No. 18-16830

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STAND UP FOR CALIFORNIA!, *et al.*,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants-Appellees,

NORTH FORK RANCHERIA OF MONO INDIANS,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of California
No. 2:16-cv-02681 (Hon. Anthony W. Ishii)

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GLOSSARY

APA	Administrative Procedure Act
EPA	Environmental Protection Agency
IGRA	Indian Gaming Regulatory Act
NEPA	National Environmental Policy Act
NIGC	National Indian Gaming Commission

INTRODUCTION

The Indian Gaming Regulatory Act ("IGRA") defines "Class III gaming" as casino-style gaming, including the use of slot machines. IGRA provides that where an Indian tribe and a State fail to negotiate a "compact" regarding Class III gaming on land under the tribe's jurisdiction, the Secretary of the Interior "*shall prescribe* . . . procedures" under which such gaming "*may be conducted* on the Indian lands over which the Indian tribe has jurisdiction." 25 U.S.C. § 2710(d)(7)(B)(vii) (emphasis added). Once issued, the Secretarial procedures are a full substitute for a tribal-state compact. Acting under this authority after the North Fork Tribe of Mono Indians ("North Fork") and the State of California failed to negotiate a compact, the Secretary issued procedures under which North Fork may conduct Class III gaming on land under its jurisdiction in in Madera County, California.

Plaintiffs (collectively, "Stand Up") argue that, in issuing these procedures, the Secretary violated the Johnson Act—a statute that prohibits certain gambling devices on Indian lands. But IGRA itself expressly provides that the Johnson Act "*shall not apply* to any gaming conducted under a Tribal-State compact" entered into "by a state [like California] in which gambling devices are legal." 25 U.S.C. § 2710(d)(6) (emphasis added). Stand Up argues that IGRA's exemption of such gaming from liability under the Johnson Act has no operation where (as here) the gaming is conducted pursuant to Secretarial procedures that are the expressly prescribed substitute for a tribal-state compact.

As elaborated below, the district court rightly rejected that argument because it would fatally undermine Congress's intent in IGRA to authorize Class III gaming, including the use of gambling devices like slot machines, in states in which gambling devices are already legal. The court also rightly rejected Stand Up's argument that the Secretary was required to make determinations pursuant to certain environmental statutes before issuing procedures for gaming by North Fork. Therefore, the judgment of the district court should be affirmed.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Stand Up's claims arise under several federal statutes, including IGRA and the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. 3 Excerpts of Record (ER) 457-63.

(b) The district court's judgment was final because it resolved all claims against all defendants. 1 ER 29. This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The district court entered judgment on July 18, 2018. 1 ER 29. Plaintiffs filed their notice of appeal on September 11, 2018, or 55 days later. 2 ER 31. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

STATEMENT OF THE ISSUES

1. Whether the challenged Secretarial procedures authorizing Class III gaming, to include the use of slot machines, on land held in trust for North Fork violates the Johnson Act's prohibition of slot machines on Indian lands, 15 U.S.C.

§ 1175(a), where the later-enacted IGRA directs the Secretary to issue "procedures . . . under which Class III gaming may be conducted" on Indian lands, *id.* § 2710(d)(7)(B)(vii), and defines Class III gaming to include slot machines, *id.* § 2703(6)-(8).

2. Whether the Secretary was required (a) to analyze impacts under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 et seq.; or (b) to perform certain analyses under the Clean Air Act, 42 U.S.C. §§ 7401 et seq., before issuing the statutorily-mandated procedures.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations not included in the opening brief are set forth in the addendum following this brief.

STATEMENT OF THE CASE

A. Class III gaming on Indian lands

Congress enacted IGRA in 1988 "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA sets different rules for the conduct of different types of gaming on Indian lands. *See generally id.* § 2710. At issue in this case is Class III gaming, or casino-type gaming, which the statute defines to include the operation of slot machines. *Id.* § 2703(6)-(8).

IGRA provides that Class III gaming "shall be lawful on Indian lands only if" three conditions are met: (1) the gaming is authorized by a tribal ordinance or

resolution meeting certain criteria and approved by the Chairman of the National Indian Gaming Commission ("NIGC"); (2) the gaming is located in a state that "permits such gaming for any purpose by any person, organization, or entity"; and (3) the gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." *Id.* § 2710(d)(1). While the first two conditions are absolute (and are not disputed here), the statute provides an express exception to the third condition, under which the Secretary not only may but *must* authorize Class III gaming absent a tribal-state compact when certain specified events have occurred. *Id.* § 2710(d)(7)(B)(vii). These events involve a state's refusal to negotiate in good faith with a tribe toward the entry of a compact. *Id.* § 2710(d)(7)(B)(i).

This exception addresses the concern of IGRA's framers that an absolute requirement for a tribal-state compact would leave tribes at the mercy of states that refused to negotiate such a compact in good faith. IGRA requires a tribe seeking to conduct Class III gaming to request that the state "enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities," and the statute charges the state to "negotiate . . . in good faith to enter into such a compact." *Id.* § 2710(d)(3)(A). But "some incentive for States to negotiate with tribes in good faith" was needed. S. Rep. 100-446, at 13 (1988).

IGRA creates that incentive by establishing a detailed remedial process by which a tribe may seek redress against a state that refuses to deal in good faith during

compact negotiations. A tribe may initiate that process by filing suit in federal district court. 25 U.S.C. § 2710(d)(7)(B)(i).[1] If the court finds that the state has indeed failed to negotiate in good faith, the court shall order the tribe and state to conclude a compact within 60 days. *Id.* § 2710(d)(7)(B)(iii). If the state and tribe fail to reach an agreement, the tribe and state must each submit its "last best offer for a compact" to a court-appointed mediator, who will then select the compact that "best comports with" IGRA "and any other applicable Federal law and with the findings and order of the court." *Id.* § 2710(d)(7)(B)(iv). At that point, the state has 60 days to decide whether it will consent to the mediator-selected compact. *Id.* § 2710(d)(7)(B)(vi). If the state *does* consent, "the proposed compact shall be treated as a Tribal-State compact." *Id.*

This case arose from a situation in which the State did *not* consent to a mediator's selected compact. In that event, the mediator shall notify the Secretary of the Interior. *Id.* § 2710(d)(7)(B)(vii). The Secretary, in turn, "*shall prescribe*, in consultation with the Indian tribe, procedures . . . under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." *Id.* (emphasis added). IGRA commands that the procedures imposed be "consistent with

[1] The Supreme Court clarified in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72 (1996), that a state may interpose its sovereign immunity as a defense to such an action. The State of California has waived its sovereign immunity for purposes of enforcing IGRA's remedial provisions. *Hotel Employees v. Davis,* 981 P.2d 990, 1011 (Cal. 1999).

the proposed compact selected by the mediator" as well as with "the provisions of [IGRA]" and "the relevant provisions of the laws of the State." *Id.* IGRA does not list any other factors that the Secretary must—or even may—consider when crafting such procedures. *See id.* The Department of the Interior has long articulated the view that, once they are issued, Secretarial procedures "are properly viewed as a full substitute for" a tribal-state compact. 63 Fed. Reg. 3289, 3292 (Jan. 22, 1998); *see also* 3 ER 380.

In addition to expressly authorizing Class III gaming under either a tribal-state compact or under Secretarial procedures issued in lieu of a compact, IGRA also expressly disclaims the applicability of the Johnson Act—an older statute prohibiting the use of "gambling device[s]," including "slot machine[s]," on Indian lands, 15 U.S.C. §§ 1171(a), 1175(a)—to Class III gaming authorized by IGRA. That disclaimer provides that the Johnson Act "shall not apply to any gaming conducted under a Tribal-State compact" entered into "by a state in which gambling devices are legal," which compact "is in effect." 25 U.S.C. § 2710(d)(6). Like various other provisions of IGRA, this provision does not expressly refer to the species of Class III gaming that is authorized not by compact but rather by Secretarial procedures issued in lieu of a compact under IGRA's remedial scheme. For example, Section 2710(d)(1) establishes the three conditions required for Class III gaming discussed above, including the requirement that such gaming is lawful "only if . . . conducted in conformance with a Tribal-state compact," but it does not expressly authorize such gaming pursuant to Secretarial procedures. *See also* 18 U.S.C. § 1166(c) (exempting from a federal statute

extending state-law prohibitions on gambling to Indian country, "class III gaming conducted under a Tribal-State compact," without expressly addressing such gaming authorized by Secretarial procedures).

