IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR, et al., Defendants, and WILTON RANCHERIA, CALIFORNIA, Intervenor-Defendant.	Case No. 1:17-cv-00058-TNM Oral Hearing Requested

WILTON RANCHERIA, CALIFORNIA'S OPPOSITION TO PLAINTIFFS' SECOND MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Wilton Rancheria, California (the Tribe) files this opposition to Plaintiffs' second Motion for Summary Judgment, ECF Nos. 90 and 91, and cross-moves this Court for summary judgment against Plaintiffs on all remaining claims pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Tribe relies on the accompanying memorandum of points and authorities.

Respectfully submitted this 16th day of May, 2019.

WILTON RANCHERIA, CALIFORNIA

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MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF WILTON RANCHERIA, CALIFORNIA'S CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

* Authorities on which we chiefly rely are marked with an asterisk.

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES:

TABLE OF AUTHORITIES—Continued

Page(s)

INTRODUCTION

The National Environmental Policy Act (NEPA) requires agencies to "take a hard look at the environmental consequences of their actions, and provide for broad dissemination of relevant environmental information." *Mayo v. Reynolds*, 875 F.3d 11, 15 (D.C. Cir. 2017) (internal quotation marks and brackets omitted). The centerpiece of that obligation is the requirement that an agency prepare a detailed statement that compares the impacts of any proposed action with those of its reasonable alternatives, thus "providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14; *see* 42 U.S.C. § 4332(2)(C). That is exactly what the Interior Department did in this case, and it is all NEPA requires.

Plaintiffs' motion for summary judgment is heavy on rhetoric, but notably light on authority. It either ignores or misrepresents the law that governs each of Plaintiffs' arguments. Start with Plaintiffs' claim that the Tribe is not a tribe. It has now been a decade since the United States agreed with the Tribe that its assets were never properly distributed in accordance with the California Rancheria Act, and a decade since a federal district court judge entered a final judgment memorializing that agreement, conferring recognition that Congress has said can only be undone by an act of Congress itself. *See* Federally Recognized Indian Tribe List Act of 1994 (List Act), Pub. L. No. 103-454, § 103, 108 Stat. 4791. All three branches of the federal Government thus agree that the Tribe is entitled to the benefits the law confers on Indians, just like the many other Rancherias restored through stipulated judgments since the 1970s. *See, e.g.*, *Stand Up for California! v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212, 298-301 (D.D.C. 2016), *aff'd*, 879 F.3d 1177 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 786 (2019). Plaintiffs ignore all this to press a procedurally improper and substantively meritless claim that the Department could not take land into trust for the Tribe. This Court should not be the first to credit such outlandish arguments.

Plaintiffs fare no better with their claim that the Department violated NEPA by initiating its review based on the Tribe's application to acquire land in Galt, California, and then issuing a final environmental impact statement (EIS) that reflected the Tribe's subsequent decision to seek

a smaller tract in nearby Elk Grove, instead. Although Plaintiffs concede that, from the start, the Department disclosed and analyzed the Elk Grove parcel as an alternative that would achieve the Tribe's goals, they insist that the public could not have known that the Department might *act* on that alternative. To reach this conclusion, Plaintiffs blow past NEPA regulations and guidance that expressly authorize agencies to select "an alternative other than the proposed action" at the culmination of the review process. Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations ("CEQ Guidance"), 46 Fed. Reg. 18,026, 18,027-28 (Mar. 23, 1981) (#5a); *see* 40 C.F.R. § 1502.14. And they do not even mention the scores of comments on the Draft EIS that addressed the Elk Grove alternative—despite controlling precedent holding that such comments establish that there was no NEPA violation. *See, e.g.*, *Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006); *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1329 (D.C. Cir. 2004). Indeed, Plaintiffs forget that they *themselves* weighed in, at one point urging the Department to choose Elk Grove over Galt for the casino. *See* AR484-486 (public testimony of Plaintiff Lynne Wheat).

Even less convincing is Plaintiffs' argument that, having addressed the environmental impacts of building a casino at Elk Grove throughout the Draft and Final EIS, the Department was required to produce *another* EIS to repeat that analysis. Plaintiffs' argument leaves out that the Supreme Court has long held NEPA is subject to a "rule of reason." *See, e.g.*, *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 373-374 (1989). "Where the preparation of an EIS would serve no purpose in light of NEPA's regulatory scheme as a whole," the Court has explained that "no rule of reason worthy of that title would require an agency to prepare an EIS." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (internal quotation marks omitted). The Department was well within its discretion not to waste its time and resources repeating its "thorough and comprehensive" analysis in a separate or supplemental EIS. *Mayo*, 875 F.3d at 21 (internal quotation marks omitted).

The grab-bag of substantive objections to the EIS and the resulting record of decision (ROD) that populate the last section of Plaintiffs' brief is likewise unavailing. Plaintiffs do not

even try to meet the high bar for showing that agency decisionmakers had closed minds or predetermined their analysis. *See Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 427 (D.C. Cir. 1986) (Scalia, J.); *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 714 (10th Cir. 2010). Plaintiffs quibble with the Department's analysis of water, title, security, and traffic issues in ways that misrepresent the record and are the sort of "flyspeck[ing]" that the D.C. Circuit has held time and again courts may not do. *E.g.*, *Nevada*, 457 F.3d at 93. And Plaintiffs' tired complaints about the timing of the Department's decision invite the Court to "engraft[]" new requirements on NEPA in contravention of basic administrative-law principles. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978). Not one of these arguments identifies an error in the Department's decisionmaking process, let alone one that could warrant vacatur.

This case illustrates the familiar admonition that "NEPA is 'not a suitable vehicle' for airing grievances about the substantive policies adopted by an agency" or Congress. *Mayo*, 875 F.3d at 16 (quoting *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015)). Plaintiffs may wish that Indian tribes were forbidden to use gaming revenues to support their members and secure their future as self-governing communities, but Congress made a different choice. This Court should deny Plaintiffs' motion and enter judgment for the Defendants on all claims.

STATEMENT

A. Legal Overview

The Indian Reorganization Act of 1934 (IRA) § 5, 25 U.S.C. § 5108, authorizes the Secretary of the Interior to acquire land in trust for Indian tribes to promote tribal self-governance and economic self-sufficiency. *See Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 31 (D.C. Cir. 2008) (per curiam). The Indian Gaming Regulatory Act (IGRA) complements that authority by allowing tribes to provide for their economic development through gaming on land acquired as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii); *see Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 830 F.3d 552, 557 (D.C. Cir. 2016).

A restored tribe seeking land for gaming purposes starts by filing an application with the Department. Before the Secretary can take land into trust, however, the Department must comply with the procedural requirements that NEPA imposes on all "major Federal actions." 42 U.S.C. § 4332(2)(C). Among other things, NEPA requires the Department to prepare a "detailed statement" that addresses "the environmental impact of the proposed" acquisition and any alternative acquisitions that would achieve the same objectives. 42 U.S.C. § 4332(2)(C)(i), (iii).

This "environmental impact statement" or "EIS" serves two purposes: "First, it ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts." *Pub. Citizen*, 541 U.S. at 768 (internal quotation marks and brackets omitted). "Second, it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Id.* (internal quotation marks omitted). Crucially, though, NEPA imposes no substantive mandate: "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot interject itself within the area of discretion of the executive as to the choice of the action to be taken." *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-228 (1980) (per curiam) (internal quotation marks omitted).

The " 'heart of the environmental impact statement' is the requirement that an agency 'rigorously explore and objectively evaluate' the projected environmental impacts of all 'reasonable alternatives' for completing the proposed action." *City of Alexandria v. Slater*, 198 F.3d 862, 866 (D.C. Cir. 1999) (quoting 40 C.F.R. § 1502.14). That assessment is meant to "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." 40 C.F.R. § 1502.14.

At some point during the NEPA review process, the agency must identify "the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving

consideration to economic, environmental, technical and other factors." CEQ Guidance, 46 Fed. Reg. at 18,027 (#4a). This alternative is called the "preferred alternative," and it "may be, but is not necessarily," the "proposed action." *Id.* (#5a). Importantly, "[t]he agency may or may not have a 'preferred alternative' at the Draft EIS stage"; it "may decide at the Final EIS stage, on the basis of the Draft EIS and the public and agency comments, that an alternative other than the proposed action is the agency's 'preferred alternative.' " *Id.*

B. The Wilton Rancheria Tribe

The modern-day members of the Wilton Rancheria tribe "are descended from peoples who spoke variations of Uto-Aztecan languages: the Bay, Plains, and Northern Sierra dialects of the Miwok language, and the Nisenan (or Southern Maidu) language." AR24440. The Tribe's historic Rancheria sat on land in Sacramento County, California, which was acquired by the United States in 1927 using money appropriated for the purchase of lands for California Indians. *Id.*

In 1958, as part of a general policy of assimilation, Congress enacted the California Rancheria Act (Rancheria Act), Pub. L. No. 85-671, 72 Stat. 619 (amended 1964). The Act provided for the distribution of the assets of forty-one named Rancherias, including the Wilton Rancheria. *Id.* The Act specified that, after distribution of the assets of a Rancheria "pursuant to th[e] Act," Indians and their family members who received any part of those assets would lose access to "any of the services performed by the United States for Indians because of their status as Indians" and the protection of "all statutes of the United States which affect Indians because of their status as Indians." § 10(b), 72 Stat. at 621. By 1964, the Government reported that it had terminated federal supervision of the Tribe. Property of California Rancherias and of Individual Members Thereof: Termination of Federal Supervision, 29 Fed. Reg. 13,146 (Sept. 22, 1964).

In 1979, Indian residents of several former Rancherias brought a class action that culminated in a stipulated judgment that restored federal status to seventeen tribes. *See* Stip. for Entry of Judgment, *Hardwick v. United States*, No. C–79–1710–SW (N.D. Cal. Dec. 22, 1983), Dkt. No. 62a; AR24441. A decade later, Congress enacted the List Act, which rejected the

assimilation policy in favor of one that sought "to restore recognition to tribes that previously have been terminated." List Act § 103(5). Through the List Act, "Congress delegated to the Secretary the regulation of Indian relations and affairs . . . including authority to decide in the first instance whether groups have been federally recognized in the past or whether other circumstances support current recognition." *Stand Up*, 204 F. Supp. 3d at 300 (ellipses in original; internal quotation marks omitted). In addition to the Secretary's authority, the List Act expressly provides that Tribes may be recognized by "a decision of a United States court" and that tribes that are recognized in this way "may not be terminated except by an Act of Congress." *Id.* at 301 (quoting List Act § 103).

Although members of the Wilton Rancheria were initially certified as members of the *Hardwick* class, they were dismissed from the final judgment based on a mistaken understanding of whether any Wilton members remained in the area. *See* Order re: Class Certification, *Hardwick*, No. C–79–1710–SW (Feb. 28, 1980), Dkt. No. 20a; Order Approving Final Judgment in Action, *Hardwick*, No. C–79–1710–SW (Dec. 22, 1983), Dkt. No. 63. In 2007, the Tribe filed suit seeking to correct that mistake. And in July 2009, the United States District Court for the Northern District of California entered a stipulated judgment in which the Government acknowledged that the Tribe had not been terminated in accordance with the Rancheria Act's provisions and agreed to restore the Tribe's federal recognition. AR596-621; *see also* Judgment *Nunc pro Tunc*, *Wilton Miwok Rancheria v. Kempthorne*, No. 5:07-cv-02681-JF (N.D. Cal. July 16, 2009), ECF No. 62.

The Department issued a Federal Register notice announcing the Tribe's restoration on July 13, 2009. *See* Restoration of Wilton Rancheria, 74 Fed. Reg. 33,468 (July 13, 2009). And it has formally included the Tribe on the definitive list of federally recognized tribes since. *See* Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 40,218, 40,222 (Aug. 11, 2009); Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200, 1204 (Feb. 1, 2019).

