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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STAND UP FOR CALIFORNIA!, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,

Defendants.

Case No. 2:16-cv-02681-AWI-EPG

INTERVENOR THE NORTH FORK RANCHERIA OF MONO INDIANS' MEMORANDUM IN SUPPORT OF RENEWED MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT

Date:
Time:
Court: 2, 8th Floor
Judge: Honorable Anthony W. Ishii

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Page(s)

DOCKETED CASES

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The Ninth Circuit remanded for this Court to consider three "threshold questions" regarding the applicability of the National Environmental Policy Act ("NEPA") to the Secretarial Procedures authorizing the North Fork Rancheria of Mono Indians ("North Fork") to develop and operate its long-planned gaming project on its land in Madera County, California (the "Madera Site"): (1) whether the Secretarial Procedures are a "major Federal action" triggering NEPA's requirements in the first place; (2) if so, whether the Secretary could rely on the prior environmental impact statement ("EIS") prepared in connection with the Secretary's earlier decisions to allow gaming and to take the Madera Site into trust for North Fork; and (3) if the Secretary could not so rely, whether to remand to the Secretary to comply with NEPA by supplementing the prior EIS. Op. 22 (Doc. 65).[1]

Under the relevant caselaw and regulations, the Secretarial Procedures for North Fork are plainly not a "major Federal action." The Supreme Court has held that NEPA does not apply to non-discretionary agency actions, *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004), and the operative NEPA regulations codifying that principle specifically state that major Federal actions do not include "[a]ctivities or decisions that are non-discretionary and made in accordance with the agency's statutory authority," 40 C.F.R. § 1508.1(q)(1)(ii). The Secretarial Procedures for North Fork fit squarely within this exception, because they were non-discretionary in the most fundamental sense: The Secretary was under a statutory mandate to issue procedures authorizing class III gaming on the Madera Site that were "consistent with" the compact selected by the mediator under the remedial scheme set out in the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2710(d)(7)(B)(vii). IGRA does not grant the Secretary the authority to make significant alterations to the compact selected by the mediator based on environmental considerations. Accordingly, Secretarial Procedures are not a "major Federal action" subject to NEPA, and the Court should reject Stand Up's NEPA claim and grant summary judgment to North Fork and the Federal Defendants on that basis. Even if the Court

[1] Unless noted otherwise, "Doc." refers to the document number in this case.

were to find Secretarial Procedures to be a "major Federal action," however, the Secretary properly relied on the prior EIS in prescribing the Secretarial Procedures.

The Ninth Circuit also remanded for the Court to consider whether the Secretary's conformity determination under the Clean Air Act ("CAA") made in connection with his prior decisions related to North Fork's gaming project was adequate for the Secretarial Procedures. North Fork and the Federal Defendants are entitled to summary judgment on Stand Up's CAA claim under *Public Citizen* and the governing CAA regulations for reasons substantially similar to those that warrant summary judgment on the NEPA claim. There is no need to remand to the Secretary for any supplemental analysis under either NEPA or the CAA.

Were the Court to order such a remand, however, it should do so without vacating the Secretarial Procedures or enjoining North Fork from proceeding with development and operation of the project the Secretary previously analyzed and approved in the extensive EIS that accompanied the Secretary's two-part determination and land-in-trust decision. Stand Up's NEPA and CAA challenges to those decisions have been conclusively rejected by every court to consider them, and Stand Up is precluded from collaterally attacking them here. Stand Up's latest attempt to delay North Fork's project through vacatur and injunctive relief is meritless.

BACKGROUND

This Court set out the background relevant to this matter in its prior ruling on summary judgment. Doc. 58, at 2-6. North Fork briefly summarizes that background and describes pertinent intervening developments below.

A. Statutory Background

IGRA. IGRA was enacted 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). Although IGRA generally prohibits gaming on lands acquired into trust after 1988, it provides that such lands are eligible for gaming if the Secretary of the Interior makes a two-part determination that gaming on the land (1) "would be in the best interest of the Indian tribe and its members," and (2) "would not be detrimental to the surrounding community," and "if the Governor of the State in which the

gaming activity is to be conducted concurs in the Secretary's determination." *Id.* § 2719(b)(1)(A). To find that gaming "would not be detrimental to the surrounding community," the Secretary considers (among other things) an environmental analysis prepared pursuant to NEPA. 25 C.F.R. §§ 292.18, 292.21(a); *see* 73 Fed. Reg. 29,354, 29,369 (May 20, 2008) ("The Secretary must have the results of the NEPA analysis in order to consider whether or not there is detriment to the surrounding community.").

IGRA authorizes class III gaming, sometimes called "casino-style" gaming, on Indian lands if the gaming is located in a state that "permits such gaming for any purpose by any person, organization, or entity," 25 U.S.C. § 2710(d)(1)(B), and the gaming is conducted either "in conformance with a Tribal-State compact" between the tribe and its home state, *id*. § 2710(d)(1)(C), or pursuant to Secretarial Procedures prescribed by the Secretary, *id.* § 2710(d)(7).

IGRA contemplates that a tribe seeking to conduct class III gaming will first attempt to obtain a compact. Where, as in California, state law permits class III gaming, IGRA mandates that "the State shall negotiate with the Indian tribe in good faith to enter into … a compact." 25 U.S.C. § 2710(d)(3)(A). If a federal court finds that the state has not negotiated in good faith, IGRA provides a highly regimented remedial process through which a tribe may ultimately conduct class III gaming under Secretarial Procedures. *Id.* § 2710(d)(7). First, upon finding that the state failed to negotiate in good faith, the court "shall order" the state and the tribe to conclude a compact within 60 days. *Id.* § 2710(d)(7)(A)(i), (B)(iii). If that fails, the court appoints a mediator, who "shall select" the compact that "best comports with" IGRA, "any other applicable Federal law," and the court's findings and order. *Id.* § 2710(d)(7)(B)(iv). If the state consents to the mediator-selected compact within 60 days, that becomes the tribal-state compact, which the Secretary must approve within 45 days. *Id.* § 2710(d)(7)(B)(vi), (d)(8)(C). If the state fails to consent, the Secretary "shall prescribe" Secretarial Procedures that are "consistent with the proposed compact selected by the mediator …, the provisions of [IGRA], and the relevant provisions of the laws of the State," and "under which class III gaming may be conducted." *Id.* § 2710(d)(7)(B)(vii).

NEPA. NEPA directs all federal agencies taking "major Federal actions significantly affecting the quality of the human environment" to include an EIS analyzing the environmental "effects" of the proposed action. 42 U.S.C. § 4332(C). The Supreme Court has held that to be a "major Federal action" under NEPA, an agency action must be the "legally relevant cause"—the proximate cause, not merely a but-for cause—of the environmental effects in question. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 763-764, 769-770 (2004). If "an agency has no ability to prevent a certain effect due to its limited statutory authority," its action is not a "legally relevant 'cause'" of that effect. *Id.* at 770.

The Council on Environmental Quality ("CEQ") recently issued regulations that codify *Public Citizen*'s holding in several relevant respects. *See* 85 Fed. Reg. 43,304 (July 16, 2020). First, the regulations establish "threshold[]" considerations for determining whether NEPA applies, including "[w]hether the proposed activity or decision is a major Federal action" and, relatedly, "[w]hether the proposed activity or decision, in whole or in part, is a non-discretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process." 40 C.F.R. § 1501.1(a)(4), (5). Second, the regulations clarify that the environmental "effects" of an agency action do not require a NEPA analysis if the agency action is merely a but-for cause of those effects or "the agency has no ability to prevent [the effects] due to its limited statutory authority." *Id.* § 1508.1(g)(2). Third, the regulations clarify that "[a]ctivities or decisions that are non-discretionary and made in accordance with the agency's statutory authority" are not "major Federal action[s]" subject to NEPA. *Id.* § 1508.1(q)(1)(ii).

CAA. The CAA requires federal agencies approving certain actions in specific areas of the country to ensure that the action conforms to the applicable state implementation plan, which is designed to achieve and maintain national air quality standards. 42 U.S.C. § 7506(c); *see* 40 C.F.R. § 93.150(a). An agency need not conduct a conformity determination, however, if the agency's action would not "cause[]" new emissions to exceed specified emissions rates. 40 C.F.R. § 93.153(b), (c)(1). The Supreme Court has explained that an agency does not "cause" new emissions where it "cannot practicably control, nor … maintain control" over them. *Public Citizen*, 541 U.S. at 772.