B. The Secretary's authorization of Class III gaming on North Fork's land

1. The Secretary's determination that North Fork's Madera parcel is eligible for gaming under IGRA and corresponding environmental analyses

North Fork is a federally recognized Indian tribe located in Madera County, California. 1 ER 2. In 2005, North Fork requested that the Secretary acquire in trust for the tribe a 305-acre parcel located in Madera, on which North Fork proposed to develop a hotel and casino. *Id.* In 2006, North Fork further requested that the Secretary make a determination that the Madera parcel is eligible for gaming under provisions of IGRA not at issue in this action. *Id.* The Secretary issued a decision in 2011 determining that the parcel was eligible for gaming, and the Governor of California concurred in that determination. 3 ER 196-97, 201. That determination is not challenged in this action. In making his decision, the Secretary conducted two analyses under federal environmental laws that are relevant to Stand Up's claims.

First, NEPA requires that federal agencies document the environmental impacts of "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332. Consistent with that requirement, the Secretary prepared an environmental impact statement analyzing the impacts of operating a

hotel and casino on that parcel. 1 ER 3. That analysis was not "based upon any particular Tribal-State Compact" into which North Fork and the State might enter to govern gaming on the Madera parcel. *Stand Up for California! v. U.S. Dep't of Interior*, 204 F. Supp. 3d, 212, 256 (D.D.C. 2016), *aff'd* 879 F.3d 1177 (2018), *cert. denied* 139 S. Ct. 786 (2019). Instead, the analysis looked broadly at the effects of "class III gaming on the Madera Site," including "significant related development in terms of hotel, restaurant, and transportation space." *Id.* at 257; *see also id.* at 307-08. Stand Up unsuccessfully challenged the sufficiency of Interior's NEPA analysis in the district court for the District of Columbia. *Id.* at 316.

Second, Interior conducted a so-called "conformity determination" under the Clean Air Act. 1 ER 3. The Act establishes a joint federal-state program to control air pollution nationwide by prescribing national ambient air quality standards, which are set by the U.S. Environmental Protection Agency ("EPA"). *See generally* 42 U.S.C. § 7409. Each state must adopt and submit for EPA's approval a state implementation plan that provides for implementation, maintenance, and enforcement of those standards within designated air quality regions. *Id.* § 7410(a)(1). Federal agencies, in turn, may not "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform" to such a state plan. *Id.* § 7506(c)(1). As a general matter, federal action conforms to a state plan when the federal action will not frustrate the state's ability to attain and maintain the federal standards. *Id.* § 7506(c)(1)(A)-(B). The Secretary determined that maintaining a

gaming facility on the Madera parcel would conform to the relevant state implementation plan, provided that North Fork undertake certain mitigation measures. *Stand Up for California!*, 204 F. Supp. 3d at 320. North Fork committed by tribal resolution to undertaking those measures. *Id.* Like its challenge to the NEPA analysis, Stand Up's challenge to the Secretary's determination that granting North Fork's application conformed to California's state implementation plan was unsuccessful. *Id.* at 323.

2. California's failure to negotiate with North Fork and imposition of Secretarial procedures

Following the Secretary's determination that the Madera parcel is eligible to host gaming, North Fork approached California—which generally allows Class III gaming on Indian lands, *see* Cal. Const. art. IV, § 19(f)—about negotiating a tribal-state compact governing Class III gaming on the Madera parcel. *See* 3 ER 269. In 2012, North Fork and the Governor of California executed a compact, which was subsequently ratified by the state legislature, and ultimately approved by the Secretary. 3 ER 269-70, 272; 78 Fed. Reg. 62,649 (Oct. 22, 2013). In 2014, however, California voters by referendum overturned the legislature's ratification of the compact. 3 ER 272.

Following the referendum's invalidation of the legislation ratifying the compact, North Fork attempted to re-engage the state in negotiations, but California declined. *Id.* North Fork then filed suit against California under 25 U.S.C. § 2710(d)(7), alleging

that California failed to negotiate in good faith for purposes of entering into a tribal-state compact. 3 ER 272. The district court ruled that California had in fact failed to "enter into negotiations with North Fork for the purpose of entering into a Tribal-State compact within the meaning of § 2710" and accordingly ordered the parties to conclude a compact within 60 days, as required by IGRA. *North Fork Rancheria of Mono Indians v. California*, No. 1:15-cv-00419, 2015 WL 11438206, at *12 (E.D. Cal. Nov. 13, 2015). When the state and the tribe failed to agree on a compact within that time, the court appointed a mediator, who reviewed the proposed compacts submitted by both sides. *See* 3 ER 272. The mediator ultimately selected the compact proposed by North Fork. *Id.* When California failed to consent to the mediator-selected compact, the mediator so notified the Secretary, as required by IGRA. *Id.*

Consequently, on July 29, 2016, the Secretary prescribed procedures "under which Class III gaming may be conducted" on North Fork's Madera parcel. 25 U.S.C. § 2710(d)(7)(B)(vii)(II); 3 ER 271. Those Secretarial procedures, which are the subject of this action, expressly provide that they "are properly viewed as a full substitute for a Class III gaming compact that would be in effect had a voluntary agreement been reached between the Tribe and the State, or if the State had consented to the court-appointed mediator's selection." 3 ER 380. Under those procedures, North Fork is permitted to operate as many as 2,000 slot machines on the Madera parcel during the first two years that gaming occurs, and as many as 2,500 machines in subsequent years. 3 ER 283, 287-88.

C. The present action

Stand Up filed the present challenge to the Secretarial procedures in the Eastern District of California, claiming that the procedures were inconsistent with the Johnson Act's prohibition of slot machines on Indian lands, and that the Secretary erred in failing to perform new NEPA and Clean Air Act conformity analyses before issuing the procedures. 3 ER 439-46.[2] On cross-motions for summary judgment, the district court decided all claims in the Secretary's favor. 1 ER 29.

With regard to the Johnson Act claim, the district court rejected Stand Up's argument that IGRA does not render the Johnson Act inapplicable unless the state has actually consented to a tribal-state compact, and therefore does not authorize the use of slot machines under Secretarial procedures. 1 ER 9-14. Looking first to the text of the two statutes, the court acknowledged that the Johnson Act clearly prohibits slot machines on Indian lands, and that IGRA does not appear to address the Johnson Act's effect on gaming. 1 ER 10-11. But as the Court explained, reading Section 2710(d)(6) *not* to make the Johnson Act inapplicable to Class III gaming authorized by Secretarial procedures "would result in internal inconsistencies within IGRA." 1 ER 11. Critically, Stand Up's reading "would render the issuance of Secretarial Procedures inoperative" not only for slot machines, but also "in every case," because IGRA provides that Class III gaming is lawful "only if . . . conducted in conformance with a

[2] Stand Up also brought a claim under the Freedom of Information Act, which is not at issue in this appeal. *See* 3 ER 444-45; Stand Up's Opening Brief ("Op. Br.") 10-12.

Tribal-State compact." 1 ER 11-12. If IGRA's references to Class III gaming authorized by a "tribal-state compact" are read to *exclude* Class III gaming authorized by Secretarial procedures, then such procedures are meaningless, notwithstanding Congress's deliberate decision to provide such procedures as a remedy for tribes dealing with an intransigent state. *See id.*

The district court also rejected Stand Up's alternate argument that Secretarial procedures should be viewed as a "limited remedy, offering fewer class III gaming options than a Tribal-State compact." 1 ER 12. The court explained that such a reading would "wholly undermine the purpose of" IGRA's remedial process, because it would allow a state, by refusing to negotiate or negotiating in bad faith, to block a tribe's ability to offer certain forms of Class III gaming on Indian land—the very outcome that the remedial procedures are intended to avoid. 1 ER 12-13. The court observed that "no court has ever found that class III gaming cannot be conducted pursuant to Secretarial Procedures for want of a Tribal-State compact." 1 ER 13. To the contrary, "many courts recognize that Secretarial Procedures issued at the final stage of IGRA's remedial process operate[] as an 'alternative mechanism permitted under IGRA' for conducting class III gaming." *Id.* (quoting *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1236 (10th Cir. 2017)).

