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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, and NORTH FORK RANCHERIA OF MONO INDIANS, Intervenor Defendant.	No. 16-cv-02681-AWI-EPG Date: NONE Time: NONE Courtroom: 2 Honorable Anthony W. Ishii

REPLY IN SUPPORT OF FEDERAL DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Like in their initial briefing on their renewed motion for summary judgment, Plaintiffs' reply largely ignores the broader context in which the Secretarial Procedures were issued. That context spans nearly a decade. The Tribe entered a tribal-state compact in 2012. But after California voters rejected the 2012 tribal-state compact, the State refused to recognize the validity of the compact or engage in further negotiations. The Tribe then availed itself of IGRA's remedial scheme, enacted to protect tribes from recalcitrant states that do not comply with IGRA's mandate to negotiate in good faith by "permit[ting] 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). Following two years of mediation, the mediator was tasked with selecting a compact to submit to the Secretary of the Interior for issuance of Secretarial Procedures. Only after this years-long process did the Secretary get involved, issuing Procedures required by IGRA in 2016.

Despite the Secretary's marginal involvement, Plaintiffs contend on remand from the Ninth Circuit that the Secretary was required to undertake a time-consuming and duplicative NEPA analysis and to prepare another conformity determination under the Clean Air Act. Plaintiffs' contentions are without merit. Because Secretarial Procedures do not and cannot alter the Tribe's development and construction plans on the Madera Parcel, or otherwise control the environmental impacts of which Plaintiffs complain, the Procedures are not a "major Federal action" requiring NEPA review. Tellingly, Plaintiffs compound their myopic view of the Secretarial Procedures as major federal action by ignoring the sharp contrast between the Department of the Interior's marginal involvement in the remedial process at issue here and its earlier, central role in approving the Tribe's fee-to-trust application in 2011. It was during this earlier, nearly seven-year process that the Department conducted a thorough environmental review wherein the Department evaluated various alternatives for Class III gaming facilities on the Madera Parcel. This earlier review fully satisfied NEPA's requirements and nothing further

is required. Plaintiffs' CAA claim fails for similar reasons. Namely, it largely ignores that the Department issued a conformity determination in 2011 and reissued it without changes in 2014. Plaintiffs also fail to carry their burden to demonstrate that the Secretarial Procedures would result in increased emissions, nor could they, because environmental impacts do not flow from the issuance of the Procedures, and in any event, they contemplate the same amount of gaming as was considered in the earlier fee-to-trust decision, for which the 2014 reissued conformity determination was made. Put simply, Plaintiffs fail to advance any compelling basis for their contention that a new conformity determination was required before issuing the Secretarial Procedures.

For these reasons, this Court should put this matter to rest for the Tribe and once again grant summary judgment for Defendants and against Plaintiffs.

ARGUMENT

I. ISSUANCE OF THE SECRETARIAL PROCEDURES DOES NOT CONSTITUTE "MAJOR FEDERAL ACTION"

A. The Tribe's construction of a casino on its land is neither "major" nor "federal" action.

As set out in Federal Defendants' principal brief, an action must be both "federal" and "major" to constitute "major Federal action" triggering NEPA review. Memorandum in Support of Federal Defendants' Renewed Motion for Summary Judgment and In Opposition to Plaintiffs' Renewed Motion for Summary Judgment, ECF No. 77-1, at 12 ("Fed. Defs.' Br.") (citing *Rattlesnake Coal.*, 509 F.3d 1095, 1101 (9th Cir. 2007); *State of Alaska v. Andrus*, 591 F.2d 537, 541 (9th Cir. 1979); *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225 (9th Cir. 2015)). The issuance of Secretarial Procedures is not "major" because the Secretary does not, and cannot, exercise sufficient authority or control over the Tribe's development, construction, and operation of its casino on its land to make the Secretarial Procedures here anything but "marginal federal action." *Rattlesnake Coal.*, 509 F.3d at 1101. Similarly, the Tribe's casino project is just that—the Tribe's project. The Secretarial Procedures do not convert this non-federal project into

a federal one. Indeed, the Secretary is not involved in the very activity Plaintiffs challenge—the development, construction, and operation of a casino on the Tribe's trust land. Fed. Defs.' Br. 12-21. Each of Plaintiffs' contrary arguments suffers from the same fundamental flaw; namely, Plaintiffs' arguments conflate the issuance of Secretarial Procedures governing Class III gaming with the Tribe's plan to build a casino on its trust land.