B. North Fork's Gaming Project And The Secretary's Two-Part Determination And Trust Decision

North Fork is a federally recognized Indian tribe located in Madera County, California. Doc. 58, at 2. Most of North Fork's roughly 2,000 citizens live below the poverty line, and their unemployment rate far exceeds the state and federal rates.[2] Aside from the proposed gaming project at issue in this case, North Fork has no source of revenue other than federal grants and California Revenue Sharing Trust Fund distributions and no land suitable for commercial development. *See id.*

In 2005, North Fork submitted a fee-to-trust application to the Department of the Interior to have a 305-acre parcel of unincorporated and mostly vacant land in Madera County taken into trust under the Indian Reorganization Act. Doc. 58, at 2. In 2006, North Fork supplemented its trust application with a request that the Secretary of the Interior authorize North Fork to game on the Madera Site under IGRA's two-part determination provision. *Id.*

North Fork's trust application and request for a two-part determination were subject to a lengthy and comprehensive review process. Interior spent four years conducting an environmental analysis under NEPA; in 2010, it published a 911-page EIS with over 5,500 pages of appendices. *See* AR179-216.[3] The EIS contained an exhaustive analysis of the potential environmental impacts of North Fork's gaming project and the mitigation measures that North Fork agreed to undertake. *E.g.*, AR179-216. Interior also conducted a conformity determination under the CAA. *See* Doc. 29-4, at 104-137.[4]

On September 1, 2011, the Secretary issued a favorable two-part determination, finding that a gaming establishment on the Madera Site would be in North Fork's best interest and would

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[2] *See, e.g.*, U.S. Dep't of Interior, Bureau of Indian Affairs, *Final Environmental Impact Statement, North Fork Casino, North Fork Rancheria of Mono Indians Fee-To-Trust and Casino/Hotel Project* ("FEIS"), at 1-10 (Feb. 2009), http://www.northforkeis.com/documents/final_eis/files/Section_1.pdf.

[3] The entire EIS can be found at https://www.northforkeis.com/ (visited Oct. 30, 2020).

[4] The federal government originally issued the conformity determination in June 2011 and reissued it in April 2014, after curing a potential procedural deficiency that Stand Up raised in its suit in the District Court for the District of Columbia. *See* Order, *Stand Up for California! v. U.S. Dep't of Interior*, No. 12-2039 (D.D.C. Dec. 16, 2013), Doc. 77 (granting Federal Defendants' motion for partial remand to reissue conformity determination).

not be detrimental to the surrounding community. AR240-291. Pursuant to IGRA, the Secretary informed the Governor of California of the favorable two-part determination and requested the Governor's concurrence. AR240-241. On August 30, 2012, the Governor concurred. AR572-573.

In November 2012, the Secretary determined to take the Madera Site into trust for North Fork. AR159-227. Based on a "thorough review and consideration" of the administrative record, the EIS, and comments received from various interested parties, AR160-161, the Secretary concluded that North Fork's project would "promote the long-term economic vitality, self-sufficiency, self-determination, and self-governance of the Tribe," AR188-189. In February 2013, the Secretary acquired the Madera Site in trust.

C. Remedial Litigation And Secretarial Procedures

On August 31, 2012, the Governor signed a compact with North Fork that allowed class III gaming on the Madera Site. AR294; *see* AR320-438. The California Legislature ratified the compact, and, in October 2013, the Secretary published notice that the compact was taking effect. AR2187; 78 Fed. Reg. 62,649, 62,649 (Oct. 22, 2013); *see* 25 U.S.C. § 2710(d)(3)(B). The following month, however, opponents of North Fork's project placed a referendum to overturn the Legislature's ratification of the compact on the November 2014 general election ballot. AR455. Voters approved the referendum, rejecting ratification of the compact. AR2187. California thereafter took the position that the compact had no force or effect and that it would not negotiate a new compact because, in its view, such negotiations would be futile in light of the referendum. *Id.*

In March 2015, North Fork brought suit against the State of California in this Court under IGRA's remedial provision, 25 U.S.C. § 2710(d)(7). North Fork sought a declaration that the State had failed to comply with IGRA's requirement to negotiate in good faith with North Fork to enter into an enforceable compact, *id.* § 2710(d)(3)(A), and an order directing the State to conclude an enforceable compact with North Fork within 60 days or submit to mediation, *see id.* § 2710(d)(7)(B)(iii)-(iv). AR315; *see* Doc. 58, at 3. On November 13, 2015, this Court entered judgment in North Fork's favor, finding that "the State failed to enter into negotiations with

North Fork for the purpose of entering into a Tribal-State compact within the meaning of § 2710" and ordering the parties "to conclude a compact within 60 days of the date of this order." AR498; *see* Doc. 58, at 3.

The State failed to consent to a compact within 60 days, and this Court therefore ordered the parties to mediation. AR2187; *see* Doc. 58, at 3; 25 U.S.C. § 2710(d)(7)(B)(v)-(vi). After the court-appointed mediator selected North Fork's compact, the State again failed to consent to it within 60 days. AR2187; *see* Doc. 58, at 3-4. The mediator so notified the Secretary on April 26, 2016, and on July 29, 2016, the Secretary prescribed Secretarial Procedures to allow North Fork to conduct class III gaming on the Madera Site. AR2186-2325.[5]

D. Procedural History

Stand Up brought this action to challenge the Secretarial Procedures, and North Fork intervened as a defendant. As relevant here, Stand Up claimed that the Secretary should have conducted a second NEPA analysis before issuing the Secretarial Procedures, notwithstanding the EIS prepared in conjunction with the Secretary's two-part determination and land-in-trust decision. First Am. Compl. 11-13, ¶¶ 43-52 (Doc. 13). Stand Up also alleged that the Secretary should have prepared another conformity determination under the CAA before issuing the Secretarial Procedures. *Id.* at 14-15, ¶¶ 53-60.[6]

This Court granted summary judgment to the Federal Defendants and North Fork on Stand Up's claims. The Court held that the Secretarial Procedures were not subject to NEPA under NEPA's rule of reason because the Secretary had "'no ability to prevent [the relevant environmental] effect due to [his] limited statutory authority'" over Secretarial Procedures. Doc. 58, at 16-22 (quoting *Public Citizen*, 541 U.S. at 770). It reasoned that IGRA contains "an exhaustive list of authorities to be considered by the Secretary in prescribing Secretarial

[5] The Secretarial Procedures do not disturb the Tribe's right to conduct class II gaming (*e.g.*, bingo and unbanked card games) on the Madera Site because class II gaming does not require Secretarial Procedures. AR2199 (Secretarial Procedures § 2.12); 25 U.S.C. § 2710(b).

[6] Stand Up also contended that the Secretarial Procedures violated the Johnson Act by permitting North Fork to operate Class III gaming devices. This Court granted summary judgment to the Federal Defendants and North Fork on that claim, and the Ninth Circuit affirmed, so Stand Up's Johnson Act claim is no longer before this Court. Op. 8-16. Stand Up has abandoned its remaining claims.

Procedures" and that list did not include federal law other than IGRA, meaning that the Secretary "could not depart from the mediator-selected compact unless it was necessary to comply with IGRA or relevant state law." *Id.* at 19-21; *see* 25 U.S.C. § 2710(d)(7)(B)(vii). This "rule of reason" holding, the Court noted, "obviate[d] the need for a determination" whether Secretarial Procedures are "a major Federal action." Doc. 58, at 15 n.13. As to Stand Up's CAA claim, the Court similarly ruled that "the Secretary lacks sufficient control over the prescribing of gaming procedures to be able to make modifications based on the requirements of the CAA," and therefore, under *Public Citizen*, the Secretary need not make a conformity determination under the CAA in issuing Secretarial Procedures. Doc. 58, at 22-25.

The Ninth Circuit vacated those NEPA and CAA rulings. It held that although IGRA requires the Secretary to issue Secretarial Procedures that are "consistent with" the mediator-selected compact, IGRA, and state law, that does not mean "the Secretary must in every case adopt the mediator-selected compact wholesale, without modification." Op. 18-19 (emphasis omitted). The court noted that the statute "does not by its terms *preclude* the Secretary from considering other federal law" and thus "can reasonably be read to allow for some discretion on the Secretary's part" to permit compliance with federal law other than IGRA. *Id.* at 19; *see also id.* at 20 ("IGRA does not foreclose all consideration of applicable federal laws by the Secretary when issuing Secretarial Procedures"). The Ninth Circuit therefore disagreed with this Court's conclusion that the "'rule of reason' categorically excuses the Secretary from" conducting NEPA review based on the Secretary's lack of discretion "to consider any other applicable federal laws besides IGRA." *Id.* at 16. The court of appeals vacated this Court's CAA ruling on the same ground, noting that "the Secretary has some discretion to consider other applicable federal laws in prescribing Secretarial Procedures." *Id.* at 22-23.

The court of appeals did not, however, decide whether the Secretary was required to undertake a NEPA analysis or a CAA conformity determination before issuing Secretarial Procedures. With respect to NEPA, the Ninth Circuit remanded the case to this Court to decide "several threshold questions regarding the applicability of NEPA's requirements" in the first instance: "(1) whether the Secretarial Procedures [a]re a 'major Federal action' triggering

NEPA's requirements in the first place; (2) if so, whether the Secretary could rely on the prior EIS for present purposes; and (3) if the Secretary could not do so, whether to remand to the Secretary to comply with NEPA by supplementing the prior EIS." Op. 22. With respect to the CAA, the court of appeals remanded for this Court to decide "whether the conformity determination previously completed during the fee-to-trust process satisfies the CAA's requirements for present purposes." *Id.* at 23.

