Colusa has provided no basis for concluding that gas prices are "significant new circumstances" requiring preparation of a supplemental EIS under 40 C.F.R. § 1502.9(c)(1)(ii).[12]

Colusa next argues (Brief 33) that Appendix M's conclusions about the "cannibalization" of revenues from other tribal casinos are based on "no data whatsoever" and are "pure speculation." Colusa is incorrect. Review of Appendix M (SER4:802 to SER5:1019 [ARN24680-24897]) reveals that GMA evaluated a tremendous amount of qualitative and quantitative data about the 10 relevant market areas and the 12 competing tribal casinos in projecting the

[11] Colusa asserts (Brief 34-35) that the FEIS inconsistently ignored the recession's impact on casino revenues but "relied upon the downturn to support the proposed Enterprise casino as a source of jobs." Colusa cites ER5:896, a page from the IGRA ROD (*see* ER3:379), not the FEIS. In discussing "[p]rojected benefits to the relationship between the tribe and non-Indian communities," the IGRA ROD briefly referred to the recession in noting the new jobs the Yuba Site casino would create. This hardly calls into question the validity of the FEIS's data.

[12] The increase in gas prices after 2006 fell during the 2008 recession; prices rose again in 2012 and have since declined again. *See* https://energy.gov/eere/vehicles/fact-915-march-7-2016-average-historical-annual-gasoline-pump-price-1929-2015 (last visited August 15, 2017).

amount of revenue that would likely be diverted from these casinos under each of the three Enterprise Rancheria casino scenarios.

Moreover, Colusa's attack on Appendix M's analysis of casino revenues is not cognizable under NEPA. A plaintiff must demonstrate that its interest comes within the "zone of interests" Congress intended to protect in the statute in question. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014). "NEPA is concerned with harm to the physical environment." *Ranchers Cattlemen Action Legal Fund v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1103–04 (9th Cir. 2005) (citing *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 778 (1983)). NEPA's zone of interests does not encompass "purely economic interests." *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005) (holding that the plaintiff, which held phosphate reserves 250 miles away from a proposed phosphate mine, could not invoke NEPA to challenge the proposed competing mine). However, an agency may integrate the NEPA process with other "procedures required by law." 40 C.F.R. § 1500.2(c). An EIS may accordingly discuss "factors not related to environmental quality" but relevant to the agency's decision. 40 C.F.R. § 1502.23. We address Colusa's challenge to Appendix M in the context of Colusa's challenge to the IGRA ROD.

C. Interior Took the Requisite Hard Look at Environmental Impacts

In arguing that the FEIS failed to take the requisite "hard look" at the potential environmental impacts of the proposed action, Colusa first reiterates (Brief 35-36) its challenge to Appendix M's cannibalization analysis, which we address in Part II.B below. Its criticisms of the FEIS's analysis of air quality and migratory fish similarly lack merit.

1. Air Quality

Colusa challenges (Brief 37) the FEIS's air quality analysis in three sentences cut and pasted without material change from its June 24, 2014 district court brief (D.Ct. Doc. 102-1 at 11). Federal Defendants responded in the district court with a detailed explanation of the data reported in the FEIS and the relevant regulations; Colusa offered no reply; and the district court explained in detail why it rejected Colusa's challenge. ER1:42-43. Rather than addressing the detailed arguments it knew Federal Defendants would make in this Response Brief, Colusa merely reiterated its original short challenge. A "bare assertion does not preserve a claim." *Greenwood v. F.A.A.*, 28 F.3d 971, 977 (9th Cir. 1994); *see* also Fed. R. App. P. 28(a)(8)(A) (appellant must state "the reasons" for its contentions, with citations to authorities and the record). Colusa thus waived this argument by failing to develop it in its Opening Brief.

In any event, Colusa's challenge to the FEIS's analysis of air quality impacts lacks merit. Colusa criticizes (Brief 37) the following passage in the FEIS's lengthy discussion of air quality impacts:

> Since the Proposed Project is located within a non-attainment area for $PM_{2.5}$, a conformity review is applicable pursuant to the CAA General Conformity Rule (40 C.F.R. § 51.853[b][1] and [2][13]). The de minimus threshold for $PM_{2.5}$ is 100 tons per year. Since Alternative A $PM_{2.5}$ emissions are below 100 tons per year, the project is considered to conform to the applicable SIP resulting in compliance with the General Conformity Rule.

ER5:901. Colusa faults the FEIS for not providing the "figures that would support that assertion." While a summary there would have been helpful, the basis for the conclusion was provided elsewhere in the FEIS.

The FEIS explained (SER3:545-546 [ARN23618-23619]) that, under the General Conformity Rule, "a conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions of the criteria pollutant or precursor in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section." 40 C.F.R. § 93.153. The FEIS reported Yuba County's federal attainment status for each criteria pollutant: $PM_{2.5}$ was the only non-attainment

[13] Former 40 C.F.R. § 51.853 has been recodified, as amended, at 40 C.F.R. § 93.153.

designation[14] and there were no maintenance designations. SER3:485 [ARN23433].

The FEIS reported that "[n]o direct criteria air pollutant emissions would be attributed to the project, with the possible exception of minor emissions from natural gas space heaters or water heating devices." SER3:547 [ARN23620]. As for indirect emissions from on-road mobile sources, Colusa points to Table 4.4-3 (SER3:548 [ARN23621]) and states (Brief 37) that "it appears that NO_x emissions may exceed EPA's *de minimis* threshold for both ozone and PM2.5 emissions." The reference to ozone is misplaced since Yuba County was not a nonattainment or maintenance area for ozone. While emissions of NO_x must be considered as a precursor to $PM_{2.5}$, 40 C.F.R. § 93.153(b)(1), NO_x emissions would not exceed the 100 tons per year threshold, as the district court found. *See* ER1:42-43. Table 4.4-3[15] reports 2010 NO_x emissions as 662.97 pounds per summer day, which equals 118.84 tons per year. However, the mitigation measures set forth in the FEIS (SER4:763-767 [ARN23845-23849]), and incorporated into the IGRA and IRA RODs (ER3:25-26, ER3:448-451), will reduce these emissions to

[14] The Yuba City-Marysville area has since been redesignated to attainment for $PM_{2.5}$ and is now a maintenance area. 79 Fed. Reg. 72981 (Dec. 9, 2014).

[15] The thresholds identified in the table relate to a state regulatory requirement, not the General Conformity Rule.

25 pounds per day (SER4:767 [ARN23849]), or 4.56 tons per year. Moreover, even without mitigation, the FEIS's cumulative impacts analysis shows that NO_x emissions from mobile sources will significantly decrease after 2010 (the year analyzed in the FEIS) because of stricter emission standards and improved engine technologies (SER4:701-703 [ARN23774-23776]), resulting in NO_x emissions below the *de minimis* threshold as of 2015. Thus, no conformity analysis would be required as of the date the facility begins operation.

Furthermore, the 2010 NO_x emissions estimate reported in Table 4.4-3 is an overestimate for purposes of the conformity determination because it includes mobile-source emissions outside the nonattainment (now maintenance) area in which the project is located. The district court's rejection of that argument (ER1:43) is inconsistent with the applicable regulation, which provides that "indirect emissions" include only those "that are caused or initiated by the Federal action and *originate in the same nonattainment or maintenance area* but occur at a different time or place as the action." 40 C.F.R. § 93.152 (emphasis added). Only mobile-source emissions occurring within the project's nonattainment or maintenance area should be counted. The district court reads the phrase "originate in the same nonattainment or maintenance area" out of the regulation. The Court need not decide this issue, however, if it agrees with the district court that the FEIS's analysis of NO_x emissions was adequate without regard to this argument.

2. Migratory Fish

Colusa also criticizes (Brief 37-39) the FEIS for not discussing whether the channels and ditches near the Yuba Site were screened to prevent migratory fish from swimming into them. Colusa begins with the misleading assertion (Brief 37) that "six fish species of concern" "may exist in the vicinity of the Yuba Parcel," citing the FEIS's general discussion of "federally listed species" (ER5:904). The FEIS reported there that six federally listed fish species (green sturgeon, delta smelt, Central Valley steelhead, and three species of salmon) potentially occur within the Olivehurst, Wheatland, Sheridan, and Nicolaus quadrangles (*i.e.*, 7.5 minute quadrangles designated by the United States Geological Survey), a 200-square-mile area that includes portions of the Feather and Bear Rivers. *Id*. The FEIS immediately explained, however, that "[t]hese fish species do not have the potential to occur within the study area, as the only aquatic habitats within the study area are agricultural irrigation ditches and canals or receive water supply from these ditches or canals," which are "not sufficient to support these species" because "[t]he water level fluctuates within these features according to crop demand." *Id*.

There are no surface waters on the Yuba Site. SER3:464 [ARN23413]. Colusa ignores the FEIS's description of the Yuba Site's watershed (SER3:459-465 [ARN23408-23414]) in asserting (Brief 38) that the FEIS does not explain

how the surface waters near the Yuba Site are connected to the habitats of these fish in the Sacramento, Feather, Yuba, and Bear Rivers. The FEIS explains that most of the Yuba Site drains north toward Kimball Creek, an intermittent stream about 800 feet north of the Yuba Site, but a portion drains south toward the South Yuba Water Irrigation Ditch along the south border and Best Slough about a mile south. SER3:459, 464 [ARN23408, ARN23413]. These drainages all discharge to canals that flow into Dry Creek, which flows west along the Yuba/Sutter County border and ultimately discharges to Bear River. SER3:459 [ARN23408]. Colusa acknowledges that Bear River is about 4.5 miles from the Yuba Site. ER3:531.

Colusa has offered no evidence undermining the FEIS's conclusion that none of these fish species occur near the Yuba Site, as the district court noted. ER1:26. Colusa's references about fish screening (Brief 38-39) explain that the screens are constructed to provide safe passage for downstream migratory fish around hydroelectric, irrigation, and other water withdrawal projects. A discussion of fish screening was thus unnecessary and would have been inappropriate for this project which does not involve such water withdrawal.[16] *See* 40 C.F.R. § 1500.1

[16] Colusa is familiar with fish screening because it withdraws water for irrigation directly from the Sacramento River. *See* https://www.usbr.gov/mp/nepa/nepa_projdetails.cfm?Project_ID=18821 (last visited August 15, 2017). With the benefit of its casino revenues, Colusa now owns over 4,000 acres of agricultural land. *See* http://www.colusa-nsn.gov/Farming/Farming.html (last visited August 15, 2017).

("Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.").

Finally, in response to Colusa's 2010 comments regarding the adequacy of the FEIS's analysis of these fish species (ER3:529-532), BIA pointed out (ER4:596) that it had consulted with the U.S. Fish & Wildlife Service under the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and that the Service did not identify any "potential project effects to biological resources." Colusa has not shown that there was any flaw in the process or conclusions of that consultation.

D. AES and BIA Both Fulfilled Their Obligations in the NEPA Process

BIA, the lead agency, selected AES as the EIS project manager, and worked with AES in the preparation of the DEIS and FEIS. See *supra* at 10-12.[17] An EIS may be prepared by a contractor where, as here, (1) the lead agency selects the contractor, (2) the contractor "execute[s] a disclosure statement prepared by the lead agency" stating that it has "no financial or other interest in the outcome of the project," and (3) the lead agency "furnish[es] guidance and "participate[s] in the

[17] Enterprise Rancheria previously retained AES to prepare the EA under BIA's supervision, as permitted by 40 C.F.R. § 1506.5(b). *See supra* at 9. BIA independently evaluated the EA and on that basis decided to prepare an EIS. There is no prohibition on an agency's retention of a contractor previously retained by the project proponent.

preparation, independently evaluates the [EIS] prior to its approval and take[s] responsibility for its scope and contents." 40 C.F.R. § 1506.5(c).

Colusa's charges (Brief 39-41) that AES had a financial conflict of interest and that BIA failed to adequately supervise AES lack merit. In the January 6, 2005 Professional Services Third-Party Agreement among AES, BIA, and Enterprise Rancheria (ER5:905), AES expressly represented in Section 3.0 that it "has no financial interest in the results of the environmental analysis of the BIA's decision regarding the approvals for the project." ER5:905. Colusa argues (Brief 39-40) that this representation is negated by the statement in Section 1.0 that AES will "assist with obtaining permit approvals necessary to construct the project" in addition to "supply[ing] environmental consulting services to prepare the environmental documentation." Colusa's concept of "financial interest" is too broad. As CEQ has explained, the type of financial interest that might create a conflict is "a promise of future construction or design work on the project." Answers to 40 Most Asked Questions on NEPA Regulations, 46 Fed. Reg. 18026, 18031 (Mar. 23, 1981). NEPA does not require project proponents and government agencies to inefficiently cycle through a rotating cast of contractors at each stage of environmental review under NEPA and other statutes. Colusa is also unduly formalistic in dismissing (Brief 40) AES's Section 3.0 representation because the signature page of the Professional Services Agreement (ER5:909) does

not include a certification under penalty of perjury. There is no such requirement.[18]

Colusa's argument (Brief 40) that BIA did not sufficiently supervise the EIS simply restates its range-of-alternatives and Appendix M arguments, which we address above. Its final point (Brief 40-41) regarding the BIA Pacific Region land acquisition guidance mischaracterizes that document SER5:1111[D.Ct. Doc. 104 at 90]. That document appropriately requires the applicant to submit a draft EA or draft EIS with the application, which then goes through multiple rounds of revision.

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In sum, the EIS should be upheld as a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the proposed action. *Block*, 690 F.2d at 761.