Plaintiffs argue that "NEPA and its caselaw are clear that 'major federal actions' include actions approving specific projects." Pls.' Opp'n to Mot. for Summ. J. by Defs. & Reply in Supp. Of Pls.' Mot. for Summ. J. 9-10, ECF No. 80 ("Pls. Reply"). Exactly. The Secretarial Procedures, unlike actions in the cases Plaintiffs cite, do not approve a specific project. *See Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) (incidental take statement approving activity causing incidental take of protected species); *Friends of Columbia Gorge, Inc. v. U.S. Forest Serv.*, 546 F. Supp. 2d 1088, 1094-95 (D. Or. 2008) (consistency determination allowing use of federal land for a specified purpose), *as amended* (July 11, 2008).[1] Instead, Secretarial Procedures approve a specific form of gaming and set out procedures governing that gaming. IGRA itself limits the Secretary's authority to do more. As discussed in Federal Defendants' principal brief, a state-tribal compact ordinarily governs Class III gaming. The Secretary issues Procedures only after negotiations fail and a mediator selects a compact, which the Secretary has no choice but to then issue as Secretarial Procedures. *See* Fed. Defs.' Br. 13, 15. This limited statutory authority means that even though no fundamental statutory conflict exists (as the Ninth Circuit held in this case),[2] the Secretary nonetheless lacks sufficient authority to control the

[1] Indeed, *Friends of Columbia Gorge, Inc.*, a case involving a quitclaim deed and a determination that the deed's purpose was consistent with the existing land management plan for use of federal lands, is more akin to the Secretary's determination on the Tribe's fee-to-trust application. 546 F. Supp. 2d at 1094, 1097. As discussed, the Secretary conducted a full NEPA review, which the district court for the District of Columbia held was sufficient under NEPA and the APA. Fed. Defs.' Br. 21-24.

[2] As discussed below and in Federal Defendants principal brief, this question is not foreclosed by the Ninth Circuit's opinion here; rather, that court expressly remanded the issue for this Court to consider in the first instance. *See* Fed. Defs.' Br. 19-20; *infra* Section II.B.

environmental impacts of the Tribe's planned casino.

Given the Secretary's proscribed authority, any analysis of a "no action alternative" under NEPA would be futile, as "the Secretary *shall* prescribe . . . [P]rocedures." 25 U.S.C. § 2710(d)(7)(B)(vii) (emphasis added). Plaintiffs' contrary argument, Pls. Reply 16, that a no-action alternative must be analyzed even absent authority not to act, merely begs the question; there is no need to analyze alternatives at all if there is no "major Federal action." 42 U.S.C. § 4332(2)(C); *Sierra Club v. Penfold*, 857 F.2d 1307, 1313 (9th Cir. 1988). And Plaintiffs' only supporting authority for the contrary proposition is a nearly 40-year old guidance document that the Ninth Circuit has recognized as non-binding. *Friends of the Earth v. Hintz*, 800 F.2d 822, 837 n.15 (9th Cir. 1986) ("[A]ppellants' reliance on this document is misplaced because courts uniformly have held that the CEQ forty questions document is not a regulation, but merely an informal statement and is not controlling authority." (citations omitted)); Pls. Reply 16.

Equally revealing, the Secretary's practice is to leave in place all essential terms from the mediator-selected compact, making only cosmetic changes required to reflect that the compact is being converted to Secretarial Procedures. *See* Fed. Defs.' Br. 13-14. In this way, the Secretary "d[id] not sufficiently involve [herself] . . . to render [Secretarial Procedures] a major Federal action requiring NEPA compliance." *Penfold*, 857 F.2d at 1314 (despite having the authority to regulate "Notice" mines to a greater extent, no federal action existed because Bureau of Land Management ("BLM") did not exercise that authority).

Plaintiffs next argue that "[i]ssuance of the Secretarial Procedures," unlike federal involvement in cases cited in Federal Defendants' principal brief, "is a pivotal approval that defines the contours of the gaming operations, without which the Tribe cannot develop and operate its proposed class III gaming facilities." Pls. Reply 10. It is true that the Secretarial Procedures govern Class III gaming at the Tribe's planned casino, but the existence of "major Federal action" requires more. The federal government must have sufficient control and authority over the environmental impacts from a proposed project to be considered a major

federal action.[3] *Penfold*, 857 F.2d at 1309, 1313-14; *Andrus*, 591 F.2d at 541; *Rattlesnake Coal.*, 509 F.3d at 1101. As discussed, issuance of Secretarial Procedures does not rise to this level of control or authority, because the Secretary does not have the authority to prevent the issuance of Procedures and thus the conduct of Class III gaming on the Tribe's land, and the Secretary has no control over environmental impacts flowing from the Tribe's construction project, which the Tribe is free to start without additional federal land management approvals. *See* Fed. Defs.' Br. 13-19. In this way, this case fits squarely within Plaintiffs' own description of situations where there exists no major federal action: "the federal government's role [is] very limited," "federal agency approval was not required for the activity causing the environmental impacts," or there is federal inaction despite the existence of regulatory authority to prevent impacts. Pls. Reply 10 (citing *Rattlesnake Coal.*, 509 F.3d at 1101; *Penfold*, 857 F.2d at 1309, 1314; *Andrus*, 591 F.2d at 543; *Molokai Homesteaders Coop. Ass'n v. Morton*, 506 F.2d 572, 580 (9th Cir. 1974)).