STANDARD OF REVIEW

As this Court has noted, judicial review "in resolving an APA challenge to an agency action is circumscribed: the court will only set aside agency action if [the agency's] findings[] and conclusions [are] found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, in excess of statutory jurisdiction or without observance of procedure required by law." Doc. 58, at 7 (quotation marks and citations omitted). "This standard is 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Id.* (quoting *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007)). Where an agency's decision not to prepare a NEPA analysis "turns on a threshold legal question regarding NEPA applicability," courts in this Circuit apply a '"reasonableness"' standard, *Northern Alaska Envtl. Ctr. v. U.S. Dep't of the Interior*, 965 F.3d 705, 712 (9th Cir. 2020), although "[t]he Supreme Court has noted … that the difference between the arbitrary and capricious and reasonableness standards is not of great pragmatic consequence," *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1012 (9th Cir. 2009) (quotation marks omitted), *amended on other grounds*, 2009 U.S. App. LEXIS 19219 (Aug. 25, 2009). Other agency determinations regarding NEPA, such as a determination that an existing EIS need not be supplemented because any "new information or circumstances do not rise to the level of significance," are subject to arbitrary and capricious review. *Id.* at 712 n.6. Because the Court reviews an agency decision based on the administrative record, "resolution of the question presented requires no fact finding and summary judgment is the appropriate means by which the merits of the case can be decided." *ForestKeeper v. Elliott*, 50 F. Supp. 3d 1371, 1377-1378

(E.D. Cal. 2014) (Ishii, J.).

ARGUMENT

I. THE SECRETARIAL PROCEDURES DO NOT VIOLATE NEPA

The Ninth Circuit remanded for this Court to consider three "threshold questions regarding the applicability of NEPA's requirements in this particular case": "(1) whether the Secretarial Procedures [a]re a 'major Federal action' triggering NEPA's requirements in the first place; (2) if so, whether the Secretary could rely on the prior EIS for present purposes; and (3) if the Secretary could not do so, whether to remand to the Secretary to comply with NEPA by supplementing the prior EIS." Op. 22 (Doc. 65).

This Court should hold that Secretarial Procedures are not a "major Federal action" under NEPA—a conclusion compelled by NEPA's regulations and the extensive body of caselaw establishing that NEPA does not apply to non-discretionary agency actions that are not the "legally relevant cause" of any environmental effects. That ruling would obviate the need to consider the remaining questions. However, should the Court rule that Secretarial Procedures are a "major Federal action," the Secretary properly relied on the prior EIS in prescribing the procedures for North Fork, making it unnecessary to conduct another lengthy environmental review in this case. Finally, even if the Court were to conclude that a supplemental environmental review is required, there is no need to vacate the Secretarial Procedures for that review to occur, let alone to enjoin the Tribe from proceeding with the "Preferred Alternative" project evaluated in the prior EIS.

A. Secretarial Procedures Are Not A "Major Federal Action"

Secretarial Procedures are not a "major Federal action" subject to NEPA. The Supreme Court has held that "where [an] agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions," its actions are not "major Federal action[s]" subject to NEPA, because they are not "the legally relevant 'cause'" of the environmental effect. *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004). That principle has been codified in NEPA's implementing regulations, which provide that major Federal actions do "not include … [a]ctivities or decisions that are non-discretionary and made in accordance with the

agency's statutory authority," 40 C.F.R. § 1508.1(q)(1)(ii), or where "the agency lacks authority to consider environmental effects as part of its decision-making process," *id.* § 1501.1(a)(5). Other caselaw both before and after *Public Citizen* confirms that when an agency has no discretion to refuse to act, or substantially modify its action, based on environmental concerns—for instance, where the agency is merely taking a statutorily required step that implements a prior discretionary decision—NEPA is not implicated.

The issuance of Secretarial Procedures for North Fork was not a "major Federal action" under that standard. Most fundamentally, IGRA *required* the Secretary to issue Secretarial Procedures authorizing class III gaming on the Madera Site. *See* 25 U.S.C. § 2710(d)(7)(B)(vii). The Secretary had no discretion to disregard IGRA's statutory mandate. Nor did the Secretary have the discretion, when issuing the Secretarial Procedures, to modify North Fork's gaming project based on environmental effects. The Secretarial Procedures were necessary before class III gaming could proceed on the Madera Site, but the discretionary decision whether to permit gaming and what kind of gaming project would be approved had already been made, through the two-part determination and trust acquisition process. Those decisions—not the Secretarial Procedures—were the relevant agency actions for purposes of NEPA, and the NEPA process the Secretary undertook then has already been conclusively held to be adequate.

1. The caselaw and NEPA regulations establish that non-discretionary actions are not major Federal actions

The leading Supreme Court decision on the issue makes clear that an agency action is not a "major Federal action" under NEPA if it is a statutorily required action that merely implements a prior discretionary determination. In *Public Citizen*, the Supreme Court held that NEPA did not require the Federal Motor Carrier Safety Administration ("FMCSA") to consider the environmental effects of Mexican trucking operations in the United States when promulgating safety and registration regulations, because FMCSA "lack[ed] discretion to prevent" such operations. 541 U.S. at 756. The Court reasoned that it was the President who had decided, by lifting an existing moratorium, to allow Mexican trucks to operate in the United States. *Id.* at 760, 766. Once that decision was made, FMCSA was required by statute to "grant registration to

all domestic or foreign motor carriers that are 'willing and able to comply with' the applicable safety, fitness, and financial-responsibility requirements." *Id.* at 758-759 (quoting 49 U.S.C. § 13902(a)(1)). As the Court explained, "the legally relevant cause of the entry of the Mexican trucks"—and of the environmental effects of those trucks—was thus "*not* FMCSA's action, but instead the actions of the President in lifting the moratorium and those of Congress in granting the President this authority while simultaneously limiting FMCSA's discretion." *Id.* at 769. FMCSA's action was therefore not a "major Federal action" subject to NEPA. *Id.* at 763-764, 770.[7]

As noted above, NEPA's implementing regulations have expressly adopted *Public Citizen*'s holding, providing that major Federal actions do "not include … [a]ctivities or decisions that are non-discretionary and made in accordance with the agency's statutory authority." 40 C.F.R. § 1508.1(q)(1)(ii); *see* 85 Fed. Reg. at 43,320 (agency activity "does not meet the definition" of "major Federal action" if "it is nondiscretionary such that the agency lacks authority to consider environmental effects as part of its decision-making process" (citing *Public Citizen*, 541 U.S. at 768-770)).

Court of appeals decisions both before and after *Public Citizen* reflect that same principle. Most recently, in *National Wildlife Federation v. Secretary of the U.S. Department of Transportation*, 960 F.3d 872 (6th Cir. 2020), an environmental group challenged the Pipeline and Hazardous Materials Safety Administration's approval of two oil spill response plans. The Clean Water Act provided that the agency '"shall … approve any plan'" that met six enumerated criteria. *Id.* at 874-875 (quoting 33 U.S.C. § 1321(j)(5)(E)(iii)). Even if certain of the criteria "might have environmental effects," and the agency had "some degree of judgment" in applying them, the Sixth Circuit explained, that was not sufficient to trigger NEPA, as those criteria did not allow the agency "to consider the environment as an end in itself" or make "free-form

[7] *Public Citizen* addressed an older version of the NEPA regulations that defined "major Federal action" to include "actions with [certain] effects" "caused by" the agency action. 541 U.S. at 763-764 (quotation marks omitted). The Court thus framed the key question as whether the increase in cross-border operations of Mexican motor carriers was an effect "caused by" FMCSA's issuance of the safety and registration regulations. *Id.* at 764, 766-767, 770.

environmental decisions" as a basis for withholding approval of a response plan. *Id.* at 874, 880. Given the agency's limited statutory authority, the Sixth Circuit held that the "legally relevant cause of any environmental impact [was not] the agency's approval of the response plan but rather Congress's decision to limit the agency's discretion in the first place." *Id.* at 879-880 (quotation marks omitted).[8]

Prior to *Public Citizen*, many courts of appeals, including the Ninth Circuit, have also held that NEPA does not apply to agency actions where the agency's discretion is substantially constrained. In *Sierra Club v. Babbitt*, 65 F.3d 1502 (9th Cir. 1995), for example, the Sierra Club challenged the approval by the Bureau of Land Management ("BLM") of a logging road pursuant to an existing right-of-way agreement with a logging company. The agreement provided that BLM could block proposed logging roads only if (1) the route was not the most direct; (2) the road would substantially interfere with existing or planned facilities; or (3) construction would result in excessive soil erosion. *Id.* at 1505-1506. The Ninth Circuit held that BLM's approval was not subject to NEPA in light of the agency's limited discretion, noting that "BLM's inability meaningfully to influence [the logging company's] right-of-way construction leads us to conclude that the procedural requirements of NEPA do not apply to this case." *Id.* at 1513. The court agreed with BLM that "the relevant agency action" was not the agency's approval of the logging road, but rather the agency's earlier action granting the right of way. *Id.* at 1507-1508, 1512.

Likewise, the D.C. Circuit held that NEPA did not apply to the Surface Transportation Board's decision to issue a certificate providing for the interim use of an abandoned railroad right of way as a recreational trail. *See Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144 (D.C. Cir. 2001). The relevant statutory scheme authorized such rails-to-trails conversions pursuant to agreements between the owners of unused railroad rights of way that

[8] In *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225-1226 (9th Cir. 2015), the Ninth Circuit likewise held that approvals of oil spill response plans under the Clean Water Act were exempt from NEPA, though with different reasoning (focusing exclusively on the "rule of reason" as the basis for exempting such approvals from NEPA, having assumed, without deciding, that the approvals would qualify as major Federal actions).

would otherwise be abandoned and trail sponsors willing to assume responsibility for the trail. *Id.* at 1149-1150. The governing regulations prescribed that if (1) a qualified trail sponsor submitted the required statement of willingness, (2) the railroad was willing to negotiate a trail use agreement, and (3) the Board had approved abandonment of the rail line, then the Board "must issue" a certificate of interim trail use ("CITU"). *Id.* at 1153 (summarizing 49 C.F.R. § 1152.29(c)(1)). The D.C. Circuit explained: "[T]he absence of significant discretion in the Board regarding issuance of a CITU removes that issuance from the reach of NEPA." *Id.* at 1152. The relevant agency action for NEPA purposes was not the issuance of the CITU, but rather the prior decision to approve abandonment of the right of way in the first instance. *Id.* at 1153-1154.