II. Interior Complied With IGRA

A. The Consultation Process Complied with IGRA

IGRA's Secretarial Determination procedure requires Interior to "consult[] with … officials of other nearby Indian tribes" in determining whether a proposed

[18] Colusa does not question AES's professional qualifications or reputation, nor could it credibly do so as Colusa itself retained AES to prepare the EA, completed in 2010, for its recent fee-to-trust request. *See* http://www.analyticalcorp.com/reports/2010/03/01/cachil-dehe-band-of-wintun-indians-of-the-colusa-indian-community/ (last visited August 15, 2017).

gaming facility "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). Colusa's argument (Brief 41-49) that BIA violated IGRA by failing to consult with it regarding potential impacts on its casino revenue mischaracterizes both the facts and the applicable law. In addition to the multiple opportunities to present data and argument to BIA through the NEPA process, BIA also afforded Colusa the opportunity to do so through the Secretarial Determination process, but Colusa simply failed to take advantage of that opportunity.

Because IGRA does not define "surrounding community," the Secretary in 2008 promulgated a regulation defining that term as "local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment." 25 C.F.R. § 292.2. The regulation similarly defines "nearby Indian tribe" as "an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters." *Id*. However, a local government or Indian tribe located more than 25 miles from the gaming establishment "may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment." *Id*.

In promulgating the regulation, Interior explained that its earlier guidance had experimented with including local governments within a radius of 10 miles, then 0 miles (*i.e.* bordering), then 50 miles, and including Indian tribes within a radius of 100 miles and then 50 miles. *See* 73 Fed. Reg. at 29357. Commenters proposed even more approaches during the rulemaking process. *Id*. at 29356-57. Interior explained that, "[b]ased on our experience," the "uniform" and "consistent" "25-mile radius best reflects those communities whose governmental functions, infrastructure or services may be affected by the potential impacts of a gaming establishment." *Id*. at 29357. However, the 25-mile radius is a "rebuttable presumption": "A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment." *Id*.

Colusa's Opening Brief (at 46) purports to challenge 25 C.F.R. § 292.2 on its face, but this Court should not consider a facial challenge because Colusa's Complaint did not challenge the regulation "on its face" or seek its invalidation. ER4:711-727. *See Klein v. City of Laguna Beach*, 810 F.3d 693, 699 (9th Cir. 2016). In any event, a presumptive 25-mile radius with a petition procedure is not obviously inconsistent with 25 U.S.C. § 2719(a)(1)(B). While an overly narrow radius might exclude affected local governments and nearby tribes, an overly broad

radius would encumber the consultation process. In light of the petition procedure, Colusa's characterization of the regulation as "rigid" or "one-size-fits-all" (Brief 43-45) is incorrect.

Colusa's as-applied challenge also fails because the petition procedure allowed for Colusa's participation without any material burden. Colusa simply declined to avail itself of the procedure. Contrary to Colusa's characterization (Brief 42), BIA did not "refuse[]" Colusa's June 23, 2009 request for consultation. As explained above at 14, BIA initiated consultation in January 2009 pursuant to the 2008 regulations.[19] Colusa sent a letter to BIA in June 2009 requesting consultation (ER5:848), and BIA responded in July 2009 informing Colusa that it could "submit comments and/or documents that establish that your governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment" (ER3:267).[20]

Colusa's complaint (Brief 37 n.13) that BIA should not have required Colusa to incur the cost of retaining a consultant in order to qualify for

[19] There is no requirement that BIA needed to start consultation earlier. Colusa's reliance on the pre-2008 50-mile policy is thus unavailing.

[20] Amicus Mooretown Rancheria asserts (at 22) that it sent a letter to BIA dated May 5, 2009 seeking consultation. BIA has been unable to locate such a letter in its files. Mooretown apparently did not follow up, nor did it thereafter submit any comments disputing the FEIS's conclusion that the proposed casino would not have a significant effect on its casino's revenue.

consultation is unpersuasive. While 25 C.F.R. § 292.2 states that a local government "may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment," the regulation does not require a threshold showing to establish entitlement to consultation followed by some different showing of detrimental impact. Under 25 C.F.R. §§ 292.19 and 292.20, the BIA Regional Director invites consultation by letter; local governments and tribes submit comments in writing; and the applicant tribe then addresses the comments in writing. Accordingly, Colusa should have submitted in 2009 any evidence or argument regarding detrimental impacts that it wanted to submit, along with its representation that it believes these impacts constitute a direct, immediate, and significant impact on its governmental functions, infrastructure, or services. Petitioning for consultation and the consultation itself is a one-step procedure.

Colusa misplaces reliance (Brief 48) on BIA's Government-to-Government Consultation Policy (2000). SER5:1101-1106[D.Ct. Doc. 104 at 75-80]. That policy does not supersede regulations specifying the consultation process in specific contexts, but instead addresses the consultation process for the drafting of regulations, legislation, budgets, and policies, which are not at issue here.

Finally, even if BIA erred in not including Colusa in its distribution list, that error was harmless because Colusa was then given the opportunity to consult.

When Colusa contacted BIA in June 2009, BIA did not take the position that Colusa was too late; instead, BIA gave Colusa the opportunity to present its concerns. The APA, 5 U.S.C. § 706, directs courts to take "due account" "of the rule of prejudicial error." In the absence of prejudice, Colusa's complaint about the IGRA consultation process provides no basis for invalidating the IGRA ROD. *See Shinseki v. Sanders*, 129 S. Ct. 1696, 1704-06 (2009) (plaintiff bears the burden to show prejudice from inadequate notice in the specific circumstances of the case).

In addition to the IGRA consultation process, Colusa had two opportunities during the NEPA process to present evidence and argument relevant to Appendix M — comments on the DEIS in 2008 and comments on the FEIS in 2010 — but failed to do so. Colusa asserts (Brief 47) that it "was only informed of the DEIS and the opportunity to comment a year later and by another tribe, not the BIA." Colusa does not argue, however, that the public notice of the DEIS's availability in March 2008 did not comply with NEPA.[21] In any event, Colusa was aware of the opportunity to comment on the FEIS in 2010, and did so, but still

[21] Colusa had to be generally aware of Enterprise Rancheria's proposed casino from public and gaming industry communications starting in 2002. In addition, BIA mailed the EA to Colusa in 2004 and the public scoping process proceeded in 2005-2006. Other tribes commented on the EA, scoping notice, and DEIS.

failed to include its current criticisms of Appendix M in its comments. ER3:523-532.

Colusa tries to excuse its failure to provide its information and arguments about competition impact during the administrative process by asserting (Brief 36-37 n.13) that the report of Alan Meister, retained in 2013, "cost tens of thousands of dollars." But the desire to defer such consultant fees is not a legal excuse for its failure timely to retain Mr. Meister during the period 2008-2010.[22] Moreover, Colusa did not even submit information and argument that could have been submitted without a retained consultant. Colusa's casino manager and Colusa's Chief Financial Officer could have expressed their views about any harm they believed the proposed casino would cause to Colusa's casino operations and government operations, as they did after Colusa filed this action in 2012. *See* ER4:701-710. Colusa could have submitted any proprietary data (*see* ER3:273 n.1) as confidential commercial and financial information. *See Cnty. of San Diego v. Babbitt*, 847 F. Supp. 768, 773 & n.2 (S.D. Cal. 1994) (explaining that NEPA, 42 U.S.C. § 4332(2)(C), expressly references the Freedom of Information Act,

[22] Auburn, for example, retained an environmental consultant to prepare comments on the EA, DEIS and FEIS, although it did not retain a gaming consultant to comment on Appendix M.

which provides that confidential commercial and financial information is exempted from disclosure, 5 U.S.C. § 552(b)(4)).

Colusa's attack on the adequacy of the procedure BIA afforded for comment on competition impacts lacks merit. Colusa simply failed to avail itself of the opportunities offered.

B. The District Court Permissibly Exercised Its Discretion In Striking the Meister Declaration.

In support of its motion for summary judgment, Colusa presented the 2014 Declaration of Alan Meister, an economist with experience in Indian gaming, along with a two-page summary presenting the conclusions of a 2013 analysis of projected reductions in Colusa's casino revenue and tribal budget. ER3:268-73. The district court granted the defendants' motions to strike this extra-record evidence. ER1:46-58.

Under the APA, a reviewing court focuses on "the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). As the district court correctly stated, extra-record review is allowed "in only four narrow circumstances: when '[1] necessary to determine whether the agency has considered all relevant factors and has explained its decision; [2] the agency has relied on documents not in the record; [3] supplementing the record is necessary to explain technical terms or complex subject matter; [4] plaintiffs make a showing of agency bad faith.'"

ER1:50 (quoting *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996)). "These exceptions only apply to 'information available at the time, not post-decisional information.'" *Id*. (quoting *Tri-Valley CAREs v. U.S. Dept. of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012)).

The district court immediately rejected exceptions (2) and (4) as inapplicable. ER1:50. It then concluded that exception (3) does not apply because the Meister Declaration does not explain evidence in the administrative record. This is in contrast to *Bunker Hill Co. v. EPA*, 572 F.2d 1286, 1292 (9th Cir. 1977), where the district court requested supplemental briefing and materials outside the administrative record to clarify a complex technological issue addressed in the original record. ER1:51. Rather, the Meister Declaration "provides new information in the form of opinions and calculations." *Id*. Finally, the district court concluded that exception (1) does not apply because the Meister Declaration and attached summary report post-date Interior's decision. ER1:52. Colusa here again invokes (Brief 58) exceptions (1) and (3), but it fails to demonstrate that the district court abused its discretion in concluding that these exceptions do not apply.[23]

[23] Colusa also argues that the Meister Declaration shows that Interior's decision was "'so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" Opening Brief 56 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). But that is a

Meister endorsed the "gravity model" methodology GMA used as "well-established." ER3:272. However, he asserted that "because GMA did not have access to any data about other casinos' actual revenues, operating margins, debt service and market areas, it necessarily was based on GMA's subjective assumptions about that information." ER3:272. He also suggested that GMA should have assessed the reduction in casino revenues on tribal budgets and on tribal payments to the Indian Gaming Special Distribution Fund ("SDF") which benefits non-tribal governments. *Id*. Meister reported the conclusions of his analysis as percentage reductions in casino revenue and discretionary tribal budget. ER3:273. He stated that he did not provide dollar amounts "to protect Colusa's proprietary information." ER3:273 n.1. The bases for these projections were not explained: the details would only be provided "on a strictly confidential basis." *Id*.

The district court correctly concluded that Exception (3) does not apply because the Meister Declaration was not offered to "explain" Appendix M. GMA's explanation of its methodology and results was sufficiently clear. Instead, Colusa had additional analyses undertaken using financial and other data from its casino and tribal government to which GMA did not have access (and which

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reason for a court to conclude that an agency decision is arbitrary and capricious, not an exception to the general rule that an agency decision must be reviewed based on the administrative record before it.

Colusa still does not disclose). As for Exception (1), the Meister Declaration post-dates Interior's decision and does not show that Interior failed to consider a relevant factor. BIA clearly considered competition impacts. While GMA did not separately quantify the effects on tribal budgets and SDF payments from the projected drops in casino revenues, those effects flow directly from the quantified drops in casino revenues, which GMA concluded were not significant. The district court correctly exercised its discretion to strike that extra-record evidence.

C. The No-Detriment Determination Was Not Arbitrary and Capricious

Even if this Court were to conclude that the district court should have considered the Meister Declaration, Colusa still failed to demonstrate that the Secretarial Determination was arbitrary and capricious.

The Assistant Secretary addressed competition with other tribal casinos in connection with Auburn's casino in Lincoln (Thunder Valley). ER3:400. He started from the premise that "IGRA does not guarantee that tribes operating existing facilities will continue to conduct gaming free from both tribal and non-tribal competition." *Id*. (citing *Sokaogon*, 214 F.3d at 941). Thus, "[m]ere competition from the Tribe's proposed gaming facility in an overlapping gaming market is not sufficient, in and of itself, to conclude that it would result in a detrimental impact on Auburn." *Id*. BIA explained in the FEIS that competition from the proposed casino was not considered "significant" because "all casinos,

including proposed casinos, would remain in operation." SER3:600 [ARN23673]. While Meister projected a 55% reduction in gross revenues, he did not assert that the Enterprise Rancheria casino would put the Colusa casino out of business.

Moreover, the accuracy of Meister's projection cannot be assessed because he provided little explanation of its basis. He did not discuss with any specificity how his modeling differed from GMA's. He did not offer any specific criticism of the market areas, gaming factor values, or capture rates reported in Appendix M. Meister thus provided little basis for rejecting GMA's projection in favor of his.

Appendix M presents the reasonable opinion of BIA's expert. As the appendix explains, GMA first conducted a gravity model analysis for the "Base Case" of 12 tribal casinos but no Enterprise Rancheria casino. This involved "estimating the revenue levels at each of the casino properties within the competitive set, researching the number of gaming positions provided within each, visiting each facility to understand the relative aesthetic attractiveness (including a consideration of non-gaming amenities), and utilizing gaming factors from proprietary and public sources." SER4:921-924 [ARN24799-24802]. GMA also conducted gravity model analyses for Scenario 1 (adding to the Base Case the proposed Yuba Site casino-hotel project), Scenario 2 (a smaller Yuba Site casino), and Scenario 3 (the small Enterprise 1 casino). *Id.* The final step was determining

the "cannibalization" amount by comparing each casino's Base Case revenue to its revenue under the three scenarios. *Id*.

GMA estimated that these 12 casinos generate a total of $929.8 million in gaming revenue annually. SER4:931 [ARN24809]. While GMA estimated each casino's revenue, it publicly reported only the aggregate number. GMA projected market growth of $39.4 million for Scenario 1 and $22.7 million for Scenario 2, but no market growth for Scenario 3. *Id*. GMA quantified the gaming revenue the proposed casino would draw from the Base Case market: $76.8 million for Scenario 1, $43.8 million for Scenario 2, and $14.1 million for Scenario 3. SER4:932-935 [ARN24810-24813]. These amounts are respectively 8.26%, 4.71%, and 1.52% of the aggregate gaming revenue.