C. The Tribe's Fee-to-Trust Application

In 2013, after nearly 60 landless years, the Tribe voted to secure its future by seeking trust land to build a casino. As reported in the press at the time, the Tribe considered two potential locations for a casino: (1) a large, undeveloped parcel of land near the City of Galt, California, and (2) the site of a partially developed mall in neighboring Elk Grove—both within miles of its historic Rancheria. *See* Bryan M. Gold, *Tribe seeks property for casino outside Galt: Wilton Rancheria chair said mall site a possibility*, Elk Grove Citizen (Mar. 7, 2013), *available at* https://bit.ly/2ICfSaL. In November 2013, the Tribe chose the 282-acre Galt site and filed a fee-to-trust application with the Department. *See* AR6312.

The Department published a Notice of Intent to prepare an EIS in connection with the Tribe's application and held a hearing "to provide an opportunity for the public and government agencies to have input into the scope of the EIS." AR16277; AR4852-53. The resulting "Scoping Report," issued in February 2014, detailed "the range of environmental issues to be addressed" in the EIS, "the types of project effects to be considered, and the range of project alternatives to be analyzed." AR16277. The Department explained that "[t]he purpose and need for the Proposed Action is to improve the Tribe's short-term and long-term economic condition and promote its self-sufficiency." AR16281. It identified six "alternatives to meet th[is] purpose and need" at three different sites, including the Tribe's proposed casino on the 282-acre parcel in Galt (Alternative A) and a casino on the 28-acre parcel at the Elk Grove mall site (Alternative F), plus a "No Action" alternative. *Id.*; *see also* AR16282-289 (providing detailed maps). The Scoping Report specifically stated that the BIA might not determine a preferred alternative until the very end of the NEPA review process:

> Alternative A is the Tribe's Proposed Project. The BIA (Lead Agency), however, may not determine a Preferred Alternative until completion of the environmental analysis. If it is clearly known at the time, a Preferred Alternative may be identified in the Draft EIS; otherwise, BIA will do so in the Final EIS or Record of Decision (ROD). As described in NEPA Section 1502.14(c), a Preferred Alternative is the alternative that the agency believes would fulfill its statutory mission and responsibilities, considering economic, environmental, technical, and other factors.

AR16290.

The 712-page Draft EIS released in December 2015 offered a detailed assessment of all seven options, including Alternatives A and F. AR26433-439; Draft Environmental Impact Statement, 80 Fed. Reg. 81,352 (Dec. 29, 2015). Consistent with the NEPA guidance issued by the Council on Environmental Quality, "[t]he degree of analysis devoted to each alternative in the EIS" was "substantially similar to that devoted to the 'proposed action.' " CEQ Guidance, 46 Fed. Reg. at 18,028 (#5b); *see, e.g.*, AR26362-430 (Summary of Potential Environmental Effects, Mitigation Measures, and Significance, listed by Alternative). The Draft EIS specified that "[p]roject alternatives are located on three different sites," AR26433, each of which was described in text and with a map, AR26433-439. The Draft EIS then offered a point-by-point analysis of the Elk Grove alternative's environmental impact, included a schematic of the proposed Elk Grove casino's footprint, and detailed information on the facility's square footage, capacity, and projected number of full-time employees, as well as the anticipated number of patrons on weekdays and weekends. AR26471-475.

The Draft EIS observed that the casino proposed for Alternative F was "of comparable size and scope to Alternative A," and that the "environmental impacts" of the Elk Grove alternative "would be less than the other development alternatives." AR26479-480. The draft further detailed various alternatives that the agency had eliminated from consideration in preparing the Draft EIS for various reasons, including that they "were determined to be infeasible and would not fulfill the stated purpose and need." AR26476. In contrast, the agency viewed the alternatives discussed in the Draft EIS as a "reasonable range" of "feasible" alternatives. *Id.*

The Department gave the public 62 days—until February 29, 2016—to comment on the Draft EIS, with an extra ten-day extension for the City of Galt. AR24444. On January 29, 2016, during the comment period, the Department held a public hearing to discuss the draft. In his opening remarks, the Tribe's Chairman told the 350 attendees that "Alternatives A and F, Elk Grove, are the tribe's preferred alternatives." AR431; *see* AR24444. Elk Grove's Economic Development Director also made a statement, "to just be on record that the City of Elk Grove is

here and in presence this evening," and to explain that Elk Grove "ha[s] had and will continue to have discussions with the tribe as we evaluate the impacts and effects of these projects on the City of Elk Grove." AR497. The crowd also heard from Plaintiff Lynne Wheat, who urged the Department to "consider [Alternative F] carefully," opining that "the Mall site in Elk Grove will still provide residents of Galt the jobs that they need" and generate much-needed revenues, while making use of the Elk Grove site's existing infrastructure. AR485.[1] As the comments poured in, dozens of commenters shared their views on the development of a casino at the Elk Grove site, *see infra* pt. B.2, with the EPA recommending that the Elk Grove alternative be designated the "environmentally preferable alternative." AR10310.

In June 2016, after complications arose with the Galt proposal, the Tribe determined that the Elk Grove alternative was the better option. *See, e.g.*, Bryan M. Gold, *Tribe now favors Elk Grove over Galt for casino complex*, Galt Herald (June 15, 2016), *available at* https://bit.ly/301AM8M. The Tribe withdrew its November 2013 application requesting the Secretary take the Galt site into trust and filed an application requesting that she take the Elk Grove site into trust instead. AR3198. On July 6, the Tribe held a town-hall meeting in Elk Grove in which it offered detailed information about its plans to build a casino on the mall site to a "standing-room only" crowd. Dana Griffin, *Residents pack community meeting for Elk Grove casino proposal*, KCRA 3 (July 7, 2016), *available at* https://bit.ly/2XF4O0a; Lance Armstrong, *Wilton Rancheria presents Elk Grove casino plan to community*, Elk Grove Citizen (July 12, 2016), *available at* https://bit.ly/2ZsPDbX.

[1] The local media took note, running numerous stories documenting the Tribe's interest in the Elk Grove alternative. *See, e.g.*, Hudson Sangree, *Tribal casino proposed at Elk Grove's 'ghost mall' site*, Sacramento Bee (Jan. 30, 2016), *available at* https://bit.ly/2VUCB53; Mark Anderson, *Spat with Galt could drive tribe to seek casino in Elk Grove*, Sacramento Business Journal (Feb. 2, 2016), *available at* https://bit.ly/2Gc5mTO; Bryan M. Gold, *Elk Grove considered alternative site for Indian casino*, Elk Grove Citizen (Feb. 2, 2016), *available at* https://bit.ly/2UzUG6C.

In an effort to address any concerns about its application for the Elk Grove site, the Tribe executed a memorandum of understanding with Sacramento County on June 14, 2016 "in which the Tribe committed to extensive mitigation in response to impacts created by th[at] Proposed Action." AR10882. "Within that intergovernmental agreement, the County acknowledge[d] that the Tribe's mitigation within that agreement will further and fully address and mitigate any and all impacts of the Proposed Action to the environment and County services." *Id.* (internal quotation marks and brackets omitted). The Tribe also entered into a separate memorandum of understanding with the City of Elk Grove in September 2016, in which the Tribe agreed to "address and mitigate any and all direct impacts" that its casino would have on "the City of Elk Grove and City of Elk Grove services as described within th[e] EIS." *Id.* (internal quotation marks and brackets omitted); AR10244.

On December 14, 2016, the Department issued its Final EIS. The accompanying Federal Register notice announced that, "after evaluating all alternatives in the Draft EIS, [the Bureau of Indian Affairs] has now selected Alternative F, located on the Elk Grove Mall Site, as its Preferred Alternative to allow for the Tribe's Proposed Project." Final Environmental Impact Statement, 81 Fed. Reg. 90,379, 90,379 (Dec. 14, 2016). It noted that, between the Draft and Final EIS, "the Elk Grove Mall site increased by approximately eight acres, from approximately 28 to 36 acres" and that certain "project components have been revised in the FEIS from their discussion in the DEIS." *Id.* The Department concluded, however, that "[t]hese changes do not impact the conclusions of the EIS." *Id.*

The Final EIS explained that the Elk Grove site furthered the "[p]urpose and [n]eed" that the agency had articulated since the Scoping Report and Draft EIS: "the promotion of tribal economic development, self-sufficiency, and strong tribal government." AR10882; *compare, e.g.*, AR16281 and AR26437-441, *with* AR10964-965. The Department concluded that "[t]he development of Alternative F would meet this purpose better than the other development alternatives, due to the extra infrastructure costs and related project delays for Alternative A." AR11008. "While Alternative F would generate traffic congestion that may increase air

emissions and noise effects during construction and operation," the Department found that "implementation of mitigation identified in [the EIS] would reduce these potential adverse effects, making the environmental effects less than those under any other Alternative." AR11009. The Department also noted that, because Alternative F was already partially developed as a mall, it "would allow the Tribe to connect to existing infrastructure, further reducing the environmental impacts, unlike Alternative A." *Id.* And it observed that the EPA had recommended that the Elk Grove alternative be designated as the "environmentally preferable alternative." *Id.*

D. Procedural History

On December 16, 2016, the EPA issued its own notice that the Final EIS was available for public comment. *See* Environmental Impact Statements; Notice of Availability, 81 Fed. Reg. 91,169 (Dec. 16, 2016); AR24528. Under NEPA regulations, that triggered a 30-day waiting period before the Department could issue a decision on the Tribe's application. *See* 40 C.F.R. § 1506.10(b)(2). On January 11, 2017—just four days before the end of that period—Plaintiffs filed suit purporting to challenge a regulation that directs the Department to "immediately acquire land into trust" after it renders a final decision and seeking to restrain the Department from taking the Elk Grove parcel into trust. *See* Compl. ¶¶ 1-2, ECF No. 1. This Court denied Plaintiffs' request for a temporary restraining order, and Plaintiffs applied to the Department of the Interior for a self-stay of any action. *See* Minute Entry for Jan. 13, 2017.

On January 19, four days after the end of the NEPA waiting period, the Department issued a record of decision (ROD) approving the Tribe's application.[2] Although an agency need not solicit comments on a final EIS, the Department accepted 11 comment letters during this period. 40 C.F.R. § 1503.1(b). Plaintiffs and their counsel at Perkins Coie submitted letters on January 9, 13, and 17, attaching scores of pages of extraneous documents, many created years

[2] Although the required 30-day waiting period ran on January 15, 2017, the EPA's notice indicated that the "review period" for the Final EIS would run on January 17.

earlier. *See* AR24572-574 (Plaintiff Lynn Wheat); AR24604-620 (Plaintiff Stand Up); AR24691-705 (Perkins Coie). These documents addressed, among other things, an unrelated plan to add 1,156 acres of rural land to the City of Elk Grove (the so-called Kammerer/99 Sphere of Influence Amendment) and the regulation Plaintiffs challenged in their suit. *See* AR24578-599 (objections to Elk Grove's expansion); AR24625-658 (objections to the construction of a propane terminal in Portland, Ore.); AR24707-745 (objections to Department regulations). The Department addressed each of these comments in a densely-set, 33-page table attached to the ROD. AR24752-785.

After the Department took title to the Elk Grove parcel and dismissed Plaintiffs' administrative appeal, Plaintiffs amended their complaint in this case. *See* ECF No. 26. The Court has already granted summary judgment to Defendants on Counts I and II of the amended complaint, which concerned the Department's authority to render a final decision on the Tribe's fee-to-trust application. *See* ECF No. 53 at 2. Plaintiffs' and Defendants' cross-motions for summary judgment are now before the Court to resolve all of the remaining claims in the amended complaint.

STANDARD OF REVIEW

A challenge to the Government's "decision to take land into trust" is "a garden-variety APA claim." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220 (2012). The decision stands unless the party challenging it can establish that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Stand Up*, 879 F.3d at 1181 (internal quotation marks omitted); *see* 5 U.S.C. § 706(2). Even then, a challenger is only entitled to relief if it can show that some error in the agency's decision actually prejudiced its interests. *See PDK Labs. Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004).

