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

And

ESTOM YUMEKA MAIDU TRIBE OF THE ENTERPRISE RANCHERIA, CALIFORNIA,
Intervenor-Defendant-Appellee.

On Appeal from the U.S. District Court for the Eastern District of California
Case No. 2:12-cv-03021 TLN-AC (Hon. Troy L. Nunley)

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

Matthew G. Adams (CA Bar No. 229021)
Jessica L. Duggan (CA Bar No. 271703)
DENTONS US LLP
One Market Plaza, Spear Tower, 24th Flr
San Francisco, CA 94105
Telephone: (415) 267-4000
Facsimile: (415) 267-4198
Email: matthew.adams@dentons.com
Attorneys for Appellee
Estom Yumeka Maidu Tribe of the Enterprise Rancheria

Michael S. Pfeffer (CA Bar No. 88068)
John A. Maier (CA Bar No. 191416)
MAIER PFEFFER KIM GEARY & COHEN LLP
1440 Broadway, Suite 812
Oakland, CA 94612
Telephone: (510) 835-3020
Facsimile: (510) 835-3040
Attorneys for Appellee
Estom Yumeka Maidu Tribe of the Enterprise Rancheria

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

I. JURISDICTIONAL STATEMENT 1
II. STATEMENT OF THE ISSUES 2
III. STATEMENT OF THE CASE 3
A. The Tribe 3
B. The Project 5
C. The Administrative Process 6
D. The District Court Proceedings 8
IV. SUMMARY OF ARGUMENT 9
V. STANDARDS OF REVIEW 12
A. Motion To Strike 12
B. Summary Judgment 12
C. Statutory Interpretation 13
D. Regulatory Interpretation 13
E. Waiver 14
VI. ARGUMENT 14
A. The District Court Did Not Abuse Its Discretion In Striking The Meister Declaration 14
B. Interior Complied With NEPA 21
1. Interior Reasonably Defined the Purpose and Need for the Project 21
2. Interior Properly Evaluated Reasonable Alternatives to the Project 25
3. Interior Took A Hard Look At Potential Environmental Impacts Of The Project 31
4. Interior Complied With NEPA's Conflict-of-Interest Requirements 36
C. Interior Complied With IGRA 41

1. The Regulatory Definitions Of "Nearby Indian Tribe" And "Surrounding Community" Are Permissible And Entitled To Considerable Deference. 43

2. Interior Properly Applied IGRA's Implementing Regulations 46

D. Interior Complied With The IRA 47

E. Any Error In Interior's Parcel Description Is Moot And Harmless 52

F. There Is No Need To Stay Further Proceedings 54

VII. CONCLUSION 55

TABLE OF AUTHORITIES

Page(s)

Cases

Alaska Survival v. Surface Transp. Bd.,
705 F.3d 1073 (9th Cir. 2013) 22, 25, 26, 30, 31

Animal Def. Council v. Hodel,
840 F.2d 1432 (9th Cir. 1988) 19

Asarco, Inc. v. U.S. Envtl. Prot. Agency,
616 F.2d 1153 (9th Cir. 1980) 19

Ass'ns Working for Aurora's Residential Environment v. Colorado Dep't of Transp.,
153 F.3d 1122 (10th Cir. 1998) 41

Barboza v. Cal. Ass'n of Professional Firefighters,
651 F.3d 1073 (9th Cir. 2011) 14

Bear Lake Watch v. Federal Energy Regulatory Commission,
324 F.3d 1071 (9th Cir. 2003) 14

Conn. ex rel. Blumenthal v. United States Dep't of Interior,
228 F.3d 82 (2d. Cir. 2000) 9

Boyd v. City & County of San Francisco,
576 F.3d 938 (9th Cir. 2009) 13, 18

Buckingham v. United States Dep't of Agric.,
603 F.3d 1073 (9th Cir. 2010) 15

Camp v. Pitts,
411 U.S. 138 (1973).....16

Chevron v. Natural Resources Defense Council,
467 U.S. 837 (1984).....14, 44

Citizens Against Burlington v. Busey,
938 F.2d 190 (D.C. Cir. 1991).....23, 25

Citizens Exposing Truth About Casinos v. Kempthorne,
492 F.3d 460 (D.C. Cir. 2007) 24

City of Angoon v. Hodel,
803 F.2d 1016 (9th Cir. 1986) 25, 31

City of Carmel-By-The-Sea v. U.S. Dep't of Transp.,
123 F.3d 1142 (9th Cir. 1996) 28

City of Roseville v. Norton,
219 F. Supp. 2d 130 (D.D.C. 2002) 28

Cmtys. Against Runway Expansion v. Fed. Aviation Admin.,
355 F.3d 678 (D.C. Cir. 2004) 41

Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation,
502 U.S. 251 (1992) 49

Comm. For a Better Arvin v. Environmental Protection Agency,
786 F.3d 1169 (9th Cir. 2016) 14

County of Charles Mix v. United States Dep't of the Interior,
674 F.3d 898 (8th Cir. 2012) 51

County of Charles Mix v. United States Dep't of Interior,
799 F. Supp. 2d 1027 (D.S.D. 2011) 52

Ctr. For Biological Diversity v. U.S. Fish & Wildlife Serv.,
450 F.3d 930 (9th Cir. 2006) 17

Ctr. for Food Safety v. Vilsack,
844 F.Supp. 2d 1006 (N.D. Cal. 2012) 38

Davis v. Mineta,
302 F.3d 1104 (10th Cir. 2002) 40

Dep't of Transp. v. Pub. Citizen,
541 U.S. 752 (2004) 15, 31, 34

Drake's Bay Oyster Co. v. Jewell,
747 F.3d 1073 (9th Cir. 2014) 55

Fence Creek Cattle Co. v. U.S. Forest Serv.,
602 F.3d 1125 (9th Cir. 2010) 19

Fla. Power & Light v. Lorion,
470 U.S. 729 (1985).....16

Friends of the Earth v. Hintz,
800 F.2d 822 (9th Cir. 1986) 19

Grand Traverse Band of Ottawa & Chippewa Indians v. United States,
198 F.Supp. 2d 920 (W.D. Mich. 2002) 24, 46

Great Basin Mine Watch v. Hankins,
456 F.3d 955 (9th Cir. 2006) 14, 15, 19

Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci,
857 F.2d 505 (9th Cir. 1988) 22

Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.,
56 F.3d 1071 (9th Cir. 1995) 54

Cal. ex rel. Imperial Cty. Air Pollution Control Dist. v. United States,
767 F.3d 781 (9th Cir. 2014) 54

Kleppe v. Sierra Club,
427 U.S. 390 (1976).....28

Laguna Greenbelt v. Dep't of Transp.,
42 F.3d 517 (9th Cir. 1994) 28

Lands Council v. McNair,
537 F.3d 981 (9th Cir. 2008) 13, 16

Lands Council v. Powell,
395 F.3d 1019 (9th Cir. 2005) 17, 20

League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen,
615 F.3d 1122 (9th Cir. 2010) 32, 34

League of Wilderness Defenders Blue Mountains Biodiversity Project v. U.S. Forest Serv.,
689 F.3d 1060 (9th Cir. 2012) 23

Life of the Land v. Brinegar,
485 F.2d 460 (9th Cir. 1973) 41

Marsh v. Or. Natural Res. Council,
490 U.S. 360 (1989).....16, 32, 34, 35

MD Pharm., Inc. v. Drug Enforcement Admin.,
133 F.3d 8 (D.C. Cir. 1998).....21

Mescalero Apache Tribe v. Jones,
411 U.S. 145 (1973) (IRA) 6, 49

N. Alaska Envtl. Ctr. v. Kempthorne,
457 F.3d 969 (9th Cir. 2006) 27, 29

N. Idaho Wool Growers v. Vilsack,
816 F.3d 1095 (9th Cir. 2016) 35

Nat'l Ass'n of Home Builders v. Defs. Of Wildlife,
551 U.S. 644 (2007).....54

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.,
545 U.S. 967 (2005).....44

Native Ecosystems Council v. Weldon,
697 F.3d 1043 (9th Cir. 2012) 32

Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.,
460 F.3d 1125 (9th Cir. 2006) 17, 20

Organized Vill. of Kake v. United States,
795 F.3d 956 (9th Cir. 2015) 55

Pac. Coast Federation of Fishermen's Associations v. Blank,
693 F.3d 1084 (9th Cir. 2012) 13, 26

Pinnacle Armor v. United States,
923 F. Supp. 2d 1226 (E.D. Cal. 2013) 20

Price Rd. N'hood Ass'n v. Dep't of Transp.,
113 F.3d 1505 (9th Cir. 1997) 35

Protect Our Cmtys Found. v. Jewell,
825 F.3d 571 (9th Cir. 2016) 22, 26, 29

Redding Rancheria v. Jewell,
776 F.3d 706 (9th Cir. 2015) 44

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989).....22, 28, 32

San Luis & Delta-Mendota Water Auth. v. Jewell,
747 F.3d 581 (9th Cir. 2014) 19

San Luis & Delta-Mendota Water Auth. v. Locke,
776 F.3d 971 (9th Cir. 2014) 17, 18, 20

Santa Clara Pueblo v. Martinez,
436 U.S. 49 (1978).....53

Santa Rosa Band of Indians v. Kings County,
532 F.2d 665 (9th Cir. 1975) 9

Seattle Audubon Society v. Mosely,
80 F.3d 1401 (9th Cir. 1996) 26

Simmons v. U.S. Army Corps of Engineers,
120 F.3d 664 (7th Cir. 1997) 25

South Dakota v. United States Dep't of Interior,
423 F.3d 790 (8th Cir. 2005) 51

Stand Up for California! v. Dep't of the Interior,
919 F.Supp. 2d 51 (D.D.C. 2013).....46

Sw. Ctr. For Biological Diversity v. U.S. Forest Service,
100 F.3d 1443 (9th Cir. 1996) 13, 16, 17, 18, 19

Tavares v. Whitehouse,
851 F.3d 863 (9th Cir. 2017) 53

Thomas Jefferson Univ. v. Shalala,
512 U.S. 504 (1994).....14

Tri-Valley CAREs v. U.S. Dep't of Energy,
671 F.3d 1113 (9th Cir. 2012) 18, 19

United States v. Mead Corp.,
533 U.S. 218 (2000).....44

Utahns for Better Transportation v. DOT,
305 F.3d 1152 (10th Cir. 2002) 40, 41

Vill. of Barrington v. Surface Transp. Bd.,
636 F.3d 650 (D.C. Cir. 2011).....41

Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council,
435 U.S. 519 (1978).....15

Westlands Water Dist. v. United States,
376 F.3d 853 (9th Cir. 2004) 22, 23, 26, 27