GMA reported the specific dollar reduction in revenue for each casino under each scenario. SER4:934 [ARN24812]. For Colusa, the amount ranged from $4,292,657 for Scenario 1 down to $952,575 for Scenario 3. Because GMA did not disclose each casino's estimated revenue, the report described the percentage reduction qualitatively. With a Yuba Site casino, the two market leaders, Thunder Valley (owned by Auburn) and Cache Creek (owned by Yocha Dehe Wintun Nation), would "absorb[] nearly 2/3 of the drop in revenue." SER4:933 [ARN24811]. Although Thunder Valley and Cache Creek would experience the greatest revenue declines, GMA concluded that "the projected decline will have

only a nominal impact on the[ir] operation" "given the substantial levels of gaming win each of these casinos generates." SER4:934 [ARN24812]. "For the small casinos such as Colusa, Gold Country [in Oroville, owned by Tyme Maidu Tribe of the Berrycreek Rancheria], and Feather Falls [in Oroville, owned by Mooretown Rancheria], the impacted gaming revenues likely represent a higher percentage of the casinos' total win as compared to Cache Creek and Thunder Valley. However, the levels do not represent a substantial percent of revenue." *Id*. As noted above, the proposed casino's aggregate market cannibalization rate is 8.26%. With an Enterprise 1 casino, GMA concluded that most casinos would experience smaller revenue drops, but the Oroville casinos Gold Country and Feather Falls would experience higher revenue losses as compared to a Yuba Site casino.[24] SER4:934 [ARN24812].

While GMA did not have access to the proprietary information of the competing casinos, it considered much publicly available information, including distance from metropolitan areas, quality of roads, the facility's age and attractiveness, number of slot machines, number and types of table games, existence and benefits of a players club, existence and seating capacity of a bingo

[24] Amicus Mooretown Rancheria objected to Enterprise Rancheria's gaming on the Yuba Site during the EIS scoping process, but it thereafter never commented on GMA's projection that its casino would actually experience a greater revenue reduction from an Enterprise 1 casino than from a Yuba Site casino.

parlor, days of operation, hotel quality and capacity, and the nature and quality of restaurants and entertainment facilities. SER4:961-965 [ARN24839-24843]. GMA applied its experience and expert judgment to the available data, including its own proprietary data about the gaming industry. Meister did not dispute GMA's qualifications, and his summary report merely presented bare conclusions with little illuminating detail. "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). Nine years after Appendix M was made publicly available, Colusa has still offered little more than a teaser about still undisclosed proprietary data.[25] Colusa cannot fairly criticize BIA for not having considered information that Colusa refuses to provide. Colusa has not demonstrated that GMA's opinion was so flawed that it was arbitrary and capricious for BIA to rely on it.

D. Mooretown Rancheria's "Leapfrog" Argument Is Not Presented in Colusa's Appeal

Amicus Mooretown Rancheria complains (at 4, 20 n.6) that Interior has impermissibly allowed Enterprise Rancheria to "leapfrog" from its Enterprise 1

[25] Colusa charges (Brief 33 n.12) that Appendix M has no "empirical basis" for its assumptions about "participation games" (*i.e.*, slot machines that pay the manufacturers a significant portion of the win). While financial arrangements between casinos and slot machine manufacturers are not public, GMA explained, based on its experience in the industry, that tribal casinos often had many "participation" machines. ER5:894.

reservation over Mooretown, based in Oroville, to a "completely new area" in Yuba County. Auburn had also asserted that Enterprise Rancheria has no historical connection to Yuba County. Interior concluded, however, that Enterprise Rancheria has a significant historical connection to the Yuba Site, which may be considered in determining whether gaming on the site is in the tribe's best interest. ER3:381-82. Auburn has not appealed and Colusa does not challenge this conclusion in its Opening Brief. The "historical connection" issue is thus not before this Court.

III. Interior Complied with the IRA

A. Interior's Determination that Enterprise Rancheria Needs Additional Land for Economic Development Is Not Arbitrary and Capricious

Interior has issued regulations, 25 C.F.R. Part 151, to implement its broad statutory authority, 25 U.S.C. § 5108, to take land into trust for tribes. Under those regulations, the Secretary may take land into trust "if the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(3). Under 25 C.F.R. § 151.10(b), the Secretary must consider a tribe's "need … for additional land" in deciding whether to take a parcel into trust. The IRA ROD explained (at 44) that Enterprise 1, the Tribe's only trust land at that time, "is not sufficient for tribal housing needs, tribal government or economic development purposes"; and at the same time, it

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." ER3:469. Contrary to Colusa's suggestion (Brief 50-51), there is no inconsistency in this statement. ER1:37 (district court rejecting the asserted inconsistency as a mischaracterization of the IRA ROD).

Colusa asserts that Enterprise Rancheria could generate tribal income (albeit less income) at a Butte County location; it thus argues (Brief 50) that, while Enterprise Rancheria might "desire" the Yuba Site, it has no "need" for it. Colusa misinterprets Section 151.10(b). That provision does not require the Secretary to find that a particular parcel chosen by a tribe is the only parcel that could fulfill its objectives, and it does not "require a justification for why a particular parcel was chosen over other possibilities." *See* ER1:37. It is "sufficient for the Department's analysis to express the Tribe's needs and conclude generally that IRA purposes were served." *South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 801 (8th Cir. 2005) ("it would be an unreasonable interpretation of [the Part 151 regulations] to require [BIA] to detail specifically why trust status is more beneficial than fee status"). Interior reasonably concluded that Enterprise Rancheria needed economic development and that taking the Yuba Site into trust would further that objective.

Colusa next asserts (Brief 51) that the IRA ROD "ignored" Enterprise Rancheria's 63-acre Oroville parcel in determining whether the Tribe needed the Yuba Site for economic development.[26] As explained in Part I.A. above, however, Colusa's argument that Enterprise Rancheria should use this land for economic development is inconsistent with its prior acknowledgment that this land would be used for tribal housing, and Colusa provides no basis for concluding that the 63-acre parcel could satisfy all of Enterprise Rancheria's tribal needs at the same time. Colusa notes (Brief 51) that the 63-acre parcel is larger than the 40-acre parcel (Enterprise 2) California acquired in 1965, but that fact is irrelevant. There has never been a legal cap on the acreage held by or for Enterprise Rancheria in fee or trust status, nor has there ever been any finding that 80 acres would always be adequate for the Tribe's needs.[27] The district court correctly found that Enterprise Rancheria's ownership of the 63-acre parcel does not make the decision to take the Yuba Site into trust arbitrary and capricious. ER1:8-9.

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[26] Colusa also briefly mentions (Brief 51) some other parcels assertedly purchased by Enterprise Rancheria in the Oroville area for tribal housing. Colusa has not made any showing that any of these parcels undercuts Interior's determination that Enterprise Rancheria has a need for the Yuba Site for economic development.

[27] The acknowledgment in the FEIS's Statement of Purpose and Need that the 40-acre Yuba Site would restore to Enterprise Rancheria land equal in acreage to the land previously lost (SER2:397 [ARN23333]) does not reflect any such legal cap or factual determination.

Colusa further seeks to undercut Interior's determination that Enterprise Rancheria needs the Yuba Site for economic development by arguing that not all the 823 members reported in the IRA ROD would benefit from a Yuba Site casino. Specifically, Colusa asserts (Brief 52) that the "non-lineal" members only have rights under the tribal constitution to federally funded programs (*see* ER5:922). Colusa also suggests (Brief 52-53) that some members are not lawful members because the statute authorizing the sale of Enterprise 2 to California and directing payment to four named persons, Pub. L. No. 88-453, 78 Stat. 534 (Aug. 20, 1964), "apparently terminated" the Indian status of those persons and their descendants. This Court should reject Colusa's invitation to question Enterprise Rancheria's enrollment decisions. These issues are not properly before this Court. Tribal membership is ordinarily an internal tribal matter. *Alto v. Black*, 738 F.3d 1111, 1115 (9th Cir. 2013); *Cahto Tribe of Laytonville Rancheria v. Dutschke*, 715 F.3d 1225, 1226 (9th Cir. 2013); *Williams v. Gover*, 490 F.3d 785, 789 (9th Cir. 2007). Interior does not routinely review tribal membership rolls, but decides tribal enrollment disputes only when tribal law so authorizes. *Id*. Similarly, federal courts generally lack jurisdiction over tribal membership disputes, although they can review Interior decisions to act (or not act) with respect to such disputes. *Aguayo*, 827 F.3d at 1222. No such decision is at issue in this case.

Moreover, nothing in the IRA ROD suggests that Interior's determination that Enterprise Rancheria had a need for the 40-acre Yuba Site turned on the precise number of lineal and non-lineal members. A Yuba Site casino will provide revenues to strengthen tribal government for the benefit of all members as well as provide job opportunities for all members.

Colusa has not come close to demonstrating that Interior's determination that Enterprise Rancheria needed an additional 40 acres for economic development was arbitrary and capricious. In deciding administrative appeals of land-into-trust decisions, the Interior Board of Indian Appeals has explained that the IRA gives BIA "broad leeway" in determining a tribe's "need" for the land, and "[i]t is not the role of an appellant to determine how that 'need' is defined or interpreted by BIA." *County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 209 (2009); *see* also *Mille Lacs County, Minnesota v. Acting Midwest Regional Director*, 62 IBIA 130, 145 (2016). Had anyone challenged the BIA Pacific Regional Director's 2012 decision accepting 225 acres in trust for Colusa based on lack of "need," Colusa no doubt would have relied on this precedent. Colusa's challenge to Enterprise Rancheria's need for the Yuba Site should be rejected.

B. The Error in the Land Description in the December 3, 2012 Federal Register Notice Was Quickly Corrected and Was Harmless

The legal description in the Notice of Final Agency Determination to take the 40-acre Yuba Site into trust for gaming purposes for Enterprise Rancheria, 77 Fed. Reg. 71612 (Dec. 3, 2012), incorrectly provided the legal description for the larger 80-acre parcel owned by YCE from which the 40-acre portion to be transferred to the United States would be divided, rather than the legal description for the 40-acre parcel. Colusa infers from this error (Brief 53) that Interior never had a clear idea of the Yuba Site's boundaries throughout the 10-year land-into-trust process. That inference is belied by the consistent depiction of the 40-acre parcel on multiple detailed maps in the administrative record. *See, e.g.*, SER1:103 [ARN1633] (EA); SER2:264 [ARN11914] (DEIS); SER2:399 [ARN23335] (FEIS). Interior quickly corrected the error in the legal description. 78 Fed. Reg. 114 (Jan. 2, 2013). This error was harmless and in no way suggests that Interior's decision to take the Yuba Site into trust was arbitrary and capricious.

CONCLUSION

The district court's judgment should be affirmed.

Respectfully submitted,

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STATEMENT OF RELATED CASES

A second appeal from the same district court decision is pending in this Court: *Citizens for a Better Way, et al. v. Zinke, et al.*, 9th Cir. No. 17-15533.

s/ Mary Gabrielle Sprague

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation, typeface requirements and type style requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 13,988 words in 14-point Times New Roman font (excluding the parts of the brief exempted by Rule 32(a)(7)).

s/ Mary Gabrielle Sprague

ADDENDUM

ADDENDUM TABLE OF CONTENTS

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 29. Indian Gaming Regulation (Refs & Annos)

25 U.S.C.A. § 2719

§ 2719. Gaming on lands acquired after October 17, 1988

Currentness

(a) Prohibition on lands acquired in trust by Secretary

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

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

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

(A) such lands are located in Oklahoma and--

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

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

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

(b) Exceptions

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

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

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

(i) a settlement of a land claim,

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

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

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

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

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

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5108 and 5110 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

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

(d) Application of Title 26

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

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

CREDIT(S)

(Pub.L. 100-497, § 20, Oct. 17, 1988, 102 Stat. 2485.)

25 U.S.C.A. § 2719, 25 USCA § 2719
Current through P.L. 115-43. Also includes P.L. 115-45. Title 26 current through 115-45.

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 45. Protection of Indians and Conservation of Resources

25 U.S.C.A. § 5108
Formerly cited as 25 USCA § 465

§ 5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

Currentness

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.

CREDIT(S)

(June 18, 1934, c. 576, § 5, 48 Stat. 985; Nov. 1, 1988, Pub.L. 100-581, Title II, § 214, 102 Stat. 2941.)

25 U.S.C.A. § 5108, 25 USCA § 5108
Current through P.L. 115-43. Also includes P.L. 115-45. Title 26 current through 115-45.

End of Document

KeyCite Yellow Flag - Negative Treatment
Unconstitutional or PreemptedLimitation Recognized by Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers, 11th Cir.(Fla.), Sep. 15, 2010

KeyCite Yellow Flag - Negative TreatmentProposed Legislation

United States Code Annotated
Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy (Refs & Annos)
Subchapter I. Policies and Goals (Refs & Annos)

42 U.S.C.A. § 4332

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

Currentness

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction. [1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

CREDIT(S)

(Pub.L. 91-190, Title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub.L. 94-83, Aug. 9, 1975, 89 Stat. 424.)

Footnotes

1 So in original. The period probably should be a semicolon.

42 U.S.C.A. § 4332, 42 USCA § 4332

Current through P.L. 115-43. Also includes P.L. 115-45. Title 26 current through 115-45.

End of Document

Titles and Records Offices are designated as Certifying Officers for this purpose. When a copy or reproduction of a title document is authenticated by the official seal and certified by a Manager, Land Titles and Records Office, the copy or reproduction shall be admitted into evidence the same as the original from which it was made. The fees for furnishing such certified copies are established by a uniform fee schedule applicable to all constituent units of the Department of the Interior and published in 43 CFR part 2, appendix A.

§ 150.11 Disclosure of land records, title documents, and title reports.