That "deferential standard of review" also applies to "NEPA-based challenges." *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017). The "role of the courts" under NEPA "is

simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Nevada*, 457 F.3d at 87-88 (internal quotation marks omitted). "It is well settled that the court will not 'flyspeck' an agency's environmental analysis, looking for any deficiency no matter how minor." *Id.* at 93. NEPA's "rule of reason" asks only "whether an EIS's deficiencies are significant enough to undermine informed public comment and informed decisionmaking." *Sierra Club*, 867 F.3d at 1368; *see Mayo*, 875 F.3d at 20.

ARGUMENT

THE DEPARTMENT'S DECISION WAS NEITHER ARBITRARY NOR CAPRICIOUS.

A. The Department Had Authority To Acquire Land In Trust For The Tribe.

Plaintiffs' first argument is that the California Rancheria Act precluded the Department from recognizing or taking land into trust for the Tribe. Plaintiffs' argument comes far too late, and is wrong on the merits. The 2009 stipulation that restored the Tribe's federal status accords fully with the California Rancheria Act and the List Act, and Plaintiffs' contrary argument would upend decades of executive, judicial, and legislative consensus regarding the restoration of tribes improperly stripped of their status.

1. The Tribe's Status Is Not Up For Debate.

Plaintiffs seem to recognize that they cannot directly challenge the Tribe's status in this action. The List Act makes clear that "a tribe which has been recognized" by a "decision of a United States court"—like the Tribe here—"may not be terminated except by an Act of Congress." List Act § 103(3)-(4). This Court cannot reopen the Northern District of California's judgment, and 2019 would be many years too late to do so anyway. *See* Fed. R. Civ. P. 60(c)(1) (parties may seek relief from a judgment by motion to the issuing court "within a reasonable time"). Even if Plaintiffs cast their argument as a challenge to the Department's decision to enter the 2009 stipulation, such challenges are subject to the APA's six-year statute of limitations, which ran no later than July 2015. *See Big Lagoon Rancheria v. California*, 789 F.3d 947, 954 (9th Cir. 2015); *Harris v. FAA*, 353 F.3d 1006, 1009 (D.C. Cir. 2004) (noting the limitations rule).

Apparently recognizing these obstacles, Plaintiffs instead question the Department's authority to take land into trust for the Tribe. Courts have had no trouble seeing through such transparent ploys before. In *Big Lagoon Rancheria*, for example, the Ninth Circuit rejected a similar argument as a belated and procedurally-improper challenge to the Department's recognition decision. 789 F.3d at 953-954. And in *Stand Up*, 204 F. Supp. 3d at 297, Judge Howell likewise rejected Stand Up's effort to revisit a tribe's status in a challenge to a fee-to-trust decision. Plaintiffs' argument is no different.[3]

2. The Government's Recognition Decision Was Lawful.

Plaintiffs' objection to the Tribe's status is also wholly without merit. The crux of their argument is that the fee-to-trust decision violates the Rancheria Act because the Act renders inapplicable to the Tribe "all statutes of the United States which affect Indians because of their status as Indians." Rancheria Act § 10(b). "True to form, Stand Up misreads" the Act. *Stand Up*, 879 F.3d at 1185. The very statutory paragraph Plaintiffs quote refutes their conclusion. The Act only applies once a rancheria's assets "have been distributed *pursuant to this Act*." Rancheria Act § 10(b) (emphasis added). The Department stipulated in 2009 that "the Tribe was *not* lawfully terminated, and the Rancheria's assets were *not* distributed, in accordance with the provisions of the [Rancheria] Act." AR602 (emphases added). So the Act's termination provision by its own terms does not apply to the Tribe.[4]

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[3] Plaintiffs suggest in a footnote (at 12 n.4) that any bar on their collateral challenge would raise constitutional difficulties by rendering the Department's decision unreviewable. But as the Tribe's experience shows, Plaintiffs' premise is incorrect. Both Sacramento County and Elk Grove intervened successfully in the recognition action and sought to reopen the stipulated judgment. *See Wilton Miwok Rancheria v. Salazar*, No. C-07-02681-JF-PVT, 2010 WL 693420 (N.D. Cal. Feb. 23, 2010).

[4] In another footnote argument (at 13 n.6), Plaintiffs contend that the stipulation is inconsistent with the IGRA because it states that the acquisition of land within or adjacent to the Tribe's historic Rancheria will not preclude other lands from being deemed "restored lands" under the IGRA. Plaintiffs suggest that restored lands must be "included in the tribe's first request for newly acquired lands." *Id.* (quoting 25 C.F.R. § 292.12(c)) That, too, is incorrect. A tribe may also establish the prerequisites for the restored-lands exception by "submit[ing] an

That conclusion was consistent with decisions dating to the 1970s, holding or approving settlements agreeing that the federal government's failure to satisfy the Rancheria Act's conditions renders a subsequent termination unlawful and that the appropriate remedy is to unwind the termination and restore the rancheria's tribal status. *See, e.g., Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 258, 259-261, 265 (N.D. Cal. 1981); *Smith v. United States*, 515 F. Supp. 56, 61-62 (N.D. Cal. 1978); *Duncan v. Andrus*, 517 F. Supp. 1, 5-6 (N.D. Cal. 1977); *accord Cohen's Handbook of Federal Indian Law* § 3.02[8][a] (Nell Jessup Newton ed., 2017) (explaining that courts found the Rancheria Act's requirements to provide irrigation and water systems to be "a condition precedent to termination" and recognizing the "restoration of tribal status" as an appropriate remedy). Like the status restored to these tribes and those covered by the 1983 *Hardwick* judgment, the Tribe's recognition "was prescribed by the Executive's agreement and stipulation and the Judiciary's order," and "confirmed through Congress' enactment of the List Act" in 1994, *Stand Up*, 204 F. Supp. 3d at 301, which ushered in a policy that actively sought "to restore recognition to tribes that previously have been terminated," List Act § 103(5).

Plaintiffs' collateral attack on the Tribe's restoration would thus require rewriting the List Act, ignoring Congress's express policy favoring restoration, invading the finality of a federal-court judgment, disputing the Department's concession that it failed to comply with the Rancheria Act, and overruling the Executive's discretion to recognize tribes. Plaintiffs' argument would also cast doubt on the status of every former Rancheria that has been restored by stipulation for the last forty-plus years. This Court should reject it, as Judge Howell did, and grant summary judgment to the Federal Defendants and the Tribe on Count III.

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application to take the land into trust within 25 years after the tribe was restored to Federal recognition," so long as "the tribe is not gaming on other lands." 25 C.F.R. § 292.12(c)(2).

B. The Department Complied Fully With NEPA's Disclosure Requirements By Addressing The Elk Grove Alternative Throughout The Review Process.

Turning to NEPA, Plaintiffs' first argument (at 13-22) is that the Department engaged in an improper "bait-and-switch" because the Scoping Report and Draft EIS identified the "proposed action" as the transfer of the Galt site into trust for purposes of the development of a casino, hotel, and associated facilities, and the Final EIS reflected the fact that the Tribe later asked the Government to take into trust the Elk Grove site instead. There was nothing remotely improper about the "proposed action" shifting from one alternative identified in the Draft EIS (Alterative A) to another alternative (Alternative F) in the Final EIS.

Alternative F—the Elk Grove site—was identified as one of several potential sites for the Tribe's proposed casino throughout the review process. AR16281. As a result, the public clearly understood that the Tribe was "seriously talking about building a casino resort" there. Hudson Sangree, *Tribal casino proposed at Elk Grove's 'ghost mall' site*, Sacramento Bee (Jan. 30, 2016), *available at* https://bit.ly/2VUCB53. One of the Plaintiffs in this case even urged the Department to select Elk Grove instead of the other alternatives. *See* AR484-486 (public testimony of Plaintiff Lynne Wheat).

1. The Department disclosed and discussed the Elk Grove alternative throughout the review process.

Plaintiffs protest (at 14-17) that the Department failed to give "notice" that it might acquire the Elk Grove parcel for the Tribe because the "proposed action" described in the Scoping Report and Draft EIS was the development of a casino in Galt. That argument misconceives the "informational role of an EIS." *Pub. Citizen*, 541 U.S. at 768 (internal quotation marks omitted). An EIS is meant to "provid[e] a clear basis for *choice among options* by the decisionmaker and the public." 40 C.F.R. § 1502.14 (emphasis added). So long as the agency's ultimate course of action was studied and disclosed, "NEPA's goal of ensuring that relevant information is available to those participating in agency decision-making" is satisfied. *Nevada*, 457 F.3d at 90. That is what happened here.

a. Plaintiffs stake much of their argument on the premise (at 15) that the public's notice extends only to what is identified in a draft EIS as the proposed action. But the proposed action is just the starting point for the NEPA analysis. "When an agency is asked to sanction a specific plan," it begins by defining the goals of that plan in light of "the needs and goals of the parties involved in the application" and the purposes behind "the agency's statutory authorization to act." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (Thomas, J.). Those *goals*, in turn, "delimit the universe of the action's reasonable alternatives." *Id.* at 195.

It is the agency's "discussion of alternatives"—not its description of the proposed action—that "forms 'the heart of the environmental impact statement.' " *Id.* at 194 (quoting 40 C.F.R. § 1502.14). Although the proposed action is analyzed as one of the alternatives, the agency must " 'rigorously explore and objectively evaluate' the projected environmental impacts of *all*" alternatives that are "reasonable in light of" the agency's "stated objectives." *City of Alexandria*, 198 F.3d at 866-867 (quoting 40 C.F.R. § 1502.14) (emphasis added).

Plaintiffs do not dispute that the Department's stated objectives were reasonable given the Tribe's plans and the IGRA's purposes. *See Citizens Against Burlington*, 938 F.2d at 196. Nor do they dispute that the Elk Grove alternative was "reasonable in light of these objectives." *City of Alexandria*, 198 F.3d at 867. Instead, Plaintiffs claim (at 16) that ultimately selecting any alternative other than the Draft EIS's "proposed action" violates "fundamental NEPA requirements." That bold proclamation is notably unsupported by any authority.

In fact, agencies have considerable discretion when it comes to choosing among the alternatives discussed in an EIS. The CEQ Guidance expressly authorizes agencies to select "an alternative *other than the proposed action* [a]s the agency's 'preferred alternative.' " CEQ Guidance, 46 Fed. Reg. at 18,027-28 (emphasis added) (#5a); *see, e.g., Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1029, 1041 (10th Cir. 2001) (rejecting challenges to agency's selection of a preferred alternative different from the original proposal). That alternative need not even have "been disseminated previously in a draft EIS," so long as it is " 'qualitatively within the spectrum of alternatives that were discussed.' " *Dubois v. U.S. Dep't of Agric.*, 102

F.3d 1273, 1292 (1st Cir. 1996) (quoting CEQ Guidance, 46 Fed. Reg. at 18,035 (#29b)); *see Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) (same). And the selection of a preferred alternative is not binding; courts have held that agencies may act on *any* option that has "already been fully considered" in the review process. *See Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1097 (10th Cir. 2004). Indeed, an agency "d[oes] not cut off the public's right to comment" even where it ultimately selects an alternative *rejected* in the Final EIS. *Id.* at 1096. Those principles dispose of Plaintiffs' citation-free challenge to the Department's decision to take the Elk Grove site into trust.

NEPA's flexibility is grounded in sound policy considerations. It would make little sense to confine an agency to the terms of an applicant's proposal when, as the CEQ Guidance recognizes, that "may be, but is not necessarily, the *agency's* 'preferred alternative.' " 46 Fed. Reg. at 18,027-28 (emphasis added) (#5a). Moreover, "[t]he proposed action may be a proposal in its initial form before undergoing analysis in the EIS process," so that it would be premature for the agency to draw any conclusions. *Id.* NEPA requires "only that proper procedures be followed for ensuring that environmental consequences have been fairly evaluated." *New River*, 373 F.3d at 1329. It "does not require that a complete plan be actually formulated at the outset," *id.*, or that the agency take a position before hearing from the experts and the public.