Statutes

5 U.S.C.
§ 301.....50
§ 552.....21
§ 706.....13

25 U.S.C.
§ 2.....50
§ 9.....50
§ 2701.....24
§ 2702.....6, 8, 24
§ 2703.....42
§ 2719.....8, 42
§ 5108.....9, 50

28 U.S.C.
§ 1291.....2
§ 1331.....2

42 U.S.C.
§4332.....7, 22, 26
§ 7506.....36

Other Authorities

25 C.F.R.
§ 151.....50, 51, 52, 53
§151.3.....9, 50
§ 151.10.....51, 53
§ 292.2.....42, 43, 47

40 C.F.R.
§ 1501.7.....48
§ 1502.9.....35
§ 1502.13.....22
§ 1502.14.....26, 27, 29
§ 1502.25.....41
§ 1506.5.....37, 38, 39
§ 1508.9.....7

71 Fed. Reg. 58769 (Oct. 5, 2006).....44

72 Fed. Reg. 1954 (Jan. 17, 2007).....44

73 Fed. Reg.
29354 (May 20, 2008).....44
29354 (May 20, 2008).....45

77 Fed. Reg. 71612 (Dec. 3, 2012).....54

78 Fed. Reg. 113 (Jan. 2, 2013).....53, 54

Edwards v. Pac. Reg'l Dir.,
45 IBIA 42 (2007).....53

Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34263, 34266
(July 28, 1983).....40

National Indian Gaming Commission, *Mooretown Rancheria*
Restored Lands (Oct. 18, 2007).....46

Cohen's Handbook of Federal Indian Law (2012 ed.).....48

GLOSSARY

AR:	Administrative Record
AES:	Analytical Environmental Services, the contractor charged with preparing the EIS
APA:	Administrative Procedure Act
Colusa:	Plaintiff-Appellant The Cachil Dehe Band of Wintun Indians of the Colusa Indian Community
EA:	Environmental Assessment
EIS:	Environmental Impact Statement
Enterprise:	Intervenor-Defendant-Appellee The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California
EOR:	Colusa's Excerpts of Record
IGRA:	Indian Gaming Regulatory Act
Interior:	Defendants-Appellees United States Department of the Interior, et al.
IRA:	Indian Reorganization Act
Meister Report:	The Declaration and Report of Alan Meister
NEPA:	National Environmental Policy Act
ROD:	Record of Decision
SER:	Appellees' Joint Supplemental Excerpts of Record
Tribe:	Intervenor-Defendant-Appellee The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California

I. JURISDICTIONAL STATEMENT

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiff-Appellant the Cachil Dehe Band of Wintun Indians ("Colusa") moved for summary judgment on June 24, 2014, relying in part on an extra-record declaration and report from Alan Meister ("Meister Report"). On July 24, 2014, Defendants-Appellees Department of the Interior, *et al.* ("Federal Defendants" or "Interior") and Intervenor-Defendant-Appellee the Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California ("Enterprise" or "Tribe") each cross-moved for summary judgment and moved to strike the Meister Report. On June 17, 2015, the District Court granted the motions to strike the Meister Report. On September 24, 2015, the District Court denied Colusa's summary judgment motion and granted summary judgment to the Federal Defendants and the Tribe. On October 22, 2015, Colusa moved for reconsideration. The District Court denied Colusa's reconsideration motion on January 23, 2017. Colusa filed a notice of appeal on February 9, 2017. The Tribe agrees with Colusa that this Court now has jurisdiction under 28 U.S.C. § 1291.

II. STATEMENT OF THE ISSUES

A. Did the district court abuse its discretion in striking the Meister Report, where (i) the parties agreed that judicial review would be based on Interior's administrative record; (ii) the Meister Report was not part of the administrative record; (iii) the Meister Report significantly post-dates the decisions challenged by Colusa; and (iv) Colusa nonetheless sought to rely on the Meister Report to argue that those decisions were arbitrary and capricious?

B. Did Interior comply with the National Environmental Policy Act ("NEPA") by (i) briefly stating the purpose and need for its proposed action; (ii) considering reasonable alternatives to the proposed action; (iii) taking a hard look at the proposed action's potential environmental consequences; and (iv) complying with conflict-of-interest requirements?

C. Did Interior comply with the Indian Gaming Regulatory Act ("IGRA") by (i) promulgating permissible regulations defining "nearby Indian tribe" and "surrounding community"; and (ii) properly applying those regulatory definitions when reviewing the proposed action?

D. Did Interior comply with the Indian Reorganization Act ("IRA") by considering the Tribe's need for land?

E. Did the *Federal Register* notice announcing Interior's decision to take land into trust for the Tribe arbitrarily and capriciously describe the trust

acquisition, and, if so, is any such error (i) harmless or (ii) rendered moot by subsequent notices?

Colusa's Opening Brief ("Br.") also requested that the Court consider whether this appeal should be stayed until the California Supreme Court decides *United Auburn Indian Community v. Brown*, a case addressing the powers of the Governor of California under state law. (Br. at 59-61.) As explained in Part VI.F, *infra*, that question is no longer at issue.

III. STATEMENT OF THE CASE

A. The Tribe

Enterprise is a federally-recognized Indian tribe whose Maidu ancestors have lived for thousands of years near the Feather River, an area of California that includes modern-day Yuba County. *See* Excerpts of Record ("EOR") 381-82; Joint Supplemental Excerpts of Record ("SER") 494-96, 516. During the Gold Rush, the vast majority of the Tribe's ancestors were enslaved or killed. SER 1031 (Maidu population reduced from 8,000 to 900). The survivors were forced into hiding in the most remote and inhospitable corners of the Feather River basin. Administrative Record ("AR") 26599-60.

In an effort to remedy this situation, the United States acquired two parcels of land for the Tribe. SER 2-4, 290, 493-96. One parcel, known as Enterprise 1,

turned out to be a steep, remote hillside that could not accommodate the Tribe's housing and economic development needs. EOR 430; SER 290-91, 430. The other parcel, known as Enterprise 2, was more suitable for those purposes. SER 3, 290-91. Both parcels were supposed to be held in trust for the Tribe's perpetual use and benefit. EOR 618.

In 1965, however, the United States transferred Enterprise 2 to the State of California for use in the State's construction of Oroville Dam. SER 291. Members of the Tribe lost their homes and their community, and they were dispersed through the Sacramento Valley. SER 3, 291. Enterprise 2 is now submerged beneath a reservoir known as Lake Oroville. SER 291. Upon taking Enterprise 2 from the Tribe, the United States provided a small reimbursement (a total of $12,196 for the entire 40-acre parcel) to four Tribal members. EOR 469, 618; SER 3-4, 291-92. Other members never received any compensation. *Id*. Nor did the Tribe receive any replacement land from the United States or the State of California. *Id*.

The loss of Enterprise 2 left the Tribe without a land base from which to pursue economic opportunities capable of funding essential government services. EOR 469, 613. As a result, the Tribe's 900 members have had few educational opportunities, suffer high rates of unemployment and poverty, and are disproportionately reliant on state and federal assistance programs. EOR 613-14;

SER 296. More than 50% of the Tribe's labor force is either unemployed or earns less than $10,000 per year. *Id.*

B. The Project

Congress enacted the IRA and IGRA to help address these very problems. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973) (IRA); 25 U.S.C. § 2702(1) (IGRA). As authorized by those two statutes, the Tribe sought land on which to develop a casino and pursue economic self-sufficiency. Beginning in the early 2000s, the Tribe acquired rights to a 40-acre property within its aboriginal territory in Yuba County (the "Yuba Site") and developed plans to build a casino and resort-hotel there (the "Project"). EOR 337-38, 341-42, 426-27, 431-33. Consistent with IGRA's strict requirements, revenues from the Project will be used to fund tribal government, tribal services, and employment for tribal members, thereby fostering economic self-sufficiency and political self-determination. EOR 338, 377-78, 397-98, 401-402, 609-614; SER 403-04.

The Yuba Site is well-suited for the Project. Among other things, it is near an existing 20,000-seat concert venue and within a 900-acre "Sports and Entertainment Zone" approved by the voters of Yuba County. EOR 395, 609; SER 6, 312. The County has confirmed that the Tribe's economic development plans are "consistent and compatible with the County's general plan and zoning of the property." SER 416.

The Project requires that the Yuba Site be transferred from private fee ownership into federal trust for the Tribe. Recognizing that the fee-to-trust transfer will prevent Yuba County from collecting the taxes, development fees, and mitigation funds that would normally apply to a development on private fee land, the Tribe has agreed to a schedule of "in-lieu" tax and fee payments that will compensate the County for the lost amounts. SER 7, 9, 317-18, 416-19; EOR 793-94. These payments are memorialized in a Memorandum of Understanding between the Tribe and the County. EOR 809-826.

C. The Administrative Process

The 30,000-page administrative record memorializes Interior's thorough, decade-long administrative process addressing the requirements of NEPA, IGRA, and the IRA.

NEPA. NEPA is a procedural statute requiring federal agencies to identify, evaluate, and consider alternatives to the environmental consequences of their proposed actions. 42 U.S.C. §§ 4332(2)(C), 4332(2)(E). Here, the environmental review process began with the preparation of an Environmental Assessment ("EA"), a concise public document designed to briefly address environmental issues and facilitate NEPA compliance. 40 C.F.R. § 1508.9. Although the EA identified few environmental concerns, Interior decided to prepare a more comprehensive EIS. EOR 472-73; SER 1033-34. Interior made both the Draft EIS

and the Final EIS available for public review and comment, and the agency responded to all comments received. EOR 339, 428-29, 472-73. The Final EIS addressed a full range of environmental issues and included nearly 500 pages of environmental analysis (AR 22789-23885) and an additional 2,888 pages of expert technical reports (AR 23911-26799). The EIS found that the Project, with the implementation of recommended mitigation measures, will not have significant environmental impacts. EOR 347-54, 435-43 (summarizing findings). Interior incorporated all recommended mitigation measures as binding conditions on Project approval. EOR 355-75, 444-64.

IGRA. Congress enacted IGRA "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2702(1). The Tribe applied for a determination that the Yuba Site is eligible for gaming pursuant to 25 U.S.C. § 2719(b)(1)(A), which authorizes tribes to operate casinos on newly-acquired trust land if (i) Interior determines that gaming is in the best interest of the applicant tribe and would not be detrimental to the surrounding community; and (ii) the Governor of the state in which the land is located concurs in those determinations. SER 186-242, 286-362, 363-385. After reviewing the evidence and consulting with local, state, and federal stakeholders, Interior determined that the Project satisfies these requirements and issued a Record of

Decision ("ROD") memorializing that determination. EOR 332-403. The Governor of California concurred. EOR 853-54.