(a) The usefulness of a Land Titles and Records Office depends in large measure on the ability of the public to consult the records contained therein. It is therefore, the policy of the Bureau of Indian Affairs to allow access to land records and title documents unless such access would violate the Privacy Act, 5 U.S.C. 552a or other law restricting access to such records, or there are strong policy grounds for denying access where such access is not required by the Freedom of Information Act, 5 U.S.C. 552. It shall be the policy of the Bureau of Indian Affairs that, unless specifically authorized, monetary considerations will not be disclosed insofar as leases of tribal land are concerned.

(b) Before disclosing information concerning any living individual, the Manager, Land Titles and Records Office, shall consult 5 U.S.C. 552a(b) and the notice of routine users then in effect to determine whether the information may be released without the written consent of the person to whom it pertains.

PART 151—LAND ACQUISITIONS

Sec.

AUTHORITY: R.S. 161: 5 U.S.C. 301. Interpret or apply 46 Stat. 1106, as amended; 46 Stat. 1471, as amended; 48 Stat. 985, as amended; 49 Stat. 1967, as amended, 53 Stat. 1129; 63 Stat. 605; 69 Stat. 392, as amended; 70 Stat. 290, as amended; 70 Stat. 626; 75 Stat. 505; 77 Stat. 349; 78 Stat. 389; 78 Stat. 747; 82 Stat. 174, as amended, 82 Stat. 884; 84 Stat. 120; 84 Stat. 1874; 86 Stat. 216; 86 Stat. 530; 86 Stat. 744; 88 Stat. 78; 88 Stat. 81; 88 Stat. 1716; 88 Stat. 2203; 88 Stat. 2207; 25 U.S.C. 2, 9, 409a, 450h, 451, 464, 465, 487, 488, 489, 501, 502, 573, 574, 576, 608, 608a, 610, 610a, 622, 624, 640d–10, 1466, 1495, and other authorizing acts.

CROSS REFERENCE: For regulations pertaining to: The inheritance of interests in trust or restricted land, see parts 15, 16, and 17 of this title and 43 CFR part 4; the purchase of lands under the BIA Loan Guaranty, Insurance and Interest Subsidy program, see part 103 of this title; the exchange and partition of trust or restricted lands, see part 152 of this title; land acquisitions authorized by the Indian Self-Determination and Education Assistance Act, see parts 900 and 276 of this title; the acquisition of allotments on the public domain or in national forests, see 43 CFR part 2530; the acquisition of Native allotments and Native townsite lots in Alaska, see 43 CFR parts 2561 and 2564; the acquisition of lands by Indians with funds borrowed from the Farmers Home Administration, see 7 CFR part 1823, subpart N; the acquisition of land by purchase or exchange for members of the Osage Tribe not having certificates of competency, see §§117.8 and 158.54 of this title.

SOURCE: 45 FR 62036, Sept. 18, 1980, unless otherwise noted. Redesignated at 47 FR 13327, Mar. 30, 1982.

§ 151.1 Purpose and scope.

These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status for individual Indians and tribes. Acquisition of land by individual Indians and tribes in fee simple status is not covered by these regulations even though such land may, by operation of law, be held in restricted status following acquisition. Acquisition of land in trust status by inheritance or escheat is not covered by these regulations.

[79 FR 76897, Dec. 23, 2014]

§ 151.2 Definitions.

(a) *Secretary* means the Secretary of the Interior or authorized representative.

(b) *Tribe* means any Indian tribe, band, nation, pueblo, community, rancheria, colony, or other group of Indians, including the Metlakatla Indian Community of the Annette Island Reserve, which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs. For purposes of acquisitions made under the authority of 25 U.S.C. 488 and 489, or other statutory authority which specifically authorizes trust acquisitions for such corporations, ''Tribe'' also means a corporation chartered under section 17 of the Act of June 18, 1934 (48 Stat. 988; 25 U.S.C. 477) or section 3 of the Act of June 26, 1936 (49 Stat. 1967; 25 U.S.C. 503).

(c) *Individual Indian* means:

(1) Any person who is an enrolled member of a tribe;

(2) Any person who is a descendent of such a member and said descendant was, on June 1, 1934, physically residing on a federally recognized Indian reservation;

(3) Any other person possessing a total of one-half or more degree Indian blood of a tribe;

(4) For purposes of acquisitions outside of the State of Alaska, *Individual Indian* also means a person who meets the qualifications of paragraph (c)(1), (2), or (3) of this section where ''Tribe'' includes any Alaska Native Village or Alaska Native Group which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs.

(d) *Trust land* or *land in trust status* means land the title to which is held in trust by the United States for an individual Indian or a tribe.

(e) *Restricted land* or *land in restricted status* means land the title to which is held by an individual Indian or a tribe and which can only be alienated or encumbered by the owner with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to Federal law or because of a Federal law directly imposing such limitations.

(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, *Indian reservation* means that area of land constituting the former reservation of the tribe as defined by the Secretary.

(g) *Land* means real property or any interest therein.

(h) *Tribal consolidation area* means a specific area of land with respect to which the tribe has prepared, and the Secretary has approved, a plan for the acquisition of land in trust status for the tribe.

[45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23, 1995]

§ 151.3 Land acquisition policy.

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

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

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

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

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

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

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

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

§ 151.4 Acquisitions in trust of lands owned in fee by an Indian.

Unrestricted land owned by an individual Indian or a tribe may be conveyed into trust status, including a conveyance to trust for the owner, subject to the provisions of this part.

§ 151.5 Trust acquisitions in Oklahoma under section 5 of the I.R.A.

In addition to acquisitions for tribes which did not reject the provisions of the Indian Reorganization Act and their members, land may be acquired in trust status for an individual Indian or a tribe in the State of Oklahoma under section 5 of the Act of June 18, 1934 (48 Stat. 985; 25 U.S.C. 465), if such acquisition comes within the terms of this part. This authority is in addition to all other statutory authority for such an acquisition.

§ 151.6 Exchanges.

An individual Indian or tribe may acquire land in trust status by exchange if the acquisition comes within the terms of this part. The disposal aspects of an exchange are governed by part 152 of this title.

§ 151.7 Acquisition of fractional interests.

Acquisition of a fractional land interest by an individual Indian or a tribe in trust status can be approved by the Secretary only if:

(a) The buyer already owns a fractional interest in the same parcel of land; or

(b) The interest being acquired by the buyer is in fee status; or

(c) The buyer offers to purchase the remaining undivided trust or restricted interests in the parcel at not less than their fair market value; or

(d) There is a specific law which grants to the particular buyer the right to purchase an undivided interest or interests in trust or restricted land without offering to purchase all of such interests; or

(e) The owner of a majority of the remaining trust or restricted interests in the parcel consent in writing to the acquisition by the buyer.

§ 151.8 Tribal consent for nonmember acquisitions.

An individual Indian or tribe may acquire land in trust status on a reservation other than its own only when the governing body of the tribe having jurisdiction over such reservation consents in writing to the acquisition; provided, that such consent shall not be required if the individual Indian or the tribe already owns an undivided trust or restricted interest in the parcel of land to be acquired.

§ 151.9 Requests for approval of acquisitions.

An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part.

§ 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.)

[45 FR 62036, Sept. 18, 1980, as amended at 60 FR 32879, June 23, 1995]

§ 151.11 Off-reservation acquisitions.

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10 (a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to § 151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

[60 FR 32879, June 23, 1995, as amended at 60 FR 48894, Sept. 21, 1995]

§ 151.12 Action on requests.

(a) The Secretary shall review each request and may request any additional information or justification deemed necessary to reach a decision.

(b) The Secretary's decision to approve or deny a request shall be in writing and state the reasons for the decision.

(c) A decision made by the Secretary, or the Assistant Secretary—Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance.

(1) If the Secretary or Assistant Secretary denies the request, the Assistant Secretary shall promptly provide the applicant with the decision.

(2) If the Secretary or Assistant Secretary approves the request, the Assistant Secretary shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly publish in the FEDERAL REGISTER a notice of the decision to acquire land in trust under this part; and

(iii) Immediately acquire the land in trust under § 151.14 on or after the date

such decision is issued and upon fulfillment of the requirements of §151.13 and any other Departmental requirements.

(d) A decision made by a Bureau of Indian Affairs official pursuant to delegated authority is not a final agency action of the Department under 5 U.S.C. 704 until administrative remedies are exhausted under part 2 of this chapter or until the time for filing a notice of appeal has expired and no administrative appeal has been filed.

(1) If the official denies the request, the official shall promptly provide the applicant with the decision and notification of any right to file an administrative appeal under part 2 of this chapter.

(2) If the official approves the request, the official shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly provide written notice of the decision and the right, if any, to file an administrative appeal of such decision pursuant to part 2 of this chapter, by mail or personal delivery to:

(A) Interested parties who have made themselves known, in writing, to the official prior to the decision being made; and

(B) The State and local governments having regulatory jurisdiction over the land to be acquired;

(iii) Promptly publish a notice in a newspaper of general circulation serving the affected area of the decision and the right, if any, of interested parties who did not make themselves known, in writing, to the official to file an administrative appeal of the decision under part 2 of this chapter; and

(iv) Immediately acquire the land in trust under §151.14 upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies under part 2 of this title, and upon the fulfillment of the requirements of §151.13 and any other Departmental requirements.

(3) The administrative appeal period under part 2 of this chapter begins on:

(i) The date of receipt of written notice by the applicant or interested parties entitled to notice under paragraphs (d)(1) and (d)(2)(ii) of this section;

(ii) The date of first publication of the notice for unknown interested parties under paragraph (d)(2)(iii) of this section.

(4) Any party who wishes to seek judicial review of an official's decision must first exhaust administrative remedies under 25 CFR part 2.

[78 FR 67937, Nov. 13, 2013]

§151.13 Title review.

(a) If the Secretary determines that she will approve a request for the acquisition of land from unrestricted fee status to trust status, she shall require the applicant to furnish title evidence as follows:

(1) The deed or other conveyance instrument providing evidence of the applicant's title or, if the applicant does not yet have title, the deed providing evidence of the transferor's title and a written agreement or affidavit from the transferor, that title will be transferred to the United States on behalf of the applicant to complete the acquisition in trust; and

(2) Either:

(i) A current title insurance commitment; or

(ii) The policy of title insurance issued to the applicant or current owner and an abstract of title dating from the time the policy of title insurance was issued to the applicant or current owner to the present.

(3) The applicant may choose to provide title evidence meeting the title standards issued by the U.S. Department of Justice, in lieu of the evidence required by paragraph (a)(2) of this section.

(b) After reviewing submitted title evidence, the Secretary shall notify the applicant of any liens, encumbrances, or infirmities that the Secretary identified and may seek additional information from the applicant needed to address such issues. The Secretary may require the elimination of any such liens, encumbrances, or infirmities prior to taking final approval action on the acquisition, and she shall require elimination prior to such approval if she determines that the liens, encumbrances or infirmities make title to the land unmarketable.

[81 FR 30177, May 16, 2016]

§ 151.14 Formalization of acceptance.

Formal acceptance of land in trust status shall be accomplished by the issuance or approval of an instrument of conveyance by the Secretary as is appropriate in the circumstances.

[45 FR 62036, Sept. 18, 1980. Redesignated at 60 FR 32879, June 23, 1995]

§ 151.15 Information collection.

(a) The information collection requirements contained in §§151.9; 151.10; 151.11(c), and 151.13 have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1076–0100. This information is being collected to acquire land into trust on behalf of the Indian tribes and individuals, and will be used to assist the Secretary in making a determination. Response to this request is required to obtain a benefit.

(b) Public reporting for this information collection is estimated to average 4 hours per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the information collection. Direct comments regarding the burden estimate or any other aspect of this information collection to the Bureau of Indian Affairs, Information Collection Clearance Officer, Room 337–SIB, 18th and C Streets, NW., Washington, DC 20240; and the Office of Information and Regulatory Affairs [Project 1076–0100], Office of Management and Budget, Washington, DC 20502.

[60 FR 32879, June 23, 1995; 64 FR 13895, Mar. 23, 1999]

PART 152—ISSUANCE OF PATENTS IN FEE, CERTIFICATES OF COMPETENCY, REMOVAL OF RESTRICTIONS, AND SALE OF CERTAIN INDIAN LANDS

Sec.

§ 291.12 Who will monitor and enforce tribal compliance with the Class III gaming procedures?

The Indian tribe and the State may have an agreement regarding monitoring and enforcement of tribal compliance with the Indian tribe's Class III gaming procedures. In addition, under existing law, the NIGC will monitor and enforce tribal compliance with the Indian tribe's Class III gaming procedures.

§ 291.13 When do Class III gaming procedures for an Indian tribe become effective?

Upon approval of Class III gaming procedures for the Indian tribe under either § 291.8(b), § 291.8(c), or § 291.11(a), the Indian tribe shall have 90 days in which to approve and execute the Secretarial procedures and forward its approval and execution to the Secretary, who shall publish notice of their approval in the FEDERAL REGISTER. The procedures take effect upon their publication in the FEDERAL REGISTER.

§ 291.14 How can Class III gaming procedures approved by the Secretary be amended?

An Indian tribe may ask the Secretary to amend approved Class III gaming procedures by submitting an amendment proposal to the Secretary. The Secretary must review the proposal by following the approval process for initial tribal proposals, except that the requirements of § 291.3 are not applicable and he/she may waive the requirements of § 291.4 to the extent they do not apply to the amendment request.

§ 291.15 How long do Class III gaming procedures remain in effect?

Class III gaming procedures remain in effect for the duration specified in the procedures or until amended pursuant to § 291.14.

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

Subpart A—General Provisions

Sec.

Subpart B—Exceptions to Prohibition on Gaming on Newly Acquired Lands

Subpart C—Secretarial Determination and Governor's Concurrence

AUTHORITY: 5 U.S.C. 301, 25 U.S.C. 2, 9, 2719, 43 U.S.C. 1457.

SOURCE: 73 FR 29375, May 20, 2008, unless otherwise noted.