Regarding Stand Up's two environmental claims, the district court rejected Stand Up's contention that the Secretary was required to perform additional analyses before issuing procedures that IGRA *compelled* him to issue. 1 ER 14-25. With regard

to NEPA, the court determined that even assuming that the issuance of Secretarial procedures is a "major federal action" to which NEPA applies, the "rule of reason" under which courts evaluate an agency's NEPA compliance did not require the Secretary to perform a NEPA analysis before issuing Secretarial procedures. 1 ER 14-22. That is because agencies are not required to conduct NEPA analyses when they lack authority to alter their conduct in reliance on such analyses. 1 ER 16-17 (citing *DOT v. Public Citizen*, 541 U.S. 752, 770 (2004)). The Secretary lacks such authority with regard to the issuance of Secretarial procedures, because IGRA *requires* him to issue procedures when the specified events have occurred, and the exhaustive list of considerations that he may take into account when crafting such procedures do not include minimization of any environmental impacts. 1 ER 17-21.

With regard to the Clean Air Act, the district court similarly concluded that the prescribing of Secretarial Procedures does not require the Secretary to pre-determine that such procedures conform to a state's air-quality implementation plan. 1 ER 22-25.

Stand Up's timely appeal followed. 2 ER 31.

SUMMARY OF ARGUMENT

No party disputes that California refused to negotiate with North Fork, that North Fork appropriately followed the IGRA remedial process, or that that process failed to yield a compact governing Class III gaming on North Fork's Madera parcel. In those circumstances, IGRA's remedial provisions *require* the Secretary of the

Interior to issue procedures under which Class III gaming—defined by statute to include the use of slot machines—may be conducted on Indian lands. Nevertheless, Stand Up maintains that the Secretary erred in issuing procedures that authorize Class III gaming on the Madera parcel. Stand Up also argues that the Secretary was required to perform certain environmental analyses under NEPA and the Clean Air Act before he could issue statutorily-mandated procedures. Both contentions are incorrect.

1. Stand Up's argument that the Secretary violated federal law—specifically, the Johnson Act—in authorizing the use of slot machines on the Madera parcel is at odds with the plain text of the later-enacted IGRA. The latter statute's detailed remedial provisions set forth in Section 2710(d)(7) do not merely authorize but in fact positively *require* the Secretary to issue procedures authorizing Class III gaming on these facts. The statute expressly defines Class III gaming to include the use of slot machines, and the remedial provisions do not limit the types of Class III gaming that are to be authorized under Secretarial procedures. Stand Up does not argue otherwise.

Instead, Stand Up argues that because IGRA's provision making the Johnson Act inapplicable, Section 2710(d)(6), does not expressly mention gaming authorized by Secretarial procedures in lieu of a compact, the Johnson Act's prohibition of slot machines on Indian land remains in effect. But Stand Up's reading of the Section 2710(d)(6) is not reasonable, let alone compelled, when that provision is read in its full statutory context. In context, that provision—like other provisions of IGRA that refer to Class III gaming authorized by compact—evidently use *gaming under a compact* as

shorthand for *gaming authorized either by a compact or by the Secretarial procedures required by IGRA* when the compacting process fails after a state's refusal to negotiate in good faith. A contrary reading of the statute would rob IGRA's remedial provisions of meaning. Stand Up's protestations otherwise are unpersuasive.

Moreover, even assuming Stand Up's reading of the Johnson Act waiver were permissible, that reading would merely identify an *ambiguity* in IGRA. This Court would be constrained to interpret such ambiguity consistent with the Secretary's long-standing and reasonable interpretation of IGRA and consistent with the Indian canon of construction, both of which favor treating Secretarial procedures as a full substitute for a tribal-state compact. That interpretation is also consistent with precedent from both this Court and the Tenth Circuit, which has cautioned against reading Section 2710(d)(6)'s treatment of the Johnson Act in ways that would criminalize activity that is expressly authorized by other provisions of IGRA.

2. Stand Up also errs in maintaining that the Secretary was required to undertake additional environmental analyses before issuing the statutorily mandated procedures. With regard to NEPA, both the Supreme Court and this Court have recognized that an agency need not study the environmental impacts of actions where the agency is not authorized to alter its course based on the results of such analysis. Here, IGRA *requires* the Secretary to issue procedures when specified events have transpired. Moreover, the statute expressly lists the considerations that the Secretary may take into account when crafting such procedures, and the avoidance of

environmental impacts is not one of those listed considerations. In addition, the multi-year process of preparing an environmental impact statement under NEPA is fundamentally inconsistent with the Secretary's obligation to expeditiously issue procedures whenever a state fails to consent to a mediator-selected compact. In any event, even assuming that the Secretary *was* obligated to perform a NEPA analysis prior to issuing procedures, the Secretary would have been free to rely on the environmental impact statement prepared before determining in 2011 that Madera parcel was eligible for gaming. Stand Up has already challenged—and unsuccessfully so—the 2011 statement in a separate case.

Stand Up's claim that the Secretary was required to make a conformity finding before issuing the challenged Secretarial procedures fails for related reasons. The Clean Air Act provision governing conformity determinations postdates IGRA, and there is no reason to assume that in enacting that provision, Congress intended to make Interior's express obligation to issue Secretarial procedures turn on a gaming facility's effects on air quality. Moreover, the issuance of Secretarial procedures under IGRA is a type of rulemaking, and EPA's regulations exempt rulemaking from the Clean Air Act's conformity requirement. Finally, and in any event, even assuming that a conformity determination were required before Secretarial procedures could issue, the analysis that the Secretary earlier performed when determining that the Madera parcel was eligible for gaming would suffice. That analysis, like the NEPA analysis on the eligibility determination, has already survived a judicial challenge from Stand Up.

The judgment of the district court should be affirmed.

STANDARD OF REVIEW

A district court's interpretation of federal statutes and its grant of summary judgment are both reviewed de novo. *United States v. 103 Electronic Gambling Devices*, 223 F.3d 1091, 1095 (9th Cir. 2000).

ARGUMENT

I. The Secretarial procedures are consistent with the Johnson Act.

Stand Up argues (Op. Br. 22-41) that the Secretary violated the Johnson Act in issuing Secretarial procedures authorizing slot machines on North Fork's Madera parcel. Stand Up's argument, however, is at odds with Congress's later-enacted and more specific direction in IGRA. IGRA's remedial provisions not only authorized such procedures but, on these facts, affirmatively *required* the Secretary to issue procedures authorizing Class III gaming, a statutory phrase defined to include the use of slot machines. 25 U.S.C. §§ 2703(6)-(8), 2710(d)(7)(B)(vii). Stand Up's attempts to narrowly read IGRA's express provision making the Johnson Act inapplicable as implicitly cutting back on the types of Class III gaming that Secretarial procedures may authorize are unpersuasive. Moreover, even assuming Stand Up's reading was permissible, principles of deference, the canon that statutes enacted to aid Indian tribes should be interpreted in those tribes' favor, and this Court's precedent all counsel in favor of resolving any ambiguity in favor of recognizing the Secretary's power to authorize the use of slot machines through Secretarial procedures.

A. IGRA unambiguously requires Interior to issue Secretarial procedures authorizing "Class III gaming"—which by definition includes the use of slot machines.

As the district court recognized, the Johnson Act prohibits "gambling devices"—defined to include slot machines—on Indian land. 15 U.S.C. §§ 1171(a)(1), 1175(a); 1 ER 9-10. But the Johnson Act is not Congress's most recent or most specific direction regarding slot machines on Indian land: IGRA is that direction. As elaborated below, IGRA's remedial provisions unambiguously required the Secretary of the Interior to authorize Class III gaming consistent with the mediator's selected compact, which here included the use of slot machines. 25 U.S.C. § 2710(d)(7)(B)(vii). That later-enacted, highly specific direction from Congress trumps the general prohibition in the Johnson Act. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000) (recognizing that the "classic judicial task of reconciling many laws enacted over time . . . necessarily assumes that the implications of a statute may be altered by the implications of a later statute," especially "where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand" (internal quotation marks omitted)); *see also 103 Electronic Gambling Devices*, 223 F.3d at 1102.