IRA. The IRA broadly authorizes Interior to acquire land in trust on behalf of federally-recognized Indian tribes. 25 U.S.C. § 5108. Land held in trust for a tribe is within the tribe's sovereign jurisdiction and is not subject to state or local taxation, zoning, or civil jurisdiction. *See, e.g., Santa Rosa Band of Indians v. Kings County*, 532 F.2d 665, 658, 667 (9th Cir. 1975); *Conn. ex rel. Blumenthal v. United States Dep't of Interior*, 228 F.3d 82, 85-86 (2d. Cir. 2000). The IRA's implementing regulations provide that Interior may take land into trust to further the general objectives of tribal self-determination, economic development or Indian housing. 25 C.F.R. §151.3(a). Interior determined that the Project would satisfy these objectives, and in November, 2012, the agency issued a ROD memorializing its decision to acquire the Yuba Site in trust for the Tribe. EOR 421-604.

D. The District Court Proceedings

Colusa filed suit, alleging that Interior violated NEPA, IGRA, and the IRA. EOR 711-727. The case was consolidated with two other challenges in the United States District Court for the Eastern District of California. EOR 87-89. All three groups of plaintiffs moved for temporary restraining orders to prevent the Yuba

Site from being acquired in trust for the Tribe. EOR 74-86; 698-700. All three motions were denied. EOR 74-86.

The parties agreed — and the district court ordered — that the case would be resolved on the basis of Interior's administrative record. EOR 69-71. But in moving for summary judgment Colusa nonetheless relied on an extra-record declaration and report from its paid economic consultant. EOR 46-52, 57-58, 268-276. The Tribe and Interior moved to strike the declaration, the report, and the portions of Colusa's summary judgment motion relying thereon. The district court granted the motions to strike. EOR 46-58.

The Tribe and Interior cross-moved for summary judgment. On September 24, 2015, the district court denied Colusa's motion for summary judgment and granted the cross-motions filed by the Tribe and Interior. EOR 13-45. Colusa filed a motion for reconsideration, arguing that the district court had not fully addressed all claims. EOR 257-262. The district court denied Colusa's reconsideration motion on January 23, 2017. EOR 2-11. This appeal followed.

IV. SUMMARY OF ARGUMENT

A. The district court did not abuse its discretion in striking the Meister Declaration. Under the APA, judicial review is generally limited to the administrative record in existence at the time of agency decision-making. In the district court, all parties agreed that judicial review would be based on Interior's

administrative record. It is undisputed that the Meister Report was not part of the administrative record. It is also undisputed that the Meister Report significantly post-dates the decisions challenged by Colusa. There are just four narrow exceptions to the rule against extra-record evidence. After addressing the undisputed facts and settled law, the district court properly found that the Meister Report does not qualify for any of the four exceptions. Colusa has identified no basis to conclude that the district court's decision to strike the Meister Report was an abuse of discretion.

B. Interior complied with NEPA. In a thorough, comprehensive EIS the agency reasonably defined the purpose and need for the Project; fully evaluated reasonable alternatives; and took a hard look at environmental issues, including socioeconomics, fish habitat, and air quality. At all times, the agency complied with the conflict-of-interest requirements set forth in NEPA's implementing regulations.

C. Interior complied with IGRA. The statute requires consultation with "nearby Indian tribes" but does not define that term. Interior has promulgated regulations (i) defining "nearby Indian tribes" as those within 25 miles of the proposed gaming site; and (ii) establishing a process by which more distant tribes may also consult by submitting information about governmental functions, infrastructure, or services. This regulatory definition represents a reasonable

construction of IGRA, and is entitled to deference. Interior properly applied the relevant regulations when it (i) accurately determined that Colusa is more than 25 miles from the Yuba Site; and (ii) specifically invited Colusa to submit information regarding the Project's potential to impact governmental functions, infrastructure, or services. Colusa has not provided any reasonable justification for its failure to respond to that invitation.

D. Interior complied with the IRA. The statute broadly authorizes Interior to acquire land for Indians. Interior has promulgated regulations specifying certain procedural requirements applicable to requests for trust land acquisition. Although the regulations specify issues Interior must consider, they do not serve as substantive limitations or prohibitions on the acquisition of trust land. Interior complied with all regulatory provisions, including the requirement to consider the Tribe's need for land, and its interpretation of its own regulations is entitled to deference.

E. Any error in Interior's description of the Yuba Site is moot and harmless. The allegedly-ambiguous *Federal Register* notice about which Colusa complains was immediately clarified and did not prejudice anyone.

F. There is no need to stay further proceedings. Colusa's motion to stay this appeal has been denied and no further response is necessary at this time.

V. STANDARDS OF REVIEW

A. Motion To Strike

The district court's decision to strike the Meister Report is reviewed for abuse of discretion. *Sw. Ctr. For Biological Diversity v. U.S. Forest Service*, 100 F.3d 1443, 1451 (9th Cir. 1996). Abuse of discretion is only found where "the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Boyd v. City & County of San Francisco*, 576 F.3d 938, 943 (9th Cir. 2009).

B. Summary Judgment

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

adequate to support a conclusion." *Bear Lake Watch v. Federal Energy Regulatory Commission*, 324 F.3d 1071, 1076 (9th Cir. 2003).

C. Statutory Interpretation

Interior's interpretations of IGRA and the IRA are governed by the two-step standard set forth in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). If Congress has "directly spoken to the precise question at issue," this Court must give effect to Congressional intent. *Chevron*, 467 U.S. at 842-43. If the statute is silent or ambiguous on the question at issue, this Court must uphold Interior's interpretation if permissible. *Id*. An interpretation is permissible if it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id*. at 843-44.

D. Regulatory Interpretation

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

E. Waiver

Parties must structure their participation in the administrative process so that it "alerts the agency to the parties' position and contentions, in order to allow the agency to give the issue meaningful consideration." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (quotations omitted). Any argument not raised by a party during the administrative process is deemed forfeited. *Id.*; *see also Buckingham v. United States Dep't of Agric.*, 603 F.3d 1073, 1080-81 (9th Cir. 2010). To avoid waiver, a party must raise objections "with sufficient clarity to allow the decision maker to understand and rule on the issue raised." *Buckingham*, 603 F.3d at 1080 (quoting *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002)). This requirement is strictly enforced. *Vt. Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553-54 (1978); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 967 (9th Cir. 2006).

VI. ARGUMENT

A. The District Court Did Not Abuse Its Discretion In Striking The Meister Declaration

Colusa contends the district court erred in striking the Meister Report. (Br. at 54-59.) Because the Meister Report plays a central role in several of Colusa's NEPA and IGRA arguments (*see* Parts VI.B and VI.C), the Tribe addresses the issue here at the outset.

Interior issued its RODs in September, 2011, and November, 2012. EOR 321-392, 409-463. Colusa filed suit on December 14, 2012. EOR 695-711. The earliest date for the Meister Report is June, 2013.[1] EOR 268-273. It is undisputed that the Report (i) was never provided to Interior during the administrative proceedings; (ii) is not part of Interior's Administrative Record; and (iii) post-dates the agency decisions at issue in this case.

Under the APA, "the focal point for judicial review should be 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). Post-decisional information "may not be advanced as a new rationalization … attacking an agency's decision." *Sw. Ctr. For Biological Diversity*, 100 F.3d at 1450. This rule arises from the narrow scope of APA judicial review. A reviewing court "is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Fla. Power & Light v. Lorion*, 470 U.S. 729, 744 (1985). The courts do not substitute their judgment for that of agency decision-makers, and each agency has discretion to rely on the opinions of its own qualified experts. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989); *Lands Council*, 537 F.3d at 987. Extra-record evidence is

[1] The Meister Report consists of a summary report and a declaration purporting to describe and authenticate the summary. EOR 268-273. The summary is dated May, 2013. EOR 271. The declaration was executed on June 24, 2014 and filed the next day. EOR 268-69.

generally prohibited because it would impermissibly transform the narrow, deferential inquiry mandated by the APA into a broad, *de novo* review. *See, e.g.*, *Ctr. For Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943-44 (9th Cir. 2006) ("We normally refuse to consider evidence that was not before the agency because it inevitably leads the reviewing court to substitute its judgment for that of the agency") (quotations omitted).

In this Circuit, there just four circumstances in which extra-record evidence may be admitted in an APA case: (i) where necessary to determine whether the agency has considered all relevant factors; (ii) where the agency itself has relied on documents not in the record; (iii) where extra-record evidence is necessary to explain technical terms or complex subject matter; and (iv) where plaintiffs make a showing of agency bad faith. *Sw. Ctr. For Biological Diversity*, 100 F.3d at 1450. These exceptions to the general rule are restricted to situations where extra-record documents are necessary to explain the administrative record. *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144-45 (9th Cir. 2006); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014). Consistent with that limited purpose, the exceptions are "narrowly construed and applied." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005). Moreover, the exceptions are limited to information available at the time of

agency decision-making; they do not apply to post-decisional material. *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130-31 (9th Cir. 2012).

The district court properly applied these well-established principles. EOR 48-52. In a detailed 13-page order (EOR 46-58), it carefully reviewed the facts, the law, and the parties' contentions, ultimately concluding that the Meister Report does not qualify for any of the four exceptions to the rule against extra-record evidence because (i) the Report "is not explanatory in nature, but rather provides new information in the form of opinions and calculations" (EOR 51); and (ii) the Report post-dates Interior's decision-making process (EOR 51-52). The court then granted Appellees' motions to strike. EOR 57-58.

The district court's decision to strike the Meister Report must be upheld absent an abuse of discretion. *Sw. Ctr. For Biological Diversity*, 100 F.3d at 1451. Abuse of discretion is only found where "the reviewed decision lies beyond the pale of reasonable justification under the circumstances." *Boyd*, 576 F.3d at 943. Colusa has not even approached that high bar. It has not cited any Circuit precedent for reversing a district court's decision to strike extra-record, post-decisional material.[2] (Br. at 54-59.) It does not seriously dispute the district

[2] Indeed, Circuit precedent overwhelmingly supports the district court's decision to strike the Meister Report. *See Sw. Ctr. for Biological Diversity*,100 F.3d at 1450–51 (no abuse of discretion in striking a letter dated over a month after decision); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014) (district court abused its discretion by allowing extra record (*cont'd*)

court's factual findings, legal analysis, or choice of remedy. (*Id*.) And it has not identified any aspect of the court's decision that is "beyond the pale." (*Id*.)