Subpart A—General Provisions

§ 292.1 What is the purpose of this part?

The Indian Gaming Regulatory Act of 1988 (IGRA) contains several exceptions under which class II or class III gaming may occur on lands acquired by the United States in trust for an Indian tribe after October 17, 1988, if other applicable requirements of IGRA are met. This part contains procedures that the Department of the Interior will use to determine whether these exceptions apply.

§ 292.2 How are key terms defined in this part?

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

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

BIA means Bureau of Indian Affairs.

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

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

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

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

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

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

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

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

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

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

Newly acquired lands means land that has been taken, or will be taken, in trust for the benefit of an Indian tribe

by the United States after October 17, 1988.

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

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

Reservation means:

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

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

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

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

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

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

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

Secretary means the Secretary of the Interior or authorized representative.

Significant historical connection means the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land.

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

Subpart B—Exceptions to Prohibitions on Gaming on Newly Acquired Lands

§ 292.3 How does a tribe seek an opinion on whether its newly acquired lands meet, or will meet, one of the exceptions in this subpart?

(a) If the newly acquired lands are already in trust and the request does not concern whether a specific area of land is a ''reservation,'' the tribe may submit a request for an opinion to either the National Indian Gaming Commission or the Office of Indian Gaming.

(b) If the tribe seeks to game on newly acquired lands that require a land-into-trust application or the request concerns whether a specific area of land is a ''reservation,'' the tribe must submit a request for an opinion to the Office of Indian Gaming.

§ 292.4 What criteria must newly acquired lands meet under the exceptions regarding tribes with and without a reservation?

For gaming to be allowed on newly acquired lands under the exceptions in 25 U.S.C. 2719(a) of IGRA, the land must meet the location requirements in either paragraph (a) or paragraph (b) of this section.

(a) If the tribe had a reservation on October 17, 1988, the lands must be located within or contiguous to the boundaries of the reservation.

(b) If the tribe had no reservation on October 17, 1988, the lands must be either:

(1) Located in Oklahoma and within the boundaries of the tribe's former reservation or contiguous to other land held in trust or restricted status for the tribe in Oklahoma; or

(2) Located in a State other than Oklahoma and within the tribe's last recognized reservation within the State or States within which the tribe is presently located, as evidenced by the tribe's governmental presence and tribal population.

SETTLEMENT OF A LAND CLAIM'' EXCEPTION

§ 292.5 When can gaming occur on newly acquired lands under a settlement of a land claim?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(i), known as the ''settlement of a land claim'' exception. Gaming may occur on newly acquired lands if the land at issue is either:

(a) Acquired under a settlement of a land claim that resolves or extinguishes with finality the tribe's land claim in whole or in part, thereby resulting in the alienation or loss of possession of some or all of the lands claimed by the tribe, in legislation enacted by Congress; or

(b) Acquired under a settlement of a land claim that:

(1) Is executed by the parties, which includes the United States, returns to the tribe all or part of the land claimed by the tribe, and resolves or extinguishes with finality the claims regarding the returned land; or

(2) Is not executed by the United States, but is entered as a final order by a court of competent jurisdiction or is an enforceable agreement that in either case predates October 17, 1988 and resolves or extinguishes with finality the land claim at issue.

INITIAL RESERVATION'' EXCEPTION

§ 292.6 What must be demonstrated to meet the "initial reservation" exception?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(ii), known as the ''initial reservation'' exception. Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:

(a) The tribe has been acknowledged (federally recognized) through the administrative process under part 83 of this chapter.

(b) The tribe has no gaming facility on newly acquired lands under the restored land exception of these regulations.

(c) The land has been proclaimed to be a reservation under 25 U.S.C. 467 and is the first proclaimed reservation of the tribe following acknowledgment.

(d) If a tribe does not have a proclaimed reservation on the effective date of these regulations, to be proclaimed an initial reservation under this exception, the tribe must demonstrate the land is located within the State or States where the Indian tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and within an area where the tribe has significant historical connections and one or more of the following modern connections to the land:

(1) The land is near where a significant number of tribal members reside; or

(2) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

(3) The tribe can demonstrate other factors that establish the tribe's current connection to the land.

RESTORED LANDS'' EXCEPTION

§ 292.7 What must be demonstrated to meet the "restored lands" exception?

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(iii), known as the ''restored lands'' exception. Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:

(a) The tribe at one time was federally recognized, as evidenced by its meeting the criteria in § 292.8;

(b) The tribe at some later time lost its government-to-government relationship by one of the means specified in § 292.9;

(c) At a time after the tribe lost its government-to-government relationship, the tribe was restored to Federal recognition by one of the means specified in § 292.10; and

(d) The newly acquired lands meet the criteria of ''restored lands'' in § 292.11.

§ 292.8 How does a tribe qualify as having been federally recognized?

For a tribe to qualify as having been at one time federally recognized for purposes of § 292.7, one of the following must be true:

(a) The United States at one time entered into treaty negotiations with the tribe;

(b) The Department determined that the tribe could organize under the Indian Reorganization Act or the Oklahoma Indian Welfare Act;

(c) Congress enacted legislation specific to, or naming, the tribe indicating that a government-to-government relationship existed;

(d) The United States at one time acquired land for the tribe's benefit; or

(e) Some other evidence demonstrates the existence of a government-to-government relationship between the tribe and the United States.

§ 292.9 How does a tribe show that it lost its government-to-government relationship?

For a tribe to qualify as having lost its government-to-government relationship for purposes of § 292.7, it must show that its government-to-government relationship was terminated by one of the following means:

(a) Legislative termination;

(b) Consistent historical written documentation from the Federal Government effectively stating that it no longer recognized a government-to-government relationship with the tribe or its members or taking action to end the government-to-government relationship; or

(c) Congressional restoration legislation that recognizes the existence of the previous government-to-government relationship.

§ 292.10 How does a tribe qualify as having been restored to Federal recognition?

For a tribe to qualify as having been restored to Federal recognition for purposes of § 292.7, the tribe must show at least one of the following:

(a) Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe (required for tribes terminated by Congressional action);

(b) Recognition through the administrative Federal Acknowledgment Process under § 83.8 of this chapter; or

(c) A Federal court determination in which the United States is a party or court-approved settlement agreement entered into by the United States.

§ 292.11 What are "restored lands"?

For newly acquired lands to qualify as ''restored lands'' for purposes of § 292.7, the tribe acquiring the lands must meet the requirements of paragraph (a), (b), or (c) of this section.

(a) If the tribe was restored by a Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe, the tribe must show that either:

(1) The legislation requires or authorizes the Secretary to take land into trust for the benefit of the tribe within a specific geographic area and the lands are within the specific geographic area; or

(2) If the legislation does not provide a specific geographic area for the restoration of lands, the tribe must meet the requirements of § 292.12.

(b) If the tribe is acknowledged under § 83.8 of this chapter, it must show that it:

(1) Meets the requirements of § 292.12; and

(2) Does not already have an initial reservation proclaimed after October 17, 1988.

(c) If the tribe was restored by a Federal court determination in which the United States is a party or by a court-approved settlement agreement entered into by the United States, it must meet the requirements of § 292.12.

§ 292.12 How does a tribe establish connections to newly acquired lands for the purposes of the "restored lands" exception?

To establish a connection to the newly acquired lands for purposes of § 292.11, the tribe must meet the criteria in this section.

(a) The newly acquired lands must be located within the State or States

where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and the tribe must demonstrate one or more of the following modern connections to the land:

(1) The land is within reasonable commuting distance of the tribe's existing reservation;

(2) If the tribe has no reservation, the land is near where a significant number of tribal members reside;

(3) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

(4) Other factors demonstrate the tribe's current connection to the land.

(b) The tribe must demonstrate a significant historical connection to the land.

(c) The tribe must demonstrate a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration. To demonstrate this connection, the tribe must be able to show that either:

(1) The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or

(2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands.

Subpart C—Secretarial Determination and Governor's Concurrence

§ 292.13 When can a tribe conduct gaming activities on newly acquired lands that do not qualify under one of the exceptions in subpart B of this part?

A tribe may conduct gaming on newly acquired lands that do not meet the criteria in subpart B of this part only after all of the following occur:

(a) The tribe asks the Secretary in writing to make a Secretarial Determination that a gaming establishment on land subject to this part is in the best interest of the tribe and its members and not detrimental to the surrounding community;

(b) The Secretary consults with the tribe and appropriate State and local officials, including officials of other nearby Indian tribes;

(c) The Secretary makes a determination that a gaming establishment on newly acquired lands would be in the best interest of the tribe and its members and would not be detrimental to the surrounding community; and

(d) The Governor of the State in which the gaming establishment is located concurs in the Secretary's Determination (25 U.S.C. 2719(b)(1)(A)).

§ 292.14 Where must a tribe file an application for a Secretarial Determination?

A tribe must file its application for a Secretarial Determination with the Regional Director of the BIA Regional Office having responsibility over the land where the gaming establishment is to be located.

§ 292.15 May a tribe apply for a Secretarial Determination for lands not yet held in trust?

Yes. A tribe can apply for a Secretarial Determination under § 292.13 for land not yet held in trust at the same time that it applies under part 151 of this chapter to have the land taken into trust.

APPLICATION CONTENTS

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

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

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

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

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

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

(e) Information required by § 292.17 to assist the Secretary in determining

whether the proposed gaming establishment will be in the best interest of the tribe and its members;

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

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

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

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

(j) The tribe's class III gaming compact with the State where the gaming establishment is to be located, if one has been negotiated;

(k) If the tribe has not negotiated a class III gaming compact with the State where the gaming establishment is to be located, the tribe's proposed scope of gaming, including the size of the proposed gaming establishment; and

(l) A copy of the existing or proposed management contract required to be approved by the National Indian Gaming Commission under 25 U.S.C. 2711 and part 533 of this title, if any.

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

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

(a) Projections of class II and class III gaming income statements, balance sheets, fixed assets accounting, and cash flow statements for the gaming entity and the tribe;

(b) Projected tribal employment, job training, and career development;

(c) Projected benefits to the tribe and its members from tourism;

(d) Projected benefits to the tribe and its members from the proposed uses of the increased tribal income;

(e) Projected benefits to the relationship between the tribe and non-Indian communities;

(f) Possible adverse impacts on the tribe and its members and plans for addressing those impacts;

(g) Distance of the land from the location where the tribe maintains core governmental functions;

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

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

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

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

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

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

§ 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.

CONSULTATION

§ 292.19 How will the Regional Director conduct the consultation process?

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

(1) Appropriate State and local officials; and

(2) Officials of nearby Indian tribes.

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

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

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

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

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

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

§ 292.20 What information must the consultation letter include?

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

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

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

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

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

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

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

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

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

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

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

EVALUATION AND CONCURRENCE

§ 292.21 How will the Secretary evaluate a proposed gaming establishment?

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

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

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

§ 292.22 How does the Secretary request the Governor's concurrence?

If the Secretary makes a favorable Secretarial Determination, the Secretary will send to the Governor of the State:

(a) A written notification of the Secretarial Determination and Findings of Fact supporting the determination;

(b) A copy of the entire application record; and

(c) A request for the Governor's concurrence in the Secretarial Determination.

§ 292.23 What happens if the Governor does not affirmatively concur with the Secretarial Determination?

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

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

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

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

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

§ 292.24 Can the public review the Secretarial Determination?

Subject to restrictions on disclosure required by the Freedom of Information Act (5 U.S.C. 552), the Privacy Act (5 U.S.C. 552a), and the Trade Secrets Act (18 U.S.C. 1905), the Secretarial Determination and the supporting documents will be available for review at the local BIA agency or Regional Office having administrative jurisdiction over the land.

INFORMATION COLLECTION

§ 292.25 Do information collections in this part have Office of Management and Budget approval?

The information collection requirements in §§ 292.16, 292.17, and 292.18 have been approved by the Office of Management and Budget (OMB). The information collection control number is 1076–0158. A Federal agency may not collect or sponsor and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control.

Subpart D—Effect of Regulations

§ 292.26 What effect do these regulations have on pending applications, final agency decisions, and opinions already issued?

These regulations apply to all requests pursuant to 25 U.S.C. 2719, except:

(a) These regulations do not alter final agency decisions made pursuant to 25 U.S.C. 2719 before the date of enactment of these regulations.

(b) These regulations apply to final agency action taken after the effective date of these regulations except that these regulations shall not apply to applicable agency actions when, before the effective date of these regulations, the Department or the National Indian Gaming Commission (NIGC) issued a written opinion regarding the applicability of 25 U.S.C. 2719 for land to be used for a particular gaming establishment, provided that the Department or the NIGC retains full discretion to qualify, withdraw or modify such opinions.

PART 293—CLASS III TRIBAL STATE GAMING COMPACT PROCESS

Sec.

participate in a conformity pilot program and have developed alternative requirements that have been approved by EPA as an implementation plan revision in accordance with §51.390 of this chapter. For the duration of the pilot program, areas selected to participate in the pilot program must comply with the conformity requirements of the pilot area's implementation plan revision for §51.390 of this chapter and all other requirements in 40 CFR parts 51 and 93 that are not covered by the pilot area's implementation plan revision for §51.390 of this chapter. The alternative conformity requirements in conjunction with any applicable state and/or federal conformity requirements must be proposed to fulfill all of the requirements of and achieve results equivalent to or better than section 176(c) of the Clean Air Act. After the three-year duration of the pilot program has expired, areas will again be subject to all of the requirements of this subpart and 40 CFR part 51, subpart T, and/or to the requirements of any implementation plan revision that was previously approved by EPA in accordance with §51.390 of this chapter.

[64 FR 13483, Mar. 18, 1999]

Subpart B—Determining Conformity of General Federal Actions to State or Federal Implementation Plans

SOURCE: 58 FR 63253, Nov. 30, 1993, unless otherwise noted.

§ 93.150 Prohibition.

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

(b) A Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken.