As described above (pp. 3-4), IGRA sets three conditions for the conduct of Class III gaming on eligible Indian lands, including the requirement that gaming be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . that is in effect." 25 U.S.C. § 2710(d)(1). Rather than make

entry into a compact an *absolute* requirement, however, Congress opted to craft remedial procedures by which tribes could obtain authorization to conduct Class III gaming by alternate means. *See generally id.* § 2710(d)(7).

The endpoint of that process is the mandatory command that the Secretary issue procedures authorizing "class III gaming" when certain events have transpired. *Id.* § 2710(d)(7)(B)(vi)). That command holds true *even though* Section 2710(d)(1) nominally requires a "tribal-state compact" that is "in effect." These provisions, taken together, plainly contemplate that Secretarial procedures, which *must* issue after certain events transpire, will authorize Class III gaming to the same extent as a tribal-state compact would. IGRA in turn expressly defines Class III gaming to include the use of slot machines, *id.* §§ 2703(6)-(8), and the remedial provisions contain no exception that would limit that definition for the purposes of Secretarial procedures.

As the district court recognized, no court has ever adopted Stand Up's position here. 1 ER 13-14. To the contrary, in describing how IGRA functions, this Court and others have regularly recognized the Secretary's power to use Secretarial procedures to authorize Class III gaming, including the use of electronic gambling devices that would otherwise be prohibited by the Johnson Act. For example, in an opinion deciding whether a given type of electronic device was a Class III gaming device (as opposed to a Class II device authorized under provisions of IGRA not at issue here), this Court explained that if the machine at issue fell into Class III, then it "can be operated by" the tribe in question "only pursuant to a compact *or to procedures prescribed*

by the Secretary of the Interior." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 542 (9th Cir. 1994) (emphasis added).

Similarly, the Fifth Circuit has described IGRA as creating "two separate tracks" by which a tribe may obtain permission to conduct Class III gaming on eligible Indian lands: the "first track" being entry into a tribal-state compact, and the "second track" culminating in the issuance of Secretarial procedures under the remedial provisions. *Texas v. United States*, 497 F.3d 491, 494 (5th Cir. 2007). With regard to the Johnson Act in particular, the Fifth Circuit explained that "Class III gaming remains illegal in Indian country" absent a tribal-state compact, "[*a*]*part from the limited circumstances in which IGRA allows Class III gaming to be imposed by the Secretary following exhaustion of the judicial good-faith/mediation process*." *Id.* at 507-08 (emphasis added). In other words, like this Court in *Sycuan Band*, the Fifth Circuit recognized that IGRA gives the Secretary the power (and the responsibility) to authorize the use of Class III gaming devices that would otherwise be prohibited under the Johnson Act. *See id.*

Those judicial understandings of IGRA are also consistent with the Secretary's own long-standing interpretation of his authority under Section 2710(d)(7). Most notably, the Department of the Interior explained in a 1998 Federal Register notice its view that IGRA's remedial provisions permit Secretarial procedures to authorize the use of devices otherwise prohibited by the Johnson Act. 63 Fed. Reg. 3289, 3292 (Jan. 22, 1998). The agency explained that a contrary reading of the statute "would

render the section of IGRA authorizing the Secretary to establish 'procedures' for Class III gaming meaningless" because "Class III gaming would remain unlawful even if procedures were set in place by the Secretary after completion of the judicially-supervised mediation process." *Id.* Instead, the "'procedures' adopted by the Secretary . . . are properly viewed as a full substitute for" a tribal-state compact. *Id.* Interior expressed that same understanding in the administrative record for this case, when it described the Secretarial procedures at issue in this case as "a full substitute" for a tribal-state compact. 3 ER 380.

For these reasons, the Secretarial procedures here authorize Class III gaming, including slot machines, to the same extent as a tribal-state compact would authorize them. Indeed, the plain text of IGRA's remedial provisions requires the Secretary to issue procedures authorizing Class III gaming, which may include the use of slot machines, when the events specifically set forth in those remedial provisions have come to pass. Because no party disputes that those events did occur here, the Secretary complied with its statutory obligation in issuing Secretarial procedures that, consistent with the relevant mediator-selected compact, authorize Class III gaming on the Madera parcel.

B. IGRA's explicit Johnson Act exemption does not implicitly limit the type of Class III gaming that may be authorized under Secretarial procedures.

Stand Up does not dispute that Section 2710(d)(7) directs the Secretary to issue procedures authorizing Class III gaming when specified events have occurred, or that

Class III gaming is defined to include the use of slot machines. Instead, Stand Up relies on Section 2710(d)(6), which expressly waives Johnson Act applicability for gaming under a tribal-state compact without providing a similar express waiver for gaming under Secretarial procedures. Stand Up argues (Op. Br. 22-41) that this difference means that Secretarial procedures may *not* authorize the use of slot machines, because the Johnson Act continues to apply. But that argument requires the Court to conclude that Section 2710(d)(6) necessarily trumps Section 2710(d)(7)'s plain statement that Secretarial procedures *may* authorize Class III gaming, which includes slot machines, on Indian lands. That argument also requires the Court to conclude that the phrase "tribal-State compact" in Section 2710(d)(6) is used differently from the same phrase in Section 2710(d)(1)(C).

Stand Up's reading is incorrect, because it would render Section 2710(d)(7) a nullity. Even assuming Stand Up's reading were permissible, moreover, any ambiguity regarding the scope of the Johnson Act's continuing applicability vel non or how that applicability interacts with Section 2710(d)(7) should be resolved in favor of treating Secretarial procedures as a full substitute for a tribal-state compact.

1. Section 2710(d)(6) is properly read to exempt from the Johnson Act gaming under a tribal-state compact *and* gaming under Secretarial procedures.

Statutory provisions are not to be read in isolation but instead "in their context and with a view to their place in the overall statutory scheme." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016). In context, Section 2710(d)(6) should be read to make the

Johnson Act inapplicable to gaming conducted pursuant to Secretarial procedures. In Section 2710(d)(6), as in other provisions of IGRA (specifically, Section 2710(d)(1) and 18 U.S.C. § 1166), references to gaming "under a Tribal-State compact" should be treated as a kind of shorthand, to include both gaming authorized by such a compact *and* gaming authorized by Secretarial procedures issued in lieu of a compact. *See* 25 U.S.C. § 2710(d)(1); 18 U.S.C. § 1166. A contrary reading of those provisions would render Section 2710(d)(7)'s remedial procedures largely meaningless, in derogation of the fundamental principle that a statute "be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009).

Section 2710(d)(1) provides that "Class III gaming activities shall be lawful on Indian lands *only if* such activities are . . . conducted in conformance with a Tribal-State compact . . . that is in effect" (emphasis added). The provision has no explicit exception for activities conducted not under a tribal-state compact but instead under Secretarial procedures issued in lieu of a compact. Yet Section 2710(d)(7)(B)(vii) unambiguously *does* authorize Class III gaming under those procedures. Therefore, Section 2710(d)(1)'s command that Class III gaming is lawful "only" under a tribal-state compact makes sense only (1) if the provision voids Section 2710(d)(7), or (2) if the provision's reference to gaming under a tribal-state compact implicitly also refers to gaming under Secretarial procedures issued in lieu of a compact. Given that the former possibility runs afoul of the canon against reading statutes in ways that render

parts of the statute "inoperative or superfluous, void or insignificant," *Corley*, 556 U.S. at 314, the latter must be correct.

A similar analysis obtains regarding 18 U.S.C. § 1166. That provision of IGRA mandates that "all State laws pertaining to the licensing, regulation, or prohibition of gambling . . . shall apply in Indian country," including criminal penalties for gambling. *Id.* § 1166(a). The provision exempts "class III gaming conducted under a Tribal-State compact," but it makes no express mention of Class III gaming conducted under Secretarial procedures issued in lieu of a compact. *Id.* § 1166(c)(2). Therefore, the statute either (1) exposes activities authorized under Section 2710(d)(7) to potential state-law criminal penalties, or (2) uses the phrase gaming "under a Tribal-State compact" as shorthand that implicitly includes gaming under Secretarial procedures issued in lieu of a compact. The former possibility would inappropriately ascribe to Congress the intent to perform a "useless act" by first authorizing Class III gaming under Secretarial procedures only to then subject such gaming to state-law criminal penalties. *103 Electronic Gambling Devices*, 223 F.3d at 1102. Thus, once again, the latter must be correct.