Colusa's primary argument seems to be that the Meister Report is admissible under the first (necessary to determine whether the agency considered all relevant factors) and third (necessary to explain complex subject matter) exceptions to the rule against extra-record evidence because "[Interior] neither obtained nor considered expert opinion on the question of the negative impacts on Colusa." (Br. at 57.) The argument fails for numerous reasons. First, it is not responsive to the abuse of discretion standard. Second, it is based on an inaccurate premise. Contrary to Colusa's representation, Interior both obtained and considered expert

---

declarations and creating a "forum for the experts to debate the merits"); *Tri-Valley CAREs*, 671 F.3d at 1131 (district court did not abuse discretion in refusing request to supplement record with post-decision report); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603–04 (9th Cir. 2014) (district court abused its discretion going beyond the administrative record); *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436–37 (9th Cir. 1988), amended, 867 F.2d 1244 (9th Cir. 1989) (district court properly limited review to administrative record); *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 976 (9th Cir. 2006) (district court did not abuse its discretion in refusing to admit extra-record evidence); *Ctr. for Biological Diversity*, 450 F.3d at 943–44 (district court did not abuse its discretion in striking extra-record documents); *Fence Creek Cattle Co. v. U.S. Forest Serv*., 602 F.3d 1125, 1131 (9th Cir. 2010) (district court did not abuse its discretion in denying motion to supplement the record); *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("district court went too far in its consideration of evidence outside the administrative record"); *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986) ("The court below properly limited review to the administrative record").

opinions regarding the Project's economic impacts.[3] SER 802-942; *see also* SER 575-602. Third, Colusa does not rely on the Meister Report to *explain* Interior's Administrative Record, but to *attack the sufficiency* of the agency's EIS. (*See, e.g.*, Br. at 23-24 [contending Meister Report is admissible to determine "whether the FEIS adequately addressed the potential adverse impacts on Colusa"].) The exceptions to the rule against extra-record evidence may not be invoked for that purpose. *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144-45 (9th Cir. 2006); *San Luis & Delta-Mendota Water Auth.*, 776 F.3d at 993. Fourth, Colusa's position is contrary to the interpretive rule mandating that the exceptions be "narrowly construed and applied." *Lands Council*, 395 F.3d at 1030. An extra-record document "must do more than raise nuanced points about a particular issue; it must point out an entirely new subject matter that the defendant agency failed to consider." *Pinnacle Armor v. United States*, 923 F. Supp. 2d 1226, 1234 (E.D. Cal. 2013) (quotations omitted). Otherwise, the exceptions would swallow the rule. Fifth, the exceptions do not apply to post-decisional material like the Meister Report. *Tri-Valley*, 671 F.3d at 1130-31.

Colusa also suggests that the federal government's fiduciary duty to Indian tribes supports the admissibility of the Meister Report. (Br. at 58-59.) Enterprise

[3] In fact, those expert opinions are acknowledged and reviewed in the Meister Report. EOR 272-73.

does not dispute the existence of a fiduciary relationship between the United States and Indian tribes. But the Tribe is unaware of any law dictating that federal-tribal relations modify or supersede APA standards of judicial review. Nor has Colusa cited any authority for that remarkable proposition. (*See* Br. at 54-59.)

Colusa also fails to provide a compelling justification for its failure to provide the subject matter contained in the Meister Report to Interior during the administrative process. Interior offered Colusa numerous opportunities to submit the Meister Report for consideration. *See* EOR 267, 339, 428-29. Colusa failed to take advantage of any of them. In a footnote, Colusa suggests that it "could not have been expected" to include proprietary economic information in public comments to Interior. (Br. at 36-37 n.13.) But the suggestion rings hollow in light of Colusa's subsequent inclusion of the Meister Report in public documents filed in this case. And if Colusa had truly been concerned about public disclosure during the administrative process, it could simply have submitted relevant information to Interior on a confidential or redacted basis. *See, e.g.*, 5 U.S.C. § 552(b)(4) (Freedom Of Information Act exemption for "commercial or financial information obtained from a person and privileged and confidential"); *MD Pharm., Inc. v. Drug Enforcement Admin.*, 133 F.3d 8, 13-14 (D.C. Cir. 1998) (upholding agency refusal to disclose confidential commercial information in administrative record).

B. Interior Complied With NEPA

NEPA is a procedural statute that does not mandate substantive environmental outcomes or dictate the results of agency decision-making. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-51 (1989). Instead, it sets out process by which federal agencies must prepare an EIS before approving major federal actions. 42 U.S.C. § 4332(2)(C). Preparation of an EIS "necessarily calls for judgment and that judgment is the agency's." *Westlands Water Dist. v. United States*, 376 F.3d 853, 866 (9th Cir. 2004). Reviewing courts do not "flyspeck an EIS or substitute [their] judgment for that of the agency concerning the wisdom or prudence of the proposed action." *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988). Interior properly exercised its judgment and fully complied with NEPA by completing an EIS that comprehensively evaluated the Project and a range of reasonable alternatives. As explained below, Colusa's claims to the contrary are unsupported by the record or the law.

1. Interior Reasonably Defined the Purpose and Need for the Project

An EIS must "briefly specify the purpose and need" for a proposed project. 40 C.F.R. § 1502.13. The courts "review purpose and need statements for reasonableness, giving the agency considerable discretion." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1084 (9th Cir. 2013); *see also Protect Our*

Cmtys Found. v. Jewell, 825 F.3d 571, 579 (9th Cir. 2016), *League of Wilderness Defenders Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012). An agency's purpose and need must be upheld "so long as the objectives the agency chooses are reasonable." *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). The reasonableness of agency objectives, in turn, is determined within the statutory context of the proposed federal action. *League of Wilderness Defenders*, 689 F.3d at 1070; *Westlands*, 376 F.3d at 867-68.

Interior's statement of purpose and need for the Project easily meets these standards. It explicitly recognizes and responds to (i) the poverty, unemployment, and absence of economic opportunity facing the Tribe and its members (SER 397); (ii) the fact that the Tribe lacks trust land suitable for economic development due to the loss of Enterprise 2 (SER 397, 422-25); (iii) IGRA's statutory findings, objectives and requirements (SER 404-05); and (iv) Interior's broader policies, regulations, and mission (EOR 427). In short, it was perfectly reasonable for Interior to consider taking land into trust for economic development purposes, pursuant to Congressional authorization, on behalf of a poor Indian tribe that had lost the land base necessary to provide employment, housing, and other government services for its citizens.

Colusa argues that Interior's purpose and need statement violates "IGRA's congressionally mandated purposes." (Br. at 27-28.) Not so. Contrary to Colusa's representation (Br. at 27), the purpose of IGRA is not to "confine tribal casinos to pre-1988 Indian lands." *See, e.g., Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 468-69 (D.C. Cir. 2007) (rejecting contention that IGRA's primary purpose was to prohibit gaming on newly-acquired land); *Grand Traverse Band of Ottawa & Chippewa Indians v. United States*, 198 F.Supp. 2d 920, 933 (W.D. Mich. 2002) ("As Congress clearly stated, the purpose of IGRA was not to limit the proliferation of Indian gaming facilities"), *aff'd* 369 F.3d 960 (6th Cir. 2004). The true intent of the statute is codified at 25 U.S.C. §§ 2701 and 2702, the latter of which specifies

> The purpose of this Act 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). Interior's statement of purpose and need clearly explains that the Project is designed to addresses those very same purposes. EOR 338, 427; SER 404-05. In fact, the statement explicitly cites and incorporates "the Congressional purposes set out in [IGRA]." *Id.*. It is difficult to imagine a purpose and need statement more consistent with IGRA than the one at issue here.

Colusa also suggests (albeit without explicitly alleging) that Interior's purpose and need statement gave too much emphasis to the Tribe's objectives.

(*See* Br. 25, 27-28.) The suggestion is without merit. It was perfectly permissible for Interior to consider the Tribe's goals and objectives; in fact, it would have been improper for to do otherwise. *Alaska Survival*, 705 F.3d at 1084-85 (agency consideration of permit applicant's objectives); *City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) (improper for agency to ignore applicant's economic goals). Furthermore, Interior's purpose and need statement was not limited to the Tribe's perspective; the agency also addressed the statutory mandates of IGRA, as well as the Department's own regulations, policies, and mission. SER 404-05; EOR 427. Moreover, Interior's purpose and need was broad enough to permit detailed consideration of a range of alternatives in the EIS. SER 409-458, 520-762; *see also* Part VI.B.2, *infra*. In any event, Colusa has failed to identify any specific element of Interior's objectives that is unreasonable. *See Citizens Against Burlington*, 938 F.2d at 196 (purpose and need must be upheld "so long as the objectives the agency chooses are reasonable").[4] For each of these reasons, Interior's purpose and need statement should be upheld.

[4] These same facts distinguish the instant case from *Simmons v. U.S. Army Corps of Engineers*, 120 F.3d 664 (7th Cir. 1997), cited by Colusa at 27. In *Simmons*, the challenged purpose and need statement was strictly limited to the project proponent's objectives, failed to address relevant federal policy concerns, and was drawn too narrowly to permit consideration of reasonable alternatives. *Simmons*, 120 F.3d at 669. In contrast, Interior's purpose and need statement represents a balance between the purposes of the agency and those of the Tribe, and, as explained *infra*, it was broad enough to permit full consideration of a reasonable range of alternatives.

2. Interior Properly Evaluated Reasonable Alternatives to the Project

An EIS must evaluate reasonable alternatives to a proposed project. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.14. A deferential "rule of reason" governs both the choice of alternatives and the extent to which the EIS must discuss each one. *Westlands*, 376 F.3d at 868. The rule of reason requires only that an EIS address sufficient alternatives to permit a "reasoned choice." *Pac. Coast Fed'n of Fishermen's Ass'ns*, 693 F.3d at 1099. Agencies are "under no obligation to consider every possible alternative to a proposed action." *Seattle Audubon Society v. Mosely*, 80 F.3d 1401, 1404 (9th Cir. 1996); *see also Alaska Survival*, 705 F.3d at 1087 (EIS "need not consider an infinite range of alternatives"). Nor must they undertake a detailed analysis of alternatives that are infeasible, ineffective, remote, speculative, or inconsistent with project purposes. *See, e.g., Protect Our Cmtys Found.*, 825 F.3d at 580-81; *Pac. Coast Fed'n of Fishermen's Ass'ns*, 693 F.3d at 1099. For such alternatives, the agency need only provide a "brief[] discuss[ion] of the reasons for their having been eliminated." 40 C.F.R. § 1502.14(a).

Interior's analysis of alternatives went well beyond the requirements of the rule of reason. The evaluation began with consideration of a variety of economic development projects and project sites within the Tribe's aboriginal territory. SER 455-56; EOR 340, 429-30. Interior carried forward five alternatives for detailed analysis in the EIS. SER 410- 458 (describing alternatives), SER 520-762

(evaluation of environmental consequences), EOR 340-42 (screening process). Those five alternatives included different locations, different types of development (including both gaming and non-gaming development options), different development intensities, and the alternative of taking no action at all. *Id*. The EIS also addressed three other options which ultimately proved infeasible. *See* SER 455-52; EOR 432-36.

The five alternatives evaluated in detail in the EIS provided Interior with a reasonable set of options: approve the Project as proposed; approve the Project with modifications (either by modifying the proposed development or by modifying its location); or deny the Project altogether. SER410-58 . Circuit case law confirms that this approach satisfies the rule of reason. *See, e.g.*, *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978 (9th Cir. 2006) ("Under NEPA, an agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative"); *Westlands*, 376 F.3d at 872 ("The touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making").