(c) [Reserved]

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

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

[58 FR 63253, Nov. 30, 1993; 58 FR 67442, Dec. 21, 1993; 75 FR 17272, Apr. 5, 2010]

§ 93.151 State implementation plan (SIP) revision.

The provisions and requirements of this subpart to demonstrate conformity required under section 176(c) of the Clean Air Act (CAA) apply to all Federal actions in designated nonattainment and maintenance areas where EPA has not approved the General Conformity SIP revision allowed under 40 CFR 51.851. When EPA approves a State's or Tribe's conformity provisions (or a portion thereof) in a revision to an applicable implementation plan, a conformity evaluation is governed by the approved (or approved portion of the) State or Tribe's criteria and procedures. The Federal conformity regulations contained in this subpart apply only for the portions, if any, of the part 93 requirements not contained in the State or Tribe conformity provisions approved by EPA. In addition, any previously applicable implementation plan conformity requirements remain enforceable until the EPA approves the revision to the applicable SIP to specifically include the revised requirements or remove requirements.

[75 FR 17272, Apr. 5, 2010]

§ 93.152 Definitions.

Terms used but not defined in this part shall have the meaning given them by the Act and EPA's regulations (40 CFR chapter I), in that order of priority.

Affected Federal land manager means the Federal agency or the Federal official charged with direct responsibility for management of an area designated as Class I under the Act (42 U.S.C. 7472)

that is located within 100 km of the proposed Federal action.

Applicability analysis is the process of determining if your Federal action must be supported by a conformity determination.

Applicable implementation plan or applicable SIP means the portion (or portions) of the SIP or most recent revision thereof, which has been approved under section 110(k) of the Act, a Federal implementation plan promulgated under section 110(c) of the Act, or a plan promulgated or approved pursuant to section 301 (d) of the Act (Tribal implementation plan or TIP) and which implements the relevant requirements of the Act.

Areawide air quality modeling analysis means an assessment on a scale that includes the entire nonattainment or maintenance area using an air quality dispersion model or photochemical grid model to determine the effects of emissions on air quality, for example, an assessment using EPA's community multi-scale air quality (CMAQ) modeling system.

Cause or contribute to a new violation means a Federal action that:

(1) Causes a new violation of a national ambient air quality standard (NAAQS) at a location in a nonattainment or maintenance area which would otherwise not be in violation of the standard during the future period in question if the Federal action were not taken; or

(2) Contributes, in conjunction with other reasonably foreseeable actions, to a new violation of a NAAQS at a location in a nonattainment or maintenance area in a manner that would increase the frequency or severity of the new violation.

Caused by, as used in the terms "direct emissions" and "indirect emissions," means emissions that would not otherwise occur in the absence of the Federal action.

Confidential business information (CBI) means information that has been determined by a Federal agency, in accordance with its applicable regulations, to be a trade secret, or commercial or financial information obtained from a person and privileged or confidential and is exempt from required disclosure under the Freedom of Information Act (5 U.S.C. 552(b)(4)).

Conformity determination is the evaluation (made after an applicability analysis is completed) that a Federal action conforms to the applicable implementation plan and meets the requirements of this subpart.

Conformity evaluation is the entire process from the applicability analysis through the conformity determination that is used to demonstrate that the Federal action conforms to the requirements of this subpart.

Continuing program responsibility means a Federal agency has responsibility for emissions caused by:

(1) Actions it takes itself; or

(2) Actions of non-Federal entities that the Federal agency, in exercising its normal programs and authorities, approves, funds, licenses or permits, provided the agency can impose conditions on any portion of the action that could affect the emissions.

Continuous program to implement means that the Federal agency has started the action identified in the plan and does not stop the actions for more than an 18-month period, unless it can demonstrate that such a stoppage was included in the original plan.

Criteria pollutant or standard means any pollutant for which there is established a NAAQS at 40 CFR part 50.

Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and originate in a nonattainment or maintenance area and occur at the same time and place as the action and are reasonably foreseeable.

Emergency means a situation where extremely quick action on the part of the Federal agencies involved is needed and where the timing of such Federal activities makes it impractical to meet the requirements of this subpart, such as natural disasters like hurricanes or earthquakes, civil disturbances such as terrorist acts and military mobilizations.

Emission inventory means a listing of information on the location, type of source, type and quantity of pollutant emitted as well as other parameters of the emissions.

Emissions budgets are those portions of the applicable SIP's projected emission inventories that describe the levels of emissions (mobile, stationary, area, etc.) that provide for meeting reasonable further progress milestones, attainment, and/or maintenance for any criteria pollutant or its precursors.

Emissions offsets, for purposes of §93.158, are emissions reductions which are quantifiable, consistent with the applicable SIP attainment and reasonable further progress demonstrations, surplus to reductions required by, and credited to, other applicable SIP provisions, enforceable at both the State and Federal levels, and permanent within the timeframe specified by the program.

EPA means the U.S. Environmental Protection Agency.

Federal action means any activity engaged in by a department, agency, or instrumentality of the Federal government, or any activity that a department, agency or instrumentality of the Federal government supports in any way, provides financial assistance for, licenses, permits, or approves, other than activities related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 *et seq.*). Where the Federal action is a permit, license, or other approval for some aspect of a non-Federal undertaking, the relevant activity is the part, portion, or phase of the non-Federal undertaking that requires the Federal permit, license, or approval.

Federal agency means, for purposes of this subpart, a Federal department, agency, or instrumentality of the Federal government.

Increase the frequency or severity of any existing violation of any standard in any area means to cause a nonattainment area to exceed a standard more often or to cause a violation at a greater concentration than previously existed and/or would otherwise exist during the future period in question, if the project were not implemented.

Indirect emissions means those emissions of a criteria pollutant or its precursors:

(1) That are caused or initiated by the Federal action and originate in the same nonattainment or maintenance area but occur at a different time or place as the action;

(2) That are reasonably foreseeable;

(3) That the agency can practically control; and

(4) For which the agency has continuing program responsibility.

For the purposes of this definition, even if a Federal licensing, rulemaking or other approving action is a required initial step for a subsequent activity that causes emissions, such initial steps do not mean that a Federal agency can practically control any resulting emissions.

Local air quality modeling analysis means an assessment of localized impacts on a scale smaller than the entire nonattainment or maintenance area, including, for example, congested roadways on a Federal facility, which uses an air quality dispersion model (*e.g.*, Industrial Source Complex Model or Emission and Dispersion Model System) to determine the effects of emissions on air quality.

Maintenance area means an area that was designated as nonattainment and has been re-designated in 40 CFR part 81 to attainment, meeting the provisions of section 107(d)(3)(E) of the Act and has a maintenance plan approved under section 175A of the Act.

Maintenance plan means a revision to the applicable SIP, meeting the requirements of section 175A of the Act.

Metropolitan Planning Organization (MPO) means the policy board of an organization created as a result of the designation process in 23 U.S.C. 134(d).

Milestone has the meaning given in sections 182(g)(1) and 189(c)(1) of the Act.

Mitigation measure means any method of reducing emissions of the pollutant or its precursor taken at the location of the Federal action and used to reduce the impact of the emissions of that pollutant caused by the action.

National ambient air quality standards (NAAQS) are those standards established pursuant to section 109 of the Act and include standards for carbon monoxide (CO_2), lead (Pb), nitrogen dioxide (NO_2), ozone, particulate matter (PM–10 and PM2.5), and sulfur dioxide (SO_2).

Nonattainment area means an area designated as nonattainment under section 107 of the Act and described in 40 CFR part 81.

Precursors of a criteria pollutant are:

(1) For ozone, nitrogen oxides (NOx), unless an area is exempted from NOx requirements under section 182(f) of the Act, and volatile organic compounds (VOC).

(2) For PM–10, those pollutants described in the PM–10 nonattainment area applicable SIP as significant contributors to the PM–10 levels.

(3) For $PM_{2.5}$:

(i) Sulfur dioxide (SO_2) in all PM2.5 nonattainment and maintenance areas,

(ii) Nitrogen oxides in all PM2.5 nonattainment and maintenance areas unless both the State and EPA determine that it is not a significant precursor, and

(iii) Volatile organic compounds (VOC) and ammonia (NH3) only in PM2.5 nonattainment or maintenance areas where either the State or EPA determines that they are significant precursors.

Reasonably foreseeable emissions are projected future direct and indirect emissions that are identified at the time the conformity determination is made; the location of such emissions is known and the emissions are quantifiable as described and documented by the Federal agency based on its own information and after reviewing any information presented to the Federal agency.

Regional water and/or wastewater projects include construction, operation, and maintenance of water or wastewater conveyances, water or wastewater treatment facilities, and water storage reservoirs which affect a large portion of a nonattainment or maintenance area.

Restricted information is information that is privileged or that is otherwise protected from disclosure pursuant to applicable statutes, Executive Orders, or regulations. Such information includes, but is not limited to: Classified national security information, protected critical infrastructure information, sensitive security information, and proprietary business information.

Take or start the Federal action means the date that the Federal agency signs or approves the permit, license, grant or contract or otherwise physically begins the Federal action that requires a conformity evaluation under this subpart.

Total of direct and indirect emissions means the sum of direct and indirect emissions increases and decreases caused by the Federal action; i.e., the "net" emissions considering all direct and indirect emissions. The portion of emissions which are exempt or presumed to conform under § 93.153 (c), (d), (e), or (f) are not included in the "total of direct and indirect emissions." The "total of direct and indirect emissions" includes emissions of criteria pollutants and emissions of precursors of criteria pollutants.

Tribal implementation plan (TIP) means a plan to implement the national ambient air quality standards adopted and submitted by a federally recognized Indian tribal government determined to be eligible under 40 CFR 49.9 and the plan has been approved by EPA.

[58 FR 63253, Nov. 30, 1993, as amended at 71 FR 40427, July 17, 2006; 75 FR 17273, Apr. 3, 2010]

§ 93.153 Applicability.

(a) Conformity determinations for Federal actions related to transportation plans, programs, and projects developed, funded, or approved under title 23 U.S.C. or the Federal Transit Act (49 U.S.C. 1601 *et seq.*) must meet the procedures and criteria of 40 CFR part 51, subpart T, in lieu of the procedures set forth in this subpart.

(b) For Federal actions not covered by paragraph (a) of this section, a conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions of the criteria pollutant or precursor in a nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section.

(1) For purposes of paragraph (b) of this section, the following rates apply in nonattainment areas (NAA's):

	Tons/ year
Ozone (VOC's or NO_X):	

	Tons/year
Serious NAA's	50
Severe NAA's	25
Extreme NAA's	10
Other ozone NAA's outside an ozone transport region	100
Other ozone NAA's inside an ozone transport region:	
VOC	50
NO_x	100
Carbon monoxide: All NAA's	100
SO_2 or NO_2: All NAA's	100
PM–10:	
Moderate NAA's	100
Serious NAA's	70
$PM_{2.5}$:	
Direct emissions	100
SO_2	100
NO_x (unless determined not to be significant precursors)	100
VOC or ammonia (if determined to be significant precursors)	100
Pb: All NAA's	25

(2) For purposes of paragraph (b) of this section, the following rates apply in maintenance areas:

	Tons/year
Ozone (NO_x, SO_2 or NO_2):	
All Maintenance Areas	100
Ozone (VOC's):	
Maintenance areas inside an ozone transport region	50
Maintenance areas outside an ozone transport region	100
Carbon monoxide: All Maintenance Areas	100
PM–10: All Maintenance Areas	100
$PM_{2.5}$:	
Direct emissions	100
SO_2	100
NO_x (unless determined not to be a significant precursor)	100
VOC or ammonia (if determined to be significant precursors)	100
Pb: All Maintenance Areas	25

(c) The requirements of this subpart shall not apply to the following Federal actions:

(1) Actions where the total of direct and indirect emissions are below the emissions levels specified in paragraph (b) of this section.

(2) Actions which would result in no emissions increase or an increase in emissions that is clearly de minimis:

(i) Judicial and legislative proceedings.

(ii) Continuing and recurring activities such as permit renewals where activities conducted will be similar in scope and operation to activities currently being conducted.

(iii) Rulemaking and policy development and issuance.

(iv) Routine maintenance and repair activities, including repair and maintenance of administrative sites, roads, trails, and facilities.

(v) Civil and criminal enforcement activities, such as investigations, audits, inspections, examinations, prosecutions, and the training of law enforcement personnel.

(vi) Administrative actions such as personnel actions, organizational changes, debt management or collection, cash management, internal agency audits, program budget proposals, and matters relating to the administration and collection of taxes, duties and fees.

(vii) The routine, recurring transportation of materiel and personnel.

(viii) Routine movement of mobile assets, such as ships and aircraft, in home port reassignments and stations (when no new support facilities or personnel are required) to perform as operational groups and/or for repair or overhaul.

(ix) Maintenance dredging and debris disposal where no new depths are required, applicable permits are secured, and disposal will be at an approved disposal site.

(x) Actions, such as the following, with respect to existing structures, properties, facilities and lands where future activities conducted will be similar in scope and operation to activities currently being conducted at the existing structures, properties, facilities, and lands; for example, relocation of personnel, disposition of federally-owned existing structures, properties, facilities, and lands, rent subsidies, operation and maintenance cost subsidies, the exercise of receivership or conservatorship authority, assistance in purchasing structures, and the production of coins and currency.

(xi) The granting of leases, licenses such as for exports and trade, permits, and easements where activities conducted will be similar in scope and operation to activities currently being conducted.

(xii) Planning, studies, and provision of technical assistance.

(xiii) Routine operation of facilities, mobile assets and equipment.

(xiv) Transfers of ownership, interests, and titles in land, facilities, and

real and personal properties, regardless of the form or method of the transfer.

(xv) The designation of empowerment zones, enterprise communities, or viticultural areas.