Stand Up disagrees, arguing that the references in Section 2710(d)(1) and in 18 U.S.C. § 1166 to gaming under a compact can be read narrowly to exclude gaming under Secretarial procedures issued in lieu of a compact without doing violence to the overall statutory scheme. *See* Op. Br. 27-35. Stand Up's arguments are unpersuasive.

First, with regard to Section 2710(d)(1), Stand Up argues (Op. Br. 31-35) that the provision may be read to authorize gaming *only* under a compact, because gaming under Secretarial procedures is separately authorized in Section 2710(d)(7). Stand Up misses the point: Section 2710(d)(1) does not merely authorize gaming under a compact; instead, it provides that Class III gaming is lawful "*only* if" conducted under a compact. That provision is irreconcilable with the text of Section 2710(d)(7)(B)(ii), unless gaming under a compact also includes gaming under Secretarial procedures issued in lieu of a compact.

Second, with regard to 18 U.S.C. § 1166, Stand Up argues (Op. Br. 27-31) that the provision serves only to subject gaming under a tribal-state compact to state jurisdiction, and that it has no impact on gaming under Secretarial procedures. The plain language of that provision, however, extends state prohibitions to *all* gaming on Indian lands, unless conducted under a compact. 18 U.S.C § 1166(a), (c). It therefore would subject gaming under Secretarial procedures to potential criminal penalties—unless the provision's reference to gaming under a compact is read to include both gaming authorized by a compact and gaming authorized by Secretarial procedures issued in lieu of a compact.

For all these reasons, Section 2710(d)(1) and 18 U.S.C. § 1166's references to gaming under a tribal-state compact must be read to include *both* gaming that is literally conducted under a compact *and* gaming that is conducted under Secretarial procedures issued as a substitute for a compact under IGRA's remedial provisions.

Section 2710(d)(6)'s Johnson Act exemption for gaming under a compact should be read the same way. *See, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (reiterating the "presumption that a given term is used to mean the same thing throughout a statute"). In addition to being consistent with the statutory text when read in context, that reading fully effectuates Congress's decision to ensure that an intransigent state will not have the power to block a tribe from conducting Class III gaming by refusing to negotiate in good faith. *See supra* pp. 4-5. That reading, moreover, gives meaning to all pertinent provisions of IGRA: it ensures that Secretarial procedures issued under Section 2710(d)(7)'s remedial scheme will actually give tribes a meaningful remedy when a State refuses to negotiate, while still subjecting all Class III gaming *not* conducted under compact or under Secretarial procedures to Johnson Act liability.

In sum, the only way to harmonize the various provisions of IGRA and to provide the relief to tribes that Congress intended is to read the phrase "under a Tribal-State compact" in Section 2710(d)(6)—as in other subsections—to include Secretarial procedures. Because the district court agreed, its judgment should be affirmed.

2. Stand Up's arguments in favor of a selective Johnson Act exemption are incorrect.

Stand Up's reading, by contrast, would deprive Section 2710(d)(7)'s remedial scheme of meaning, as the district court recognized. 1 ER 11-12. As explained in the previous section, in reading the statutory references to gaming under a compact

narrowly, Stand Up would subject Class III gaming authorized under Section 2710(d)(7) not only to the Johnson Act's prohibitions, but also to state-law criminal penalties under 18 U.S.C. § 1166. Stand Up would also create a logical conflict between Section 2710(d)(7) and Section 2710(d)(1)'s provision that Class III gaming is authorized "only" under a tribal-state compact. And it would do so despite the importance of Section 2710(d)(7)'s remedial scheme to IGRA as a whole. Stand Up nevertheless maintains that its reading of Section 2710(d)(6) is preferable because that reading would enable to tribes to conduct all Class III gaming except for the use of slot machines under Secretarial procedures, while respecting Congress's asserted goal of ensuring that slot machines would never be permitted on Indian land without a state's consent. *See* Op. Br. 34-41. Stand Up's reasoning is flawed in multiple respects.

As an initial matter, Stand Up's argument necessarily assumes that narrowly reading the phrase "under a Tribal-State compact" in Section 2710(d)(6) would have no effect on the equivalent terms used in Section 2710(d)(1) and 18 U.S.C. § 1166. As explained previously, however, a phrase used at multiple places in a statute is generally presumed to have the same meaning in each place. *See Brown*, 513 U.S. at 118. If Stand Up's interpretation of Section 2710(d)(6) were applied to the equivalent phrases in those other statutory provisions, IGRA would break down. Stand Up's interpretation would potentially subject *all* Class III gaming under Secretarial procedures—not just use of slot machines—to state-law prohibitions, or even categorically render unlawful all Class III gaming authorized by such procedures. *See supra* pp. 22-25.

Moreover, even looking at Section 2710(d)(6) in isolation, there is no support for Stand Up's supposition that Congress particularly sought to avoid authorizing the use of slot machines, out of all other types of Class III gaming, absent state consent. The evident purpose of Section 2710(d)(7)'s remedial procedures is to *allow* Class III gaming on Indian land without a state's consent where that state has refused to negotiate in good faith. *See Rincon Band of Luiseno Mission Indians v. Schwarzenegger*, 602 F.3d 1019, 1032 (9th Cir. 2010). Class III gaming is expressly defined to include the operation of slot machines. 25 U.S.C. § 2703(6)-(8). Yet Congress said nothing in the text of Section 2710(d)(7) or elsewhere to suggest that slot machines may not be authorized under Secretarial procedures. Only the Johnson Act, and not IGRA, treats slot machines differently. And Section 2710(d)(6) shows that IGRA supersedes the Johnson Act with respect to the gaming that IGRA authorizes.

More fundamentally, Stand Up has provided no reason why Congress *would* have been solicitous about slot machines in particular, when Stand Up acknowledges that all other types of Class III gaming may be authorized by Secretarial procedures absent state consent. Stand Up cites no congressional findings about the particular burdens of slot-machine gaming compared to other types of Class III gaming. Nor are slot machines uniquely likely to be contrary to a state's public policy, given that—under a compact *or* Secretarial procedures—IGRA authorizes slot machines only on Indian land to the extent that the state in question *already* allows slot machines within

its boundaries. 25 U.S.C. § 2710(d)(1). Stand Up offers two other reasons for its reading of Section 2710(d)(6), neither of which is availing.

First, Stand Up argues (Op. Br. 23-24) that Section 2710(d)(6)'s reference to gaming under a compact should not be read implicitly to include gaming under Secretarial procedures because IGRA explicitly provides that a mediator-selected compact to which a state consents "shall be treated as a Tribal-State compact," 25 U.S.C. § 2710(d)(7)(B)(vi), but includes no similar language regarding Secretarial procedures. But any implicit suggestion that gaming under Secretarial procedures is accordingly *not* to be treated as equivalent to gaming under a compact is overcome here by the significant tension that such reading would create between IGRA's remedial provisions and other sections of the statute. *See supra* pp. 22-25; *see also Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019, 1034-35 (10th Cir. 2003) (declining to rely on interpretive principle of *expressio unius est exclusio alterius* to hold that IGRA's Johnson Act waiver applies only to gambling devices authorized under a compact and not to devices authorized under Class II gaming provisions, where other contextual evidence strongly suggests Congress intended a broader waiver).

Second, Stand Up argues (Op. Br. 39-40) that IGRA's legislative history compels its reading. Stand Up points specifically to a colloquy between Senators Reid and Inouye, in which Senator Inouye stated that IGRA "would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gambling devices operated pursuant to a compact with the State in which the tribe is located."

134 Cong. Rec. at 24,024 (Sept. 18, 1988). That statement, however, simply parrots the text of 25 U.S.C. § 2710(d)(6). It does not specifically address the treatment of Class III gaming authorized by Secretarial procedures in lieu of a compact, and therefore it does not answer the question whether the waiver's reference to gaming under a compact includes or excludes gaming authorized by such procedures. A narrow reading of Senator Inouye's statement would create all the same tensions between IGRA's remedial provisions and other sections of the statute discussed above. Moreover, this Court and the Tenth Circuit have both implicitly rejected a narrow reading of Senator Inouye's statement in holding that IGRA's express authorization of the use of certain kinds of electronic devices as a form of Class II gaming (which is not conducted pursuant to tribal-state compact) overcomes the Johnson Act's prohibition of such devices on Indian lands, notwithstanding that IGRA's Johnson Act exemption makes no express provision for such devices. *See 103 Electronic Gambling Devices*, 223 F.3d at 1101-03; *Seneca-Cayuga*, 327 F.3d at 1033-35. In any event, the statement of a single member of Congress does not by itself show the intent of Congress as a whole. *See CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980).