If there were any merit to Plaintiffs' suggestion (at 16-18) that describing the Galt casino in Alternative A as the proposed action was somehow inconsistent with NEPA's requirements, then an agency could never actually implement "an alternative other than the proposed action" without starting from scratch. CEQ Guidance, 46 Fed. Reg. at 18,027-28 (#5a). That would not only contradict the CEQ Guidance, which is "entitled to substantial deference," *Marsh*, 490 U.S. at 372, it would also undercut the EIS's purpose of "providing a clear basis for *choice among*

options by the decisionmaker and the public." 40 C.F.R. § 1502.14 (emphasis added). This Court should not be the first to embrace such a theory.[5]

b. Plaintiffs' notice arguments are not just legally unfounded, they are also contradicted by the record. Far from hiding the ball, the Department advised the public from the start that it might select the Elk Grove alternative at the end of the review process and then cogently explained its reasons for doing so in the Final EIS.[6]

Consistent with the CEQ Guidance, the February 2014 Scoping Report explained that, while "Alternative A is the Tribe's Proposed Project," the Department "*may not determine a Preferred Alternative until completion of the environmental analysis*." AR16290 (emphasis added); *see* CEQ Guidance, 46 Fed. Reg. at 18,027-28 (#5a) (noting that an agency may select a preferred alternative at any time during the review process). No reasonable person reading the Scoping Report could have thought that the only option on the table was a casino at the Galt site. To the contrary, the report attached detailed maps of three different sites, including the Elk Grove mall site, with preliminary diagrams of six different development options. AR16282-89. The Scoping Report more than reasonably communicated to the public that the Department was seriously considering several possible actions.

So did the 712-page Draft EIS. It featured a detailed analysis of all six development options, plus a "No Action/No Development" alternative. AR26433-37. The Draft EIS's discussion of the Elk Grove alternative included a schematic of the proposed casino's footprint

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[5] For the same reasons, this Court should reject Plaintiffs' bizarre claim (at 17-18) that, because an applicant might not be able to implement an alternative at the time of a draft EIS, the public can only anticipate the agency selecting the proposed action.

[6] Plaintiffs complain (at 16) that the Department never published notice of the Tribe's June 2016 application to take the Elk Grove site into trust. There was no requirement to do so. The fee-to-trust regulations require only limited pre-decision notice to "the state and local governments having regulatory jurisdiction over the land *to be acquired*" "[u]pon receipt of a tribe's written request to have lands taken into trust." 25 C.F.R. § 151.11(d) (emphasis added). Plaintiffs do not argue that the Department failed to notify "the state and local government having regulatory jurisdiction over" the Elk Grove site "[u]pon receipt" of the Tribe's application for the Elk Grove site. *Id*.

and detailed information on the facility's square footage, capacity, and projected number of full-time employees, as well as the anticipated number of patrons on weekdays and weekends. AR26471-73. The Department reviewed the projected impact of such a development in every section of the draft, touching on everything from traffic conditions, AR26832-37, to aesthetics, AR26913-15. Although the draft concluded that Alternative A best met the purpose and need of the proposal, AR26479; AR26481, the Department declined to choose a preferred alternative.[7]

After reviewing the Draft EIS and comments on it—including the EPA's recommendation that the Elk Grove alternative be designated the environmentally preferable alternative—the Department issued the Final EIS in December 2016. It concluded that "Alternative F, Casino Resort at Mall Site, would best meet the BIA's purpose and need," which included expanding the Tribe's "land base, establishing a reservation for its members, and promoting meaningful opportunities for economic development and self-sufficiency." AR11008; *see also* AR24487; AR10310. The Department explained that "[t]he development of Alternative F would meet this purpose better than the other development alternatives." AR11008. In particular, the Department found that the Elk Grove alternative was preferable to the Tribe's original proposal because of "the extra infrastructure costs and related project delays for Alternative A," *id.*, and the fact that "Alternative F would allow the Tribe to connect to existing infrastructure, further reducing the environmental impacts, unlike Alternative A." AR11009; *see also* AR24487. That is exactly the kind of environmentally conscious decisionmaking process that NEPA is intended to produce.

Ignoring all of this, Plaintiffs insist that identifying the Galt casino described in the Tribe's initial request as the proposed action skewed the Department's analysis. Plaintiffs fret (at 15-16, 23-24) that the Department held public meetings in Galt and displayed a copy of the Draft EIS in Galt's branch of the Sacramento County library. But all three proposed sites sit

[7] The Tribe's Chairman announced at the January 2016 public hearing convened by the Department that "Alternatives A and F, Elk Grove, are the tribe's preferred alternatives." AR431.

within a roughly 8-mile radius, *see* AR16282 (fig. 1).[8] And if Elk Grove residents did not want to drive fifteen or twenty minutes to Galt's public library to read the Draft EIS, the draft and all the other NEPA documents were readily available on a website established for that purpose, www.wiltoneis.com.

Plaintiffs also complain (at 24) that the alternatives the Department considered "were heavily weighted towards Galt" and included only one alternative in Elk Grove. That is not accurate, or relevant. Fewer than half of the alternatives examined in the Final EIS involved the Galt site, and the Department actually considered two alternatives for the Elk Grove site: the casino ultimately chosen and a "Reduced Intensity and Retail" option, which it ultimately rejected. AR24446 n.26; AR26477; AR11004. And in any event, by analyzing an alternative in Elk Grove, the Department provided public notice that this was one of the development proposals under consideration. Although the Department did not invite the City of Elk Grove to participate as a "cooperating agency" at the scoping stage, the City lodged extensive comments on the Draft EIS, *see* AR10290-10307, and it was made a cooperating agency on May 19, 2016, just six days after it requested that designation. AR11606-07.

c. For all their hand-wringing, Plaintiffs are "unable to specifically explicate, much less demonstrate," what was *missing* from the Scoping Report and Draft EIS as a result of the Department's supposed error here—let alone how the absence of that information impacted "the level of environmental review that [the Department] conducted." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 75 (D.D.C. 2018) (internal quotation marks omitted). They "ha[ve] not shown that" the claimed errors here "left the public unable to make known its environmental concerns about the project's impact," or that they left "the agency without public comment on a material environmental aspect of [the] project." *New River*, 373

[8] Plaintiffs speculate that the Department held hearings in Galt "because the regulations recommend a scoping hearing 'when the impacts of a particular action are confined to specific sites,' and the impacts would be felt primarily in Galt." Mot. at 24 (quoting 40 C.F.R. § 1501.7(b)(4)). Plaintiffs cite no record evidence to support that claim, and the regulation that they quote says not a word about *where* a scoping hearing should be held.

F.3d at 1329. To the contrary, the record shows that the public was fully informed about and engaged in the process of evaluating the Elk Grove alternative. *See infra* pt. B.2. Nor have Plaintiffs "pointed to any area [*they*] would have addressed differently had the" Department identified Elk Grove as the proposed action. *New River*, 373 F.3d at 1330.

The lack of any legal basis to impugn the Department's review may be why Plaintiffs strain to accuse the Department of bad faith. But even that ham-handed effort fails. Plaintiffs suggest (at 21) that the Department "obviously knew something in January 2014 that the public did not" about the Tribe's potential interest in the Elk Grove site. In fact, a local Elk Grove newspaper reported as early as *March 2013* that "[t]he leader of the Wilton Rancheria tribe said the Elk Grove Promenade Mall site could be an option for a future casino if their proposal to build one four miles south of Elk Grove [in Galt] falls through." Bryan M. Gold, *Tribe seeks property for casino outside Galt*, *supra*.

Plaintiffs claim (at 22)—again without citation—that the Department was required to initiate scoping for the Elk Grove site as soon as it knew that the Tribe might take an interest in pursuing development there. But they can point to nothing in NEPA that requires an agency to look past a party's application to initiate a costly and burdensome environmental review of an alternative the agency thinks an applicant might wind up preferring. Rather, what NEPA requires is that the agency "defin[e] at the outset the objectives of an action" in light of the application actually before it, *Citizens Against Burlington*, 938 F.2d at 196, select and discuss alternatives that are reasonable "in light of these stated objectives," *City of Alexandria*, 198 F.3d at 867, and refrain from taking an action that was not disclosed and studied in the process. *Cf. Nevada*, 457 F.3d at 93. The Department did all of those things: the February 2014 Scoping Report discussed building a casino at the Elk Grove site as an alternative to the Tribe's proposal, and the Draft and Final EISes analyzed the environmental impacts of the Elk Grove alternative that the Department ultimately chose.

2. The comments submitted in response to the EIS confirm that the Elk Grove alternative was properly disclosed.

The comments submitted in response to the Draft EIS confirm that the Department satisfied NEPA's notice requirement. The purpose of an EIS is to "provide a springboard for public comment in the agency decisionmaking process." *Pub. Citizen*, 541 U.S. at 768 (internal quotation marks and brackets omitted). The comments here reflect that "the public had sufficient information to comment on" each alternative "evaluated in the [Draft EIS]." *Nevada*, 457 F.3d at 90; *see Standing Rock Sioux*, 301 F. Supp. 3d at 74 (similar). Indeed, "Plaintiffs, like the rest of the public, seem to have had no difficulty" in submitting comments addressing the Elk Grove alternative. *Standing Rock Sioux*, 301 F. Supp. 3d at 74. Among the most significant examples:

- Plaintiff Lynne Wheat delivered an impassioned plea at the public hearing on the Draft EIS, asking the Department "to consider carefully the last Alternative F [Elk Grove]," and explaining: "I believe the Mall site in Elk Grove will still provide residents of Galt the jobs that they need. The residents will be employed. They'd come back home. They would spend their money in their hometown of Galt, and that would produce the sales tax revenue." AR10677.

- Plaintiff Stand Up submitted *three* separate letters—two of which plainly assumed that the Elk Grove site was a potential candidate for trust acquisition. In these letters, Stand Up argued that the "City of Galt *and* Elk Grove" had "substantial role[s] in the federal process as well as state legal obligations to adhere to the California Environmental Quality Act"—obligations that would apply to Elk Grove only if the Elk Grove alternative was under consideration. AR10429 (emphasis added); AR10439.

- The City of Elk Grove submitted a letter, which attached several extensive memoranda commenting on the Elk Grove alternative and explained that "[w]hile there is not an application at this time to take the Alternative F site [Elk Grove] into trust, *our understanding is that this is still the appropriate time to comment on the Alternative F site*." AR10290 (emphasis added); *see also* AR10688-89 (hearing testimony of Darrell Doan, Econ Dev. Dir. of Elk Grove).

- Sacramento County submitted a letter indicating that "[t]he County understands that the Elk Grove alternative site may have merit as a potential location for the project" and explaining that the Tribe's memorandum of understanding with the County and City of Elk Grove "addresses the County's needs [if the] *Elk Grove site is ultimately selected*." AR10348 (emphasis added).

- The EPA submitted a letter "recommend[ing]" that the Elk Grove alternative "be designated the environmentally preferable alternative and that BIA and the Tribe *strongly consider this site for the project*." AR10310 (emphasis added); *see* AR10313.

- The California Central Valley Regional Water Quality Control Board submitted a letter detailing the water infrastructure demands and potential water quality impacts of the Elk Grove alternative. AR10318-22.

- The Environmental Council of Sacramento submitted a detailed letter that pointed out the air quality advantages of the Elk Grove alternative, AR10447-48, and concurred with the Draft EIS's discussion of impacts on endangered species "since it may be some time before an FEI[S] is prepared, and this document will be used by the tribe and the BIA in determining *the most appropriate alternative for siting the casino*." AR10448 (emphasis added).