(xvi) Actions by any of the Federal banking agencies or the Federal Reserve Banks, including actions regarding charters, applications, notices, licenses, the supervision or examination of depository institutions or depository institution holding companies, access to the discount window, or the provision of financial services to banking organizations or to any department, agency or instrumentality of the United States.

(xvii) Actions by the Board of Governors of the Federal Reserve System or any Federal Reserve Bank necessary to effect monetary or exchange rate policy.

(xviii) Actions that implement a foreign affairs function of the United States.

(xix) Actions (or portions thereof) associated with transfers of land, facilities, title, and real properties through an enforceable contract or lease agreement where the delivery of the deed is required to occur promptly after a specific, reasonable condition is met, such as promptly after the land is certified as meeting the requirements of CERCLA, and where the Federal agency does not retain continuing authority to control emissions associated with the lands, facilities, title, or real properties.

(xx) Transfers of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity and assignments of real property, including land, facilities, and related personal property from a Federal entity to another Federal entity for subsequent deeding to eligible applicants.

(xxi) Actions by the Department of the Treasury to effect fiscal policy and to exercise the borrowing authority of the United States.

(xxii) Air traffic control activities and adopting approach, departure, and enroute procedures for aircraft operations above the mixing height specified in the applicable SIP or TIP. Where the applicable SIP or TIP does not specify a mixing height, the Federal agency can use the 3,000 feet above ground level as a default mixing height, unless the agency demonstrates that use of a different mixing height is appropriate because the change in emissions at and above that height caused by the Federal action is *de minimis*.

(3) Actions where the emissions are not reasonably foreseeable, such as the following:

(i) Initial Outer Continental Shelf lease sales which are made on a broad scale and are followed by exploration and development plans on a project level.

(ii) Electric power marketing activities that involve the acquisition, sale and transmission of electric energy.

(4) Actions which implement a decision to conduct or carry out a conforming program such as prescribed burning actions which are consistent with a conforming land management plan.

(d) Notwithstanding the other requirements of this subpart, a conformity determination is not required for the following Federal actions (or portion thereof):

(1) The portion of an action that includes major or minor new or modified stationary sources that require a permit under the new source review (NSR) program (Section 110(a)(2)(c) and Section 173 of the Act) or the prevention of significant deterioration program (title I, part C of the Act).

(2) Actions in response to emergencies which are typically commenced on the order of hours or days after the emergency and, if applicable, which meet the requirements of paragraph (e) of this section.

(3) Research, investigations, studies, demonstrations, or training (other than those exempted under paragraph (c)(2) of this section), where no environmental detriment is incurred and/or, the particular action furthers air quality research, as determined by the State agency primarily responsible for the applicable SIP;

(4) Alteration and additions of existing structures as specifically required by new or existing applicable environmental legislation or environmental

regulations (e.g., hush houses for aircraft engines and scrubbers for air emissions).

(5) Direct emissions from remedial and removal actions carried out under the Comprehensive Environmental Response, Compensation and Liability Act and associated regulations to the extent such emissions either comply with the substantive requirements of the PSD/NSR permitting program or are exempted from other environmental regulation under the provisions of CERCLA and applicable regulations issued under CERCLA.

(e) Federal actions which are part of a continuing response to an emergency or disaster under paragraph (d)(2) of this section and which are to be taken more than 6 months after the commencement of the response to the emergency or disaster under paragraph (d)(2) of this section are exempt from the requirements of this subpart only if:

(1) The Federal agency taking the actions makes a written determination that, for a specified period not to exceed an additional 6 months, it is impractical to prepare the conformity analyses which would otherwise be required and the actions cannot be delayed due to overriding concerns for public health and welfare, national security interests and foreign policy commitments; or

(2) For actions which are to be taken after those actions covered by paragraph (e)(1) of this section, the Federal agency makes a new determination as provided in paragraph (e)(1) of this section and:

(i) Provides a draft copy of the written determinations required to affected EPA Regional office(s), the affected State(s) and/or air pollution control agencies, and any Federal recognized Indian tribal government in the nonattainment or maintenance area. Those organizations must be allowed 15 days from the beginning of the extension period to comment on the draft determination; and

(ii) Within 30 days after making the determination, publish a notice of the determination by placing a prominent advertisement in a daily newspaper of general circulation in the area affected by the action.

(3) If additional actions are necessary in response to an emergency or disaster under paragraph (d)(2) of this section beyond the specified time period in paragraph (e)(2) of this section, a Federal agency can make a new written determination as described in (e)(2) of this section for as many 6-month periods as needed, but in no case shall this exemption extend beyond three 6-month periods except where an agency:

(i) Provides information to EPA and the State or Tribe stating that the conditions that gave rise to the emergency exemption continue to exist and how such conditions effectively prevent the agency from conducting a conformity evaluation.

(ii) [Reserved]

(f) Notwithstanding other requirements of this subpart, actions specified by individual Federal agencies that have met the criteria set forth in either paragraphs (g)(1), (g)(2), or (g)(3) of this section and the procedures set forth in paragraph (h) of this section are "presumed to conform," except as provided in paragraph (j) of this section. Actions specified by individual Federal agencies as "presumed to conform" may not be used in combination with one another when the total direct and indirect emissions from the combination of actions would equal or exceed any of the rates specified in paragraphs (b)(1) or (2) of this section.

(g) The Federal agency must meet the criteria for establishing activities that are "presumed to conform" by fulfilling the requirements set forth in either paragraphs (g)(1), (g)(2), or (g)(3) of this section:

(1) The Federal agency must clearly demonstrate using methods consistent with this subpart that the total of direct and indirect emissions from the type of activities which would be presumed to conform would not:

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

(ii) Interfere with provisions in the applicable SIP for maintenance of any standard;

(iii) Increase the frequency or severity of any existing violation of any standard in any area; or

(iv) Delay timely attainment of any standard or any required interim emission reductions or other milestones in

any area including, where applicable, emission levels specified in the applicable SIP for purposes of:

(A) A demonstration of reasonable further progress;

(B) A demonstration of attainment; or

(C) A maintenance plan; or

(2) The Federal agency must provide documentation that the total of direct and indirect emissions from such future actions would be below the emission rates for a conformity determination that are established in paragraph (b) of this section, based, for example, on similar actions taken over recent years.

(3) The Federal agency must clearly demonstrate that the emissions from the type or category of actions and the amount of emissions from the action are included in the applicable SIP and the State, local, or tribal air quality agencies responsible for the SIP(s) or TIP(s) provide written concurrence that the emissions from the actions along with all other expected emissions in the area will not exceed the emission budget in the SIP.

(h) In addition to meeting the criteria for establishing exemptions set forth in paragraphs (g)(1), (g)(2), or (g)(3) of this section, the following procedures must also be complied with to presume that activities will conform:

(1) The Federal agency must identify through publication in the FEDERAL REGISTER its list of proposed activities that are "presumed to conform" and the basis for the presumptions. The notice must clearly identify the type and size of the action that would be "presumed to conform" and provide criteria for determining if the type and size of action qualifies it for the presumption;

(2) The Federal agency must notify the appropriate EPA Regional Office(s), State, local, and tribal air quality agencies and, where applicable, the agency designated under section 174 of the Act and the MPO and provide at least 30 days for the public to comment on the list of proposed activities "presumed to conform." If the "presumed to conform" action has regional or national application (*e.g.*, the action will cause emission increases in excess of the *de minimis* levels identified in paragraph (b) of this section in more than one of EPA's Regions), the Federal agency, as an alternative to sending it to EPA Regional Offices, can send the draft conformity determination to U.S. EPA, Office of Air Quality Planning and Standards;

(3) The Federal agency must document its response to all the comments received and make the comments, response, and final list of activities available to the public upon request; and

(4) The Federal agency must publish the final list of such activities in the FEDERAL REGISTER.

(i) Emissions from the following actions are "presumed to conform":

(1) Actions at installations with facility-wide emission budgets meeting the requirements in § 93.161 provided that the State or Tribe has included the emission budget in the EPA-approved SIP and the emissions from the action along with all other emissions from the installation will not exceed the facility-wide emission budget.

(2) Prescribed fires conducted in accordance with a smoke management program (SMP) which meets the requirements of EPA's Interim Air Quality Policy on Wildland and Prescribed Fires or an equivalent replacement EPA policy.

(3) Emissions for actions that the State or Tribe identifies in the EPA-approved SIP or TIP as "presumed to conform."

(j) Even though an action would otherwise be "presumed to conform" under paragraph (f) or (i) of this section, an action shall not be "presumed to conform" and the requirements of § 93.150, § 93.151, §§ 93.154 through 93.160 and §§ 93.162 through 93.164 shall apply to the action if EPA or a third party shows that the action would:

(1) Cause or contribute to any new violation of any standard in any area;

(2) Interfere with provisions in the applicable SIP or TIP for maintenance of any standard;

(3) Increase the frequency or severity of any existing violation of any standard in any area; or

(4) Delay timely attainment of any standard or any required interim emissions reductions or other milestones in any area including, where applicable,

emission levels specified in the applicable SIP or TIP for purposes of:

(i) A demonstration of reasonable further progress;

(ii) A demonstration of attainment; or

(iii) A maintenance plan.

(k) The provisions of this subpart shall apply in all nonattainment and maintenance areas except conformity requirements for newly designated nonattainment areas are not applicable until 1 year after the effective date of the final nonattainment designation for each NAAQS and pollutant in accordance with section 176(c)(6) of the Act.

[58 FR 63253, Nov. 30, 1993, as amended at 71 FR 40427, July 17, 2006; 75 FR 17274, Apr. 5, 2010]

§ 93.154 Federal agency conformity responsibility.

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

[75 FR 17275, Apr. 5, 2010]

§ 93.155 Reporting requirements.

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

(b) A Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies, any federally-recognized Indian tribal government in the nonattainment or maintenance area, and, where applicable, affected Federal land managers, the agency designated under section 174 of the Clean Air Act and the MPO, within 30 days after making a final conformity determination under this subpart.

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

[75 FR 17275, Apr. 5, 2010]

§ 93.156 Public participation.

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

(b) A Federal agency must make public its draft conformity determination

PART 1500—PURPOSE, POLICY, AND MANDATE

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and E.O. 11514, Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55990, Nov. 28, 1978, unless otherwise noted.

§ 1500.1 Purpose.

(a) The National Environmental Policy Act (NEPA) is our basic national charter for protection of the environment. It establishes policy, sets goals (section 101), and provides means (section 102) for carrying out the policy. Section 102(2) contains ''action-forcing'' provisions to make sure that federal agencies act according to the letter and spirit of the Act. The regulations that follow implement section 102(2). Their purpose is to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act. The President, the federal agencies, and the courts share responsibility for enforcing the Act so as to achieve the substantive requirements of section 101.

(b) NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Most important, NEPA documents must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail.

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

§ 1500.2 Policy.

Federal agencies shall to the fullest extent possible:

(a) Interpret and administer the policies, regulations, and public laws of the United States in accordance with the policies set forth in the Act and in these regulations.

(b) Implement procedures to make the NEPA process more useful to decisionmakers and the public; to reduce paperwork and the accumulation of extraneous background data; and to emphasize real environmental issues and alternatives. Environmental impact statements shall be concise, clear, and to the point, and shall be supported by evidence that agencies have made the necessary environmental analyses.

(c) Integrate the requirements of NEPA with other planning and environmental review procedures required by law or by agency practice so that all such procedures run concurrently rather than consecutively.

(d) Encourage and facilitate public involvement in decisions which affect the quality of the human environment.

(e) Use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment.

(f) Use all practicable means, consistent with the requirements of the Act and other essential considerations of national policy, to restore and enhance the quality of the human environment and avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.

§ 1500.3 Mandate.

Parts 1500 through 1508 of this title provide regulations applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act)

except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*) section 309 of the Clean Air Act, as amended (42 U.S.C. 7609) and Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970, as amended by Executive Order 11991, May 24, 1977). These regulations, unlike the predecessor guidelines, are not confined to sec. 102(2)(C) (environmental impact statements). The regulations apply to the whole of section 102(2). The provisions of the Act and of these regulations must be read together as a whole in order to comply with the spirit and letter of the law. It is the Council's intention that judicial review of agency compliance with these regulations not occur before an agency has filed the final environmental impact statement, or has made a final finding of no significant impact (when such a finding will result in action affecting the environment), or takes action that will result in irreparable injury. Furthermore, it is the Council's intention that any trivial violation of these regulations not give rise to any independent cause of action.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Reducing the length of environmental impact statements (§ 1502.2(c)), by means such as setting appropriate page limits (§§ 1501.7(b)(1) and 1502.7).

(b) Preparing analytic rather than encyclopedic environmental impact statements (§ 1502.2(a)).

(c) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(d) Writing environmental impact statements in plain language (§ 1502.8).

(e) Following a clear format for environmental impact statements (§ 1502.10).

(f) Emphasizing the portions of the environmental impact statement that are useful to decisionmakers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(g) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.7).

(h) Summarizing the environmental impact statement (§ 1502.12) and circulating the summary instead of the entire environmental impact statement if the latter is unusually long (§ 1502.19).

(i) Using program, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1502.20).

(j) Incorporating by reference (§ 1502.21).

(k) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(l) Requiring comments to be as specific as possible (§ 1503.3).

(m) Attaching and circulating only changes to the draft environmental impact statement, rather than rewriting and circulating the entire statement when changes are minor (§ 1503.4(c)).

(n) Eliminating duplication with State and local procedures, by providing for joint preparation (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(o) Combining environmental documents with other documents (§ 1506.4).

(p) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1508.4).

(q) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1508.13).

[43 FR 55990, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Integrating the NEPA process into early planning (§ 1501.2).

(b) Emphasizing interagency cooperation before the environmental impact statement is prepared, rather than submission of adversary comments on a completed document (§ 1501.6).

(c) Insuring the swift and fair resolution of lead agency disputes (§ 1501.5).

(d) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.7).

(e) Establishing appropriate time limits for the environmental impact statement process (§§ 1501.7(b)(2) and 1501.8).