In *Goos v. I.C.C.*, 911 F.2d 1283 (8th Cir. 1990), the Eighth Circuit reached the same conclusion, explaining that "major federal action occurs when a federal agency has discretion in its enabling decision to consider environmental consequences and that decision forms the legal predicate for another party's impact on the environment." *Id.* at 1295 (quotation marks omitted). The court held that the agency's issuance of a CITU (or its equivalent) was not a major Federal action under that standard because the agency had no discretion to "refuse to issue [such certificates] because of environmental consequences." *Id.* at 1293, 1295. Like the D.C. Circuit, the Eighth Circuit contrasted the issuance of a CITU with the prior abandonment proceeding, at which the agency considers "'the present or future public convenience and necessity,'" including environmental effects. *Id.* at 1293, 1295 & n.7 (quoting 49 U.S.C. § 10903).

These cases, and NEPA's implementing regulations, demonstrate that agency actions are not subject to NEPA where the agency cannot decline to take action or cannot meaningfully take environmental effects into account by altering its decision based on those effects. Specifically, a statutorily required agency action that implements a previous discretionary decision is not a "major Federal action." In such situations, the relevant cause of the alleged environmental effects is the prior discretionary decision to allow the activity in question. If that discretionary decision was entrusted to the agency, as in the case of *Citizens Against Rails-to-Trails* and *Goos*, it is that earlier decision that is the relevant agency action for NEPA purposes.

2. The Secretary lacks the necessary discretion to make Secretarial Procedures a "major Federal action"

Under these principles, Secretarial Procedures are not a "major Federal action." As an initial matter, Secretarial Procedures are "non-discretionary" in the most fundamental sense, 40 C.F.R. § 1508.1(q)(1)(ii)—the Secretary cannot refuse to prescribe Secretarial Procedures under IGRA. "[T]he basic principle announced in *Public Citizen*," the Supreme Court has explained, is "that an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take." *National Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 667-668 (2007); *see also Sauk Prairie Conservation Alliance v. United States Dep't of the Interior*, 944 F.3d 664, 679-680 (7th Cir. 2019) ("NEPA applies only when an agency has discretion over whether to take the proposed action"), *cert. denied*, 140 S. Ct. 2764 (2020). The Secretary lacks that discretion because IGRA *requires* the Secretary to issue procedures where the state fails to cooperate in the compacting and subsequent remedial process. 25 U.S.C. § 2710(d)(7)(B)(vii). In NEPA parlance, the Secretary lacks discretion to pursue "the no action alternative," which is an essential element of a NEPA review. *See* 40 C.F.R. § 1502.14(c) (the EIS "shall… [i]nclude the no action alternative"); *see also* 43 C.F.R. § 46.30 (Interior regulations defining "[n]o action alternative" as '"no project' in cases where a new project is proposed for implementation").

The Secretary also lacks discretion to "prevent" the alleged environmental effects of gaming, *Public Citizen*, 541 U.S. at 770, or to put it differently, to act on the basis of environmental considerations in the decision-making process, *see* 40 C.F.R. § 1501.1(a)(4), (a)(5). The statutory mandate that the Secretary prescribe procedures that are "consistent with" the mediator-selected compact under 25 U.S.C. § 2710(d)(7)(B)(vii) substantially constrains the Secretary's discretion, in sharp contrast to the Secretary's broad discretion in making a two-part determination under § 2719(b)(1)(A). Under the two-part determination, the Secretary must decide whether the proposed project would be "detrimental to the surrounding community," which expressly permits the Secretary to consider the project's environmental effects. 25 U.S.C. § 2719(b)(1)(A). Indeed, the relevant regulations *require* the Secretary to conduct a NEPA

analysis in conjunction with that determination. *See Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 265 (D.D.C. 2016) ("IGRA implementing regulations expressly instruct the Secretary to incorporate the NEPA process into her [two-part] determination."); 25 C.F.R. §§ 292.18, 292.21(a) (two-part determination); *cf. id.* §§ 151.10(a)-(c), (e)-(h), 151.11(a) (trust decision). IGRA's provisions governing Secretarial Procedures do not confer any similar discretion on the Secretary. That distinction is significant. *See Sierra Club v. FERC*, 867 F.3d 1357, 1372-1373 (D.C. Cir. 2017) (contrasting FERC's authority to consider the "public convenience and necessity" in approving pipeline applications, which is sufficiently broad to trigger NEPA, with narrower authority to issue upgrade licenses for liquefied natural gas terminals under a "narrow" delegation of authority, which is not); *Goos*, 911 F.2d at 1293, 1295 (contrasting the agency's authority to consider "public convenience and necessity" in an abandonment proceeding, which is subject to environmental review, with the agency's limited discretion in issuing interim use certificates, which is not); *see generally Harris v. Harris*, 935 F.3d 670, 675 (9th Cir. 2019) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'" (alteration in original)).

The Secretary's limited role—and limited discretion—in the final steps of IGRA's remedial process is confirmed by other provisions in the statute. In particular, there is no dispute that if California had consented to the mediator-selected compact (which is materially identical to the Secretarial Procedures), the Secretary's approval of that compact would not have been subject to NEPA. *See* 25 U.S.C. § 2710(d)(8)(C) (giving the Secretary only 45 days to approve or disapprove a compact); *cf. Jamul Action Comm. v. Chaudhuri*, 837 F.3d 958, 964-965 (9th Cir. 2016) (agency action required to occur within 90 days not subject to NEPA, because preparing an EIS "takes an agency at least 360 days"). It makes little sense to construe IGRA as requiring the Secretary to conduct another lengthy NEPA review simply because the State chose not to consent to the mediator-selected compact; to the contrary, the added delay would reward states for their intransigence in the IGRA remedial process—encouraging the very conduct that

IGRA was intended to overcome. *See Barrientos v. 1801-1825 Morton LLC*, 583 F.3d 1197, 1210 (9th Cir. 2009) (court will not "construe '[l]egislative enactments … as establishing statutory schemes that are illogical, unjust, or capricious"').

As in *Citizens Against Rails-to-Trails* and *Goos*, therefore, the time to conduct NEPA review was in 2011 and 2012, when the Secretary exercised discretion to allow North Fork's gaming project by making a favorable two-part determination and acquiring the Madera Site in trust. And, of course, the Secretary in fact did conduct a thorough NEPA review then, consistent with the statute and Interior Department regulations. Once those decisions were made, and the State failed to cooperate in the compacting process or consent to the mediator-selected compact pursuant to IGRA's remedial scheme, the Secretary was required to issue Secretarial Procedures "consistent with" the mediator-selected compact and lacked discretion to substantially depart from it based on environmental considerations. *See* 25 U.S.C. § 2710(d)(7)(B)(vii).

To be sure, the Ninth Circuit held that—as a general matter—IGRA "allow[s] for some discretion on the Secretary's part" in prescribing Secretarial Procedures because the Secretary can consider other federal law besides IGRA. Op. 19-21. Even so, the statute does not give the Secretary the kind of discretion that would make Secretarial Procedures a "major Federal action." Courts have repeatedly held that, even where agencies possess some degree of discretion over particular actions with environmental consequences, those actions are not subject to NEPA where the governing statute or regulations do not authorize the agencies to consider environmental effects for their own sake—*i.e.*, base their decisions on environmental effects—even if the agency's consideration of the limited statutory or regulatory criteria might incidentally have environmental consequences. *See National Wildlife Federation*, 960 F.3d at 880 (action not subject to NEPA where decision-making criteria did not authorize agency to consider the environment "as an end in itself" or to make "free-form environmental decisions"); *Sierra Club v. FERC*, 867 F.3d at 1373 (agency lacked sufficient discretion to trigger NEPA where it could not rely on the environmental effects of gas exports "as a justification for denying" the relevant license) (emphasis omitted); *cf. Center for Biological Diversity v. U.S. Army Corps of Eng'rs*, 941 F.3d 1288, 1297-1298 (11th Cir. 2019) (under the rule of reason, that

"the agency could, in fact, mitigate [environmental] effects" under its limited discretion does not make the agency the legally relevant cause, because "the agency was not statutorily authorized to base its decision on those ancillary effects," and the agency could not be expected to exercise its limited authority with the "ulterior motive" of achieving favored environmental outcomes).

Rather, the issuance of Secretarial Procedures is analogous to the issuance of safety and registration regulations for Mexican trucks in *Public Citizen,* the approval of oil spill response plans in *National Wildlife Federation*, the approval of a logging road in *Sierra Club*, and the issuance of interim trail use certificates in *Citizens Against Rails-to-Trails* and *Goos*. In each case, the federal agency was under a statutory, regulatory, or contractual mandate to take the challenged action—and in each case, the courts held that the actions were not subject to NEPA, because the legally relevant "cause" of any environmental effects was not the challenged action itself, but rather the prior discretionary determinations that activated the agency's mandate. That the agency's action in each of those cases may have had environmental consequences was not sufficient to trigger NEPA review.