For all these reasons, Stand Up's argument do not demonstrate error in the district court's interpretation of IGRA.

3. Any ambiguity regarding the scope of Section 2710(d)(6) should be resolved in favor of treating Secretarial procedures as a full substitute for a tribal-state compact.

As we have explained, Stand Up's argument places the Johnson Act exemption in Section 2710(d)(6) in fundamental tension with Section 2710(d)(7)(B)(vii). That tension would reveal an ambiguity in IGRA. *See Garfias-Rodriguez v. Holder*, 702 F.3d 504, 512 (9th Cir. 2012) (recognizing ambiguity in immigration statute where plain text of one provision treated condition as a qualifying factor for adjustment of status and plain text of another provision treated same condition as a *dis*qualifying factor). In resolving the ambiguity, the Court should not assume (as Stand Up does) that Section 2710(d)(6)'s silence about Secretarial procedures trumps Section 2710(d)(7) explicit authorization for Secretarial procedures that include slot machines. To the contrary, three considerations would militate in favor of reading the statute to authorize the use of slot machines under Secretarial procedures.

First, this Court would be required to consider the deference owed to the Secretary's longstanding interpretation of IGRA. *See Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 730 (9th Cir. 2003). The Secretary has long read IGRA to authorize the use of slot machines under Secretarial procedures, notwithstanding that Section 2710(d)(6) does not explicitly exempt gaming under such procedures from the Johnson Act. *See* 63 Fed. Reg. at 3292. For the reasons discussed above, that reading of IGRA is reasonable and thus deserving of this Court's deference.

Second, the Indian canon of statutory interpretation points in the same direction. Under that canon, ambiguities in statutes enacted to aid Indian tribes should be resolved in the tribes' favor. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)*; Artichoke Joe's*, 353 F.3d at 729-30. This Court has recognized that Congress intended that courts would apply that canon in interpreting IGRA. *See Rincon Band*, 602 F.3d at 1027 (9th Cir. 2010) (citing S. Rep. No. 100-446, at 13-14). Here, that canon dictates resolving any tension between Sections 2710(d)(6) and 2710(d)(7) in favor of authorizing the use of slot machines under Secretarial procedures. A contrary interpretation would place a tribe's ability to operate slot machines at the mercy of a state's willingness to negotiate a tribal-compact in good faith—notwithstanding that Congress deliberately enacted Section 2710(d)(7)'s remedial procedures to prevent States from having such leverage. *See* S. Rep. 100-446, at 13; *Rincon Band*, 602 F.3d at 1032 (recognizing that IGRA's remedial provisions allow Interior to "impose a gaming arrangement" on a state "without the affected state's approval").

Third and finally, this Court in *103 Electronic Gaming Devices* warned against reading the Johnson Act and IGRA in ways that would simultaneously prohibit some forms of gaming under the Johnson Act while authorizing them under IGRA. *See* 223 F.3d at 1101-03; *see also Seneca-Cayuga Tribe of Oklahoma v. NIGC*, 327 F.3d 1019, 1033-35 (10th Cir. 2003). This Court held that the Johnson Act's prohibition on electronic gambling devices should not be read to apply to electronic bingo aids that IGRA authorizes as a form of Class II gaming allowed on Indian lands under statutory

provisions not at issue here. *103 Electronic Gambling Devices*, 223 F.3d at 1101-03. In reaching that decision, this Court acknowledged both that such electronic bingo aids fall within the plain language of the Johnson Act's prohibition, and that IGRA's Johnson Act exemption does not expressly extend to Class II gaming, which is not conducted under a tribal-state compact. *Id.* at 1093, 1102. Nevertheless, because IGRA's Class II gaming provisions explicitly allows the use of electronic bingo aids, the Johnson Act should not be read to render that authorization "a nullity." *Id.* at 1102. "Why would Congress protect such technologic aids" in IGRA, "yet leave them to the wolves of a Johnson Act forfeiture action? We cannot presume that in enacting IGRA, Congress performed such a useless act." *Id.* (internal quotation marks omitted). The Tenth Circuit reached a similar conclusion in *Seneca-Cayuga*. *See* 327 F.3d at 1032 (declining to "ascribe to Congress the intent both to carefully craft through IGRA this protection afforded to users of Class II technologic aids and to simultaneously eviscerate those protections by exposing users of Class II technologic aids to Johnson Act liability for the very conduct authorized by IGRA.").

Stand Up's position that the Johnson Act continues to apply here runs afoul of those decisions. Instead, those decisions counsel that the Johnson Act should not be read to prohibit activities expressly authorized by IGRA—such as the promulgation of Secretarial procedures authorizing the full panoply of Class III gaming—even where IGRA's Johnson Act exemption does not explicitly exempt such activities from the older statute's application. *See 103 Electronic Gambling Devices*, 223 F.3d at 1101-03;

Seneca-Cayuga, 327 F.3d at 1033-35. Therefore, this Court should resolve any ambiguity regarding the scope of IGRA's Johnson Act exemption or how that exemption interacts with IGRA's remedial provisions in favor of recognizing that Secretarial procedures are a full substitute for a tribal-state compact.

The district court's conclusion that Interior acted within its statutory authority when it issued that Secretarial procedures should be affirmed.

II. The Secretary had no duty to perform additional environmental analyses before issuing the statutorily mandated procedures.

Stand Up argues (Op. Br. 41-66) that the Secretary could not issue the procedures at issue here without preparing an environmental impact statement under NEPA and without performing a conformity determination under the Clean Air Act. Stand Up is incorrect in both respects.

A. The Secretary was not required to prepare an environmental impact statement under NEPA.

With regard to NEPA, the district court correctly concluded that the Secretary was not required to prepare an environmental impact statement before issuing the challenged procedures. The Supreme Court and this Court have recognized that NEPA's requirements do not attach to actions that an agency is required by statute to take, i.e., to situations where the agency lacks discretion to make changes in response to the findings of a NEPA analysis. Any need to perform a NEPA analysis is further obviated by the fact that performing that analysis would fundamentally conflict with the Secretary's obligations under IGRA. In any event, were a NEPA analysis required

here, the environmental impact statement that the Secretary prepared in 2011, which was already upheld in another lawsuit, would suffice.

1. The issuance of Secretarial procedures does not trigger the need to prepare an environmental impact statement.

NEPA generally requires an environmental analysis for "major [f]ederal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). But both the Supreme Court and this Court have recognized that NEPA does *not* require the preparation an environmental analysis where an agency lacks statutory authority to tailor its actions to avoid impacts that might be identified by such an analysis. This is true for two related reasons.

First, actions over which an agency lacks discretion are not major federal actions within the meaning of the statute. A major federal action is defined as an "action[] with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18. The relevant "effects" of a major federal action are those that "are caused by the action." *Id.* § 1508.8. To qualify, there must be more than a "but for" relationship between the agency's action and any environmental impacts. *Public Citizen*, 541 U.S. at 767. Where an agency "has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." *Id.* at 770. Therefore, the agency need not analyze such effect.