(f) Preparing environmental impact statements early in the process (§ 1502.5).

(g) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(h) Eliminating duplication with State and local procedures by providing for joint preparation (§ 1506.2) and with other Federal procedures by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(i) Combining environmental documents with other documents (§ 1506.4).

(j) Using accelerated procedures for proposals for legislation (§ 1506.8).

(k) Using categorical exclusions to define categories of actions which do not individually or cumulatively have a significant effect on the human environment (§ 1508.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(l) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1508.13) and is therefore exempt from requirements to prepare an environmental impact statement.

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view traditional policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to insure full compliance with the purposes and provisions of the Act. The phrase "to the fullest extent possible" in section 102 means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible.

PART 1501—NEPA AND AGENCY PLANNING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609, and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55992, Nov. 29, 1978, unless otherwise noted.

§ 1501.1 Purpose.

The purposes of this part include:

(a) Integrating the NEPA process into early planning to insure appropriate consideration of NEPA's policies and to eliminate delay.

(b) Emphasizing cooperative consultation among agencies before the environmental impact statement is prepared rather than submission of adversary comments on a completed document.

(c) Providing for the swift and fair resolution of lead agency disputes.

(d) Identifying at an early stage the significant environmental issues deserving of study and deemphasizing insignificant issues, narrowing the scope of the environmental impact statement accordingly.

(e) Providing a mechanism for putting appropriate time limits on the environmental impact statement process.

action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.8 Time limits.

Although the Council has decided that prescribed universal time limits for the entire NEPA process are too inflexible, Federal agencies are encouraged to set time limits appropriate to individual actions (consistent with the time intervals required by § 1506.10). When multiple agencies are involved the reference to agency below means lead agency.

(a) The agency shall set time limits if an applicant for the proposed action requests them: *Provided*, That the limits are consistent with the purposes of NEPA and other essential considerations of national policy.

(b) The agency may:

(1) Consider the following factors in determining time limits:

(i) Potential for environmental harm.

(ii) Size of the proposed action.

(iii) State of the art of analytic techniques.

(iv) Degree of public need for the proposed action, including the consequences of delay.

(v) Number of persons and agencies affected.

(vi) Degree to which relevant information is known and if not known the time required for obtaining it.

(vii) Degree to which the action is controversial.

(viii) Other time limits imposed on the agency by law, regulations, or executive order.

(2) Set overall time limits or limits for each constituent part of the NEPA process, which may include:

(i) Decision on whether to prepare an environmental impact statement (if not already decided).

(ii) Determination of the scope of the environmental impact statement.

(iii) Preparation of the draft environmental impact statement.

(iv) Review of any comments on the draft environmental impact statement from the public and agencies.

(v) Preparation of the final environmental impact statement.

(vi) Review of any comments on the final environmental impact statement.

(vii) Decision on the action based in part on the environmental impact statement.

(3) Designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(c) State or local agencies or members of the public may request a Federal Agency to set time limits.

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55994, Nov. 29, 1978, unless otherwise noted.

§ 1502.1 Purpose.

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the

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

§ 1502.2 Implementation.

To achieve the purposes set forth in § 1502.1 agencies shall prepare environmental impact statements in the following manner:

(a) Environmental impact statements shall be analytic rather than encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be kept concise and shall be no longer than absolutely necessary to comply with NEPA and with these regulations. Length should vary first with potential environmental problems and then with project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of the Act and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decisionmaker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by sec. 102(2)(C) of NEPA environmental impact statements (§ 1508.11) are to be included in every recommendation or report.

On proposals (§ 1508.23).

For legislation and (§ 1508.17).

Other major Federal actions (§ 1508.18).

Significantly (§ 1508.27).

Affecting (§§ 1508.3, 1508.8).

The quality of the human environment (§ 1508.14).

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined. Agencies shall use the criteria for scope (§ 1508.25) to determine which proposal(s) shall be the subject of a particular statement. Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.

(b) Environmental impact statements may be prepared, and are sometimes required, for broad Federal actions such as the adoption of new agency programs or regulations (§ 1508.18). Agencies shall prepare statements on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decisionmaking.

(c) When preparing statements on broad actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such

as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements shall be prepared on such programs and shall be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.7), tiering (§ 1502.20), and other methods listed in §§ 1500.4 and 1500.5 to relate broad and narrow actions and to avoid duplication and delay.

§ 1502.5 Timing.

An agency shall commence preparation of an environmental impact statement as close as possible to the time the agency is developing or is presented with a proposal (§ 1508.23) so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decisionmaking process and will not be used to rationalize or justify decisions already made (§§ 1500.2(c), 1501.2, and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency appropriate environmental assessments or statements shall be commenced no later than immediately after the application is received. Federal agencies are encouraged to begin preparation of such assessments or statements earlier, preferably jointly with applicable State or local agencies.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7).

§ 1502.7 Page limits.

The text of final environmental impact statements (e.g., paragraphs (d) through (g) of § 1502.10) shall normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decisionmakers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements

in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

§ 1502.10 Recommended format.

Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. The following standard format for environmental impact statements should be followed unless the agency determines that there is a compelling reason to do otherwise:

(a) Cover sheet.

(b) Summary.

(c) Table of contents.

(d) Purpose of and need for action.

(e) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of the Act).

(f) Affected environment.

(g) Environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of the Act).

(h) List of preparers.

(i) List of Agencies, Organizations, and persons to whom copies of the statement are sent.

(j) Index.

(k) Appendices (if any).

If a different format is used, it shall include paragraphs (a), (b), (c), (h), (i), and (j), of this section and shall include the substance of paragraphs (d), (e), (f), (g), and (k) of this section, as further described in §§ 1502.11 through 1502.18, in any appropriate format.

§ 1502.11 Cover sheet.

The cover sheet shall not exceed one page. It shall include:

(a) A list of the responsible agencies including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and if appropriate the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.10).

The information required by this section may be entered on Standard Form 424 (in items 4, 6, 7, 10, and 18).

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of controversy (including issues raised by agencies and the public), and the issues to be resolved (including the choice

among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

§ 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.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The descriptions shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 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)).

[43 FR 55994, Nov. 29, 1978; 44 FR 873, Jan. 3, 1979]

§1502.17 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis, including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§1502.18 Appendix.

If an agency prepares an appendix to an environmental impact statement the appendix shall:

(a) Consist of material prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§1502.21)).

(b) Normally consist of material which substantiates any analysis fundamental to the impact statement.

(c) Normally be analytic and relevant to the decision to be made.

(d) Be circulated with the environmental impact statement or be readily available on request.

§1502.19 Circulation of the environmental impact statement.

Agencies shall circulate the entire draft and final environmental impact statements except for certain appendices as provided in §1502.18(d) and unchanged statements as provided in §1503.4(c). However, if the statement is unusually long, the agency may circulate the summary instead, except that the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

If the agency circulates the summary and thereafter receives a timely request for the entire statement and for additional time to comment, the time for that requestor only shall be extended by at least 15 days beyond the minimum period.

§1502.20 Tiering.

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions. (Section 1508.28).

§1502.21 Incorporation by reference.

Agencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the statement and its content briefly described. No material

may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

§ 1502.22 Incomplete or unavailable information.

When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking.

(a) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

(b) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable; (2) a statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment; (3) a summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment, and (4) the agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community. For the purposes of this section, ''reasonably foreseeable'' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

(c) The amended regulation will be applicable to all environmental impact statements for which a Notice of Intent (40 CFR 1508.22) is published in the FEDERAL REGISTER on or after May 27, 1986. For environmental impact statements in progress, agencies may choose to comply with the requirements of either the original or amended regulation.

[51 FR 15625, Apr. 25, 1986]

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of the Act the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrently with and integrated with environmental impact analyses and related surveys and studies required by the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*), and other environmental review laws and executive orders.

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other entitlements which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other entitlement is necessary, the draft environmental impact statement shall so indicate.

PART 1503—COMMENTING

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 55997, Nov. 29, 1978, unless otherwise noted.

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A–95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under §1506.10.

§ 1503.2 Duty to comment.

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved and agencies which are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority. Agencies shall comment within the time period specified for comment in §1506.10. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments.

(a) Comments on an environmental impact statement or on a proposed action shall be as specific as possible and may address either the adequacy of the statement or the merits of the alternatives discussed or both.

(b) When a commenting agency criticizes a lead agency's predictive methodology, the commenting agency should describe the alternative methodology which it prefers and why.

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A–95 (Revised), part I, sections 6(c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56000, Nov. 29, 1978, unless otherwise noted.

§ 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in § 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement,

agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long leadtime equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

§ 1506.2 Elimination of duplication with State and local procedures.

(a) Agencies authorized by law to cooperate with State agencies of statewide jurisdiction pursuant to section 102(2)(D) of the Act may do so.

(b) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement is not required to recirculate it except as a final statement. Otherwise the adopting agency shall treat the statement as a draft and recirculate it (except as provided in paragraph (c) of this section).

(c) A cooperating agency may adopt without recirculating the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) When an agency adopts a statement which is not final within the agency that prepared it, or when the action it assesses is the subject of a referral under part 1504, or when the statement's adequacy is the subject of

a judicial action which is not final, the agency shall so specify.

§ 1506.4 Combining documents.

Any environmental document in compliance with NEPA may be combined with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental impact statement, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental impact statement, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.17). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3 any environmental impact statement prepared pursuant to the requirements of NEPA shall be prepared directly by or by a contractor selected by the lead agency or where appropriate under § 1501.6(b), a cooperating agency. It is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest. Contractors shall execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project. If the document is prepared by contract, the responsible Federal official shall furnish guidance and participate in the preparation and shall independently evaluate the statement prior to its approval and take responsibility for its scope and contents. Nothing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the FEDERAL REGISTER and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the *102 Monitor*. An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and areawide clearinghouses pursuant to OMB Circular A–95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures including:

(a) A handbook which the Council may supplement from time to time, which shall in plain language provide guidance and instructions concerning the application of NEPA and these regulations.

(b) Publication of the Council's Memoranda to Heads of Agencies.

(c) In conjunction with the Environmental Protection Agency and the publication of the 102 Monitor, notice of:

(1) Research activities;

(2) Meetings and conferences related to NEPA; and

(3) Successful and innovative procedures used by agencies to implement NEPA.

§ 1506.8 Proposals for legislation.

(a) The NEPA process for proposals for legislation (§ 1508.17) significantly affecting the quality of the human environment shall be integrated with the legislative process of the Congress. A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement which can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(b) Preparation of a legislative environmental impact statement shall conform to the requirements of these regulations except as follows:

(1) There need not be a scoping process.

(2) The legislative statement shall be prepared in the same manner as a draft statement, but shall be considered the "detailed statement" required by statute; *Provided*, That when any of the following conditions exist both the draft and final environmental impact statement on the legislative proposal shall be prepared and circulated as provided by §§ 1503.1 and 1506.10.

(i) A Congressional Committee with jurisdiction over the proposal has a

rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) and the Wilderness Act (16 U.S.C. 1131 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(c) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Filing requirements.

(a) Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, attention Office of Federal Activities, EIS Filing Section, Ariel Rios Building (South Oval Lobby), Mail Code 2252–A, Room 7220, 1200 Pennsylvania Ave., NW., Washington, DC 20460. This address is for deliveries by US Postal Service (including USPS Express Mail).

(b) For deliveries in-person or by commercial express mail services, including Federal Express or UPS, the correct address is: US Environmental Protection Agency, Office of Federal Activities, EIS Filing Section, Ariel Rios Building (South Oval Lobby), Room 7220, 1200 Pennsylvania Avenue, NW., Washington, DC 20004.

(c) Statements shall be filed with the EPA no earlier than they are also transmitted to commenting agencies and made available to the public. EPA shall deliver one copy of each statement to the Council, which shall satisfy the requirement of availability to the President. EPA may issue guidelines to agencies to implement its responsibilities under this section and §1506.10.

[70 FR 41148, July 18, 2005]

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under §1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see §1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

§ 1506.11 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these regulations, the Federal agency taking the action should consult with the Council about alternative arrangements. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.12 Effective date.

The effective date of these regulations is July 30, 1979, except that for agencies that administer programs that qualify under section 102(2)(D) of the Act or under section 104(h) of the Housing and Community Development Act of 1974 an additional four months shall be allowed for the State or local agencies to adopt their implementing procedures.

(a) These regulations shall apply to the fullest extent practicable to ongoing activities and environmental documents begun before the effective date. These regulations do not apply to an environmental impact statement or supplement if the draft statement was filed before the effective date of these regulations. No completed environmental documents need be redone by reasons of these regulations. Until these regulations are applicable, the Council's guidelines published in the FEDERAL REGISTER of August 1, 1973, shall continue to be applicable. In cases where these regulations are applicable the guidelines are superseded. However, nothing shall prevent an agency from proceeding under these regulations at an earlier time.

(b) NEPA shall continue to be applicable to actions begun before January 1, 1970, to the fullest extent possible.

PART 1507—AGENCY COMPLIANCE

Sec.

AUTHORITY: NEPA, the Environmental Quality Improvement Act of 1970, as amended (42 U.S.C. 4371 *et seq.*), sec. 309 of the Clean Air Act, as amended (42 U.S.C. 7609), and E.O. 11514 (Mar. 5, 1970, as amended by E.O. 11991, May 24, 1977).

SOURCE: 43 FR 56002, Nov. 29, 1978, unless otherwise noted.

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with these regulations. It is the intent of these regulations to allow each agency flexibility in adapting its implementing procedures authorized by §1507.3 to the requirements of other applicable laws.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements enumerated below. Such compliance may include use of other's resources, but the using agency shall itself have sufficient capability to evaluate what others do for it. Agencies shall:

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate ECF system and that all participants in this case were served through that system.

s/ Mary Gabrielle Sprague