Stand Up ignores the relevant caselaw and regulations and instead rests its argument on the faulty premise that "Secretarial Procedures are … functionally equivalent to a permit" (Br. 18), as though the Secretary could decline to issue such procedures as he might decline to issue a discretionary permit. As explained, however, the Secretary lacks such discretion under IGRA. Stand Up compounds its error by invoking what it describes as "well-settled Ninth Circuit case law" to argue that any "prerequisite for a project with adverse impact on the environment" constitutes a major Federal action subject to NEPA. Br. 18-19 (citing *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996)). But to the extent that case provides any support for Stand Up's argument, the Supreme Court has since held that such but-for causation is insufficient to trigger NEPA, *Public Citizen*, 541 U.S. at 767, and CEQ has codified that ruling in the governing NEPA regulations, stating expressly: "A 'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA." 40 C.F.R. § 1508.1(g)(2). Stand Up is simply wrong on the "threshold" question before the Court.

* * *

The Secretary conducted NEPA review at the appropriate point in the IGRA decision-making process—when making the two-part determination and trust decision—and produced a 911-page final EIS with more than 5,500 pages of appendices. That EIS requires a series of mitigation measures that will govern North Fork's gaming at the Madera Site. Stand Up challenged Interior's 2012 trust decision, as well as the underlying NEPA analysis, but it lost at every step of the way, with courts conclusively upholding the sufficiency of the environmental review and the legality of the trust decision. *See Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 786 (2019). No additional NEPA review was required, because the issuance of the Secretarial Procedures years later in 2016 was not a "major Federal action" under the governing caselaw and regulations. The Court should grant summary judgment to the Federal Defendants and North Fork on that basis.

B. To The Extent Secretarial Procedures Are Subject To NEPA, The Existing EIS Was Sufficient

Even if the Court concludes that Secretarial Procedures are generally a "major Federal action" requiring NEPA review, there was no reason for the Secretary to conduct a further NEPA review before issuing the Secretarial Procedures for North Fork. Interior's regulations encourage responsible officials to "make the best use of existing NEPA documents by supplementing, tiering to, incorporating by reference, or adopting previous NEPA environmental analyses to avoid redundancy and unnecessary paperwork." 43 C.F.R. § 46.120(d). The agency may rely on an "existing environmental analysis prepared pursuant to NEPA" if it "determines, with appropriate supporting documentation, that [the existing EIS] adequately assesses the environmental effects of the proposed action and reasonable alternatives," after evaluating "whether new circumstances, new information or changes in the action or its impacts not previously analyzed may result in significantly different environmental effects." *Id.* § 46.120(c).

Here, Interior had already produced a detailed EIS in 2010 analyzing the environmental effects of North Fork's gaming project during the two-part determination process. The two-part determination approved the "Preferred Alternative" analyzed in the 2010 EIS. And the

Secretarial Procedures are simply a step toward implementation of that already analyzed and approved project.

Accordingly, the Secretarial Procedures expressly reference the Preferred Alternative and the EIS analyzing it, noting that "a comprehensive environmental review has already been prepared" for the "Preferred Alternative." AR2264 (§ 11.1(a)); *see also* AR2201 (§ 2.23) (defining "Preferred Alternative" as "the construction of the Tribe's initial Gaming Facility… identified as Alternative A in the final environmental impact statement prepared" pursuant to NEPA). The Secretarial Procedures also adopt the mitigation measures in the existing EIS, noting that "[t]o the extent that the Project remains within the scope of the Preferred Alternative," "the Tribe accepts its obligation to implement the applicable off-reservation mitigation measures as prescribed in the 'Final Environmental Impact Statement, North Fork Casino, North Fork Rancheria of Mono Indians Fee-To-Trust and Casino/Hotel Project[.]'" AR2270-2271 (§ 11.7(e)). The Secretarial Procedures also expressly require a further environmental review for any expansion of the project beyond the Preferred Alternative. AR2264 (§ 11.1(a)). These provisions reflect the common-sense conclusion that the existing EIS adequately covered the "Preferred Alternative" gaming project the existing EIS had already analyzed, while providing for further environmental review in the event of any future departure from the "Preferred Alternative." Under these circumstances, it would serve no purpose to require the agency to repeat the NEPA analysis it has already conducted.

Stand Up seeks to brush all this aside and instead focus on technicalities, which it contends (Br. 20) are "conclusive evidence that the Secretary did not consider the Secretarial Procedures to be covered by the 2010 EIS." For example, Stand Up places much weight (Br. 20) on the statement in the Secretarial Procedures that the procedures are "separate from" the Secretary's two-part determination and trust decision. But that only acknowledges the truism that the issuance of Secretarial Procedures is a separate agency action from those earlier decisions; it does not speak at all to whether a second NEPA analysis is required for the Secretarial Procedures.

Stand Up then argues (Br. 20) that the "administrative record in this matter is inadequate to enable this Court to conclude that the 2010 EIS suffices to comply with NEPA in the Secretary's issuance of the Secretarial Procedures," because the administrative record "does not include the 2010 EIS or the studies and data upon which it is based." But arbitrary and capricious review under the APA is based on the "whole record," 5 U.S.C. § 706, which is not limited to "those documents that the *agency* has compiled and submitted as 'the' administrative record." *Thompson v. U.S. Dep't of Interior*, 885 F.2d 551, 555 (9th Cir. 1989). Instead, the whole administrative record "'consists of all documents and materials directly or *indirectly* considered by agency decision-makers.'" *Id.*; *accord Club One Casino, Inc. v. U.S. Dep't of the Interior*, 2017 WL 5877033, at *1 (E.D. Cal. Nov. 29, 2017) (Ishii, J.). Further, the Court may consider documents outside the administrative record where (among other things) "'the agency has relied on documents not in the record.'" *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). Under those standards, this Court may consider the existing EIS, which the Secretary cited and relied on in the Secretarial Procedures. AR2201 (defining "Preferred Alternative" as Alternative A considered in the EIS "noticed on August 6, 2010 (75 Fed. Reg. 47,621-47,622)").[9]

Stand Up also argues (Br. 22-24) that the existing EIS is insufficient because the Secretarial Procedures authorize up to two gaming facilities on the Madera Site, rather than a single facility. But to the extent Stand Up is arguing that the Secretary should have analyzed the environmental effects of a possible second facility, the Secretary had no reason to do so. *See* 43 C.F.R. § 46.100(b)(2) (Interior applies NEPA "when the proposal is developed to the point that … [t]he effects of the proposed action can be meaningfully evaluated"). While the Secretarial

[9] The 2010 EIS was also noticed in the Federal Register and is publicly available at www.northforkeis.com. The failure to produce readily available public materials as part of the administrative record is, at most, a harmless error. *See Today's IV, Inc. v. Federal Transit Admin.*, 2014 WL 5313943, at *10-11 (C.D. Cal. Sept. 12, 2014), *aff'd sub nom. Japanese Vill., LLC v. Federal Transit Admin.*, 843 F.3d 445 (9th Cir. 2016) (agency's failure to include a document in the administrative record is harmless when that omission "'clearly had no bearing on the procedure used or the substance of decision reached'"); *cf. State v. U.S. Dep't of Homeland Security*, 2020 WL 1557424, at *8 (N.D. Cal. Apr. 1, 2020) (federal defendants were "not required to produce [in the administrative record] any book in its entirety unless such book is not publicly available").

Procedures acknowledge the possibility that North Fork may someday undertake a gaming project on the Madera Site that is beyond the scope of the "Preferred Alternative" evaluated in the existing EIS, they do not approve any such project. Rather, they provide that before undertaking any project other than the Preferred Alternative—including construction of an additional gaming facility—North Fork must prepare "a comprehensive and adequate tribal environmental impact report" setting forth, among other things, "[a]ll Significant Effects on the Environment of the proposed Project" and "[m]itigation measures proposed to minimize Significant Effects on the Environment." AR2264-2265 (Secretarial Procedures § 11.1(a)); *see also* AR2201 (Secretarial Procedures § 2.25) (defining "Project[s]" for which tribal environmental impact report is required).[10] Moreover, the Tribe has not made any plans for a second facility, meaning that there is nothing sufficiently concrete for the Secretary to evaluate.

Before undertaking any such project, North Fork would have to enter into intergovernmental agreements providing for mitigation of any significant effects on the environment, effects on public safety, and compensation for expenditures for public services and treatment of problem gambling. AR2269-2270 (Secretarial Procedures § 11.7). North Fork thus will not be able to expand its gaming beyond the Preferred Alternative unless relevant state and local government entities agree (or an arbitrator concludes) that North Fork has sufficiently mitigated adverse environmental and other impacts. *See id.*; AR2271-2272 (Secretarial Procedures § 11.8) (setting out arbitration process).

Given the procedural safeguards in place that would prevent the development of a second facility absent further environmental review, the Secretary's decision not to conduct a lengthy review of an as-yet-unplanned second facility was entirely reasonable—and certainly not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A).

[10] A failure to prepare an "adequate" tribal environmental impact report would be a breach of Secretarial Procedures, which can be remedied in court. AR2269, 2288-2291 (Secretarial Procedures §§ 11.6, 13.0).