Second, the "rule of reason" under which an agency's compliance with NEPA is judged does not require an agency to consider environmental effects that the agency lacks discretion to control, even assuming that the actions giving rise to those effects qualify as major federal actions in the first instance. *Public Citizen*, 541 U.S. at 767. As this Court has explained, "NEPA remains subject to a 'rule of reason' that frees agencies from" preparing a NEPA analysis "on 'the environmental impact of an action it could not refuse to perform.'" *Alaska Wilderness League v. Jewell,* 788 F.3d 1212, 1225 (9th Cir. 2015) (quoting *Public Citizen*, 541 U.S. at 769). The rule of reason guides "every aspect" of an agency's NEPA compliance, *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991), and "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency does not need to consider the environmental effects arising from those actions." *Alaska Wilderness League*, 788 F.3d at 1225 (brackets and internal quotation marks omitted).[3]

This rule applies here because the Secretary lacks discretion over whether to issue Secretarial procedures. As explained above, IGRA commands—using the mandatory "shall"—that the Secretary issue procedures authorizing Class III gaming

[3] These decisions squarely contradict Stand Up's contention (Op. Br. 49) that the public-information value of an environmental impact statement alone justifies preparing a NEPA analysis where the agency has limited discretion. *See Public Citizen*, 541 U.S. at 768-69; *see also* 40 C.F.R. § 1500.1(c) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action.").

when specified events have transpired and failed to produce a tribal-state compact. 25 U.S.C. § 2710(d)(7)(B)(vii); *see generally, e.g.*, *Sierra Club v. Whitman*, 268 F.3d 898, 904 (9th Cir. 2001) ("'shall' in a statute generally denotes a mandatory duty"). The well-documented purpose of IGRA's remedial provisions further demonstrates that the duty to issue procedures is mandatory when the specified events have taken place. A contrary reading would leave a tribe with no recourse where a state has refused to negotiate in good faith toward the entry of a tribal-state compact, were the Secretary to purport to exercise discretion to decline to issue procedures, despite Congress's deliberate choice not to place tribes at the mercy of an intransigent state.

In addition to constraining the Secretary's decision *whether* to issue Secretarial procedures, IGRA also constrains the *content* of such procedures. Specifically, IGRA's remedial scheme places primary responsibility for selecting the rules that will apply to Class III gaming on a particular parcel on a court-appointed mediator. *See* 25 U.S.C. § 2710(d)(7)(B)(iv). The Secretary's duty, by contrast, is to issue procedures that are "consistent with the proposed compact selected by the mediator," with "the provisions of this chapter," and with "the relevant provisions of the laws of the State." *Id.* § 2710(d)(7)(B)(vii)(I). In other words, IGRA charges the Secretary with the obligation to issue procedures that are compatible with the mediator's compact, while also providing that the Secretary must tailor the procedures to comport with other provisions of IGRA and with state law. It does *not* confer similar authority for the

Secretary to deviate from the terms of a mediator-selected compact in order to minimize environmental impacts or promote other policy goals.

Stand Up argues that this Court should nevertheless infer such authority from IGRA's silence. But such an inference is at odds with the larger context of IGRA's remedial scheme. As discussed throughout this brief, the purpose of IGRA's remedial scheme is to provide a full substitute for a tribal-state compact if and when the process of negotiating a tribal-state compact breaks down. There can be no dispute that when a state and a tribe successfully negotiate a compact, Class III gaming may go forward without any NEPA analysis by the Secretary. *See* 25 U.S.C. § 2710(d)(8)(C) (providing that a tribal-state compact becomes effective without any action by the Secretary after 45 days). Interpreting IGRA to confer on the Secretary an obligation to perform a multi-year NEPA analysis—and the authority to second-guess the terms of a mediator-selected compact based on the Secretary's non-statutory view of what is environmentally best or otherwise in the public interest—would place tribes that must resort to IGRA's remedial process at a disadvantage. It is more sensible to read the statute as conferring on the Secretary only the obligation to consider the three criteria expressly stated in the statute—the terms of the mediator-selected compact, IGRA itself, and state law, *id.* § 2710(d)(7)(B)(vii)(I)—in issuing Secretarial procedures, *not* to infer unstated authority to conduct a wide-ranging analysis of the public interest.

Against this statutory background, Stand Up's specific arguments in favor of Interior's discretion to minimize or avoid environmental impacts are unavailing.

First, Stand Up's contention (Op. Br. 47-48) that Secretarial procedures need only be "consistent with" that compact, such that they could be different in certain respects, requires the Court to interpret the statutory language in a vacuum. As explained above, reading IGRA to confer on the Secretary discretion to depart from the selected compact in order to vindicate environmental interests is at odds with the structure and purpose of IGRA's remedial provisions.

Second, Stand Up's suggestion (Op. Br. 49-50) that reading IGRA to constrain the Secretary's discretion could result in compacts that violate substantive federal civil rights, labor, and other laws is not well-taken. IGRA specifically requires the mediator in question to ensure that the selected compact is "the one which best comports with the terms of [IGRA] and any other applicable Federal law." 25 U.S.C. § 2710(d)(7)(B)(iv). Congress certainly *could* have expressly required that the Secretary independently confirm that the compact chosen by the mediator is consistent with federal law—as it did when it imposed on the Secretary the obligation to ensure that Secretarial procedures comply with IGRA and with state law. *Id.* § 2710(d)(7)(B)(vii)(I). But it did not.

Third and finally, Stand Up's attempts to show that the Secretary has historically deviated from the terms of mediator-selected compacts based on considerations other than those expressly stated in Section 2710(d)(7)(B)(vii) are unpersuasive. Stand Up points, for example, to a letter stating that, in issuing the challenged Secretarial procedures, the Secretary "purposely refrained from changing regulatory provisions in

deference to the Mediator's submission to the Department and the Tribe's specific request that we change that submission as little as possible." Op. Br. 57 (citing 3 ER 273). Stand Up evidently contends that the Secretary's recognition that he has *some* authority—and a correlative obligation—to deviate from the terms of a mediator-selected compact undermines the argument that the Secretary lacks the discretion necessary to trigger NEPA obligations. But as previously explained, the Secretary's authority and obligation to consider factors other than the terms of the mediator-selected compact when issuing Secretarial procedures is limited to those factors that Congress included in IGRA. The broad goal of minimizing environmental impacts is simply not one of those factors.

Stand Up also argues at length (Op. Br. 58-61) about the fact the Secretarial procedures at issue here *do* deviate from the mediator's selected compact in a particular respect. Specifically, while the mediator-selected compact would have required that the State assume regulatory jurisdiction over gaming on the Madera parcel, the Secretarial procedures give the state the *option* of exercising regulatory jurisdiction; moreover, the procedures provide that, if the state does not do so, the NIGC will exercise jurisdiction. 3 ER 330. But the Secretary did not deviate in that respect in order to avoid or minimize environmental impacts, but only to make the procedures "consistent with . . . the provisions of" IGRA. 25 U.S.C. § 2710(d)(7)(B)(vii)(I). As stated above, that is one of the two considerations other

than the contents of the selected compact that IGRA expressly directs the Secretary to take into account when crafting procedures. *See id.*

As the district court recognized, 1 ER 18, requiring the state to accept regulatory responsibilities under Secretarial procedures would be inconsistent with IGRA's decision to give states the option, but not the obligation, to assume regulatory jurisdiction over gaming on Indian lands. *See* 25 U.S.C. § 2710(d)(7)(B); S. Rep. 100-446, at 13-14 (explaining that IGRA is designed to "make use of existing State regulatory systems . . . through negotiated compacts"). The Secretary's effort to reconcile the selected compact with other applicable laws, as well as to respect the state's sovereignty, does not demonstrate that the Secretary had discretion to impose environmental-review conditions as part of the procedures.

Also unavailing is Stand Up's citation (Op. Br. 61-63) to Secretarial procedures issued to govern gaming by other tribes, which procedures are not at issue in this case. Neither of the two sets of procedures cited by Stand Up contains changes intended to minimize the environmental impacts of gaming on a parcel. *See id.* Indeed, one of the two sets of procedures explicitly declines to make certain changes from the mediator-selected compact. *Id.* at 62.

For the foregoing reasons, Stand Up is incorrect that the Secretary had discretion to deviate from the terms of the compact selected by the court-appointed mediator for the purpose of avoiding environmental impacts. Because the Secretary lacked such discretion, the Secretary had no obligation to perform a NEPA analysis,

both because issuing the procedures was not a major federal action and because the rule of reason does not so require. *See Public Citizen*, 541 U.S. at 767.

2. Preparing a NEPA analysis would be inconsistent with the Secretary's obligations under IGRA.

Irrespective of the degree of discretion that the Secretary possesses over the issuance and content of Secretarial procedures, this Court has recognized that an agency need not prepare a NEPA analysis when so doing would create "an irreconcilable and fundamental conflict with the substantive statute at issue." *Jamul Action Committee v. Chaudhuri*, 837 F.3d 958, 963 (9th Cir. 2016) (quoting *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 648 (9th Cir. 2014)); *Flint Ridge Development Co. v. Scenic Rivers Ass'n*, 426 U.S. 776, 788 (1976). That rule independently confirms that the Secretary had no obligation to perform a NEPA analysis before issuing the challenged Secretarial procedures.