Colusa objects to Interior's decision to approve EIS alternative A (the Project), contending that the agency improperly "discarded" alternative B (a smaller casino at the Yuba Site), alternative C (a water park at the Yuba Site), alternative D (a casino at an alternative site), and alternative E (no action). (Br. at

29.) Once again, Colusa's premise is inaccurate. Alternatives B, C, D, and E were not "discarded" or otherwise eliminated from the EIS; rather, those alternatives were included and fully evaluated in the document. SER 429-55, 520-762.

Moreover, Colusa's objection to the approval of Alternative A is precisely the sort of substantive challenge that is *not* permitted under NEPA. The Supreme Court has made it clear that "NEPA itself does not mandate particular results, but simply prescribes the necessary process." *Robertson*, 490 U.S. 332, 351 (1989); *see also Laguna Greenbelt v. Dep't of Transp*., 42 F.3d 517, 523 (9th Cir. 1994) (adopting same principle). Thus, a reviewing court "cannot interject itself…as to the choice of the action to be taken." *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). While Colusa may have preferred that Interior approve alternatives B, C, D, or E, such preferences are "simply not grounds for finding that the agency failed to meet its obligations…or that the agency's decision was arbitrary and capricious." *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 170 (D.D.C. 2002), *aff'd* 348 F.3d 1020 (D.C. Cir. 2003) (rejecting similar NEPA objection to a casino project); *see also City of Carmel-By-The-Sea v. U.S. Dep't of Transp*., 123 F.3d 1142, 1159 (9th Cir. 1996) (rejecting NEPA argument where "ultimately, [plaintiff]'s disagreement . . . appears to be a substantive one").

Colusa also complains about the fact that alternatives B and D are smaller than the Project. (Br. at 29.) But there was nothing improper or unreasonable

about Interior's decision to include these smaller alternatives in the EIS. Alternative B presents the option of a reduced-intensity development at the Yuba Site. EOR 344, 433; SER 429-438. This was a perfectly reasonable possibility to consider. *See, e.g., N. Alaska Envtl. Ctr.*, 457 F.3d at 978 (upholding agency evaluation of reduced-intensity alternative). Alternative D presents the option of economic development at the Butte Site, the Tribe's existing trust land. EOR 341, 345, 430, 434-35; SER 447-453. This, too, was a reasonable possibility to consider. As explained in the EIS, Alternative D represents the largest development that can feasibly be built on the Butte Site. *See* SER 1018-19 (larger development would be infeasible and cost-prohibitive). The fact that it is smaller than the Project is not indicative of arbitrary decision-making; rather, it is evidence that the Butte Site is not well-suited for economic development.

Colusa further objects to the EIS's treatment of an alternative development site along California Highway 99. (Br. at 30.) The objection is without basis. As noted above, alternatives found to be infeasible, ineffective, remote, or speculative need not be fully evaluated in an EIS. 40 C.F.R. § 1502.14(a); *Protect Our Cmtys Found.,* 825 F.3d at 580-81. Consistent with that rule, the EIS explains that the Highway 99 Site was determined infeasible and eliminated from further consideration due to the presence of sensitive biological resources, absence of water and wastewater infrastructure, and the Tribe's inability to secure investment.

SER 456; *see also* EOR 340, 430. In contrast to these problems, the Yuba Site is located in an area designated for entertainment land uses (EOR 399; SER 501-11); is immediately adjacent to necessary infrastructure that can readily be adapted to the Project (SER 472-73, 778-794); and has few sensitive biological resources (SER 1117-24, 1132-33). Interior's treatment of the Highway 99 site was entirely appropriate.

Colusa also contends that Interior improperly relied on the Tribe's representations about the absence of available financing for alternative development sites. (Br. at 29-30.) The argument fails for two reasons. First, controlling case law allows agencies to rely on information submitted by a permit applicant. *See, e.g., Alaska Survival*, 705 F.3d at 1087 ("no error" where agency relied on applicant's assessment of feasibility). Second, absence of financing was only one of the factors supporting Interior's conclusion that the alternative sites were infeasible. *See* EOR 340-41, 429-30; SER 455-56.

Colusa further argues that the EIS should have evaluated a land exchange or a casino development on 63 acres of land adjacent to the City of Oroville. (Br. at 30-31.) Colusa waived these arguments by failing to raise them during the NEPA process. EOR 523-32 (comments on Draft EIS); *see also* SER 164 (failure to comment during scoping process); SER1021-24 (failure to comment on Draft EIS); EOR 525 (brief mention of 63-acre site fails to propose casino alternative); *Public*

Citizen, 541 U.S. at 764-65 (waiver). Moreover, both arguments would fail even if they were not waived. The administrative record shows that the 63-acre property is dedicated for future use as low- and moderate-income housing (SER 289; EOR 595-96) and is unsuitable for a casino-hotel development because it is "landlocked" (*i.e.*, lacks access to the public road system), surrounded by residences, and near a school (SER 1020.7).[5] And the administrative record contains no support for Colusa's suggested land exchange.

In this Circuit, "[t]hose challenging the failure to consider an alternative have a duty to show that the alternative is viable." *Alaska Survival*, 705 F.3d at 1087. To meet that burden, Colusa was required to identify "specific evidentiary facts" demonstrating the viability of its preferred alternatives. *City of Angoon*, 803 F.2d at 1022. It has utterly and completely failed to do so here. (*See* Br. at 25-31.) For this reason, in addition to those set forth above, each of Colusa's objections to the alternatives analysis must be rejected.

[5] Indeed, Colusa's own comments on the Final EIS appear to concede that the 63-acre parcel is dedicated for housing. *See* EOR 525.

3. Interior Took A Hard Look At Potential Environmental Impacts Of The Project

In a lengthy series of overlapping arguments, Colusa contends that Interior failed properly to evaluate the environmental consequences of the Project. (Br. at 31-39.) Such claims are subject to the "hard look" test: if the agency has taken a hard look at environmental issues, the EIS must be upheld. *Robertson*, 490 U.S. at 350. The hard look test does not mandate perfection. Consistent with NEPA's procedural focus, it simply requires that the EIS contain "a reasonably thorough discussion of the significant aspects of [the project's] environmental consequences." *League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). In other words, an EIS must be upheld if it "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Id*.

In applying the hard look test, the courts do not "impose themselves as a panel of scientists that instructs the agency, chooses among scientific studies, and orders the agency to explain every possible scientific uncertainty." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012). Indeed, the Supreme Court has been clear that federal agencies "have discretion to rely on the opinions of [their] own qualified experts even if, as an original matter, a court mind find contrary views more persuasive." *Marsh*, 490 U.S. at 378 (1978).

Ignoring this deferential legal framework, Colusa raises four narrow, hyper-technical arguments attacking the scientific judgments expressed in the EIS. (Br. 31-39.) None of the four arguments has merit.

First, Colusa complains about EIS Appendix M, an expert technical report addressing socioeconomic issues. (Br. at 32-36.) In Colusa's view, the Meister Report is a more reliable because it was drafted with "full access to information" about Colusa's gaming and governmental revenues. (Br. at 34, 36). But the Meister Report was never presented to Interior during the administrative process, is not part of the administrative record, was properly stricken by the District Court, and therefore cannot now serve as the basis for invalidating the EIS. (*See* Part VI.A, *supra*.) Moreover, the record demonstrates that Interior did, in fact, take a hard look at socioeconomic issues. EOR 350, 375-78, 383-92, 397-401, 439; SER 802-942; SER 575-602. Appendix M was prepared by experts on economic issues in the gaming and hospitality industry. SER 936-38. Contrary to Colusa's representation, their study was not "outright guesswork" (Br. at 31), "pure speculation" (Br. at 33), or "unsubstantiated guesses" (Br. at 35). Appendix M thoroughly and responsibly evaluated the Project's potential to impact revenues at other tribal gaming facilities in the region, using quantitative data, qualitative information, and verified modeling programs to test three different economic scenarios. SER 812-16. The evaluation showed that some tribal gaming facilities

might be affected by the Project, but none would face significant hardship.[6] *See generally* SER 812-885. Colusa may prefer the Meister Report to Appendix M, but Interior has discretion to rely on the opinions of its own qualified experts. *Marsh*, 490 U.S. at 378. And it cannot be said that the EIS failed to provide "a reasonably thorough discussion of…probable environmental consequences" related to socioeconomic issues. *Allen*, 615 F.3d at 1130. That is all the hard look standard requires. *Id*.

Second, Colusa alleges, with little elaboration, that several appendices to the EIS contained stale data and should have been supplemented. (Br. at 32.) Six of the seven claims — those relating to appendices D, E, G, H, J, and L — were never presented to Interior during the administrative process, and have therefore been waived. *See* EOR 523-32 (failure to present); *Public Citizen*, 541 U.S. at 764-65 (waiver). The seventh claim — namely, that the economic analysis in Appendix M should be supplemented to address the 2008 economic downturn — was presented to and squarely addressed by Interior. EOR 526, 595. The agency concluded that preparation of a supplemental analysis was unnecessary and might lead to inaccurate long-term projections. *Id.* That determination was consistent with controlling law. An agency "need not supplement an EIS every time new

[6] Indeed, the two casinos expected to face the greatest decline in revenues — neither of which has any affiliation with Colusa — will only experience "nominal" operational impacts. SER 934.

information comes to light." *Marsh*, 490 U.S. at 373. Supplementation is only required if there are substantial changes to the proposed action or if significant new information demonstrates the action "will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Id*. at 374; *see also* 40 C.F.R. §1502.9(c). "To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made." *Marsh*, 360 U.S. at 373; *see also Price Rd. N'hood Ass'n v. Dep't of Transp*., 113 F.3d 1505, 1510 (9th Cir. 1997) ("[t]o require more would task the agencies with a sisyphean feat"). Interior's decision not to supplement was reasonable, clearly articulated, and entitled to deference, and it should be upheld. *Id*.; *see also N. Idaho Wool Growers v. Vilsack*, 816 F.3d 1095, 1106 (9th Cir. 2016) (upholding decision not to prepare supplemental analysis where relevant issues were discussed in Final EIS).

Third, Colusa alleges that the EIS does not provide a hard look at air emissions because (i) the document "merely asserted" that the Project would conform to state air quality plans but "did not give any figures that would support that assertion" and (ii) Project-related emissions appear to exceed applicable *de*

minimis thresholds.[7] (Br. at 37.) Neither of these assertions is an accurate representation of the record. The EIS disclosed the Project's unmitigated emissions. SER 547-48. It identified a suite of mitigation measures (none of which is challenged by Colusa) capable of minimizing those emissions. SER 761-67. And it provided detailed information, including figures, explaining that the mitigation measures will reduce emissions below relevant *de minimis* thresholds. SER 548, 767. This was more than enough to satisfy the hard look standard.