- The Tribe itself submitted a letter asking the Department to add additional detail to its analysis of the Elk Grove alternative and to add language indicating that "[t]he Tribe is in discussions with the current owner over the terms of an agreement to purchase the Mall site." AR10327.

- The Shingle Springs Band of Miwok Indians submitted a letter with detailed objections to the Elk Grove alternative. AR10344-47.

The Department also received numerous comments from individual members of the public, voicing their support for or indifference to building a casino at the Elk Grove site. *See, e.g.*, AR10469; AR10472; AR10480; AR10490; AR10493; AR10505-06; AR10508-11; AR10519; AR10521; AR10526-27; AR10541; AR10587-88; AR10591; AR10593; AR10595-96. Others stated opposition to the casino project "that is being considered in Elk Grove," AR10501, "the Elk Grove Casino project in the works," AR10512, and "the Draft EIS proposal to build a casino in Elk Grove," AR10542. *See also, e.g.*, AR10491; AR10502-04; AR10507; AR10514; AR10538-39; AR10597-600; AR10603.

"[T]he volume and substance of the comments received by the" Department "in response to the DEIS undermine [Plaintiffs'] position that the DEIS failed to serve its purpose." *New River*, 373 F.3d at 1329-30. Indeed, the comments addressed "the very matters of principal concern to" Plaintiffs, namely the suitability of the Elk Grove site for gaming and development. *Id.* at 1329. In spite of all this, Plaintiffs maintain (at 19-21) that "the public could not possibly have known" that the Department might select the Elk Grove alternative because the site was subject to a 2007 development agreement that did not contemplate a casino. With all due respect, that is nonsense. Even the City of Elk Grove—which actually concluded the

development agreement—understood that the Draft EIS comment period was "the appropriate time to comment on the Alternative F site." AR10290. Members of the public responding to "the Draft EIS proposal to build a casino in Elk Grove," AR10542, plainly understood that the Department might actually take that parcel into trust. And the EPA was presumably not knowingly wasting its time when it urged the Department to designate Elk Grove as the "environmentally preferable alternative." AR10310. In any event, the Department's subsequent acquisition of the parcel conclusively demonstrates that the premise of Plaintiffs' argument—that the development agreement made it impossible for the Department to take the Elk Grove parcel into trust—is simply untrue. *See infra* pt. D.2.a.

3. At the very least, the public had ample notice of the Tribe's interest in the Elk Grove site.

The comments are not the only evidence that the public was aware that the Elk Grove alternative was under serious consideration. The Tribe's interest in acquiring the Elk Grove parcel was also widely reported in the local media and the subject of a packed "town-hall" style meeting hosted by the Tribe in Elk Grove. Even residents who confined themselves to reading the headlines of stories published during the comment period would have known that the Elk Grove site was a real option. *See, e.g.*, Hudson Sangree, *Tribal casino proposed at Elk Grove's 'ghost mall' site*, *supra*; Mark Anderson, *Spat with Galt could drive tribe to seek casino in Elk Grove*, Sacramento Bus. J. (Feb. 2, 2016), *available at* https://bit.ly/2Gc5mTO; Bryan M. Gold, *Elk Grove considered alternative site for Indian casino, supra*. Those who read deeper would find coverage of how local residents and community leaders were weighing the pros and cons of a casino development in Elk Grove. *See, e.g.*, Hudson Sangree & Richard Chang, *Casino proposed for southern Sacramento County prompts hopes, concern*, Sacramento Bee (Feb. 16, 2016), *available at* https://bit.ly/2Iuw2Dd. Indeed, at least one commenter expressly referred to an article in the *Elk Grove Citizen* entitled "Elk Grove remains an option for proposed Indian casino site." AR10507; *see* Lance Armstrong, *Elk Grove remains an option for proposed Indian casino site*, Elk Grove Citizen (Feb. 23, 2016), *available at* https://bit.ly/2ICnIkQ.

In addition to the comments submitted and the press coverage during the comment period, the Tribe held a town-hall meeting in Elk Grove in July 2016 in which it offered detailed information about its plans to build a casino on the mall site to a "standing-room only" crowd. Dana Griffin, *Residents pack community meeting for Elk Grove casino proposal*, *supra*; Lance Armstrong, *Wilton Rancheria presents Elk Grove casino plan to community*, *supra*.

Without mentioning the public comments discussed above (or the Tribe's town hall), Plaintiffs argue (at 22) that media coverage cannot excuse noncompliance with NEPA's requirements. That misses the point. The substance of the Draft and Final EIS, and the comments the Department received in response, establish that there was *no* NEPA violation here. The media coverage and public participation in the dialogue over the Elk Grove alternative reinforce that "NEPA's goal of ensuring that relevant information is available to those participating in agency decision-making" was met. *Nevada*, 457 F.3d at 90.[9]

C. The Department Was Not Required To Prepare A Separate Or Supplemental Environmental Impact Statement.

In a variation on their theme, Plaintiffs claim (at 23-30) that NEPA required the Department to prepare a new or supplemental EIS once the Tribe filed its application in June 2016 asking the Department to take the Elk Grove site into trust. The record and the case law say otherwise. These agency decisions are governed by NEPA's "rule of reason," a highly deferential standard that allows an agency to make decisions about the need for an EIS "based on the usefulness of any new potential information to the decisionmaking process." *Mayo*, 875 F.3d at 20 (quoting *Pub. Citizen*, 541 U.S. at 767). Plaintiffs have not come close to establishing that

[9] Contrary to Plaintiffs' suggestion, NEPA's requirements are subject to a harmless-error analysis. Case after case in this Circuit has applied the APA's harmless-error rule, 5 U.S.C. § 706, in the NEPA context. *See, e.g.*, *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 401 (D.C. Cir. 2017); *Nevada*, 457 F.3d at 90; *New River*, 373 F.3d at 1327-28; *Indian River Cty. v. Dep't of Transp.*, 348 F. Supp. 3d 17, 61 (D.D.C. 2018), *appeal filed*, No. 19-5012 (D.C. Cir. Jan. 29 2019); *Standing Rock Sioux*, 301 F. Supp. 3d at 74; *Powder River Basin Res. Council v. U.S. Bureau of Land Mgmt.*, 37 F. Supp. 3d 59, 89 n.14 (D.D.C. 2014); *Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 164 n.16 (D.D.C. 2014); *City of Williams v. Dombeck*, 151 F. Supp. 2d 9, 25-26 (D.D.C. 2001).

the Department's decision not to redo or supplement the Draft EIS was unreasonable in light of the extensive study and public dialogue on the Elk Grove alternative in the Draft EIS.

1. The Department reasonably determined that there was no need to prepare a new EIS for the Tribe's Elk Grove fee-to-trust application.

The D.C. Circuit has repeatedly explained that "[a] court's role in reviewing an agency's decision not to prepare an EIS is a limited one, designed primarily to ensure that no arguably significant consequences have been ignored." *Id.* (internal quotation marks omitted). "[W]here the preparation of an EIS would serve 'no purpose' in light of NEPA's regulatory scheme as a whole, no rule of reason worthy of that title would require an agency to prepare an EIS." *Id.* (quoting *Pub. Citizen*, 541 U.S. at 767) (alteration omitted). The same reasoning extends to the Department's decision not to prepare a *second* EIS after analyzing the environmental impacts of both Alternative A and Alternative F in detail.

Plaintiffs can identify no "arguably significant consequences" the Department "ignored" by choosing not to rehash its analysis of the Elk Grove alternative in a new EIS that would identify Alternative F as the proposed action sought by the Tribe. *Id.* (internal quotation marks omitted). Instead, they ask this Court to set aside controlling precedent and add novel requirements to NEPA. Plaintiffs insist (at 23) that an EIS is "statutorily *required*" whenever a tribe files a new fee-to-trust application. That is true, as far as it goes. *See* 42 U.S.C. § 4332(2)(C). But the question here is whether the Draft EIS that the Department had *already prepared* and that the public had *already commented on* was sufficient. The answer is "yes." The purpose of an EIS is to ensure that the agency takes "a 'hard look' at the environmental consequences of its actions, including alternatives to its proposed course" and "that these environmental consequences, and the agency's consideration of them, are disclosed to the public." *Sierra Club*, 867 F.3d 13 at 1367. The Draft EIS accomplished those objectives with respect to the Elk Grove alternative just as it did for Alternative A. And because the Department had "adequately considered and disclosed the environmental impact of" the Elk Grove

alternative, a second EIS was not required. *New River*, 373 F.3d at 1327 (internal quotation marks omitted); *see Pub. Citizen*, 541 U.S. at 767.

Plaintiffs claim next (at 24-25) that an agency cannot select an alternative other than the proposed action without preparing a separate EIS when the proposed action is "precisely defined." No authority supports that claim. The federal register notices and decisions Plaintiffs cite appear to be *examples* of cases in which an agency has chosen among closely related alternatives. But they do not even implicitly suggest that an agency cannot choose among alternatives at different sites, as the Department did here. To the contrary, the Ninth Circuit decision Plaintiffs cite reiterates the principle that no new EIS is needed so long as there are no "environmental impacts that the agency *has not already considered*." *Russell Country Sportsmen*, 668 F.3d at 1049 (emphasis added). Plaintiffs do not point to any environmental impacts from the Elk Grove alternative that the Department had not already considered in the EIS it prepared. The public had a meaningful opportunity to comment on that alternative, and used it.

2. The Department acted well within its broad discretion in determining that there was no need to prepare a supplemental EIS.

For essentially the same reasons that the Department was not required to restart the NEPA process when the Tribe filed its fee-to-trust application for the Elk Grove parcel, it was also not required to issue a supplemental EIS. The question is not even close: case after case holds that "only those changes that cause *effects which are significantly different from those already studied* will require supplementary consideration." *Public Emps. for Envtl. Responsibility v. U.S. Dept. of the Interior*, 832 F. Supp. 2d 5, 28 (D.D.C. 2011) (emphasis added and internal quotation marks omitted); *see Marsh*, 490 U.S. at 374; *Friends of Marolt Park*, 382 F.3d at 1097; *Russell Country Sportsmen*, 668 F.3d at 1049.

Plaintiffs rattle off (at 26-28) a series of issues regarding the Elk Grove alternative that they claim were not adequately addressed in the Draft EIS. But those arguments—even

assuming that raising them in this perfunctory manner did not waive them[10]—would go to the sufficiency of the EIS. Not one of them suggests that designating Elk Grove the proposed action in the Final EIS "cause[d] effects" that were "significantly different from those already studied" in the Draft EIS. *Public Emps. for Envtl. Responsibility*, 832 F. Supp. 2d at 28. Nor could they. The Draft EIS contemplated that the Department might prefer the Elk Grove alternative, and so it studied and gathered extensive comments regarding all of the potential impacts of building a casino there.

Plaintiffs claim (at 29) that the comments submitted by the cities of Galt and Elk Grove somehow show that a supplemental EIS was required. Just the opposite: those comments demonstrate that the Draft EIS served its purpose of "elicit[ing] suggestions for change" in the analysis offered in the Draft EIS. *New River*, 373 F.3d at 1329 (internal quotation marks omitted). Far from "ignoring" those comments, as Plaintiffs suggest (at 30), the Department spent over 80 pages responding to them and made revisions to the analysis in the Final EIS where appropriate. *See, e.g.*, AR10718-32 (responses to comments from Elk Grove); AR10747-811 (responses to comments from Galt). Plaintiffs have identified no comments from Galt or Elk Grove that the Department failed to address.