C. If Additional NEPA Analysis Is Required, The Secretarial Procedures Should Not Be Vacated Or Enjoined

1. Any remand should be without vacatur

Even if Stand Up's challenges had merit and the Court ordered the Secretary to undertake further NEPA review, the Secretarial Procedures should not be vacated. As an initial matter, the Ninth Circuit never even hinted at the possibility of vacating the Secretarial Procedures. Rather, it merely directed this Court—if this Court were to conclude that the Secretarial Procedures were subject to NEPA and reliance on the prior EIS was insufficient—to consider "whether to remand to the Secretary to comply with NEPA *by supplementing the prior EIS*." Op. 22 (emphasis added). There is good reason the Ninth Circuit gave no indication that the Secretarial Procedures must be vacated in the meantime. In determining whether vacatur is warranted, courts consider two factors: "how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'" *California Communities Against Toxics v. EPA*, 688 F.3d 989, 992 (9th Cir. 2012) (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993)). Those factors weigh strongly against vacatur here.

a. Seriousness of the Secretary's errors

Stand Up has not identified any serious errors by the Secretary. The prior EIS already evaluated the environmental effects of building and operating a class III gaming facility with up to 2500 slot machines and a resort-style hotel at the Madera Site. That analysis was upheld against Stand Up's prior challenges, and Stand Up is barred by preclusion principles from collaterally attacking it here. *Beauchamp v. Anaheim Union High Sch. Dist.*, 816 F.3d 1216, 1225 (9th Cir. 2016) ("'Collateral estoppel, or issue preclusion, bars the relitigation of issues actually adjudicated in previous litigation between the same parties.'" (quoting *Clark v. Bear Stearns & Co., Inc.*, 966 F.2d 1318, 1320 (9th Cir. 1992)). Stand Up is accordingly limited to challenging any difference between the class III gaming operations previously approved and those permitted under the Secretarial Procedures. And the only material difference Stand Up has identified is that the Secretarial Procedures would, if certain additional steps are taken, permit the

Tribe to allocate its 2500 slot machines and other gaming activities across two facilities instead of consolidating them into one.

Stand Up seizes on the possibility of a second gaming facility at the Madera Site as a "major expansion" (Br. 23) of the project that was analyzed and considered as the "Preferred Alternative" in the 2010 EIS, focusing on language in the Secretarial Procedures that says the Tribe "may establish and operate not more than (2) Gaming Facilities" at the Madera Site. But that argument fails for the reasons above: The Secretarial Procedures contain procedural safeguards that would prevent any expansion of the project beyond the previously analyzed "Preferred Alternative," absent further environmental review and intergovernmental agreements regarding any necessary mitigation efforts. *See supra* Section I.B. Were the Court to conclude that the existing record is insufficient with respect to a possible second facility, any error would be limited to that facility and have no bearing on the Preferred Alternative that was previously analyzed and approved.

Stand Up also misrepresents (Br. 27) the nature of the Secretary's supposed error, characterizing the Secretary as having "failed altogether to conduct the required NEPA analysis." The fact is that the Secretary conducted a thorough environmental analysis of class III gaming and a resort-style hotel on the Madera Site, and found the proposed project to be superior to other alternatives, including reduced-intensity gaming and no-gaming projects. *See* FEIS 2-83. And there is no reason to believe that the analysis would be meaningfully different for a hypothetical project in which gaming activities were spread across two facilities at the same location. To be clear, two facilities would not result in twice the gaming; the Secretarial Procedures authorize up to 2500 gaming devices—the same number considered in the EIS. *See* FEIS 2-32 (noting that, under the terms of the draft compact at the time, "[t]he Tribe is entitled to operate 2000 Gaming Devices, with additional 500 machines allowed if a new MOU is negotiated between Tribe and Madera County"). It would be unwarranted and unnecessary to vacate the Secretarial Procedures simply to allow the Secretary to supplement the existing analysis to address any marginal difference between a project consolidating gaming within one facility and a hypothetical one in which the Tribe might exercise the same gaming rights across two facilities.

In addition, in evaluating the seriousness of any error, the Court must consider the limited range of options before the Secretary. When the EIS was first prepared in connection with the Secretary's decision to take the Madera Site into trust in 2012, there were multiple options other than gaming on the Madera Site, including non-gaming activities on the site, gaming on another site, or no action at all. Those alternatives are no longer available: The Madera Site is in trust for the Tribe as class III gaming-eligible land, and the Secretary is under a statutory mandate to issues procedures allowing the Tribe to exercise its class III gaming rights on that land on terms that are consistent with those in the mediator-selected compact. 25 U.S.C. § 2710(d)(7)(B)(vii). Stand Up's objection regarding the number of facilities affects only a single provision in the Secretarial Procedures that would become relevant only if North Fork were to depart from the "Preferred Alternative" the Secretary approved, falling far short of the type of serious error that might warrant vacatur.

b. Disruptive consequences of vacatur

Vacating the Secretarial Procedures during the pendency of any remand would be unjustifiably disruptive. Having prevailed in its good-faith suit against the State and completed IGRA's remedial process, North Fork is entitled to secretarial authorization of class III gaming on the Madera Site. Vacatur of Secretarial Procedures would further delay North Fork's already long-postponed project, perpetuating the Tribe's dire economic straits and depriving it of IGRA's benefits. The operation and construction of the gaming facility is expected to alleviate the high unemployment rate among North Fork members, providing over 2,400 temporary construction jobs, over 1,500 full- and part-time resort jobs, and over 800 indirect and induced jobs outside of gaming, many of which will be filled by tribal citizens. AR247. In addition, as the Secretary found, "[r]evenues derived from the resort will allow the Tribe to expand governmental services," including "much needed social, housing, government, administrative, education, health, and welfare services," and help North Fork to "strengthen Mono cultural programs and initiatives, thereby helping to sustain the collective and individual efforts of the Tribe and its citizens to revitalize and maintain their unique Mono heritage, language, and traditions for future generations." AR247-248. Further delay in the project will continue to

harm North Fork and its members, depriving them of the benefits that IGRA instructs they should receive. *See* 25 U.S.C. § 2702(1).

Nor does Stand Up have a legitimate basis to seek a "temporary halt" of the project. Br. 28; *see Public Employees for Envtl. Responsibility v. Hopper*, 827 F.3d 1077, 1084 (D.C. Cir. 2016) ("Delaying construction or requiring Cape Wind to redo the regulatory approval process could be quite costly. The project has slogged through state and federal courts and agencies for more than a decade."). Critically, this is not a situation where the Secretary might decide *not* to issue Secretarial Procedures after conducting a new NEPA analysis. The Secretary *must* issue Secretarial Procedures. Whatever the effects of the beginning of construction, those would be the necessary effect of starting *any* class III gaming project substantially similar to the Preferred Alternative on the Madera Site. Currently, North Fork's only plans are for the Preferred Alternative, meaning that any activities in furtherance of the project have been fully reviewed under NEPA. Stand Up claims there might be environmental harms if the project goes beyond the scope of the existing EIS. But North Fork currently has no such plans, and before any such plans could be carried out, North Fork would need to go through the tribal environmental review process and reach agreements with the relevant state governments described above, giving Stand Up ample time to provide comments if warranted. *See* AR2266-2268 (Secretarial Procedures §§ 11.2-11.3) (describing notice procedures). Stand Up's requested remedy is thus inappropriately overbroad: Instead of seeking to prevent the construction of a second gaming facility, Stand Up wants to stop the entire gaming project—whether or not environmental analysis has already been conducted, as it has for the Preferred Alternative—serving its strategic goal of delay, but not the purposes of NEPA. *See Today's IV, Inc. v. Federal Transit Admin.*, 2014 WL 5313943, at *18 (C.D. Cal. Sept. 12, 2014), *aff'd sub nom. Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445 (9th Cir. 2016) ("A complete vacatur would also have significant consequences, *i.e.*, substantial delay to parts of the Project for which no NEPA violation has been identified and the loss of $4.7 million per month for the duration of the delay.").

2. Stand Up is not entitled to injunctive relief

As an alternative to vacatur, Stand Up seeks to "enjoin all project activities" until the NEPA process is complete, but it altogether fails to meet the high burden for seeking such relief. The Ninth Circuit has squarely held that a NEPA violation does not require "an injunction prohibiting all action pending NEPA compliance," explaining that "Supreme Court and Ninth Circuit precedents clearly establish that courts must apply the usual equitable factors in determining the scope of an injunction pending NEPA compliance." *Northern Cheyenne Tribe v. Norton*, 503 F.3d 836, 844 n.30 (9th Cir. 2007). Stand Up fails to meet these factors.

First, Stand Up has not shown irreparable injury. "Speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must *demonstrate* immediate threatened injury as a prerequisite to preliminary injunctive relief." *Caribbean Marine Servs. Co. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988) (citation omitted). The only potential harm that Stand Up identified (Br. 29) is North Fork's "operation of casinos whose environmental impacts have not been analyzed." But as discussed, North Fork has not even made plans for a second facility, and the facility that is planned was fully reviewed by the existing EIS. Therefore, Stand Up cannot demonstrate that there is likely or imminent injury to the environment as a result of the Secretary's approval of a second gaming facility. Moreover, if a second facility is proposed in the future, its impacts will have to be reviewed under the tribal environmental review process before the project begins. Thus, even if the Court orders the Secretary to conduct additional analysis under NEPA as to this as-yet-unplanned facility, there is no likelihood of harm to the environment from this second facility before the Secretary completes his analysis.