Fourth, Colusa takes issue with Interior's evaluation of "six fish species of concern, of which five are listed under the Endangered Species Act." (Br. at 37-39.) Tellingly, it never bothers to identify any of the six species by name. (*Id*.) But the gist of the argument seems to be that the Project might impact critical fish habitat. Interior took a careful hard look at that very issue. EOR 336-38, 424-26, 604, 611. After reviewing federal endangered species databases and visiting the Yuba Site, the agency concluded that the aquatic features near the property — essentially, agricultural drainage ditches — do not provide appropriate habitat for any fish species of concern, endangered or otherwise. EOR 604. Interior also evaluated the possibility that wastewater or stormwater runoff from the Yuba Site could reach critical fish habitat elsewhere in the region, ultimately concluding that

[7] The thresholds come from the Clean Air Act's general conformity requirement, which requires federal agencies to ensure that their actions and permits do not authorize activities not in conformity with planning documents known as "State Implementation Plans" or "SIPs." 42 U.S.C. § 7506(c)(1).

on-site wastewater and stormwater treatment would eliminate any risk of adverse effect. SER 528-29. In addition, Interior consulted with the United States Fish and Wildlife Service, the federal agency charged with protecting endangered fish species and their habitats, which voiced no concerns. SER 795-801; EOR 595-96. These analyses represent a hard look at potential impacts to fish habitat.

4. Interior Complied With NEPA's Conflict-of-Interest Requirements

In its final set of NEPA arguments, Colusa accuses Interior of a conflict-of-interest. (Br. at 39-41.) The accusation does not withstand scrutiny. NEPA's implementing regulations impose three conflict-of-interest requirements, and, as the district court properly concluded, Interior satisfied each one. EOR 21-23 (district court analysis); 40 C.F.R. § 1506.5(c) (three requirements).

First, the regulations provide that an EIS must be prepared either by the lead federal agency or by a consultant selected by the lead federal agency. 40 C.F.R. § 1506.5(c). The administrative record confirms that Interior selected Analytical Environmental Services ("AES") as the preparer of the EIS. *See* EOR 889 ("AES is the consulting firm that BIA selected in accordance with 40 C.F.R. Section 1506.5(c)" and "[t]his Agreement constitutes…BIA's selection of AES as the primary EIS contractor"). That choice satisfied the first conflict-of-interest requirement.

Second, the regulations require EIS contractors to execute a disclosure statement confirming they have no financial or other interest in the project. 40 C.F.R. § 1506.5(c). The record shows AES executed the required statement. *See* EOR 889 ("This Agreement constitutes the required disclosure statement"). Thus, the second requirement was also satisfied.

Third, the regulations mandate that the lead federal agency participate in the preparation of the EIS, independently evaluate the EIS prior to approval, and take responsibility for the EIS' scope and contents. 40 C.F.R. § 1506.5(c). The record establishes that Interior properly discharged each of these responsibilities. *See, e.g.*, SER 298 (decision to prepare EIS); EOR 890 (responsibility for scope and contents of EIS); SER 585-59 (direction of scoping process); EOR 836-29 (notice of availability of the Draft EIS); SER 1024-26 (supervision of hearing on Draft EIS); EOR 582-604 (responses to comments on the Draft EIS); SER 769-71 (preparation of Final EIS). The agency officials directly responsible for overseeing the EIS are clearly identified in the "list of preparers" presented in chapter 7 of the document. SER769-771 . This evidence is more than enough to satisfy the third conflict-of-interest requirement. *See Ctr. for Food Safety v. Vilsack*, 844 F.Supp. 2d 1006, 1022-23 (N.D. Cal. 2012) (relying on list of preparers to reject conflict-of-interest claim), *aff'd* 718 F.3d 829 (9th Cir. 2013).

Colusa alleges Interior nonetheless violated NEPA by failing to require that AES swear to the absence of conflicts of interest *under penalty of perjury*. (Br. at 40.) But no such oath is required. NEPA's implementing regulations merely require contractors to "execute a disclosure statement prepared by the lead agency…specifying that they have no financial or other interest in the outcome of the project." 40 C.F.R. § 1506.5(c).[8] That is precisely what happened here. EOR 889.

Colusa also takes issue with AES' willingness to provide permitting advice. (Br. at 39-40.) In Colusa's view, this created "a clear conflict of interest" because "no permit approvals would be required unless Enterprise's application were to be approved." (Br. at 40.) Yet again, Colusa's premise is inaccurate. The Project was not the only potential course of action requiring permits; other alternatives, including those which Colusa believes were improperly "discarded," would also

[8] The Bureau of Indians Affairs NEPA Guidebook, cited by Colusa at 39, is not to the contrary. The Guidebook simply incorporates by reference the requirements of 40 C.F.R. §1506.5(c): "Any consulting firm chosen to prepare an EIS for the BIA must prepare a statement disclosing that it has 'no financial or other interests in the project.' (40 C.F.R. § 1506.5(c))." BIA NEPA Guidebook, § 8.7.4 *available at* https://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf (last accessed Aug. 16, 2017). The Guidebook's only reference to "penalty of perjury" comes in an unlabeled, undated sample document buried in an appendix. *Id*., Appendix 11. The contents of the sample document are explicitly described as "an example" rather than an agency requirement. *Id*., § 8.7.4. In any event, the Guidebook does not carry the force of law and its requirements are not directly enforceable. *Id*., § 1.1. ("This Guidebook is strictly advisory. It does not create policy, add to, delete from nor otherwise modify any legal requirement.")

have required extensive state and federal permitting. *See, e.g.*, EOR 430 (Highway 99 site contains wetlands and requires development of new wastewater treatment infrastructure).

Colusa's reliance on *Davis v. Mineta*, 302 F.3d 1104 (10th Cir. 2002) and *Utahns for Better Transportation v. DOT*, 305 F.3d 1152 (10th Cir. 2002) is likewise in error. In *Davis*, an agreement between the environmental contractor and the project proponent prohibited the contractor from finding that the project at issue would significantly impact the environment. *Davis*, 302 F.3d at 1112. The agreement between Interior and AES contains no comparable provision. EOR 889-893. And, contrary to Colusa's representation (Br. at 40), *Utahns for Better Transportation* does not mandate invalidation of Interior's EIS. In fact, *Utahns* explicitly *refused to invalidate and remand an EIS* even though the lead agency had a conflict-of-interest. *See Utahns for Better Transportation*, 305 F.3d at 1184-85.

Indeed, there is good reason to conclude that an EIS contractor 's willingness to advise on permitting issues does not constitute a NEPA violation. For one thing, such a result would be inconsistent with applicable guidance from the Council on Environmental Quality. *See* Council on Environmental Quality *Guidance Regarding NEPA Regulations*, 48 Fed. Reg. 34263, 34266 (July 28, 1983) (cautioning against "overly burdensome" application of conflict-of-interest

requirements). For another, permitting analysis is a mandatory element of every EIS. *See* 40 C.F.R. § 1502.25(b) (Draft EIS must address "federal permits, licenses, and other entitlements").

Moreover, even if AES' willingness to advise on permitting issues had violated NEPA (and, as explained above, it did not), there would be no reason to invalidate Interior's EIS. In reviewing an alleged breach of NEPA's conflict-of-interest requirements, "the ultimate question for the court is [ ] whether the alleged breach compromised the objectivity and integrity of the NEPA process." *Ass'ns Working for Aurora's Residential Environment v. Colorado Dep't of Transp.*, 153 F.3d 1122, 1129 (10th Cir. 1998). Absent evidence that the NEPA process was compromised, "there is no cause to invalidate the EIS." *Cmtys. Against Runway Expansion v. Fed. Aviation Admin.*, 355 F.3d 678, 686 (D.C. Cir. 2004); *see also Vill. of Barrington v. Surface Transp. Bd.*, 636 F.3d 650, 673 (D.C. Cir. 2011) (no need to consider conflict-of-interest claims absent substantive errors in EIS); *Utahns for Better Transp.*, 305 F.3d at 1184-85 (conflict of interest does not invalidate EIS if agency engaged in adequate supervision); *Ass'ns Working for Aurora's Residential Environment*, 153 F.3d at 1129 (same); *Life of the Land v. Brinegar*, 485 F.2d 460, 468 (9th Cir. 1973) (same). Here, there is no record evidence that AES' willingness to advise on permitting issues compromised the NEPA process in any way.

C. Interior Complied With IGRA

As relevant here, IGRA authorizes gaming on newly-acquired tribal trust land if (i) Interior determines that gaming is in the best interest of the applicant tribe and would not be detrimental to the surrounding community; and (ii) the Governor of the state in which the land is located concurs in those determinations. 25 U.S.C. § 2719(b)(1)(A). This is commonly known as a "two-part determination" or "two-part process."

Before making a two-part determination, Interior must consult with "appropriate State and local officials, including officials of other nearby Indian tribes." 25 U.S.C. § 2719(b)(1)(A). IGRA does not define "nearby Indian tribe" or "surrounding community" and imposes no further requirements with regard to the consultation process. *Id*.; *see also* 25 U.S.C. § 2703.

Interior has promulgated formal regulations implementing and defining key elements of the two-part process. *See* 25 C.F.R. part 292. The regulations define "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." 25 C.F.R. § 292.2. "Surrounding community" is defined as "local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment." *Id*. In short, 25 miles is the critical distance. However,

the regulations also establish a process by which local governments and Indian tribes located more than 25 miles from a proposed gaming site may consult by submitting information about potential impacts to governmental functions, infrastructure, or services. *Id*.

The Tribe applied for a two-part determination from Interior. The application (and a later supplement) provided substantial evidence of the Tribe's historic connection to the Yuba Site, the benefits of the Project to the Tribe and its neighbors, and the absence of detriment to the surrounding community. SER 186-242, 286-362, 363-85. Interior carefully reviewed this evidence, as well as additional material obtained through the IRA and NEPA review processes. *See* EOR 332-403 (identifying and summarizing material). The agency then consulted with "appropriate State and local officials, including officials of other nearby Indian tribes," as required by IGRA. *See* SER 1034-51; EOR 394-96 (describing consultation process and identifying consulting parties). On the basis of all of this evidence, Interior determined that the Project would be in the best interest of the Tribe and would not be detrimental to the surrounding community. EOR 375-403 (two-part determination). The Governor of California concurred in that determination. EOR 853-54.

Colusa is located more than 25 miles from the Yuba Site, but nonetheless contends it should have been consulted during the two-part process. (Br. at 41-49.)

It alleges that the Secretary's regulations defining "nearby Indian tribe" and "surrounding community" are improper. (Br. at 45-46.) It also alleges that Interior's application of those regulations to Colusa was arbitrary and capricious. (Br. at 46-49.) As the District Court properly concluded (EOR 29-33), neither claim has merit.