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[10] Plaintiffs do not explain *how* the Department's treatment of these matters was "[un]reasonable" or how these supposed "deficiencies" could have been "significant enough to undermine informed public comment and informed decisionmaking." *Sierra Club*, 867 F.3d at 1368. "It is well established in this circuit that 'perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are deemed waived.' " *Sherrod v. McHugh*, 334 F. Supp. 3d 219, 265 (D.D.C. 2018) (quoting *Johnson v. Panetta*, 953 F. Supp. 2d 244, 250 (D.D.C. 2013)); *see Jericho Baptist Church Ministries, Inc. (D.C.) v. Jericho Baptist Church Ministries, Inc. (Md.)*, 223 F. Supp. 3d 1, 8 (D.D.C. 2016) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." (quoting *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007)). The issues that Plaintiffs list were addressed in the Draft EIS, the Final EIS, or both. *See, e.g.*, AR26979-80, AR10703-04 (water resources); AR26637, A10719-20 (proximate residential areas); AR26985-87 (public services); AR26784-87, AR27142-237, AR11666-712 (economic analysis). Without knowing what Plaintiffs think was wrong with those analyses, the Tribe cannot respond to their claims.

As a fallback, Plaintiffs contend (at 29) that the Department had to prepare an "evaluation" before it declined to prepare a supplemental EIS. That is incorrect. The language Plaintiffs quote out of context from *Lemon v. McHugh*, 668 F. Supp. 2d 133 (D.D.C. 2009), refers to an agency's obligation when it considers a major action *vel non*. *Cf., e.g.*, *Mayo*, 875 F.3d at 15. The *Lemon* court referred to a supplemental EIS (rather than an EIS) because the question in that case was whether the agency could approve a new action based on an EIS it had conducted six years earlier. 668 F. Supp. 2d at 135-137. Neither *Lemon* nor any of the other cases Plaintiffs cite suggests that an agency must prepare a special analysis whenever an alternative that was discussed in a draft EIS becomes the proposed action by the end of the NEPA process. The Final EIS acknowledged that the Elk Grove alternative had replaced Alternative A as the proposed action in the Tribe's application. AR10957; *see* Final Environmental Impact Statement, 81 Fed. Reg. at 90,379. No elaborate explanation was needed to show that the real-world environmental effects of Alternatives A and F had not changed, regardless of which was labeled the Tribe' proposed action.[11]

Perhaps unsurprisingly, Plaintiffs barely mention the only actual change to the Elk Grove alternative between the Draft and Final EIS: the addition of roughly eight acres of parking spaces. The Department noted and addressed that change throughout the Final EIS, explaining that it came about in the course of "refining the site plan and accounting for needed roadways and parking." AR10961; *see id.* AR10885, AR10996 n.1. Plaintiffs do not dispute that this *de minimis* change did not require a supplement to the Draft EIS. *See Marsh*, 490 U.S. at 374 (holding that a supplemental EIS is required only if changes will "affect the quality of the human environment in a significant manner or to a significant extent not already considered" (internal quotation marks and brackets omitted)).

[11] Nor do Plaintiffs cite any authority to support their claim (at 28) that the Department had to prepare a supplemental EIS to address new information it added to the Final EIS in response to comments it received on the draft. If that were the rule, then an agency could never address the concerns raised in comments without preparing a supplement.

D. Plaintiffs Have Not Identified Any Legal Defects In The Department's Decision Or The EIS.

Plaintiffs' brief closes with a jumble of objections to the substance of the Final EIS and ROD, which makes it hard to tell what arguments they are squarely pressing. As best the Tribe can tell, Plaintiffs have three arguments, none of which has merit. They imply that the Department predetermined the outcome of its analysis, though they cannot and do not even try to meet the high bar for such claims. They raise a grab-bag of supposed deficiencies in the NEPA analysis, though each of those issues was addressed by the Department in a manner that more than satisfies NEPA's deferential rule of reason. And they complain about the timing of the Department's decision, though the Department complied fully with NEPA and its own regulations. None of Plaintiffs' arguments identify a legal defect in the Final EIS or the ROD.

1. Plaintiffs cannot meet the high burden to show impermissible predetermination or inalterably closed minds.

Without directly arguing the point, Plaintiffs cite (at 30) case law involving agencies impermissibly predetermining the outcome of NEPA review or reviewing public comments with closed minds. Plaintiffs' hesitation to address the argument head on is understandable; they cannot possibly meet the high burden to show either predetermination or closed minds.

The standard for predetermination in the NEPA context is a "high" one: "predetermination occurs only when an agency *irreversibly and irretrievably* commits itself to a plan of action that is dependent upon the NEPA environmental analysis producing a certain outcome, *before* the agency has completed that environmental analysis." *Forest Guardians*, 611 F.3d at 714 (emphases in original) (quoted approvingly in *Flaherty v. Bryson*, 850 F. Supp. 2d 38, 70 (D.D.C. 2012)); *see also Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 892 (9th Cir. 2002) (NEPA requires "environmental analysis before any irreversible and irretrievable commitment of resources.") (internal quotation marks omitted). Of course, Plaintiffs can cite no evidence that the Department here did anything like that: the Department "had no preexisting agreement" to take the land into trust, *Silverton Snowmobile Club v. U.S. Forest Serv.*, 433 F.3d 772, 781 n.2 (10th Cir. 2006), and "the agency was free to decide *not* to" take the land into trust

"up until the time it issued its Decision," *Native Ecosystems*, 304 F.3d at 893. Plaintiffs do not argue otherwise, or even acknowledge the applicable standard.

Plaintiffs also cannot show that anyone in the Department acted with an impermissibly closed mind. The D.C. Circuit has for decades held that "the presumption of administrative regularity" controls absent "a clear and convincing showing that [an] agency member has an unalterably closed mind on matters critical to the disposition of the proceeding." *Ass'n of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979); *see also Air Transp. Ass'n of Am., Inc. v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011). Even where a decisionmaker has "indicated that he . . . favored" a particular outcome, has "predict[ed]" the outcome, or has made an "announcement of [his] own considered position," that alone "gives no indication of a mind that has been closed to the evidence" or "demonstrated that that view could not be changed." *Consumers Union of U.S., Inc. v. FTC*, 801 F.2d 417, 427 (D.C. Cir. 1986) (Scalia, J.).

Plaintiffs cite (at 30) *Nehemiah Corp. of America v. Jackson*, 546 F. Supp. 2d 830 (E.D. Cal. 2008) to suggest that a public perception of agency bias may chill participation. But the evidence in that case illustrates why it does not apply here. *Nehemiah* involved a proposed HUD rule banning a practice that HUD's Secretary had already publicly stated he was "very much against." *Id.* at 847. Indeed, news reports had the Secretary on record "stat[ing] that HUD would approve the new rule *even in the face of critical comments*." *Id.* (emphasis added). The situation here is not remotely analogous. Plaintiffs do not identify *any* specific statement by Department personnel prior to the NEPA process "demonstrat[ing]" hostility to critical comments or that a Department decisionmaker's "view could not be changed." *Consumers Union*, 801 F.2d at 427.[12]

[12] The best Plaintiffs can do (at 34-35) is an email from the Tribe's title company, which says that Boyd Gaming Corporation (then the Tribe's casino design and development partner) was under the impression that the Department "would like to have the land taken into trust before 1/20/17." AR3248. This hearsay-within-hearsay account by a title company employee, conveying the impression of a Boyd Gaming employee, could not even theoretically assist the

Instead, the principal evidence Plaintiffs invoke (at 30-35) is the timing of the Department's decision and the supposed flaws in its rationale.[13] But the D.C. Circuit has expressly "reject[ed] the suggestion that [courts should] look to the adequacy of [the decisionmaker's] examination of the facts and issues in order to determine whether he was biased." *C & W Fish Co. v. Fox*, 931 F.2d 1556, 1564 (D.C. Cir. 1991). Courts "should focus on the agency member's prejudgment, if any, rather than a failure to weigh the issues fairly." *Id.* The distinct question of whether the agency "weighed the facts properly is to be examined only in determining if his decision was arbitrary or capricious," and courts ought not "second guess an agency decision or question whether the decision made was the best one." *Id.* at 1565. Plaintiffs present no direct evidence of prejudgment, and they cannot substitute criticisms of the substance of the decision.

2. Plaintiffs identify no meaningful deficiencies in the EIS or ROD.

Plaintiffs turn next to the very thing courts in this Circuit have said time and again is improper in judicial review of a NEPA analysis: "flyspeck[ing]" the Department's "environmental analysis, looking for any deficiency no matter how minor." *Sierra Club*, 867 F.3d at 1368 (quoting *Nevada*, 457 F.3d at 93); *accord Theodore Roosevelt Conservation P'ship v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011). Plaintiffs claim that the Department failed to give

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Court in determining that a particular decisionmaker met the "closed mind" standard. The overall subject-matter of the email was simply to prepare the land for conveyance into trust *if* the Department approved the application. That is entirely benign and unsurprising: As this Court has already recognized, "federal regulations require conversations between the Department and tribes about the land acquisition process before the release of a decision." ECF No. 80 at 4; *see also* 25 C.F.R. § 151.12(c)(2)(iii) (requiring the Department to be able to "[i]mmediately acquire the land in trust" upon approving an application).

[13] Plaintiffs repeat the claim (at 35) that the Tribe must have known there would be a favorable decision ahead of time because it exercised its option to purchase the Elk Grove site before the Department's decision. As the Tribe has already explained, it took a calculated business risk when it purchased the land in the hopes that the parcel could quickly be taken in trust if the Department agreed. *See* ECF No. 81 at 3-4. That risk was qualitatively different from the Tribe's earlier decision to pay $1 million for an *option* on the land—after all, an unexercised option is money down the drain, but a $36 million piece of property is an asset.

adequate treatment to four different issues in the EIS. In fact, the Department addressed all four, and its detailed responses plainly satisfy the deferential reasonableness standard that applies to judicial review of an agency's NEPA analysis.

a) Encumbrances on the land

Neither the development agreement between the City of Elk Grove and the parcel's former owner nor an Army Corps of Engineers permit posed any obstacle to the Department's decision, as the ROD explained in detail. Ignoring that explanation, Plaintiffs assert (at 35) that applicants seeking to have land taken into trust "must clear objections identified in [the Department's] preliminary title opinions before preparing an analysis and notice of decision" and that the Department should have disclosed the encumbrances in the EIS. Plaintiffs are wrong.

For starters, Plaintiffs never explain how the development agreement could have been relevant to the NEPA analysis. Because taking the land into trust would preempt the agreement, *see* AR24511, the Department's assessment of environmental impacts had to—and did—consider what mitigation or other measures would be appropriate without reference to the agreement.[14] And whatever environmental benefits the development agreement contained were replicated when the Tribe voluntarily entered into a memorandum of understanding with Elk Grove to "fully address and mitigate any and all direct impacts of the [casino] to the City." AR10244.

[14] Plaintiffs do not even bother to explain why they think the Army Corps of Engineers permit is relevant to the NEPA analysis. Although they note (at 37) that the permit "affects the environment," they do not explain how they think it affects the fee-to-trust decision that they are challenging. Although taking the land into trust would arguably affect the *state*-law development agreement in light of tribal sovereignty, *see* AR24512, Plaintiffs provide no explanation for how taking the land into trust would, on its own, affect the *federal*-law permit. In any event, any potential title issues were resolved shortly before the ROD was issued, when the Corps agreed to modify the permit to accommodate the change in use for the casino site. *See* AR25842-44. Notably, the permit obligations remained with the Howard Hughes Corporation—the prior owner of the casino site and continuing owner of the larger mall site—and the modification required Howard Hughes to put up a bond insuring that the mitigation required by the permit would be completed. *See id.*

The development agreement was likewise irrelevant to the Department's fee-to-trust decision. As the Department explained in the ROD, the regulations provide that the "Secretary *may* require the elimination of" encumbrances but is required to do so only "*if* she determines that" they "make title to the land unmarketable." 25 C.F.R. § 151.13(b) (emphases added); *see* AR24515-16. The "purpose of" that requirement "is to ensure that the Tribe has marketable title to convey to the United States, thereby *protecting the United States*"—not third parties. Title Evidence for Trust Land Acquisitions, 81 Fed. Reg. 30,173, 30,174 (May 16, 2016). Accordingly, "Section 151.13 is not a factor that the Department must take into consideration before deciding whether to approve a trust acquisition" or a matter for the NEPA process; "rather, it is a final condition of accepting the conveyance in trust." AR24517.