Second, the balance of hardships weighs strongly against an injunction. As discussed in Section I.C.1.b *supra*, North Fork has already suffered years of delay. It has a strong interest in finally beginning construction and operation of a gaming facility, to provide employment to its members and support critical governmental and social services. The only potential hardship to

Stand Up is the hypothetical harm from a second facility, harm that North Fork is required to mitigate under the terms of the Secretarial Procedures.

Third, the public interest also weighs strongly against an injunction. An injunction would disserve IGRA's policy of "promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1); *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003) ("The general purpose of IGRA is 'promoting tribal economic development' and 'self-sufficiency.'").[11] An injunction would also undermine the purpose of IGRA's good-faith remedial process and Secretarial Procedures, whose "function … is to permit the tribe to process gaming arrangements on an expedited basis." *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1041 (9th Cir. 2010). In addition to these statutory policies, the Secretary has determined, based on a thorough administrative process that lasted more than seven years, that the very project at issue here—class III gaming on the Madera Site—would be in the public interest, a decision in which the Governor concurred. AR243-244 (Sept. 1, 2011 Record of Decision); AR317-316 (Aug. 30, 2012 Letter from Gov. Brown to Sec'y Salazar). The Court should defer to the considered expert judgment of these public officials. *Golden Gate Restaurant Ass'n v. San Francisco*, 512 F.3d 1112, 1126-1127 (9th Cir. 2008) ("[O]ur consideration of the public interest is constrained in this case, for the responsible public officials … have already considered that interest."); *Ambach v. Bell*, 686 F.2d 974, 987 (D.C. Cir. 1982) (per curiam) ("[W]e must respect the decision of the Secretary as reflecting the best interests of the public in his expert judgment.").

Moreover, Stand Up's request that the Court "enjoin all project activities" pending a further NEPA analysis (Br. 29) is entirely disproportionate to the issues in this case, as North Fork is perfectly free to develop and operate a class II gaming facility on the Madera Site—

[11] *See also, e.g.*, *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001) ("tribal self-government may be a matter of public interest"); *Seneca-Cayuga Tribe of Okla. v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) (noting, as to public-interest factor, the "paramount federal policy that Indians develop independent sources of income and strong self-government"); *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for W.D. of Mich.*, 46 F. Supp. 2d 689, 705 (W.D. Mich. 1999) (noting "the concomitant federal interest in promoting tribal self-sufficiency and self-government, plus the rather substantial contribution of the casino to the local economy").

without the Secretarial Procedures required for class III gaming, which is all that Stand Up has challenged. *See* AR2199 (Secretarial Procedures § 2.12) ("Nothing herein shall be construed in a manner that … prevents the conduct of class II gaming[.]"); 25 U.S.C. § 2710(b).

* * *

Because North Fork is now statutorily entitled to conduct class III gaming at the Madera Site, and because the planned project has already been reviewed under NEPA, this Court should not vacate the Secretarial Procedures or enjoin development activities if the Secretary is required to conduct limited additional environmental analysis regarding a hypothetical second gaming facility.

II. THE SECRETARY'S ISSUANCE OF THE SECRETARIAL PROCEDURES DID NOT VIOLATE THE CLEAN AIR ACT

A. Secretarial Procedures Would Not Cause Indirect Emissions

The Ninth Circuit ruled that Secretarial Procedures are not "*per se*" exempt from the Clean Air Act, reasoning that "the Secretary has some discretion to consider other applicable federal laws in prescribing Secretarial Procedures." Op. 16, 23. However, even if IGRA does not categorically bar application of the CAA through a *per se* exemption, that is merely the beginning—not the end—of the analysis. Under applicable CAA regulations, a conformity determination is required only for federal actions that "cause[]" "direct and indirect emissions" exceeding certain thresholds. 40 C.F.R. § 93.153(b), (c)(1). There is no dispute that "[d]irect emissions" are not at issue here. Doc. 58, at 24 n.21. And Stand Up has failed to establish that the Secretarial Procedures would cause "indirect emissions"—that is, emissions that "the agency can practically control" and "[f]or which the agency has continuing program responsibility." 40 C.F.R. § 93.152; *see Public Citizen*, 541 U.S. at 771 (CAA conformity determination is not required where agency "cannot practicably control, nor will it maintain control" over emissions).

First, the Secretary does not have "practical control" over emissions resulting from North Fork's proposed project, given the statutory mandate to prescribe Secretarial Procedures that are "consistent with" the mediator-selected compact. 25 U.S.C. § 2710(d)(7)(B)(vii). Here, the mediator-selected compact authorized a class III gaming facility consistent with the "Preferred

Alternative" that had been previously analyzed and approved as part of the NEPA and CAA review conducted in connection with the prior decision to take that land into trust. AR19, 81 (mediator-selected compact §§ 2.24, 11.1). The Secretary had no authority to depart from that compact to impose *additional* environmental mitigation requirements on top of those already required. "Neither the language of the CAA 'nor [EPA's] regulation requires that a federal agency attempt to 'leverage' its legal authority to influence or control nonfederal activities.'" *South Coast Air Quality Mgmt. Dist. v. FERC*, 621 F.3d 1085, 1100-1101 (9th Cir. 2010) (quoting 58 Fed. Reg. 63,214, 63,221 (Nov. 30, 1993)); *cf. Center for Biological Diversity*, 941 F.3d at 1297 (agency cannot be expected to exercise its limited authority with the "ulterior motive" of achieving favored environmental outcomes). Thus, as in *Public Citizen*, where the Supreme Court concluded that the FMCSA lacked authority to "practicably control" emissions from Mexican trucks in the U.S. because it could not countermand the President's decision to allow them entry, 541 U.S. at 772-773, so too the Secretary lacks authority to practically control emissions beyond the mitigation measures already incorporated as conditions of the Preferred Alternative project in the mediator-selected compact.

Exercising such leverage here would run afoul of the purposes of Secretarial Procedures under IGRA. Unlike truly discretionary actions the Secretary may take in connection with class III gaming—such as a land-into-trust acquisition or a two-part determination—Secretarial Procedures are a *remedy* "designed to protect tribes from recalcitrant states" by forcing the Secretary to act in strict accordance with a specific statutory mandate. *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1299 (9th Cir. 1998). Under IGRA, the issuance of class III gaming procedures was not meant to be a decision point for the Secretary to advance collateral federal policy priorities, but a mandatory step vindicating a tribe's right to conduct gaming. Given the Secretary's narrow mandate in issuing Secretarial Procedures, whatever discretion the Secretary has to modify the terms of a mediator-selected compact cannot fairly be considered "practical control" over emissions.[12]

[12] As with NEPA, there is no dispute that if California had consented to the mediator-selected compact (which is materially identical to the Secretarial Procedures), the Secretary's approval of that compact under 25 U.S.C. § 2710(d)(8)(C) would not have required a CAA conformity determination. *See supra* p.

Second, following the issuance of the Secretarial Procedures, the Secretary does not *maintain* control as a result of any "continuing program responsibility" with respect to North Fork's project. *See* 40 C.F.R. § 93.152 ("Continuing program responsibility means a Federal agency has responsibility for emissions caused by: (1) Actions it takes itself; or (2) Actions of non-Federal entities that the Federal agency, in exercising its normal programs and authorities, approves, funds, licenses or permits, provided the agency can impose conditions on any portion of the action that could affect the emissions."). Secretarial Procedures may be "a required initial step" for North Fork to conduct its gaming activities, but that "initial step[] do[es] not mean that [the Secretary] can practically control any resulting emissions." 40 C.F.R. § 93.152; *see also* 58 Fed. Reg. at 63,221 ("The EPA does not believe that Congress intended to extend the prohibitions and responsibilities to cases where, although licensing or approving action is a required initial step for a subsequent activity that causes emissions, the agency has no control over that subsequent activity"). The Secretary does not have the authority to place additional conditions on class III gaming once Secretarial Procedures are adopted, and either the National Indian Gaming Commission—an independent federal regulatory agency—or the State Gaming Agency will be responsible for regulating the class III gaming to be conducted, with the assistance of North Fork. *See* AR2245 (Secretarial Procedures § 8.2). Accordingly, Secretarial Procedures are merely an "initial step" (indeed, a step that the Secretary *must* take) to enable the Tribe to exercise its class III gaming rights, not "continuing program responsibility" over the emissions resulting from the gaming activities of a sovereign tribe.

B. The 2011 Conformity Determination Satisfies The CAA's Requirements

Just as the Secretary was not required to issue separate conformity determinations when he issued a favorable two-part determination under IGRA (in September 2011) and when he approved taking the Madera Site into trust for North Fork (in November 2012), the Secretary was not required to issue a new conformity determination in issuing Secretarial Procedures (in July

16. Moreover, as noted above, once the Madera Site had been taken into trust as gaming-eligible land, the Tribe was free to develop and operate a class II gaming facility without the need for Secretarial Procedures—underscoring the Secretary's lack of "practical control" over emissions.