Plaintiffs' continued reliance on *Ramsey v. Kantor* fails for similar reasons. *See* Pls. Reply 11. Unlike the incidental take statement in *Ramsey*, Secretarial Procedures are not the "functional[] equivalent [of] a permit," *Ramsey*, 96 F.3d at 444, because the Secretarial Procedures are not required for construction activities to commence. By contrast, the incidental

[3] Plaintiffs' related contention that "the federal government's role is primary" because "[t]he State, local, and tribal governments have no ability to approve or develop and operate the class III casino project without the federal government's approval" is plainly incorrect. Pls. Reply 10-11. As Plaintiffs' own principal brief recognizes, a tribal-state compact in which the federal government is not a party is the far more common mechanism for approving Class III gaming. Pls.' Renewed Mot. for Summ. J. 18 & n.6, ECF No. 73 ("Pls. Br."). While it is true the Secretary must approve a tribal-state compact, if the Secretary takes no action within forty-five days, "the compact shall be considered to have been approved by the Secretary." 25 U.S.C. § 2710(d)((8)(c). In this way, IGRA contemplates that states and tribes, not the federal government, are the primary parties tasked with determining regulation of Class III gaming. And here, as Plaintiffs recognize in their principal and reply briefs, the only difference between the Tribe's and California's compacts submitted to the mediator was the effective date of the compact, Pls. Br. 14 (citing AR0000003); Pls. Reply 24-25, demonstrating that California, the Tribe, and ultimately the mediator selecting the compact to be submitted to the Secretary for issuance of the Secretarial Procedures, served the primary "role[s]" in determining the contours of the Procedures' content.

take statement in *Ramsey* was required for fishing practices that themselves led to the environmental impacts at issue. Plaintiffs' attempt to equate the Secretarial Procedures governing Class III gaming with federal approvals that directly regulate activities leading to environmental impacts is unsupported. The true analog to the fishing activities in *Ramsey* here is the Tribe's development, construction, and operation of their casino on their land, activities the Secretarial Procedures do not regulate. Tellingly, Plaintiffs do not discuss, much less attempt to distinguish or otherwise rebut, *Jamul Action Committee v. Chaudhuri* (*Jamul*), No. 2:13-CV-01920-KJM-KJN, 2015 WL 2358590, at *5 (E.D. Cal. May 15, 2015), *aff'd*, 837 F.3d 958 (9th Cir. 2016), in which this Court recognized that the federal government has no role in approving construction of a casino by a tribe on its trust land. *See also* Fed. Defs.' Br. 17.

Plaintiffs' remaining arguments fail. Plaintiffs argue that the Procedures are "major" because the 2010 EIS concluded that the Tribe's planned casino project would have significant impacts on the environment. Pls. Reply 11. But the conclusion—made in the context of the Department's determination whether to take land into trust—that development, construction, and operation of a casino will have significant environmental effects does not make the Secretarial Procedures, which do not regulate those activities, "major." In judging what constitutes a "major Federal action," effects that are not proximately caused by the federal government's approval are not considered.[4] *See Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (analysis of environmental effects limited to "reasonably close causal relationship" akin to "the familiar doctrine of proximate cause from tort law"); *see also Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (rejecting but-for causation standard). And the fact that an earlier action—here, the Secretary's approval of the Tribe's fee-to-trust application—was a major federal action has no bearing on whether subsequent actions—here, the issuance of

[4] As discussed *infra*, the fact that the 2010 EIS, prepared in considering the Tribe's fee-to-trust application, found the Tribe's project would have significant environmental effects on the human environmental actually undercuts, rather than supports, Plaintiffs' argument that the Secretarial Procedures are major federal action. *See* discussion *infra* Section II.

Secretarial Procedures—are major. Even if the Tribe decides to delay development and construction of a casino until a compact is in place or Secretarial Procedures have been issued, this voluntary choice of the Tribe does not convert the Procedures into the proximate cause of the environmental effects flowing from the development and construction of a casino on the Madera Parcel. On the contrary, the Tribe was free to begin construction of a casino following the Secretary's approval of the Tribe's fee-to-trust application. Thus, the fee-to-trust application and its accompanying NEPA analysis, not the Procedures, are the proximate cause of the environmental effects of which Plaintiffs complain.

Finally, that the Tribe could begin construction immediately and conduct certain other, non-Class III gaming on its trust land without further action from the Secretary or further environmental review reinforces the absence of major federal action here. *See* Pls. Reply 12. Though it is true that the National Indian Gaming Commission ("NIGC") has regulatory authority over Class II gaming, NEPA does not apply to NIGC approvals of ordinances required under IGRA for Class II gaming.[5] *Jamul Action Comm. v. Chaudhuri (Jamul Action Comm.)*, 837 F.3d 958, 962 (9th Cir. 2016) ("NIGC was not required to prepare an EIS [for approval of a gaming ordinance] because there is an irreconcilable statutory conflict between NEPA and IGRA.").

In sum, the Department simply lacks requisite control and authority over the Tribe's casino project to turn that non-federal activity into a major Federal action.

[5] In their principal brief, Federal Defendants stated that "the Tribe has discretion to . . . conduct certain forms of gaming, including electronic bingo games classified as Class II gaming under IGRA, without any action from the federal government." Fed. Defs.' Br. 18. In fact, the NIGC is required to approve tribal ordinances governing Class II gaming that meet IGRA's provisions, and such an ordinance goes into effect automatically (to the extent consistent with IGRA) after the passage of 90-days from submission to the Commission. 25 U.S.C. § 2710(b), (e). This fact has no bearing on whether the Secretarial Procedures are major federal action, however, because NIGC approvals of ordinances governing Class II gaming are not subject to NEPA.