Though it was not required to entertain Plaintiffs' arguments concerning the title, the Department nevertheless did so. It explained that "[e]ven assuming that the Development Agreement" remained unamended, "activities on trust land are regulated by the Tribe and Federal government, and not local governments," so that "the Development Agreement does not prohibit the Department from approving the Tribe's trust application." AR24512. And even if "there could be a land use or jurisdictional conflict," the Department concluded in its policy judgment that "these conflicts are resolvable and outweighed by the other benefits associated with the trust acquisition." *Id.*; *see City of Alexandria*, 198 F.3d at 867 (noting the "considerable deference" due to an "agency's expertise and policy-making role" in the NEPA analysis).

The authorities Plaintiffs cite support the Department's conclusion. The *Fee-to-Trust Handbook* invoked by Plaintiffs (at 35) explains that the BIA "will require elimination" of encumbrances only "if [the Solicitor's Office] determines that [they] make title to the land unmarketable." Bureau of Indian Affairs, U.S. Dep't of the Interior, *Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook)* 18-19 (2016), *available at* https://on.doi.gov/2PKk1dD. And the letter from the BIA's regional director made clear that the BIA's title concerns were related not to its NEPA analysis, but rather to concerns that "title

objections . . . might possibly defeat or adversely affect *the Government's* title or cause losses *to the United States*." AR3707-08 (emphases added).

Plaintiffs insinuate (at 37-38) that there must be something more to the BIA's title concerns because the Tribe proactively reached out to the BIA to resolve them. But until the Department determined that the development agreement was a non-issue, the Tribe was understandably eager to do what it could to explore ways to amend or cancel the agreement.[15]

b) Water supply

Plaintiffs argue (at 35, 39-40) that the Department insufficiently analyzed whether the Sacramento County Water Agency (SCWA) could supply the Elk Grove site with water. That is patently untrue. The Department considered in detail the effects of the project on local water supply services and groundwater levels, and it specifically responded to comments raising objections like the ones Plaintiffs press here.

With regard to water supply and distribution, the Final EIS explained that "SCWA has capacity to meet anticipated demand for domestic water use" for the Elk Grove site. AR10704. It acknowledged that a "significant effect would occur to SCWA water supply distribution facilities as a result of the need to provide service to" the Elk Grove casino cite, but it determined

[15] Plaintiffs' remaining half-hearted arguments are insufficiently developed to be considered properly before the Court. *See supra*, p. 29 n.10. Both also plainly lack merit. *First*, in a single sentence, Plaintiffs contend (at 36-37) that "the development agreement prevented the site from qualifying as 'Indian lands' available for gaming." They cite a statutory provision defining "Indian lands" to include "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe"—a definition the Elk Grove site clearly satisfies. 25 U.S.C. § 2703(4). Plaintiffs also offer a conclusory statement that the development agreement "interfered with tribal governance," citing a regulatory provision that has nothing at all to do with tribal governance, *see* 25 C.F.R. § 151.11(b) (describing how the Secretary should consider distance from a Tribe's reservation when deciding whether to take additional land into trust), and ignoring Elk Grove's agreement that once the land was taken into trust, the city would no longer exercise any jurisdiction over it. *See* AR3221, AR10246. *Second*, Plaintiffs accuse the Department (at 37) of "run[ning] roughshod over private or public property rights by acquiring land in trust." Plaintiffs never identify any supposedly endangered rights and do not acknowledge the September 2016 memorandum of understanding between Elk Grove and the Tribe to mitigate all external effects of the Tribe's casino facility. *See* AR10235-51.

that with appropriate mitigation, the effects on SCWA's water supply service would be "[l]ess than [s]ignificant." AR10918. To that end, the Final EIS directed the Tribe to "enter into a service agreement prior to project operation to reimburse" SCWA "for necessary new, upgraded, and/or expanded water . . . collection, distribution, or treatment facilities." AR11565. The EIS also included a detailed water feasibility study by an independent engineering firm, *see* AR27239, which found that SCWA could supply water and concluded that the development fees assessed to the Tribe to complete the infrastructure at the site would amount to a modest $1.5 million, less a credit for the fee paid by the previous developer. *See* AR27264.

The Final EIS separately considered the effect of the project on local groundwater, which it also found to be "[l]ess than [s]ignificant." AR10894. In support of that conclusion, the Final EIS explained that the "Elk Grove Urban Water Management Plan already accounts for commercial use of the site," and that SCWA's "groundwater resources are expected to remain stable in drought years and to be resistant to the effects of climate change." *Id*. Moreover, the Department found that the groundwater supply in the area was generally stable, even in drought years, AR11043, and that SCWA's usage from its principal water groundwater basin "is significantly below" "the annual long-term sustainable yield," such that the basin "is not considered to be in overdraft." AR11148. Contrary to Plaintiffs' claim (at 39), the Final EIS also considered the cumulative effect of the casino project and other potential developments. It explained that "SCWA has capacity to meet anticipated demand for domestic water use" and "*cumulative impacts to groundwater would not be substantial*." AR11527 (emphasis added).

Moreover, the Department considered and responded to comments related to water supply. In responding to Elk Grove's comment that the Draft EIS was "unclear regarding impacts to SCWA's system," the Final EIS explained that "[t]he existing planned commercial use at the Mall site is included in Sacramento County's General Plan and is comparable to the use" under the Elk Grove casino alternative so that "water demands at the Mall site are accounted for in SCWA's master planning." AR10729. It acknowledged that there would be a significant effect on SCWA's water distribution facilities but explained that, "through

discussions with SCWA's Department of Community Development," "it was determined that most of the water system acreage and impact fees have been paid and construction is mostly complete," although the Tribe would pay its fair share for additional upgrades. *Id.* (internal quotation marks omitted). The Department responded to Plaintiffs' generic comments concerning the water supply in the ROD, explaining that the mitigation measures would ensure that the Tribe would bear the cost for maintaining SCWA's service capacity at existing levels and that the additional acreage for parking did not require a change to the water analysis. *See* AR24779-80.

Straining, Plaintiffs pick a summary statistic out of a fourteen-year-old-report and infer from it that SCWA lacks capacity to supply the necessary water to the proposed Elk Grove casino. That argument need not detain this Court long. "It is a hard and fast rule of administrative law, rooted in simple fairness, that issues not raised before an agency are waived and will not be considered by a court on review." *Nuclear Energy Inst., Inc. v. EPA*, 373 F.3d 1251, 1297 (D.C. Cir. 2004) (per curiam). Plaintiffs never raised this objection in their comments and so cannot assert it now. Even if they could, Plaintiffs are wrong.

Plaintiffs (at 40) look to the SCWA 2005 master plan's estimate of the average per-acre water usage for mixed-use-zoned land, and because this value is lower than the casino's anticipated per-acre usage, Plaintiffs leap to assume that the Department did not "actually read the 2005 Master Plan." This Court has already held that the 2005 Master Plan is not part of the administrative record. *Compare* ECF No. 62 at 6 *with* ECF No. 57 at 8. In any event, Plaintiffs provide no justification for their assumption that the county-wide water-use averages can be used to show how much any individual acre will use. And on top of that, it is far from clear that the SCWA considered the mall site as an ordinary mixed-used parcel; as Plaintiffs' acknowledge in a footnote (at 40 n.43), the casino project area falls within the special "Lent Ranch Specific Plan" area with unique water use planning. *See* SCWA, *Zone 40 Water Supply Master Plan* at 1-5 (Feb. 2005), *available at* https://bit.ly/2VrbM7q (showing the "Lent Ranch Specific Plan"); *id.* at 1-6 (explaining that for "specific plan" areas, "[d]evelopment patterns may ultimately be

somewhat different than that assumed for estimating water demands"); *see also* AR24510-11 (explaining that the Alternative F site is within the Lent Ranch Specific Planning Area, "a special purpose zoning district"). Plaintiffs' unexplained assumptions cannot undermine the Department's conclusion that SCWA had already planned for water usage "comparable" to the casino project.

Plaintiffs further allege (at 40) that the Department never "consulted with SCWA" "prior to the [Final EIS]," but in fact the Department's responses to the comments indicate that it did. AR10729; *see also* AR27257 (water feasibility study's description of "discussions with SCWA's Department of Community Development"). At the end of the day, Plaintiffs' disagreement with the Department's water assessment does not make the Department's well-considered NEPA analysis unreasonable.[16]

[16] Plaintiffs filed an improper motion for reconsideration seeking to introduce a document that they claim (at 40) shows that SCWA "could not serve the area without procuring additional water supplies and building additional infrastructure." As explained in the Tribe's and the Department's oppositions to Plaintiffs' motion for reconsideration, that document—created months *after* the land-to-trust decision—could not have been considered by the Department when it made its decision and so is not relevant to judicial review of the agency's action. *See* ECF Nos. 92-93.

Even if the Court considers it, the document does not say what Plaintiffs suggest it does. It says simply that SCWA's supply portfolio was "fully allocated" "[a]t this time"—i.e., March 6, 2017, more than a month after the ROD, and so it presumably accounts for the Elk Grove casino site. ECF No. 87-1. Moreover, the document concerns Elk Grove's "Kammerer/99 Sphere of Influence Amendment"—not the Tribe's casino. *Id.* As noted, the Kammerer proposal seeks to add 1,156 acres of rural land to the City of Elk Grove for completely new commercial and residential development. Whether additional water supplies will be needed to serve a completely new development of more than a thousand acres of farmland, ECF No. 87-1, says nothing about SCWA's ability to supply water to a 36-acre project on a partially-built mall site. And even if the letter's analysis were somehow relevant to the casino project, its conclusion that "additional infrastructure will be required" to "serve the area," *id.*, is entirely consistent with the mitigation measures described in the Final EIS, AR11565. Lastly, if the Court is inclined to consider documents outside the administrative record, it should also review SCWA's 2015 Urban Water Management Plan, which shows that SCWA has access to far more water than its anticipated needs. *See* SCWA, *2015 Urban Water Management Plan* 6-18 (June 2016), *available at* https://bit.ly/2E8AGTf.

c) Propane facility

Plaintiffs' "propane facility" argument (at 41) is equally unavailing. To begin with, the purported risks of a terrorist attack on a propane facility fall outside the scope of NEPA review. NEPA requires agencies to consider the "degree to which *the proposed action* affects public health or safety." 40 C.F.R. § 1508.27(b)(2) (emphasis added). The risks Plaintiffs complain of are the effects of the *propane facility*, not the casino, and the Department was not obliged to consider them.

Even if the facility's impacts were somehow relevant to the Department's analysis of the Elk Grove casino, the risk of explosion would not be. As the Supreme Court explained in a case involving the reopening of the Three Mile Island nuclear power plant, the mere "*risk* of an accident is not an effect on the physical environment" itself, for a "risk is, by definition, unrealized in the physical world." *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 775 (1983); *accord Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1466-67 (9th Cir. 1996) ("An increased risk of accident is not an impact to the physical environment."). The harms from a hypothetical terrorist attack itself are likewise "too attenuated to require NEPA review." *New Jersey Dep't of Envtl. Prot. v. U.S. Nuclear Regulatory Comm'n*, 561 F.3d 132, 140 (3d Cir. 2009). As the Third Circuit explained in another case involving a nuclear facility, a terrorist attack requires "the act of a third-party criminal" and "the failure of all government agencies specifically charged with preventing terrorist attacks." *Id.* If NEPA required the Department "to analyze the potential consequences" of a terrorist attack, the Department "would spend time and resources assessing security risks over which it has little control and which would not likely aid its other assigned functions" to encourage tribal self-governance and economic self-sufficiency. *Id.* at 141. Such risks are outside any "manageable line" the court might draw. *Metro. Edison*, 460 U.S. at 774 n.7.