1. The Regulatory Definitions Of "Nearby Indian Tribe" And "Surrounding Community" Are Permissible And Entitled To Considerable Deference

Congress delegated to Interior the authority to promulgate regulations implementing IGRA. *See Redding Rancheria v. Jewell*, 776 F.3d 706, 711-12 (9th Cir. 2015). Because the statute does not define "nearby Indian tribe" or "surrounding community," the regulatory definitions of those terms are entitled to considerable deference. *Chevron*, 467 U.S. at 842-43. The regulations must be affirmed so long as they represent a permissible construction of IGRA. *Id.*; *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). Deference is particularly appropriate here because Interior's regulations were promulgated pursuant to formal notice-and-comment rulemaking. *See* 71 Fed. Reg. 58769 (Oct. 5, 2006) (notice of proposed rulemaking); 72 Fed. Reg. 1954 (Jan. 17, 2007) (additional comment period); 73 Fed. Reg. 29354 (May 20, 2008) (notice of final rule); *United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2000) (particular deference to formally-promulgated rules).

Colusa attacks the regulatory definitions of "nearby Indian tribe" and "surrounding community" without acknowledging the deference to which they are due. (Br. at 45-46). In Colusa's view, the agency "did not supply a reasoned independent judgment" for incorporating a 25-mile consultation radius into those definitions. (*Id.*). The claim is baseless. In promulgating the regulations, Interior reviewed the underlying purposes of the two-part consultation requirements, noting that Congress was primarily concerned with "those entities and individuals living in close proximity to the gaming establishment" and did not intend for consultation to extend to all potentially-affected communities. 73 Fed. Reg. 29354, 29356 (May 20, 2008). Interior further explained that its own experience overseeing a variety of consultation radii (including 30, 50, and 100 miles) indicates that "a 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 29356-57. And Interior noted that the 25-mile radius is not overly restrictive because the regulations provide a mechanism for more distant governments (including tribes) to petition for consultation in situations where governmental functions, infrastructure or services may be impacted. *Id.* This thoughtful, transparent decision-making process was the very epitome of a "reasoned independent judgment."

For its part, *amicus curiae* Mooretown Rancheria argues that the regulatory definitions of "nearby Indian tribe" and " surrounding community" are contrary to the purposes of IGRA because they fail to protect "the well-being of tribes with IGRA-compliant casinos" who have relied on "IGRA's general rule limiting gaming to pre-1988 trust land." (Amicus at 20.) But IGRA was not intended to suppress competition or insulate Indian gaming from normal market forces. *Stand Up for California! v. Dep't of the Interior*, 919 F.Supp. 2d 51, 77 (D.D.C. 2013). Nor was it intended to prohibit expansion of Indian gaming beyond pre-1988 trust land:

> As Congress clearly stated, the purpose of the IGRA was not to limit the proliferation of Indian gaming facilities. Instead, it was to provide express statutory authority for the operation of such tribal gaming facilities as a means of promoting tribal economic development, and to provide regulatory protections for tribal interests in the conduct of such gaming. The clearly defined purpose of the statute creates no basis for presuming that Congress intended to narrow the right to game except where that intent is clearly stated.

Grand Traverse Band, 198 F. Supp. 2d at 933. In fact, *Mooretown's own casino is located on land that was not held in trust in 1988*.[9] There is simply no basis to conclude that the regulatory definitions of "nearby Indian tribe" and "surrounding community" impermissibly conflict with the purposes of IGRA.

[9] *See* National Indian Gaming Commission, *Mooretown Rancheria Restored Lands* (Oct. 18, 2007) *available at* https://www.nigc.gov/images/uploads/indianlands/mooretownfnl.pdf.

2. Interior Properly Applied IGRA's Implementing Regulations

Colusa also objects to Interior's application of the regulatory definitions of "nearby Indian tribe" and "surrounding community," repeatedly bemoaning the agency's "rigid adherence" to the 25-mile consultation radius. (Br. at 43, 45-47.) But Interior did not exclude Colusa based on a "rigid" 25-mile limit. Consistent with 25 C.F.R. § 292.2, the agency invited Colusa to provide information about the Project's potential to affect governmental functions, infrastructure, or services. EOR 267. Colusa simply failed to avail itself of that opportunity.

Colusa also claims that it did not have notice of the Project until it was too late for effective participation in the administrative process. (Br. at 47-49.) If that is true, Colusa has no one to blame but itself. Interior properly provided notice of all opportunities for participation in the administrative process. Among other things, the agency mailed a copy of the EA to potentially-interested parties, including Colusa; published notice of the preparation of the EIS and invited comments on the proper scope of the document; held a public hearing on the scope of the EIS; published notices inviting comments on the Draft EIS; made the Draft EIS available for public review and comment for 45 days; held a public hearing on the Draft EIS; specifically invited Colusa to provide information about the Project's potential to impact governmental functions, infrastructure, or services; and published notice of the Final EIS. EOR 339, 428-29 (summarizing notices

and opportunities to comment); EOR 267 (specific invitation to comment); SER 131-32 (EA mailed to Colusa). Throughout this process, the agency also maintained a website at which interested parties could obtain and review Project information. *See, e.g.*, EOR 842, 844, 850.

Each and every notice, hearing, and comment period met — and in many cases exceeded — applicable requirements. *See, e.g.*,40 C.F.R. §§ 1501.7 (scoping), 1506.6 (identifying acceptable methods of notifying and involving interested parties), 1506.10(c) (comment period for Draft EIS), 1506.10(b) (availability of Final EIS). Therefore, even if Colusa truly lacked awareness of the Project there would be no basis to find that Interior acted arbitrarily or capriciously.[10]

D. Interior Complied With The IRA

Before the IRA's enactment, federal policy toward Indian tribes focused on removing tribes from their aboriginal lands, forcing assimilation of individual Indians into mainstream society, and actively suppressing tribal identity and culture. *See* Felix S. Cohen, *Cohen's Handbook of Federal Indian Law*, 41-79 (2012 ed.) (hereinafter "*Cohen's Handbook*"). For example, the General Allotment Act of 1887, 28 Stat. 388, provided a mechanism by which communal tribal lands could be "allotted" to individuals and pass out of Indian ownership.

[10] Mooretown Rancheria's similar arguments (Amicus at 22) should be dismissed for the same reasons.

Id.; *see also Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992). The purpose of this policy was to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Cnty. of Yakima*, 502 U.S. at 254. The results were devastating for Indian tribes: between 1887 and 1933, the allotment policy alone led to the loss of roughly 72% of all tribal land in the United States, an area equal to approximately 100 million acres. *Cohen's Handbook* at 73-74.

Congress enacted the IRA in 1934 to repudiate and remedy the disastrous consequences of prior Indian policy. The Act was explicitly designed to support tribal self-sufficiency by "put[ting] a halt to the loss of tribal lands." *Mescalero Apache Tribe v. Jones*, 411 U.S. at 151-52. Thus, the IRA represented a fundamental shift in federal policy from one of forced assimilation to one "encourag[ing] economic development, self-determination, cultural plurality, and the revival of tribalism" through the preservation and restoration of tribal lands. *Cohen's Handbook* at 81.

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

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

25 U.S.C. § 5108.[11] Consistent with the overarching purposes of the statute, Section 5's grant of land acquisition authority is extremely broad: it does not restrict the type or location of property that can be acquired for Indian tribes; it does not require tribes to meet any economic prerequisites; and it does not require tribes to identify the specific individuals who will benefit from the trust acquisition. *Id*.

Congress has delegated to Interior the authority to promulgate regulations "carrying into effect the various provisions of any act relating to Indian affairs," including the IRA. 25 U.S.C. § 9; *see also* 25 U.S.C. § 2 (Secretary manages all Indian affairs); 5 U.S.C. § 301 (authority to prescribe regulations). Pursuant to this authority, Interior has issued regulations governing the IRA trust land acquisition process. The regulations are published in part 151 of title 25 of the Code of Federal Regulations, and are commonly referred to as the "Part 151 Regulations."

The Part 151 Regulations implement Interior's broad authority to acquire land in trust for Indian tribes whenever such acquisition "is necessary to facilitate" the general objectives of "tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(3). Like the IRA, the Part 151 Regulations do not restrict the type or location of property the United States can acquire for Indian tribes; do not require tribes to meet any economic prerequisites; and do not

[11] Formerly codified at 25 U.S.C. § 465.

require tribes to identify the specific individuals who will benefit from the trust acquisition. *See* 25 C.F.R. §§ 151.1-151.15.

The Part 151 Regulations do establish certain procedural requirements governing Interior's consideration of requests for trust land acquisition. The procedural requirements include a list of eight issues Interior must evaluate. *See* 25 C.F.R. § 151.10(b). But while each of the eight issues must be *considered*, none of them serves as a *substantive limitation or prohibition* on the acquisition of trust land. *See* 25 C.F.R. § 151.10.

One of the eight issues Interior must consider is the applicant tribe's need for additional trust land. *See* 25 C.F.R. § 151.10(b). In evaluating a tribe's needs, Interior is only required to determine whether the IRA's general purposes — political self-government, economic self-sufficiency, and the restoration of lands — would be served by the proposed acquisition. *South Dakota v. United States Dep't of Interior*, 423 F.3d 790, 801 (8th Cir. 2005). Tribal needs such as self-determination, economic growth, housing, and cultural preservation have been held to satisfy this standard. *Id*. (tribal self-sufficiency and economic growth); *see also County of Charles Mix v. United States Dep't of the Interior*, 674 F.3d 898, 903 (8th Cir. 2012) (self-sufficiency and self-government).

Here, the administrative record shows that Interior carefully considered the Tribe's need for additional land. The agency noted that the Tribe suffers from

extremely high rates of unemployment and poverty. *See, e.g.*, EOR 377-78. 398; SER 296. Its only economically-viable land was taken in 1964. SER 1032. And its remaining trust land is a remote, steeply-sloped parcel that is accessible only by dirt roads and unsuitable for economic development. *See, e.g.*, EOR 383, 469; SER 3, 1049. This evidence is more than enough to demonstrate that Interior's analysis was reasonable.

Colusa argues that the Tribe does not truly "need" the Yuba Site because tribal income could be generated at other locations. (Br. at 50.) But, as the District Court rightly noted, Interior was not required to justify why one parcel was chosen for acquisition as against other properties. EOR 37 (citing *South Dakota*, 423 F.3d at 801). The Part 151 regulations "require only that [Interior's] analysis express the Tribe's needs and conclude generally that IRA purposes were served." *County of Charles Mix v. United States Dep't of Interior*, 799 F. Supp. 2d 1027, 1045 (D.S.D. 2011), *aff'd* 674 F.3d 898 (8th Cir. 2012). Interior's analysis easily clears that bar.