2016). The conformity determination requirement is imposed by the CAA regulations, which provide that "[a] Federal agency must make a determination that a Federal action conforms to the applicable implementation plan in accordance with the requirements of this subpart before the action is taken." 40 C.F.R. § 93.150(b). The regulations further clarify that where the "Federal action" is "a permit, license, or other approval for some aspect of a non-Federal undertaking, *the relevant activity* is the part, portion, or phase of the non-Federal undertaking that requires the Federal permit, license, or approval." *Id.* § 93.152 (emphasis added). Here, the two-part determination, the land-into-trust decision, and the Secretarial Procedures are all steps in approving the same "relevant activity"—*i.e.*, North Fork's development and operation of a gaming project on the Madera Site.[13] Because the Secretarial Procedures relate to the same "relevant activity" that was analyzed in the 2011 conformity determination, there was no need—as Stand Up argues (Br. 32)—for the Secretary to conduct a new conformity determination or further "analysis or discussion to demonstrate compliance with section 176 of the Clean Air Act."[14]

Stand Up argues (Br. 32) that because "Secretarial Procedures approve the construction and operation of a larger gaming complex," the Secretary cannot rely on the 2011 conformity determination. CAA regulations do recognize that a re-evaluation is required where there is a

[13] Stand Up points to the Secretary's statement in issuing the Secretarial Procedures that "this action to issue procedures is separate from the Departmental decision made years ago requesting the Governor's concurrence to allow gaming on the subject parcel as well as the subsequent decision made in 2012 to accept that parcel into trust." AR2188. But it is apparent from that letter that the Secretary was not referring to the CAA definition of "Federal action," but was instead using the term "action" in the sense in which it is used in the Administrative Procedure Act. *See* 5 U.S.C. § 551(13) (defining "agency action" as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act"). As there was a pending APA challenge to the two-part determination and trust decisions at the time Secretarial Procedures were issued, *see Stand Up for California! v. U.S. Dep't of Interior*, No. 12-2039 (D.D.C.), the Secretary was merely clarifying that the issuance of Secretarial Procedures was a separate "agency action" for purposes of APA review.

[14] Stand Up objects (Br. 32) that the "2011 conformity determination, its supporting studies and data" are not in the administrative record. As the determination was already made and did not need to be re-evaluated, there was no need to reproduce the materials in the current administrative record. In any event, the Secretarial Procedures expressly incorporate and rely upon the final conformity determination, AR2270-2271 (Secretarial Procedures § 11.7(e)), which the Secretary publicly noticed in the Federal Register and made publicly available, with all supporting materials, at http://www.northforkeis.com. 75 Fed. Reg. 47,621 (Aug. 6, 2010). *See also supra* p. 21 & n.9.

"modification to the action" that "result[s] in an increase in emissions above the levels specified in § 93.153(b)." 40 C.F.R. § 93.157(a); *see also* 75 Fed. Reg. 17,254, 17,265 (Apr. 5, 2010) ("Since conformity determinations are only needed for emissions that exceed the de minimis levels, EPA has clarified in the rule that the Federal agency does not have to revise its conformity determination unless the modification would result in an increase that equals or exceeded the de minimis emission levels for the area."). But, as set forth in Section I.B *supra*, there has not been such a modification: Any departure from the "Alternative A" evaluated in the 2011 conformity determination (*i.e.*, the "Preferred Alternative" evaluated in the EIS) is subject to procedural safeguards that would necessitate an additional environmental review and, if necessary, intergovernmental agreements to address any additional environmental effects. AR2201 (Secretarial Procedures § 2.23). Moreover, there has been no change in the number of slot machines authorized at the Madera Site, which remain capped at 2500—as in the prior analysis. And even if the Court concludes there has been a "modification to the action," 40 C.F.R. § 93.157(a), Stand Up has failed to meet its burden on summary judgment to show that the *incremental* change in emissions—not the total emissions from the action—"would equal or exceed de minimis threshold levels, so as to require a conformity determination." *Protect Lake Pleasant, LLC v. Connor*, 2010 WL 5638735, at *42 (D. Ariz. July 30, 2010) (citing *County of Rockland v. FAA*, 335 F. App'x 52 (D.C. Cir. 2009)).

Stand Up also argues (Br. 33) that the Secretary cannot rely on the 2011 conformity determination because it is "out of date." Stand Up points out that the conformity determination automatically lapsed on June 17, 2016, five years after the original determination and just a month and a half before the issuance of Secretarial Procedures. However, the CAA regulations provide that a determination will not lapse after five years if "a continuous program to implement the Federal action has commenced." 40 C.F.R. § 93.157(b). Under the regulations, "*[c]ontinuous program to implement* means that the Federal agency has started the action identified in the plan and does not stop the actions for more than an 18-month period, unless it can demonstrate that such a stoppage was included in the original plan." *Id.* § 93.152. In turn, "*[t]ake or start the Federal action* means the date that the Federal agency signs or approves the

permit, license, grant or contract or otherwise physically begins the Federal action that requires a conformity evaluation under this subpart." *Id.* Using these definitions, "the Federal action" to approve North Fork's development and operation of a gaming facility on the Madera Site started no later than September 1, 2011, when the Secretary issued a favorable two-part determination, the first step in the prolonged regulatory approval process. AR240. The action continued over the next five years, with additional steps taken by the Secretary on November 26, 2012 (issuance of the trust acquisition record of decision), February 5, 2013 (taking the Madera Site into trust), and April 9, 2014 (reissuing the final conformity determination after curing notice deficiency). AR159-227, AR479; *Stand Up*, No. 12-2039 (D.D.C. May 6, 2015), Doc. 129-7; *Stand Up*, No. 12-2039 (D.D.C. Sept. 6, 2016), Doc. 169 at 162. In parallel, North Fork undertook the necessary steps under IGRA to negotiate with the State for a gaming compact, which culminated in the good-faith suit (filed March 17, 2015) that led to the issuance of Secretarial Procedures the next year, and fought off a series of legal challenges that effectively limited North Fork's ability to begin construction. *See Stand Up*, No. 12-2039 (D.D.C. Jan. 29, 2013), Doc. 42 at 50 (requiring North Fork to "provide notice to the parties and the Court at least 120 days prior to any physical alteration of the land at the Madera Site," so that other parties would have the opportunity to seek preliminary injunctive relief before such alteration); *Stand Up*, No. 12-2039 (D.D.C. Nov. 3, 2016), Doc. 178 (providing notice pursuant to the January 29, 2013 Order). Where an action necessarily takes years to go through the required regulatory approvals, it would be perverse to inject even further delay into the process by requiring the agency to repeatedly re-run the conformity determination. Under these circumstances, the 2011 conformity determination cannot be considered to have lapsed.[15]

[15] Stand Up also argues (Br. 33) that the Secretary cannot rely on the 2011 conformity determination because it was based on an old version of the applicable emissions model (EMFAC2007, approved in 2008) that had been replaced by the time Secretarial Procedures were issued (EMFAC2011, approved in 2013). However, the regulations do not require conformity determinations to be re-run upon the approval of a new emissions model. As explained in the Notice of Availability approving the EMFAC2011 model, "[a]nalyses that begin before or during the [6-month] grace period [following the Notice] may continue to rely on EMFAC2007." 78 Fed. Reg. 14,533, 14,535 (Mar. 6, 2013). Indeed, the same issue was already decided against Stand Up in the D.C. litigation, where the D.C. Circuit and the district court rejected Stand Up's argument that the Secretary was required to use the latest emissions model when re-issuing the final conformity determination in 2014. *Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d

C. If Additional CAA Analysis Is Required, Neither The Conformity Determination Nor The Secretarial Procedures Should Be Vacated

For the reasons discussed in Section I.C *supra*, to the extent further CAA analysis is required—which it is not—the appropriate remedy is remand without vacatur of either the conformity determination or the Secretarial Procedures. The district court in the D.C. litigation came to a similar conclusion, remanding the conformity determination without vacatur to permit the Secretary to cure a procedural notice error. *Stand Up*, No. 12-2039 (D.D.C. Sept. 6, 2016), Doc. 169 at 161-162. Likewise, there is no basis to vacate the Secretarial Procedures as a whole even if a new conformity determination is conducted; if a new conformity determination requires additional mitigation measures—which may very well not be the case—there is every reason to believe that North Fork could adopt them without any substantive changes to the Secretarial Procedures. As the district court in the D.C. litigation noted, "the conformity determination is only a small piece" of "the entire trust determination" enabling class III gaming at the Madera Site. *Stand Up*, No. 12-2039 (D.D.C. Sept. 6, 2016), Doc. 169 at 163-164. Similarly, the Secretary can address any CAA issues without requiring the entire project to be put on hold.

CONCLUSION

North Fork's renewed motion for summary judgment should be granted, and Stand Up's renewed motion for summary judgment should be denied.

1177, 1191 (D.C. Cir. 2018) ("the relevant date for compliance with the regulatory emissions modeling requirement was 2011, when the Department initially made its conformity determination"); *Stand Up*, No. 12-2039 (D.D.C. Sept. 6, 2016), Doc. 169 at 163-164. Having lost the issue conclusively in the D.C. litigation, Stand Up is collaterally estopped from rearguing the point here. *See Beauchamp*, 816 F.3d at 1225.

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Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STAND UP FOR CALIFORNIA!, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	Case No. 2:16-cv-02681-AWI-EPG **CERTIFICATE OF SERVICE**

I hereby certify that, on October 30, 2020, I electronically filed the foregoing document with the Clerk of the Court for the U.S. District Court for the Eastern District of California using the CM/ECF system, which sent notification of such filing to counsel of record in this case.

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