B. The Ninth Circuit's opinion does not foreclose Federal Defendants' arguments; rather, it expressly remands for this Court to consider them.

The Ninth Circuit explicitly remanded the issue of major federal action to this Court to consider in the first instance, ruling only on whether a fundamental statutory conflict exists between NEPA and IGRA. *Stand up for Cal.! v. U.S. Dep't of Interior (Stand Up III)*, 959 F.3d 1154, 1165-66 (9th Cir. 2020). Yet Plaintiffs contend the "major federal action" arguments that the Federal Defendants make in their brief on remand are foreclosed. That is incorrect.

The Ninth Circuit has repeatedly distinguished between the absence of a "major Federal action" due to lack of federal control over and responsibility for environmental impacts, on the one hand, and the exemption from NEPA created by an "irreconcilable and fundamental conflict between" the substantive statute at issue and NEPA, on the other. *Stand Up III*, 959 F.3d at 1162-64 (internal citation and quotation marks omitted); *Jamul Action Comm.*, 837 F.3d at 962-64 (describing "irreconcilable statutory conflict between NEPA and IGRA" as an exemption that exists "*even in the presence of major federal action*" (emphasis added)); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 646-50 (9th Cir. 2014) (agreeing with district court's assessment that Bureau of Reclamation action was a "major Federal action" and separately analyzing as "excus[ing] [an agency] from complying with NEPA" whether compliance "'would create an irreconcilable and fundamental conflict' with the substantive statute at issue." (internal citations omitted)).

Plaintiffs contend the Ninth Circuit's distinction misreads *Public Citizen*. Pls. Reply 14. But *Public Citizen* discusses both the statutory conflict issue the Ninth Circuit ruled on in this case *and* the definition of "major federal action." *See Pub. Citizen*, 541 U.S. at 763-64 (explaining the definition of "major Federal action" as provided in the 1978 regulations), *id.* at 767 (first discussing basic principles of causation and only then separately discussing the "rule of reason" as a principle also "inherent in NEPA and its implementing regulations . . . ." (citation omitted)). The Ninth Circuit plainly ruled on only the former of these two issues, distinguishing *Public Citizen* "because that case involved a situation in which an agency unambiguously had no

discretion to change the decision made by the President," *Stand Up III*, 959 F.3d at 1164. Though the Ninth Circuit concluded *some* discretion exists here, it did not engage the question of whether the Secretary has sufficient control and authority for Secretarial Procedures to meet the definition of "major Federal action" under applicable regulations. Indeed, it remanded on that issue. *Id*. at 1165.[6]

Plaintiffs' attempt to tie this Court's hands thus fails. The issue on remand should be resolved under the well-settled principle that the definition of "major Federal action" depends on an inquiry into a federal decisionmaker's authority and actual involvement in an otherwise private activity. *See, e.g., Penfold*, 857 F.2d at 1314 (BLM's review of certain mining operations in Alaska only "marginal" action despite discretionary authority to stop such operations); *Andrus*, 591 F.2d at 541 ("The Ninth Circuit, however, has not been receptive to arguments that impact statements must accompany inaction, or actions that are only marginally federal"); *Molokai*, 506 F.2d at 580 ("The right of the federal government to object to violations of its loan agreements, or its determination not to object" is not federal action); *San Francisco Tomorrow v. Romney*, 472 F.2d 1021, 1025 (9th Cir. 1973) (contractual right to monitor for compliance does not trigger NEPA); *cf. Metro. Edison Co.*, 460 U.S. at 774 (requiring "a reasonably close causal relationship" between environmental effects and the alleged cause). As discussed, the Secretarial Procedures do not meet this well-established definition.

II. THE 2010 EIS REINFORCES THE SECRETARY'S COMPLIANCE WITH NEPA.

The Department previously analyzed the impacts of the development, construction, and operation of a casino on the Madera site in the 2010 EIS. This preexisting environmental review

[6] Even if Plaintiffs were correct that *Public Citizen* does not support the Ninth Circuit's distinction between "major Federal action" and fundamental statutory conflict, the cases recognizing this distinction post-date *Public Citizen*, and this Court may not simply ignore the reasoning in those cases. *See Lair v. Bullock*, 697 F.3d 1200, 1206 (9th Cir. 2012) (Ninth Circuit precedent remains binding absent intervening Supreme Court authority that rejects prior Circuit approach and result under prior analytical framework).

only further demonstrates that the current action—issuance of Secretarial Procedures—is not itself a major federal action. Given the lack of a *new* major federal action to which NEPA's procedures could attach, there is no federal duty to conduct further environmental review on top of what the Department did in 2010. As the Supreme Court held in *Norton v. S. Utah Wilderness All.* (*SUWA*), once an agency completes a NEPA analysis, supplementation is required "only if there remains major Federal action to occur." 542 U.S. 55, 73 (2004) (internal alterations, quotations, and citations omitted). *See also* Fed. Defs.' Br. 21-23.

Plaintiffs contend that *SUWA* is distinguishable because the lawsuit related to government inaction in *SUWA* whereas here the Department affirmatively issued the Procedures.[7] Pls. Reply 18-19. However, Federal Defendants cited *SUWA* for the uncontroversial proposition that there is no continuing or ongoing duty to supplement an existing environmental review absent specific circumstances such as remaining major federal action. *See* Fed. Defs.' Br. 21-23. Plaintiffs do not attempt to rebut this principle, nor could they. It is a basic principle of NEPA law that only *proposed* major federal actions require environmental evaluation. *See* 40 C.F.R. §§ 1502.5, 1502.9(c)(1)(ii), 1508.23. Plaintiffs' contrary arguments do not change the fact that the Department conducted an environmental review when it viewed its action as meeting the definition of "major Federal action"—in approving the Tribe's fee-to-trust application—but did not conduct a new or supplemental analysis in issuing the Secretarial Procedures.[8] That is because the Secretarial Procedures are not major federal action and no

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[7] Plaintiffs also argue that *SUWA* is distinguishable because it post-dates Interior's regulations governing incorporation by reference, and because the Procedures are major Federal action. Pls. Reply 18. Plaintiffs do not explain, and it is not apparent, how the date of Interior's regulations—that only apply to major Federal actions—could be relevant to whether the Procedures constitute major Federal action in the first instance. And, of course, Plaintiffs' final contention is conclusory.

[8] Plaintiffs' argument that preclusion is inapplicable here is similarly ill-fitting. In their principal brief, Federal Defendants pointed out that, to the extent Plaintiffs are attempting to relitigate the 2010 EIS, such attempts are precluded by their prior failed lawsuit. Federal Defendants simply argued that the Secretarial Procedures were not a separate major Federal action, and any challenge to the earlier 2010 EIS is precluded. *See* Fed. Defs.' Br. 22-23. Federal Defendants

further NEPA review is required.

Plaintiffs make much of the fact that the 2010 EIS is not in the administrative record in this case. But, as discussed in their principal brief, Federal Defendants do not rely on that prior environmental assessment for their arguments on remand that the Secretarial Procedures are not a major federal action. Fed. Defs.' Br. 23 n.13. Plaintiffs already challenged the 2010 EIS, and a district court has already upheld its legality.[9] *Stand Up I*, 204 F. Supp. 3d at 316. Because the 2010 EIS was not relied upon by the agency in issuing the Secretarial Procedures it was simply not part of the administrative record. Plaintiffs have offered no cogent argument why this document should have been included in the record and at no point challenged the completeness of the administrative record throughout this case. No further review is required at this stage because the Secretarial Procedures are not major federal action. *See supra* Section I.

Plaintiffs also give outsized attention to the exact number of slot machines contemplated in the 2010 EIS compared with the Secretarial Procedures. Pls. Reply 22-26. Of course, Federal Defendants do not rely on the exact number of slot machines or precise size of the Tribe's casino project for their arguments that Secretarial Procedures are not major federal action due to insufficient federal control and authority over the Tribe's plans. *See* Fed. Defs.' Br. 13-21. Rather, it is the absence of a major federal action in the first place, not the number of slot machines, that precludes application of NEPA. *See* Fed. Defs.' Br. 22; *SUWA*, 542 U.S. at 73 (supplementation of existing NEPA analysis required "only if there remains major Federal action to occur."). As it stands, the number of slot machines and the specifics of the site are, like every other key term from the mediator-selected compact, adopted wholesale without substantive

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did not argue, as Plaintiffs now contend, that all of Plaintiffs' NEPA claims were barred by preclusion. *See* Pls. Reply 17.

[9] Although Plaintiffs appealed the district court's decision in *Stand up for Cal.! v. U.S. Dep't of Interior (Stand Up I)*, 204 F. Supp. 3d 212 (D.D.C. 2016), *aff'd*, 879 F.3d 1177 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 786 (2019), they declined to challenge on appeal those portions of the court's decision upholding the 2010 EIS. *See Stand Up for Cal.! v. U.S. Dep't of Interior (Stand Up II)*, 879 F.3d 1177, 1179 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 786 (2019).

revision. *Compare* AR00000022 (selected compact Section 4.1) *with* AR00002203-04 (Secretarial Procedures Section 4.1); *see also* Fed. Defs.' Br. 14 (listing essential provisions from the mediator-selected compact unmodified as issued in the Secretarial Procedures). In this way, the Secretary exercised no authority or control over the issue, and thus the number of gaming devices or the size of the Tribe's proposed construction project cannot contribute to a showing that the Secretarial Procedures constitute major federal action. *See Penfold*, 857 F.2d at 1314 (despite having the authority to regulate Notice mines to a greater extent, no federal action existed where "BLM d[id] not sufficiently involve itself in the approval process to render Notice mine review a major Federal action requiring NEPA compliance"); Fed. Defs.' Br. 13-14.

At bottom, Secretarial Procedures do not represent federal control and authority over the Tribe's planned development, construction, and operation of a casino on its land sufficient to convert that non-federal project into a federal one, or to otherwise constitute "major" action under NEPA. Accordingly, the Secretarial Procedures challenged here do not constitute major federal action, and Plaintiffs' arguments to the contrary fail.

III. THE EXISTING CONFORMITY DETERMINATION AS REISSUED IN 2014 SATISFIES ANY CAA REQUIREMENTS HERE

As addressed in previous briefing, the Secretary satisfied any CAA requirements when she made a conformity determination for purposes of the fee-to-trust decision in June 2011. The determination was reissued in 2014 after the agency cured a notice deficiency. It covers the same activity on the Madera Parcel—Class III gaming—at issue here. *Stand Up II*, 879 F.3d at 1190. Thus, the Secretary's analysis of the air-quality effects undertaken then satisfies any obligation under the CAA for purpose of issuing the Secretarial Procedures. The arguments offered in Plaintiffs' Reply rest almost entirely on their characterization of Section 4.2 of the Procedures, which states that the Tribe "may establish and operate not more than two (2) Gaming Facilities and engage in Class III Gaming only on eligible Indian lands held in trust for the Tribe, located within the boundaries of the Madera Parcel." AR00002204. However, in addition to failing to show a modification in the project warranting a new conformity determination,

Plaintiffs have failed to show any prejudice stemming from the alleged CAA violation. For these reasons, the Court should grant summary judgment in favor of Defendants on Plaintiffs' CAA claim.

Plaintiffs argue that because the Secretarial Procedures limit the Tribe to "not more than two" gaming facilities on the Madera Parcel, AR00002204, this amounts to a deviation from the 2014 conformity determination, requiring the Secretary to undertake a new determination. Their argument is baseless. First, the number of slot machines recognized in the Secretarial Procedures does not deviate from the Tribe's proposed project described in its fee-to-trust application, see *Compare* AR00000242 (recognizing that the Tribe's proposed resort included up to 2,500 gaming devices, table games, and bingo) *with* Secretarial Procedures, Section 4.1 AR00002203 (recognizing that Tribe may operate up to 2,000 gaming devices in the first two years gaming activities occur, and up to 2,500 gaming devices thereafter). As a result, not only is the *kind of gaming* in the Secretarial Procedures the same as those analyzed in the previous conformity determination, the *capacity of gaming* is the same, in that both recognize that the Tribe may operate up 2,500 gaming devices, or slot machines, on the Madera Parcel. Thus, the restriction on the number of gaming devices provides the sufficient limiting factor such that the Secretarial Procedures fall squarely within the scope of the previous conformity determination. Plaintiffs recognize as much. Pls. Reply 26 (recognizing that air pollutant emissions are tied to the capacity of the casino). Federal regulation specifically states that a "determination is not required to be re-evaluated if . . . any modification to the action does not result in an increase in emissions above the levels specified in [40 C.F.R.] § 93.153(b)." 40 C.F.R. § 93.157(a). So notwithstanding the recognition in the Secretarial Procedures that the Tribe may establish "not more than" two gaming facilities, this does not give rise to a modification necessitating a new conformity determination.

Second, Plaintiffs' are also incorrect in stating that gaming authorized under the Secretarial Procedures would be larger than the project analyzed during the 2014 reissued

determination because the Secretarial Procedures are not intended apply to a particular project but instead establish the process by which the Tribe may conduct Class III gaming. But even if the Procedures did apply in the manner Plaintiffs contend, as stated above, the Procedures do not currently authorize any project significantly larger than the one already analyzed. As such, issuance of Procedures do not result in "emission of additional air pollutants without requiring them to be mitigated," Pls. Reply 31. And in any event, should the Tribe choose at a later date to construct a second facility, the Procedures require "a comprehensive and adequate tribal environmental impact report" for any expansion of scope, ensuring mitigation of any significant emissions. AR00002264 (Secretarial Procedures § 11.1(a)).

Moreover, Plaintiffs' mere allegation of the possibility of "additional air pollutants," without more, is insufficient to carry their burden to show a legal violation. On summary judgment, Plaintiffs must show that the "emissions would equal or exceed *de minimis* threshold levels, so as to require a conformity determination." *Protect Lake Pleasant, LLC v. Connor*, No. CIV 07-0454-PHX-RCB, 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)). They have not met that burden. Instead, Plaintiffs argue that they are prejudiced by not having information on increased air emissions. Pls. Reply 31. There is no such prejudice because issuance of the Secretarial Procedures does not result in increased emissions. In addition, in asserting that not conducting a new conformity determination somehow deprived them of their ability to obtain information about air pollution emissions, Plaintiffs fail to recognize that they *did* participate in the 2011 conformity determination and its reissuance in 2014, and unsuccessfully challenged the reissuance of the conformity determination in the District of Columbia district court and on appeal. *See Stand Up I*, 204 F. Supp. 3d at 320-21. And even if it could be determined that there was some error by not including the previous conformity determination in the administrative record for this case, that error is not prejudicial where, like here, Plaintiffs have possession of the documents, had actual notice of the prior conformity determination, and participated in the administrative

process.[10] *See Cal. Cmtys. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 993 (9th Cir. 2012).

Finally, Plaintiffs attempt to refute the applicability of 40 C.F.R. § 93.157(a), Pls. Reply 28, which identifies three distinct instances in which an agency is not required to re-evaluate its previously prepared conformity determination: (1) "the agency has maintained a continuous program to implement the action;" (2) "the determination has not lapsed;" *or* (3) "any modification to the action does not result in an increase in emissions" above those specified in another provision. 40 C.F.R. § 93.157(a). Federal Defendants raised arguments in its principal brief demonstrating how all three of these instances are met here, Fed. Defs.' Br. 27-29. While Plaintiffs argue at length that the Secretarial Procedures are not part of a continuous program to implement an action, Plaintiffs offer no more than conclusory statements that the conformity determination has lapsed and that the project was modified through issuance of the Procedures, permitting increased gaming. They fail to grapple at all with the fact that the conformity determination was reissued in 2014, such that five years had not lapsed between the initial conformity determination and the issuance of the Secretarial Procedures. *See* 40 C.F.R. § 93.157(b) (stating that a "conformity status of a Federal action automatically lapses *5 years from the date a final conformity determination* is reported under § 93.155, unless the Federal action has been completed or a continuous program to implement the Federal action has commenced.") (emphasis added). Further, as demonstrated above, their outcries that the Secretarial Procedures modify emissions fail because Plaintiffs fail to account for the restriction on the number of slot machines, and their assertions that the Procedures result in increased emissions is speculative. Moreover, while it is correct that Interior's fee-to-trust and IGRA determinations are separate

[10] Plaintiffs also fail to recognize that the Ninth Circuit tasked this Court on remand with considering "in the first instance whether the conformity determination previously completed during the fee-to-trust process satisfies the CAA's requirements for present purposes." *Stand Up III*, 959 F.3d at 1166. If the Ninth Circuit believed that the Secretary was required to make that assessment before the Court could address the issue, it certainly could have remanded the case back to the agency to first make the determination.

final agency actions under the APA, they are all part of a continuous effort to advance the Tribe's economic development through Class III gaming on the Madera Parcel.[11] For these reasons, the Court should deny Plaintiffs' renewed motion for summary judgment as to their CAA claim and grant Defendants' renewed motions.

IV. IF THE COURT FINDS IN FAVOR OF PLAINTIFFS AND DETERMINES A REMAND IS NECESSARY, REMAND WITHOUT VACATUR IS THE APPROPRIATE REMEDY

If the Court finds in favor of Plaintiffs on their NEPA or CAA counts and determines the matter should be remanded back to the Secretary, remand without vacatur is the appropriate remedy. By painting vacatur as a near-certainty under Ninth Circuit case law, Plaintiffs suggest that this Court's hands are tied and it must vacate the Secretarial Procedures should it rule in Plaintiffs' favor. Not so. While the Ninth Circuit has recognized remand without vacatur is appropriate in limited circumstances, it has not limited the availability of the remedy as far as Plaintiffs contend. Vacatur is a type of equitable relief, and courts are not mechanically obligated to vacate agency decisions that they find invalid. As the Ninth Circuit explained in *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (emphasis added):

> Although the district court has power to do so, it is *not required to set aside every*

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[11] In refuting Federal Defendants' contention that the Secretarial Procedures are part of a continuous program to implement an action, Plaintiffs point to 40 C.F.R. §§ 93.152, 51.166(b)(9) and note that the Tribe's preconstruction approvals, permits, and contracts are not in the administrative record. Pls. Reply 29. Since the Madera Parcel is held in trust for the benefit of the Tribe, it is the Tribe, not the federal government, who is tasked with oversight of construction activities relating to any Class III gaming facility and thus, those documents are appropriately not contained in the administrative record. Further, contrary of Plaintiffs' assertions, Pls. Reply 32-35, Federal Defendants do not contend or concede that the Secretary or the NIGC maintains "continuing program responsibility" for purposes of "indirect emissions" subject to the conformity requirement articulated in 40 C.F.R. § 93.152, which is separately defined in the regulations from "continuing program implementation." Since Plaintiffs challenge the issuance of the Secretarial Procedures, not any subsequent action or purported supervision over Class III gaming by the federal government or one of its agencies following issuance of the Procedures, such an assertion is beyond the scope of the challenge here. Further, Plaintiffs do not point to any attempt by the federal government or one of its agencies to expressly condition any Class III gaming approvals by the Secretary or any other federal official on maintaining "continuing program responsibility."

> *unlawful agency action*. The court's decision to grant or deny injunctive or declaratory relief under [the] APA is controlled by principles of equity.

The APA recognizes as much, stating that nothing "herein [] affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702; *see also Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (stating that a court may remand without vacatur to allow the agency action to remain in force until the action can be considered or replaced); *Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080-81 (9th Cir. 2010) ("Our courts have long held that relief for a NEPA violation is subject to equity principles."); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("[W]hen equity demands, the regulation can be left in place while the agency follows the necessary procedures."); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) ("[G]uided by authorities that recognize that a reviewing court has discretion to shape an equitable remedy, we leave the challenged designations in effect.").

Plaintiffs contend that the only circumstances in which the Ninth Circuit remands without vacatur is when vacating an agency decision would result in serious environmental injury or would be economically disastrous. Pls. Reply 36. But that is not the Ninth Circuit's measure for determining whether a situation warrants leaving a decision in place on remand. Instead, in determining whether an action should be vacated, the court balances "how serious the agency's errors are" against "the disruptive consequences of an interim change that may itself be changed." *Cal. Cmtys. Against Toxics*, 688 F.3d at 992 (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)). Further, this Court has recognized that, "[a] curable NEPA defect can be addressed absent vacatur if neither *Allied-Signal* factor has been established." *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1106 (E.D. Cal. 2013) (citing *Home Builders Ass'n of N. Cal. v. U.S. Fish and Wildlife Serv.*, Case No. CIV. S-05-0629 WBS-GGH, 2007 WL 201248 at *6-7 (E.D. Cal.2007)), *appeal filed*, No. 13-16105 (9th Cir. May 31, 2013); *see Sierra Forest Legacy*, 951 F. Supp. 2d at 1106 ("Vacatur is clearly a form of equitable relief that the Court may award, withhold, and craft to fit

the circumstances of the case before it.").

In support of their assertion that the Secretarial Procedures should be vacated if further environmental review is required, Plaintiffs point to *Oregon Nat. Desert Ass'n v. Zinke*, 250 F. Supp. 3d 773 (D. Or. 2017), Pls. Reply 36-37, where the district court applied the *Allied-Signal* factors and concluded a right of way issued by BLM should be vacated for the agency's failure to consider the impact of the winter habitat for sage grouse in the Final EIS for the project. *Oregon Nat. Desert Ass'n* 250 F. Supp. 3d at 774. There, the court determined that the first *Allied-Signal* factor, the seriousness of the agency's defect, weighed against BLM because the analysis in the Final EIS on this issue went against NEPA's dual goals: (1) informed decision-making and because the agency could not cure the defect without additional (2) public notice and comment. *Id*. 774-75.

The considerations favoring vacatur in *Oregon Natural Desert Association* are not present here. As an initial matter, issuance of the Secretarial Procedures is not an agency action that lends itself to environmental impacts. While Secretarial Procedures may impose limitations by which the Tribe may engage in Class III gaming, they are not put in place for a particular project but instead to define a process by which the Tribe may engage in Class III gaming. Separately, Interior fully considered the environmental impacts of Class III gaming on the Madera Parcel in a separate decision and its associated 2010 EIS, as prepared by Interior for the fee-to-trust decision, which undertook a full analysis of Class III gaming on the Madera Parcel, the same activity on the same parcel of land as covered by the Secretarial Procedures. The fee-to-trust decision and the sufficiency of the 2010 EIS were fully upheld by a reviewing court. *Stand Up I*, 204 F. Supp. 3d at 302-316; *Stand Up II*, 879 F.3d at 1177.

Further, should the Court determine additional review is required for the Secretarial Procedures, Interior may, in its discretion, decide to rely on the 2010 EIS, as is permitted by its regulations. *See* 43 C.F.R. §§ 46.120, 46.140. Thus, Plaintiffs' reliance on the rationale underpinning the decision to vacate in *Oregon Natural. Desert Association* is misplaced. On the

contrary, Interior was informed of the environmental consequences of construction and operation of a Class III gaming facility by the Tribe and robust public participation occurred in advance of the publication of the 2010 EIS. *Stand Up I*, 204 F. Supp. 3d at 232-33 (describing the six-year NEPA process and public comment periods). *See Laguna Greenbelt, Inc. v. U.S. DOT*, 42 F.3d 517, 527 (9th Cir. 1994) (per curiam) ("[E]ven where there is a violation of NEPA's procedural requirements, relief will not be granted if the decision-maker was otherwise fully informed as to the environmental consequences and NEPA's goals were met." (citing *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1023 (9th Cir. 1980) (per curiam))). The nature of the defect would favor remand without vacatur here if the Court determines additional review is required. *See Home Builders Ass'n of N. Cal.*, 2007 WL 201248 at *6-7 ("[G]iven the slight nature of the agency's error, there is a legitimate possibility that the agency will be able to substantiate its rule without altering the ultimate substance."). For these reasons and those articulated in Federal Defendants' principal brief, to the extent they must be applied, Federal Defendants have satisfied the *Allied-Signal* factors, and the Court should remand without vacating the Secretarial Procedures.

Finally, as stated in their principal brief, should the Court find in favor of Plaintiffs on either of their two remaining counts and determine a remand is necessary, Federal Defendants respectfully request that the Court order further briefing on the issue of remedies. This approach would allow the parties to tailor their requested remedy, including through presentation of declaration testimony where appropriate, to the scope of any environmental review deficiency and accompanying remand identified by the Court.

CONCLUSION

Plaintiffs have failed to advance any compelling argument demonstrating that the Secretary's issuance of Procedures governing Class III gaming was inconsistent with any applicable federal law. When issuing the Procedures, the Secretary did not take major federal action requiring NEPA. The Court should also reject Plaintiffs' CAA claim because the 2011

conformity determination, as reissued in 2014, covers the Secretary's issuance of Procedures and thus satisfies any corresponding obligations under the CAA and its implementing regulations. For the foregoing reasons, the Court should deny Plaintiffs' renewed motion for summary judgment and grant summary judgment to Defendants on the two remaining claims in this case.

DATED: January 7, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 7, 2021, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated: January 7, 2021

/s/ *JoAnn Kintz*
JOANN KINTZ