In any event, the Department *did* consider the safety implications of the propane facility in both its Final EIS and ROD. *See* AR11175-76; AR24781-82. The Final EIS noted that when the prior mall development project on the very same site was being evaluated, a state

environmental impact report considered "four separate studies done on potential risks" from the propane facility and concluded that "the risk level posed" was "acceptable and impacts are considered to be less-than-significant." AR11175-76 (internal quotation marks omitted). A California appellate court decision found that conclusion to be "amply supported by the evidence" and that "the potential for criminal sabotage . . . would not create a significant risk to persons at the" site. AR11176 (quoting *S. Cty. Citizens for Responsible Growth v. City of Elk Grove*, No. C042302, 2004 WL 219789, at *20-21 (Cal. Ct. App. Feb. 5, 2004) (unpublished)). The Final EIS found that prior analysis sufficient, *id.*, and in response to Stand Up's comments, the ROD explained that the prior environmental impact report sufficiently "addressed the risks associated with criminal sabotage" so that the EIS did "not need to analyze the same impacts further." AR24782. The ROD even went on to explain why the studies underlying the prior environmental impact report that found no significant risk were the most reliable. *See id.*[17]

Plaintiffs' remaining complaints (at 41) are that the Department did not reevaluate "terrorism risks after the terrorist attacks of September 11, 2001" (though they do not explain why that matters); credit a histrionic report by a group styled the "Northwest Citizen Science Initiative" speculating about novel ways terrorists might attack a propane facility in Portland, Oregon, *see* AR24625; or analyze a self-serving letter from the company that owns the Elk Grove propane facility objecting to the Kammerer/99 expansion mentioned above, p. 12, and repeating objections rejected in a 2001 environmental impact report and by the state court that reviewed it. *See* AR39-42. None of these objections seriously calls the Department's analysis

[17] Plaintiffs suggest (at 41-42) that the Department could not rely on these earlier analyses, citing a case that held that a "non-NEPA document . . . cannot satisfy a federal agency's obligations under NEPA." *S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (per curiam). In that case, however, the federal agency asserted that certain impacts "*need not be evaluated*" because the facility at issue operated under a state permit that addressed those impacts. *Id.* at 725-726 (emphasis added). The court rejected the contention that the state permit absolved the federal agency of its NEPA duty to consider the issue; it did not suggest that a federal agency may not rely on a state agency's detailed study as part of doing its own NEPA analysis.

into question, and "no rule of reason worthy of that title" could require the Department to respond to each one point-by-point. *Pub. Citizen*, 541 U.S. at 767.

d) Traffic

Last and least, Plaintiffs toss in a paragraph (at 42) claiming that the Department failed to consider a how expanding the Elk Grove site from 28 acres to 36 acres might affect overall traffic at the site.[18] As Plaintiffs acknowledge, however, the Department *did* consider the issue and concluded that the increase in parking would not affect traffic because the size of the gaming floor had not changed. Without disputing the Department's analysis, Plaintiffs now suggest that there could be more traffic because the ROD disclosed that the casino would not have access to adjacent parking at the existing mall. It is not clear from Plaintiffs' brief how *less* parking could result in *more* traffic, but it suffices to say that this is precisely the kind of "flyspeck[ing]" that NEPA forbids. *See, e.g.*, *Sierra Club*, 867 F.3d at 1368.

3. The Department made its decision in the timeframe permitted by law.

Plaintiffs are left to complain that the ROD issued too fast. But the timing of the Department's decision did not violate any governing regulation and is not a substitute for identifying a substantive error in the ROD. NEPA regulations provide that "[n]o decision on the proposed action shall be made or recorded" until "[t]hirty (30) days after" the EPA's "publication" of the notice of availability of the Final EIS. 40 C.F.R. § 1506.10(b). Here, the EPA's notice of the Final EIS was published on December 16, 2016, and the ROD issued 34 days later, on January 19, 2017. *See* AR24519, AR24522, AR24530. Thirty-four is more than thirty; that ought to be the end of the story. Yet Plaintiffs contend (at 32) that the Department cannot have given their comments sufficiently close scrutiny because the ROD issued two days after the close of the comment period on the Final EIS.

[18] The ROD explained that the reason for the acreage increase before the Final EIS was that the owner of the nearby mall property told the Tribe it could not use its parking and "would have to provide all of its own parking"—hence the increase in parking that was considered in the Final EIS. AR24771.

It is black-letter administrative law that courts may not "engraft[] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978). Rather, "[a]dministrative decisions should be set aside in [the NEPA] context, as in every other, only for substantial procedural or substantive reasons *as mandated by statute.*" *Id.* at 558. (emphasis added). Congress did not require agencies to wait longer than thirty days after preparing a Final EIS, and neither did the Council on Environmental Quality, which promulgated NEPA's implementing regulations. To imply a substantive violation of the Act from an agency's *compliance* with the regulation's timing requirements would be to rewrite the rules in direct contravention of *Vermont Yankee*. This Court should decline Plaintiffs' "invitation to engage in this act of judicial creativity." *Manhattan Tankers, Inc. v. Dole*, 787 F.2d 667, 671 (D.C. Cir. 1986) (citing *Vermont Yankee*, 435 U.S. at 524).[19]

Even if it were appropriate for this Court to fashion procedural requirements without a statutory or regulatory basis, there is no need to do so here. The Department received only eleven comment letters in the comment period, and just four of those came on the last day. *See* AR24530. The Department thus had ample time to consider and address them, which it did in detail across 34 pages of the ROD. AR24752-85. If it were true, as Plaintiffs contend (at 33), that the Department did not give these comments "careful consideration," then Plaintiffs ought to

[19] The one district-court case Plaintiffs cite is not to the contrary. That case did not review government action for NEPA compliance. The government had admitted error in its NEPA analysis, and the decision addressed only whether the plaintiff was entitled to attorney's fees. Its analysis is entirely consistent with *Vermont Yankee*. The court did not hold that an agency must spend a certain amount of time considering comments on an EIS. It found that the combination of an unduly rapid decision—suspiciously timed to come just before an announcement that applicant was out of compliance with the Clean Air Act—*and* significant deficiencies in the environmental analysis could, taken together, support an inference of bad faith by the government for purposes of determining that fees were warranted. *N. Carolina All. for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 671, 676 (M.D.N.C. 2001).

have been able to identify some meaningful deficiency in the Department's responses. They have not. [20]

CONCLUSION

For the foregoing reasons and those advanced by the Federal Defendants in their opposition to Plaintiffs' motion and cross-motion for summary judgment, the Tribe respectfully requests that this Court deny Plaintiffs' motion for summary judgment, grant the Tribe's and Federal Defendants' cross-motion for summary judgment, and enter judgment for Defendants on all counts.

DATED this 16th day of May, 2019.

Respectfully submitted,

WILTON RANCHERIA, CALIFORNIA

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[20] Plaintiffs assert (at 32) that, "[o]n average," it takes the Department "15 months from the close of the comment period on a [Final EIS] to review and respond to comments and issue a ROD." As the Department has already pointed out, that figure has no statutory or regulatory basis, and it comes from Plaintiffs' averaging time periods from nine cases, which Plaintiffs themselves selected arbitrarily without any analysis of whether their circumstances were similar to this case—in particular, whether the Department was wrapping up business at the close of an administration. *See* ECF No. 82 at 7-8. The implication that the overall process was rushed is also false: The Tribe waited 1,155 days between filing its initial application and the Department's decision. *See id.* at 7.

ADDENDUM

TABLE OF CONTENTS

Page

25 C.F.R. § 151.11

§ 151.11 Off-reservation acquisitions.

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

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

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

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

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

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

25 C.F.R. § 151.12

§ 151.12 Action on requests.

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

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

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

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

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

(i) Promptly provide the applicant with the decision;

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

(iii) Immediately acquire the land in trust under § 151.14 on or after the date such decision is issued and upon fulfillment of the requirements of § 151.13 and any other Departmental requirements.

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

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

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

(i) Promptly provide the applicant with the decision;

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

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

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

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

(iv) Immediately acquire the land in trust under § 151.14 upon expiration of the time for filing a notice of appeal or upon exhaustion of administrative remedies under part 2 of this title,

and upon the fulfillment of the requirements of § 151.13 and any other Departmental requirements.

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

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

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

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

[78 FR 67937, Nov. 13, 2013].

25 C.F.R. § 151.13

§ 151.13 Title review.

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

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

(2) Either:

(i) A current title insurance commitment; or

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

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

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

[81 FR 30177, May 16, 2016]

25 C.F.R. § 292.12

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

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

(a) The newly acquired lands must be located within the State or States where the tribe is now located, as evidenced by the tribe’s governmental presence and tribal population, and the tribe must demonstrate one or more of the following modern connections to the land:

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

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

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

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

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

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

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

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

40 C.F.R. § 1501.7

§ 1501.7 Scoping.

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the FEDERAL REGISTER except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

40 C.F.R. § 1502.14

§ 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. § 1503.1

§ 1503.1 Inviting comments.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State and local agencies which are authorized to develop and enforce environmental standards;

(ii) Indian tribes, when the effects may be on a reservation; and

(iii) Any agency which has requested that it receive statements on actions of the kind proposed.

Office of Management and Budget Circular A–95 (Revised), through its system of clearinghouses, provides a means of securing the views of State and local environmental agencies. The clearinghouses may be used, by mutual agreement of the lead agency and the clearinghouse, for securing State and local reviews of the draft environmental impact statements.

(3) Request comments from the applicant, if any.

(4) Request comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected.

(b) An agency may request comments on a final environmental impact statement before the decision is finally made. In any case other agencies or persons may make comments before the final decision unless a different time is provided under § 1506.10.

40 C.F.R. § 1506.10

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

40 C.F.R. § 1508.27

§ 108.27. Significantly.

Significantly as used in NEPA requires considerations of both context and intensity:

(a) *Context*. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

(b) *Intensity*. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

[43 FR 56003, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

Forty Most Asked Questions Concerning CEQ's
National Environmental Policy Act Regulations,
46 Fed. Reg. 18,026 (Mar. 23, 1981) ("CEQ Guidance")

* * *

4a. Q. What is the "agency's preferred alternative"?

A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative," although in some cases one alternative may be both. See Question 6 below. It is identified so that agencies and the public can understand the lead agency's orientation.

* * *

5a. Q. Is the "proposed action" the same thing as the "preferred alternative"?

A. The "proposed action" may be, but is not necessarily, the agency's "preferred alternative." The proposed action may be a proposal in its initial form before undergoing analysis in the EIS process. If the proposed action is internally generated, such as preparing a land management plan, the proposed action might end up as the agency's preferred alternative. On the other hand the proposed action may be granting an application to a non-federal entity for a permit. The agency may or may not have a "preferred alternative" at the Draft EIS stage (see Question 4 above). In that case the agency may decide at the Final EIS stage, on the basis of the Draft EIS and the public and agency comments, that an alternative other than the proposed action is the agency's "preferred alternative."

5b. Q. Is the analysis of the "proposed action" in an EIS to be treated differently from the analysis of alternatives?

A. The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the "proposed action." Section 1502.14 is titled "Alternatives including the proposed action" to reflect such comparable treatment. Section 1502.14(b) specifically requires "substantial treatment" in the EIS of each alternative including the proposed action. This regulation does not dictate an amount of information to be provided, but rather, prescribes a level of treatment, which may in turn require varying amounts of information, to enable a reviewer to evaluate and compare alternatives.

* * *

29b. Q. How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?

A. This question might arise in several possible situations. First, a commentor on a draft EIS may indicate that there is a possible alternative which, in the agency's view, is not a reasonable alternative. Section 1502.14(a). If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response. Section 1503.4(a). For example, a commentor on a draft EIS on a coal fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits, or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commentor on a draft EIS on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commentor on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest, and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2,000, 4,000, or 6,000 units. A commentor on the draft EIS might urge the consideration of constructing 5,000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered, and, therefore, could be addressed in the final EIS.

A fourth possibility is that a commentor points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a reasonable

alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commentor on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

If the new alternative was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all alternatives.