Colusa also questions the Tribe's need for housing, arguing that Tribal members will not live at the Yuba Site. (Br. at 50-51.) The argument misses the forest for the trees. As Interior explained, casino gaming is "among the most effective means by which the Tribe can meet the diverse and urgent economic

needs of its members." EOR 427. Revenue from the Project will be used to fund other Tribal programs and services, *including housing*. EOR 338, 427.

Colusa further suggests that Interior erred by failing to investigate whether Congress terminated a portion of the Tribe in 1965. (Br. at 52-53.) This issue was fully reviewed and rejected by the Interior Board of Indian Affairs in *Edwards v. Pac. Reg'l Dir.*, 45 IBIA 42 (2007). The *Edwards* decision has been final for more than a decade, and Colusa has identified no grounds to disturb the result.

Colusa ultimately resorts to smear tactics, suggesting the Tribe plans to exclude some of its citizens from Project benefits. (Br. at 52-53.) These petty accusations are legally irrelevant to Interior's compliance with the IRA. Neither the statute nor the Part 151 regulations require Interior to identify the specific individuals who will benefit from a trust acquisition. 25 C.F.R. § 151.10. And it is well-settled that a tribe's membership policies are an internal matter not subject to scrutiny by Interior or judicial review. *See, e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978); *Tavares v. Whitehouse*, 851 F.3d 863, 876 (9th Cir. 2017). Moreover, Colusa's allegations are without factual basis. The entire Tribe needs the Project and the entire Tribe will benefit.

E. Any Error In Interior's Parcel Description Is Moot And Harmless

The Yuba Site is a 40-acre portion of the 82-acre parcel officially known as Assessor Parcel Number 014-280-095. *See* EOR 609. The *Federal Register* notice

announcing Interior's approval of the Project accurately stated that 40 acres of land would be taken into trust for the Tribe. 77 Fed. Reg. 71612 (Dec. 3, 2012). But the legal description in the notice also referred to Assessor Parcel Number 014-280-095 (*i.e.*, the entire 82-acre parcel). *Id.*

Colusa complains that this ambiguity rendered it "impossible to determine *which* 40 acres within the 80 [sic] acres described would actually be taken into trust." (Br. at 53.) The claim is not believable. Together, the EIS and the RODs contain hundreds references, descriptions, and maps of the exact 40 acres proposed to be used for the Project. *See, e.g.*, EOR 322, 326, 330-31, 410, 414-15, 418, 609. Moreover, Interior immediately addressed the ambiguity by issuing a *Federal Register* notice clarifying the situation — a fact not disclosed or addressed by Colusa. *See* 78 Fed. Reg. 113 (Jan. 2, 2013). Colusa does not identify any prejudice resulting from the 30-day period between the original *Federal Register* notice and the clarification. (Br. at 53-54.) Therefore, any error in Interior's parcel description is both moot and harmless. *See Cal. Ex rel. Imperial Cty. Air Pollution Control Dist. v. United States*, 767 F.3d 781, 794 (9th Cir. 2014) (mistaken legal description was harmless error); *Idaho Dep't of Fish & Game v. Nat'l Marine Fisheries Serv.*, 56 F.3d 1071, 1074-75 (9th Cir. 1995) (claims mooted by agency issuance of superseding documentation). Colusa is entitled to no relief. *See, e.g., Nat'l Ass'n of Home Builders v. Defs. Of Wildlife*, 551 U.S.

644, 659-60 (2007) (misstatement in Federal Register did not require remand); *Organized Vill. of Kake v. United States*, 795 F.3d 956, 969 (9th Cir. 2015) (plaintiff bears burden to demonstrate prejudice); *Drake's Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1090-91 (9th Cir. 2014) (no relief absent prejudicial error).

F. There Is No Need To Stay Further Proceedings

Colusa's Opening Brief, filed on May 22, 2017, included four paragraphs of argument requesting that further proceedings in this appeal should be stayed until the California Supreme Court decides *United Auburn Indian Community v. Brown*, a case addressing the powers of the Governor of California under state law. (Br. at 59-61). Colusa then repeated that same request in a Motion to Stay Appellate Proceedings filed on May 31, 2017 (ECF 16). The Tribe opposed Colusa's Motion, explaining that (i) a stay would cause substantial harm to the Tribe; (ii) Colusa cannot demonstrate that it will suffer hardship or inequity in being required to advance this appeal; (iii) Colusa's assertions about the potential economies of a stay were questionable; and (iv) Circuit rules provide a reasonable procedure for updating the Court if and when *United Auburn Indian Community v. Brown* is resolved. (ECF 29). On July 3, 2017, the Court denied Colusa's Motion to Stay without prejudice to a future motion for leave to file supplemental briefing addressing the result (if any) of the California Supreme Court case. (ECF 31). The relevant facts and law have not changed since that time.

VII. CONCLUSION

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

Dated: August 16, 2017

Respectfully submitted,

By: /s/ Matthew G. Adams

Matthew G. Adams
Jessica L. Duggan
DENTONS US LLP
Attorneys for Appellee
Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California

STATEMENT OF RELATED CASE

Pursuant to Circuit Rule 28-2.6, Intervenor-Defendant-Appellee states that Citizens for a Better Way, et al. v. Zinke, et al., Case No. 17-15533, currently pending before this Court, (i) arises out of the cases that were consolidated in the district court and (ii) involves a challenge to some of the same agency actions at issue in this appeal.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that, according to the word count provided by Microsoft Word 2010, the body of the foregoing brief contains 12,482 words. The text of the brief is in 14-point Times New Roman, which is proportionately spaced.

TABLE OF ADDENDA

TITLE **PAGE**

Indian Gaming Regulatory Act
25 U.S.C. § 2701 2

Indian Gaming Regulatory Act
25 U.S.C. § 2702 3

Indian Gaming Regulatory Act
25 U.S.C. § 2719 4

National Environmental Policy Act
42 U.S.C. § 4332 7

Department of the Interior, Bureau of Indian Affairs Regulation
25 C.F.R. § 151.3 10

Department of the Interior, Bureau of Indian Affairs Regulation
25 C.F.R. § 151.10 11

Department of the Interior, Bureau of Indian Affairs Regulation
25 C.F.R. § 292.2 13

Department of the Interior, Bureau of Indian Affairs Regulation
25 C.F.R. § 292.19 16

Department of the Interior, Bureau of Indian Affairs Regulation
25 C.F.R. § 292.20 17

Department of the Interior, Bureau of Indian Affairs Regulation
25 C.F.R. § 292.21 19

National Environmental Policy Act Regulation
40 C.F.R. § 1502.9 20

National Environmental Policy Act Regulation
40 C.F.R. § 1502.13 22

National Environmental Policy Act Regulation
40 C.F.R. § 1502.14 23

National Environmental Policy Act Regulation
40 C.F.R. § 1502.25 24

National Environmental Policy Act Regulation
40 C.F.R. § 1506.5 25

National Environmental Policy Act Regulation
40 C.F.R. § 1506.6 26

National Environmental Policy Act Regulation
40 C.F.R. § 1506.10 29

ADDENDUM OF STATUTES AND REGULATIONS

25 U.S.C. § 2701

Title 25: Indians
Chapter 29: Indian Gaming Regulations

§ 2701. FINDINGS

The Congress finds that--

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

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

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

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

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

25 U.S.C. § 2702

Title 25: Indians
Chapter 29: Indian Gaming Regulations

§ 2702. DECLARATION OF POLICY

The purpose of this chapter is--

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

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

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

25 U.S.C. § 2719

Title 25: Indians
Chapter 29: Indian Gaming Regulations

§ 2719. GAMING ON LANDS ACQUIRED AFTER OCTOBER 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

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

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

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

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

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

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

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

(b) Exceptions

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

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

State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

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

(i) a settlement of a land claim,

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

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

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

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

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

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

(c) Authority of Secretary not affected

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

(d) Application of Title 26

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

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

42 U.S.C. § 4332

Title 42. The Public Health and Welfare
Chapter 55. National Environmental Policy
Subchapter I. Policies and Goals

§ 4332. COOPERATION OF AGENCIES; REPORTS; AVAILABILITY OF INFORMATION; RECOMMENDATIONS; INTERNATIONAL AND NATIONAL COORDINATION OF EFFORTS

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

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

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

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

(i) the environmental impact of the proposed action,

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

(iii) alternatives to the proposed action,

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

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

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

(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.

(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.

25 C.F.R. § 151.3

Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 151. Land Acquisitions

§ 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.

25 C.F.R. § 151.10

Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter H. Land and Water
Part 151. Land Acquisitions

§ 151.10 On-reservation acquisitions.

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

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

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

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

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

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

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

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

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

25 C.F.R. § 292.2

Title 25. Indians
Chapter I. Bureau of Indian Affairs, Department of the Interior
Subchapter N. Economic Enterprises
Part 292. Gaming on Trust Lands Acquired After October 17, 1988
Subpart A. General Provisions

§ 292.2 How are key terms defined in this part?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reservation means:

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

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

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

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

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

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

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

Secretary means the Secretary of the Interior or authorized representative.

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

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

25 C.F.R. § 292.19

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

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

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

(1) Appropriate State and local officials; and

(2) Officials of nearby Indian tribes.

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

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

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

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

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

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

25 C.F.R. § 292.20

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

§ 292.20 What information must the consultation letter include?

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

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

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

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

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

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

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

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

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

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

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

25 C.F.R. § 292.21

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

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

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

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

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

40 C.F.R. § 1502.9

Title 40: Protection of Environment
Chapter V: Council on Environmental Quality
Part 1502. Environmental Impact Statement

§ 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.

40 C.F.R. § 1502.13

Title 40: Protection of Environment
Chapter V: Council on Environmental Quality
Part 1502. Environmental Impact Statement

§ 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.

40 C.F.R. § 1502.14

Title 40: Protection of Environment
Chapter V: Council on Environmental Quality
Part 1502. Environmental Impact Statement

§ 1502.14 ALTERNATIVES INCLUDING THE PROPOSED ACTION.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

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

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

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

(d) Include the alternative of no action.

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

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

40 C.F.R. § 1502.25

Title 40: Protection of Environment
Chapter V: Council on Environmental Quality
Part 1502. Environmental Impact Statement

§ 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.

40 C.F.R. § 1506.5

Title 40: Protection of Environment
Chapter V: Council on Environmental Quality
Part 1506: Other Requirements of NEPA

§ 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.

40 C.F.R. § 1506.6

Title 40: Protection of Environment
Chapter V: Council on Environmental Quality
Part 1506: Other Requirements of NEPA

§ 1506.5 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.

40 C.F.R. § 1506.10

Title 40: Protection of Environment
Chapter V: Council on Environmental Quality
Part 1506: Other Requirements of NEPA

§ 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.

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/ Matthew G. Adams
Matthew G. Adams

104165352\V-15