This Court has held that requiring the NIGC to prepare a NEPA analysis before approving a gaming compact under IGRA would create such an irreconcilable conflict, in light of the fact that IGRA gives the Commission only 90 days to approve a gaming ordinance, while preparing a NEPA analysis takes significantly longer. *Jamul Action Committee*, 837 F.3d at 964. While IGRA does not set an explicit deadline for issuing Secretarial procedures after a state fails to consent to a mediator-selected compact, this Court has recognized that the remedial process is intended to "permit the tribe to process gaming arrangements on an expedited basis." *Rincon Band*, 602

F.3d at 1041; *cf.* 25 U.S.C. § 2710(d)(8)(C) (providing the Secretary only 45 days to approve a tribal-state compact submitted for agency approval). Issuing Secretarial procedures is thus similarly incompatible with the multi-year process of completing an environmental impact statement.

3. To the extent a NEPA analysis were necessary, the Secretary's previous environmental impact statement is sufficient.

Stand Up's demands for further NEPA analysis here also fail to account for the significant fact that the Secretary has already studied the effects of maintaining a gaming facility on the Madera parcel. The Secretary completed an environmental impact statement in 2011 when making the initial determination that the parcel was eligible for gaming. *Stand Up for California!*, 204 F. Supp. 3d at 232-34. That statement was not "based upon any particular tribal-state compact or Secretarial procedures," and it has already been upheld by a district court against a challenge by Stand Up. *Id.* at 256.

NEPA allows an agency to fulfill its requirements using an existing NEPA document after determining that the document "adequately assesses the environmental effects of the proposed action and reasonable alternatives." 43 C.F.R. § 46.120(c). An agency need not prepare a new NEPA analysis if the action and its effects have already been "covered sufficiently by an earlier environmental document." *id.* § 46.300. Even assuming that the issuance of Secretarial procedures did trigger NEPA's requirements, any effects of gaming on the Madera parcel were

"covered sufficiently" by the 2011 environmental impact statement. *Id.* While the Secretarial procedures actually issued differ in some respects from the scope of gaming considered by the 2011 statement—for example, by providing for gaming to be spread out at two facilities instead of one and allowing up to 2,500 slot machines instead of 2,000—the rule of reason applies to judging the adequacy of an environmental impact statement. *Pacific Coast Federation of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1099 (9th Cir. 2012). That rule does not require preparation of an additional statement, even assuming one were required.

B. The Secretary was not required to make a conformity determination under the Clean Air Act.

Stand Up's final argument is that the Secretary was required to make a "conformity determination" under the Clean Air Act, 42 U.S.C. § 7506(c)(1), before issuing the Secretarial procedures. That argument also fails. The Clean Air Act's conformity provision should not be read to frustrate Congress's deliberate choice in the earlier-enacted IGRA to constrain the Secretary's discretion to issue Secretarial procedures. In any event, the Secretary's analysis in his 2011 eligibility determination would satisfy any obligation under the Clean Air Act.

1. Issuing Secretarial procedures does not trigger the Clean Air Act's conformity provision.

IGRA's remedial provisions, which were enacted in 1988, predate 42 U.S.C. § 7506(c)(1), which was added to the Clean Air Act in 1990. Pub. L. 101-549 (Nov. 15, 1990). As explained in the previous section, those remedial provisions give the

Secretary no discretion over whether to issue Secretarial procedures. Nor do they give the Secretary discretion to deviate from the terms of a proposed compact in order to meet environmental goals. Congress's decision to limit discretion in these respects is fundamentally related to its decision to entrust the courts, not the Secretary, with primary responsibility for determining what type of gaming should be allowed absent state consent. All of those deliberate choices would be significantly undermined if the Clean Air Act were read to require that the Secretary issue procedures *only* where gaming would conform to a state air-quality implementation plan. The two statutes should not be read to frustrate Congress's specific choices in crafting IGRA's remedial provisions. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statue dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.").

EPA's regulations interpreting the Clean Air Act provide an additional reason why the issuance of Secretarial procedures does not trigger the conformity provision. EPA has specifically exempted rulemaking and administrative adjudications from the Clean Air Act's conformity requirements. 40 C.F.R. § 93.153(c)(2)(iii). Because the issuance of Secretarial procedures is a type of rulemaking or administrative adjudication governing what activities are permitted on a given parcel of Indian land, the exemption applies.

2. Interior's 2011 conformity analysis satisfied any statutory obligation.

Even assuming that the Clean Air Act's conformity requirements do apply to the issuance of Secretarial procedures, the Secretary's 2011 analysis of the air-quality effects satisfied any obligation under the Act. When he determined that the Madera parcel was eligible for gaming, the Secretary considered the air-quality impacts of gaming on the parcel and determined that the impacts would conform to the relevant state implementation plan provided that North Fork commit to certain mitigation measures. *Stand Up for California!*, 204 F. Supp. 3d at 320. North Fork has done so. *Id.* Stand Up unsuccessfully challenged the Secretary's 2011 conformity determination. *Id.*

As explained above with regard to the agency's 2011 NEPA analysis, there is no reason to think that the limited deviations from the kind of gaming analyzed in 2011 and the kind of gaming ultimately authorized by the Secretarial procedures here would significantly change the conformity analysis. *See supra* p. 44. Accordingly, there is no reason for the Secretary to perform a new analysis at this time.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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90-6-21-01130

STATEMENT OF RELATED CASES

Pending before this Court is No. 18-16696, *Club One Casino, Inc. v. U.S. Dep't of Interior*, which concerns other aspects of the Secretarial procedures and related agency action that are the subject of the instant appeal.

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 18-16830

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This brief contains 11,654 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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ADDENDUM

15 U.S.C. § 1171(a) A1

25 U.S.C. § 2702(1) A2

25 U.S.C. § 2703(6)-(8) A3

40 C.F.R. § 1500.1 ..... A6

40 C.F.R. § 1508.18 ..... A8

40 C.F.R. 93.153(c)(2)(iii) A10

43 C.F.R. § 46.120(c) A11

15 U.S.C. § 1171(a)

§ 1171 Definitions

As used in this chapter—

(a) The term "gambling device" means--

(1) any so-called "slot machine" or any other machine or mechanical device an essential part of which is a drum or reel with insignia thereon, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(2) any other machine or mechanical device (including, but not limited to, roulette wheels and similar devices) designed and manufactured primarily for use in connection with gambling, and (A) which when operated may deliver, as the result of the application of an element of chance, any money or property, or (B) by the operation of which a person may become entitled to receive, as the result of the application of an element of chance, any money or property; or

(3) any subassembly or essential part intended to be used in connection with any such machine or mechanical device, but which is not attached to any such machine or mechanical device as a constituent part.

25 U.S.C. § 2702(1)

§ 2702 Declaration of policy

The purpose of this chapter is—

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

25 U.S.C. § 2703(6)-(8)

§ 2703 Definitions

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means--

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards, including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include--

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days

after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

40 C.F.R. § 1500.1

§ 1500.1 Purpose

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

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

(c) Ultimately, of course, it is not better documents but better decisions that count. NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take

actions that protect, restore, and enhance the environment. These regulations provide the direction to achieve this purpose.

40 C.F.R. § 1508.18

§ 1508.18 Major Federal action

Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (§ 1508.27). Actions include the circumstance where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

(a) Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§§ 1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 et seq., with no Federal agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(b) Federal actions tend to fall within one of the following categories:

(1) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 et seq.; treaties and international conventions or agreements;

formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(2) Adoption of formal plans, such as official documents prepared or approved by federal agencies which guide or prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(3) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(4) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as federal and federally assisted activities.

40 C.F.R. § 93.153(c)(2)(iii)

§ 93.153 Applicability

. . .

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

. . .

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

. . .

(iii) Rulemaking and policy development and issuance.

43 C.F.R. § 46.120(c)

§ 46.120 Using existing environmental analyses prepared pursuant to NEPA and the Council on Environmental Quality regulations

…

(c) An existing environmental analysis prepared pursuant to NEPA and the Council on Environmental Quality regulations may be used in its entirety if the Responsible Official determines, with appropriate supporting documentation, that it adequately assesses the environmental effects of the proposed action and reasonable alternatives. The supporting record must include an evaluation of whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects.