Case Nos. 16-5327, 16-5328

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Stand Up for California!, et al.,

Plaintiffs-Appellants,

Picayune Rancheria of the Chukchansi Indians,
a federally recognized Indian Tribe,

Plaintiff-Appellant,

v.

United States Department of the Interior, *et al.*

Defendants-Appellees,

North Fork Rancheria of Mono Indians,

Intervenor-Defendant-Appellee

Appeal from the
United States District Court for the District of Columbia
Case No. 1:12-CV02039-BAH, Hon. Beryl A. Howell

Stand Up Plaintiffs' Opening Brief

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici: Appellants are Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God-Madera, and Dennis Sylvester.

Appellant Stand Up for California! is a non-profit 501(c)(4) corporation organized under the laws of the State of California, and serves as a community watchdog group that focuses on gambling issues affecting California citizens, including tribal gaming, card clubs, horse racing, satellite wagering, charitable gaming, and the state lottery.

Appellant Madera Ministerial Association is a non-profit 501(c)(3) organization located in Madera County, California. The Madera Ministerial Association has members who serve as pastors leading congregations and serving in other clergy-related positions throughout the City of Madera and County of Madera. The Madera Ministerial Association serves the Madera community advancing the spiritual well-being and care of the community in many different respects including the social, emotional, mental, and physical well-being of the community. The Madera Ministerial Association provides counselling and assistance

to members of the community who have emotional and financial difficulties. The Madera Ministerial Association also serves as a community watchdog to warn and protect community members against negative or destructive influences from within and outside the community.

Appellant First Assembly of God – Madera is a church located approximately one-half mile from the proposed casino site that is the subject of this appeal. First Assembly of God – Madera serves the Madera community advancing the spiritual well-being and care of the community.

Picayune Rancheria of the Chukchansi Indians is appellee and also appellant in No. 16-5328, which has been consolidated with this case.

Other appellees are United States Department of the Interior, Ryan Zinke,[1] in his official capacity as Secretary of the U.S. Department of Interior, Bureau of Indian Affairs, Michael S. Black, in his official

[1] Under Rule 43(a) of the Federal Rules of Appellate Procedure, Ryan Zinke and Michael S. Black have been automatically substituted into this action as defendants and appellees in place of their predecessors.

capacity as Acting Assistant Secretary of Bureau of Indian Affairs, and United States of America.

Intervenor appellee is North Fork Rancheria of Mono Indians.

No amici appeared or participated in the district court proceedings.

B. Rulings Under Review: The ruling under review is the order and final judgment of the district court, entered by Judge Beryl A. Howell on September 6, 2016, in *Stand Up for California! v. U.S. Dept. of the Interior*, 2016 WL 4621065 (D.D.C., Sept. 6, 2016, No. CV 12-2039 (BAH)). [JA*(Doc. 168, 169).]

C. Related Cases: The case on review was not previously before this court. This case was consolidated with No. 16-5328 on the court's own motion.

Other cases involving the same or similar parties and issues in other courts are:

(1) *Stand Up for California v. U.S. Dep't of the Interior*, No. 2:16-cv-02681 AWI-EPG (E.D. Cal., filed Nov. 11, 2016);

(2) *Picayune Rancheria v. U.S. Dep't of the Interior*, No. 16-cv-950-AWI (E.D. Cal., filed July 1, 2016);

(3) *Picayune Rancheria of the Chukchansi Indians v. Brown*, No. MCV072004 (Super. Ct. Madera County, filed Mar. 21, 2016);

(4) *Stand Up for California v. State of California*, No. MCV062850 (Super. Ct. Madera County, filed Mar. 27, 2013) (opinion filed by California Court of Appeal Fifth District (Nos. F069302/F070327) on December 12, 2016) (petitions for review filed with California Supreme Court on January 20 and 23, 2017 (No. S239630)); and

(5) *North Fork Rancheria of Mono Indians v. State of California*, No. 1:15-cv-00419-AWI (E.D. Cal., filed Mar. 17, 2015).

CORPORATE DISCLOSURE STATEMENT

The Stand Up plaintiffs and appellants have no parent companies. Nor do any publicly-held companies have a 10% or greater ownership interest in any of the Stand Up plaintiffs and appellants.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

Statutes

TABLE OF AUTHORITIES
(continued)

Page

Regulations

TABLE OF AUTHORITIES
(continued)

Page

Other Authorities

GLOSSARY OF ABBREVIATIONS

BIA:	Bureau of Indian Affairs
County:	The County of Madera
Department:	The Department of the Interior
EMFAC:	Emissions Factor Model
EPA:	Environmental Protection Agency
FEIS:	Final Environmental Impact Statement
IGRA:	Indian Gaming Regulatory Act
IGRA Decision:	September 2011 decision by the Secretary under IGRA
IRA:	Indian Reorganization Act
IRA Decision:	November 2012 decision by the Secretary under IRA
JA:	Joint Appendix
Madera Site:	Site of the proposed casino for the North Fork Rancheria of Mono Indians
MOU:	Memorandum of Understanding
NEPA:	National Environmental Policy Act
North Fork Tribe	North Fork Rancheria of Mono Indians
Secretary:	Secretary of the Interior
Stand Up:	Plaintiffs Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God-Madera, and Dennis Sylvester
Tribe:	North Fork Rancheria of Mono Indians

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, and issued a final order disposing of all claims on September 6, 2016. [JA*(Doc. 168.] Plaintiffs Stand Up for California!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God-Madera, and Dennis Sylvester (collectively, "Stand Up") filed a timely notice of appeal on October 31, 2016.[2] [JA*(Doc. 172).] This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The Secretary of the Interior ("Secretary") approved the acquisition of land to be held in trust for the North Fork Rancheria of Mono Indians (the "North Fork Tribe" or "Tribe"), and determined that the Tribe would be permitted to conduct gaming on that land. This appeal raises three issues:

[2] Plaintiff Picayune Rancheria of the Chukchansi Indians filed a separate notice of appeal on November 2, 2016. [JA*(Doc. 175).] This court consolidated the two appeals on November 15, 2016. Because Stand Up and the Picayune Rancheria do not share common interests on all issues, this brief is filed on behalf of the Stand Up appellants only.

1. Whether the Secretary was authorized under the Indian Reorganization Act ("IRA") to take the land in trust for the Tribe.

2. Whether the Secretary's action, findings, and conclusions under the Indian Gaming Regulatory Act's ("IGRA") two-part determination were arbitrary, capricious, or contrary to law.

3. Whether the Secretary's decisions violated Section 176 of the Clean Air Act, 42 U.S.C. § 7506, which requires that federal agencies adopt a conformity determination to assure that projects they approve will not interfere with the states' achievement of Clean Air Act standards.

STATEMENT OF THE CASE

A. Statutory Framework

As this case concerns two decisions by the Secretary to take land into trust for the North Fork Tribe to build a casino, we begin with a description of the statutory scheme governing those decisions.

1. The IRA authorizes the Secretary to take land into trust for Indian tribes that were under federal jurisdiction in 1934

Section 5 of the IRA authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. To acquire the land, the Secretary must determine whether the applicant qualifies as an "Indian," a term that is specifically defined in the statute to include several categories of persons. As relevant here, Section 19 defines Indian to include "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." *Id.* § 5129. To qualify as "Indian" under this section, the applicant tribe must have been "under federal jurisdiction when the IRA was enacted in June 1934." *Carcieri v. Salazar*, 555 U.S. 379, 382 (2009). Thus, absent some other statutory basis, the Secretary only has authority under the IRA to take land into trust for recognized Indian tribes under federal jurisdiction in 1934.

When Congress passed the IRA in 1934, it provided an opt-out procedure for Indians who did not want the Act to govern their reservation. Section 18 provides, "This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special

election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 5125.

2. With certain narrow exceptions, IGRA prohibits gaming on land acquired in trust after 1988

Congress enacted IGRA in 1988 "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2702(1). As relevant here, IGRA allows a tribe to conduct Las Vegas-style casino gaming on any Indian land "located in a State that permits such gaming for any purpose by any person, organization, or entity," so long as the gaming is "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State . . . ." 25 U.S.C. § 2710(d)(1).

To prevent casinos from proliferating nationwide, Congress expressly prohibited gaming on land acquired by the Secretary in trust after 1988: "gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988 . . . ." 25 U.S.C. § 2719(a).

This prohibition is subject to several exceptions, including the "two-part determination" exception that is at issue here. Under that exception, a tribe may conduct gaming on new Indian land if, after consulting with the tribe and state officials, the Secretary determines that gaming "would be in the best interest of the Indian tribe and its members," and "would not be detrimental to the surrounding community . . . ." 25 U.S.C. § 2719(b)(1)(A).

As the Department of the Interior (the "Department") has acknowledged, this statutory scheme "was intended to promote the economic development of tribes by facilitating Indian gaming operations," but it "was not intended to encourage the establishment of Indian gaming facilities far from existing reservations." [JA*(NF_AR_0004203).] Moreover, because IGRA "favors tribal gaming on existing and former reservations, and on lands acquired in trust prior to October 17, 1988," the Secretary should "apply heavy scrutiny to tribal applications for off-reservation gaming." [JA*(NF_AR_0040531).][3]

[3] Gaming on lands acquired by tribes after 1988 is sometimes referred to as "off-reservation gaming." [JA*(NF_AR_0040531).]

B. Statement of Facts

1. The North Fork Tribe proposes to build a large, off-reservation Las Vegas-style casino

The North Fork Tribe is a federally recognized Indian tribe with trust land near North Fork, California. The Tribe gained federal recognition in 1983 pursuant to a stipulated judgment entered in *Hardwick v. United States*, C-79-1910 SW (N.D. Cal. 1983) (the "*Hardwick* Stipulation"). *See* 50 Fed. Reg. 6055, 6057 (1985). The Tribe formed a tribal council in 1993 and adopted a constitution in 1996. [JA*(NF_AR_0010855, 0004036).]

In 2004, the Tribe submitted an application to the Bureau of Indian Affairs (the "BIA") requesting that an approximately 305-acre parcel near the City of Madera, California ("Madera site") be placed in trust to allow the Tribe to construct a casino. [JA*(NF_AR_0001336).] The Madera site had been purchased by a subsidiary of Las Vegas-based Station Casinos, which agreed to provide the land to the Tribe in exchange for a casino management contract under which it will receive 24% of the casino's net income. [JA*(NF_AR_0001166).] The proposed development included a Las Vegas-style casino with an 83,065-square

foot gaming floor, restaurant and retail facilities, a 200-room hotel tower, and 4,500 parking spaces. [JA*(NF_AR_0040450-51).]

In February 2009, the BIA issued a final environmental impact statement ("FEIS")—as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq.—discussing environmental impacts associated with the casino project, including impacts on problem gambling. [JA*(NF_AR_0029702).]

In June 2011, the BIA issued a conformity determination under Section 176 of the Clean Air Act, 42 U.S.C. § 7506, in which it concluded that the project would generate 42 tons per year of nitrogen oxide emissions and 21 tons per year of reactive organic gas emissions. [JA*(NF_AR_0039267).] To demonstrate conformity, the BIA required the Tribe to either purchase emission reduction credits or enter into a voluntary emissions reduction agreement with the regional air district. [JA*(NF_AR_0039270).] The Tribe chose to purchase the credits. [JA*(NF_AR_0039270).]

2. The Secretary approves the casino project in two separate decisions

The Secretary approved the project in two separate decisions.

First, in September 2011, the Secretary determined that gaming would be permissible on the Madera site under IGRA, if the Secretary were to acquire the land in trust for the Tribe (the "IGRA Decision"). [JA*(NR_AR_0040444-0040538).] The Secretary acknowledged that development of the proposed casino would have significant detrimental impacts on the surrounding community, but based on the anticipated benefits of the casino and mitigation measures identified in the FEIS, the Secretary concluded "[t]he weight of evidence in the record strongly indicates that the Tribe's proposed gaming facility in Madera County would not result in detrimental impact on the surrounding community." [JA*(NF_AR_0040511, 0040533-0040534).]

Second, in November 2012, the Secretary approved North Fork's application to take the land into trust for the purpose of conducting gaming (the "IRA Decision"). [JA*(NF_AR_0041138-0041206).] The Secretary concluded that he had authority to take land into trust for the North Fork Tribe because the Tribe qualifies as Indian under Section 19 of the IRA because the Tribe was under federal jurisdiction in 1934. The Secretary based his decision on a Section 18 election held at the North Fork Rancheria in 1935, when six adult Indians at the Rancheria were

given ballots and four voted to reject the IRA. [JA*(NF_AR_NEW_0002012).] According to the Secretary, "[t]he calling of a Section 18 election at the Tribe's Reservation conclusively establishes that the Tribe was under federal jurisdiction for *Carcieri* purposes." [JA*(NF_AR_0041198).]

C. Procedural History

1. Stand Up's complaint

Stand Up filed this action in December 2012 against the Department, the Secretary, the BIA, and the assistant Secretary to the BIA (collectively, the "federal defendants"). The initial complaint challenges the IGRA and IRA Decisions under the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 et seq., IRA, IGRA, and NEPA**.** [JA*(Doc. 1).]

The operative third amended complaint also includes a claim under the Administrative Procedure Act based upon the Secretary's failure to comply with the Clean Air Act's conformity determination requirement, 42 U.S.C. § 7506. [JA*(Doc. 103).]

In January 2013, North Fork Tribe was allowed to intervene as a defendant. [JA*(01/17/13 Docket Entry).]

In January 2013, the district court consolidated Stand Up's action with a similar action commenced by the Picayune Rancheria of the Chukchansi Indians. [JA*(01/09/13 Docket Entry).]

2. Remand to comply with the Clean Air Act

In August 2013, federal defendants moved to stay the action to allow them to comply with the Clean Air Act without vacating the Secretary's decisions approving the project or the actions taking the land into trust. [JA*(Doc. 63).] This was necessary because the federal defendants had no record of having complied with certain regulations governing the preparation and adoption of a conformity determination under the Clean Air Act. 42 U.S.C. § 7506; 40 C.F.R. § 93.155(a). [JA*(Doc. 63-1, p.1).]

In December 2013, the court granted the motion. [JA*(Doc. 77).] On remand, the BIA issued the required notice, and reissued the final conformity determination unchanged from the 2011 conformity determination. [JA*(NF_AR_NEW_0001178-1221, 0001768-1769).]

3. The district court's opinion

On September 6, 2016, the district court denied Stand Up's motion for summary judgment and granted in part and denied in part defendants' cross motions for summary judgment. [JA*(Docs. 168, 169).] The details of the district court's opinion are discussed in the argument sections below.

SUMMARY OF ARGUMENT

1. The Secretary lacked authority to acquire the Madera site into trust. The Secretary's finding that the Tribe was "under federal jurisdiction" in 1934 was arbitrary, capricious, and an abuse of discretion. Moreover, the district court erred in attempting to justify the Secretary's IRA Decision based on conclusions and evidence on which the Secretary did not rely.

2. The Secretary's finding under IGRA that the casino will not be detrimental to the surrounding community is not supported by the record and is contradicted by undisputed evidence of the casino's adverse impacts. The Secretary misapplied the statutory standard by purporting to balance the project detriments against its benefits, and the Secretary' s finding that the project would not be detrimental to the

surrounding community is based on unjustified assumptions not supported by the record. As such, the Secretary's decision is arbitrary, capricious, and an abuse of discretion.

3. The Secretary violated Environmental Protection Agency regulations governing the preparation of a conformity determination under Section 176 of the Clean Air Act, 42 U.S.C. § 7506, by: (1) failing to provide a required notice *before* approving the project (40 C.F.R. § 93.155(a)); and (2) reissuing the 2011 conformity determination in 2014 without applying "the latest and most accurate emission estimation techniques available." 40 C.F.R. § 93.159(b).

ARGUMENT

I

Standard of Review

This court's review of Stand Up's claims under the Administrative Procedure Act is *de novo*, "as though on direct appeal from the agency." *Catholic Healthcare West v. Sebelius*, 748 F.3d 351, 353 (D.C. Cir. 2014). The court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or

limitations," or adopted "without observance of procedure required by law." 5 U.S.C. § 706(2).

II

The Secretary Lacked Authority to Acquire the Madera Site into Trust

As described above, the IRA authorizes the Secretary to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. Before taking any land into trust, the Secretary was required to determine that the North Fork Tribe met the definition of "Indian" in Section 19, which for purposes of this appeal is "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . ." 25 U.S.C. § 5129. As interpreted by the Supreme Court, the Tribe must have been a recognized Indian tribe "under federal jurisdiction when the IRA was enacted in June 1934." *Carcieri*, 555 U.S. at 382.[4]

The Department has determined that satisfying *Carcieri* generally requires a fact-intensive, two-part inquiry into (1) whether the tribe

[4] In *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, this court held that Section 19 *does not* require a tribe to have been federally recognized in 1934, only that it was under jurisdiction at that time. 830 F.3d 552, 563 (D.C. Cir. 2016).

was under federal jurisdiction prior to 1934, and (2) whether the Tribe's jurisdictional status remained intact in 1934. [JA*(NF_AR_0000777).] *See also Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell*, 830 F.3d 552, 563-64 (D.C. Cir. 2016).

Here, the Secretary did not undertake this fact-intensive, two-part inquiry. Instead, he asserted, without discussion or support, that the holding of an election pursuant to Section 18 of the IRA at the North Fork Rancheria in 1935 obviates the need for any inquiry. According to the Secretary, the mere fact that an election was held "conclusively establishes" that the Tribe was under federal jurisdiction in 1934:

> As indicated in the report prepared in 1947 by Theodore H. Haas, Chief Counsel for the United States Indian Service, a majority of adult Indians residing at the Tribe's Reservation voted to reject the IRA at a special election duly held by the Secretary on June 10, 1935. *The calling of a Section 18 election at the Tribe's Reservation conclusively establishes that the Tribe was under federal jurisdiction for Carcieri purposes.*

[JA*(NF_AR_0041198) (emphasis added).]

The Secretary's conclusion is wrong for at least two separate reasons. First, the Section 18 election established only whether the

Indians living on a reservation elected to have the IRA apply to a particular place—the reservation where the election was held. It did not determine the existence of any particular tribe.

Second, the Secretary failed to make any finding demonstrating a nexus between the North Fork Tribe and the adult Indians residing at the Rancheria in 1934. Without such a nexus, the Secretary lacked evidence that the North Fork Tribe was under federal jurisdiction in 1934, and therefore lacked authority to take land into trust for the Tribe.

A. A Section 18 election does not establish the existence of a tribe

1. By its plain language, Section 18 applies the IRA to "reservations" based on the votes of "adult Indians," but says nothing about any tribal affiliation

Section 18 states, "This Act shall not apply *to any reservation* wherein a majority of the *adult Indians*, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 5125 (emphasis added). Under the statute's plain language, the IRA applies to a "reservation" unless the "adult Indians" opt out. There is no mention of any requirement that the

"adult Indians" who vote be part of a tribe. Further, the IRA either applies or does not to the reservation itself, not to any particular tribe or tribes that may have voted in the election. In short, Section 18 has nothing to do with tribal affiliations, and, therefore, a Section 18 election cannot be used as evidence that the North Fork Tribe existed in 1934. *Qi-Zhuo v. Meisner*, 70 F.3d 136, 140 (D.C. Cir. 1995) ("Where . . . the plain language of the statute is clear, the court generally will not inquire further into its meaning.").

2. Contemporaneous and subsequent interpretations of Section 18 confirm that elections were held for Indians residing on a reservation, not for tribes

That a Section 18 election does not evidence any tribal affiliation by those who voted is evidenced by the Department's own understanding of both who is eligible to vote at such an election and the effects of such an election. *See Bankamerica Corp. v. United States*, 462 U.S. 122, 130 (1983) (holding that courts must give "great weight" to "the contemporaneous interpretation of a challenged statute by an agency charged with its enforcement")

In determining who was eligible to vote under Section 18, the Solicitor for the Department in 1934 concluded that an Indian must both reside on and hold legal interest in the reservation. [JA*(Doc. 115-1, p.12).] Under the second criterion, the Solicitor identified three ways an Indian could establish a sufficient legal interest: (1) ownership of restricted property within the reservation, (2) entitlements to participate in tribal elections or tribal affairs on a reservation, or (3) receipt of benefits from the Department representatives stationed on a particular reservation. [*Id.*] Tribal affiliation was but one method by which a resident could establish a legal interest in the reservation. [JA*(Doc. 115-1, p.13) ("Tribal affiliation may still be one indication of the right to reside on a given reservation; but other proofs of such right are possible.").] Thus, participation in a Section 18 election does not mean that the participants were affiliated as a tribe.

In 1934, both Congress and the Department recognized that a Section 18 election did not itself affect tribal affiliations or the lack thereof. This is evidenced by the Department's implementation of Section 16, which provides Indians the right to organize as tribes and

adopt a constitution and bylaws.[5] Congress recognized at least four different Indian groups that may have resided at reservations following a Section 18 election and could organize under Section 16:

> (a) A band or tribe of Indians which has only a partial interest in the lands of a single reservation;
>
> (b) A band or tribe which has rights coextensive with a single reservation;
>
> (c) A group of Indians residing on a single reservation who may be recognized as a "tribe" for purposes of the Wheeler-Howard Act [the IRA] regardless of former affiliations; and
>
> (d) A tribe whose members are scattered over two or more reservations in which they have property rights as members of such tribe.

[JA*(Doc. 115-1, p.8).] Only group (b) represents a situation under which all Indians residing on a reservation were members of the same tribe.

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55 Section 16 provides: "Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when—(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and (2) approved by the Secretary pursuant to subsection (d) of this section." 25 U.S.C. § 5123.

As recently as November 2013, the Department explicitly stated in a memorandum opposing summary judgment in another case that voting under Section 18 was "conducted by reservation and not by tribe." [JA*(Doc. 106-5, p.28).]

In the IRA Decision, however, the Secretary took a contrary position without explanation. This was not reasoned decision making. *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("We have long held that an agency must provide adequate explanation before it treats similarly situated parties differently.").

3. The Department's record of the Section 18 election on the North Fork Rancheria does not show any tribal affiliation

The sole document on which the Secretary relied as evidence of the Section 18 election at the Rancheria was the Haas Report, which does not show an Indian tribe voted at the Rancheria. Table A, which lists the voting statistics at reservations, contains no information regarding the tribal makeup of Indians at the various reservations. It simply provides statistics on the numbers of Indians who voted for or against application of IRA. [JA*(NF_AR_NEW_0002012).]

Table A also shows that some Indians who *were not* tribes at the time of the election did in fact vote and then *later* proceeded to organize into tribes. For example, Table A shows that the Indians of the Lower Sioux Indian Community and the Prairie Island Indian Community voted to accept application of the IRA under Section 18. [JA*(NF_AR_NEW_0002013).] Following the Section 18 election, however, the Solicitor stated, "Neither of these two Indian groups constitutes a tribe but each is being organized [as a tribe] on the basis of their residence upon reserved land." [JA*(Doc. 115-1, p.22).]

Table A also shows that at the Quinault Reservation in Washington State, 184 adult Indians voted to accept application of the IRA under Section 18. [JA*(NF_AR_NEW_0002016).] Prior to the 1934 vote, the Supreme Court held that "Chehalis, Chinook and Cowlitz tribes are among those whose members are entitled to take allotments within the Quinault Reservation, if without allotments elsewhere." *Halbert v. United States*, 283 U.S. 753, 760 (1931). Thus, it is clear that in 1934 Indians identified with at least three other Indian groups resided within the Quinault Reservation and were not members of the Quinault Tribe. But Table A reflects only the number of Indians who

voted at the reservation.[6] Simply put, their votes did not evidence any particular tribal affiliation.

Finally, "Stockbridge" appears on Table A under the "Reservation" column. [JA*(NF_AR_NEW_0002017).] Stockbridge, however, is not a reservation but a tribe that did not have land for a reservation in 1934. "Notwithstanding the lack of a tribal land base and pursuant to 25 U.S.C. § 478 [now § 5125], the Secretary *held an election for members of the Tribe* on December 15, 1934, on the question of whether the Tribe would accept or reject the terms of the IRA." *Shawano County, Wisconsin v. Acting Midwest Director*, 53 IBIA 62, 64 (Feb. 28, 2011) (emphasis added). Thus, in the unique case of the

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[6] Subsequent litigation related to the status of the Indians at the Quinault Reservation also confirms the Secretary's improper reliance on Table A as evidence that the North Fork Tribe existed in 1934. The Interior Board of Indian Appeals explicitly held that the "Indians of Quinault Reservation" who voted under Section 18 were not "one and the same" with the present-day federally recognized Quinault Tribe. *Brown v. Commissioner of Indian Affairs*, 8 IBIA 183, 188 (1980). Further, this court recognized that in 1934, members of the Cowlitz Tribe lived on the Quinault Reservation. *Confederated Tribes of Grand Ronde*, 830 F.3d at 561. In other words, while Table A shows that there was a Section 18 election at the Quinault reservation in 1934, it is not evidence that the present-day Quinault tribe was under federal jurisdiction at that time. The same must be said of the North Fork Tribe as it relates to the election held on the North Fork Rancheria.

Stockbridge tribe, the Section 18 election was conducted on behalf of a tribe and not a reservation. Because this is not apparent on the face of Table A, however, even in the case of the Stockbridge tribe, the mere fact of an election does not itself demonstrate tribal affiliation.

4. The district court's rationale cannot save the Secretary's decision

Despite that Section 18 does not use the term "tribe," the district court determined that the Section 18 election at North Fork Rancheria nonetheless established the existence of a tribe based on the definition of "tribe" found in Section 19: "The term 'tribe' *wherever used in this Act* shall be construed to refer to any Indian tribe, organized band, pueblo, or *the Indians residing on one reservation*." 25 U.S.C. § 5129 (emphasis added). The court concluded that Indians who voted in the Section 18 election were a tribe because they resided on the same reservation. [JA*(Doc. 169, pp.102-106).]

Notably, this analysis does not appear in the IRA Decision. It is improper for a reviewing court to supply the basis for an agency's action that the agency itself did not give. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins.* Co., 463 U.S. 29, 43 (1983) ("The

reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given."). This court should reject the district court's analysis outright.

In any event, the district court was wrong. Whether to organize as a tribe is a matter of tribal choice and autonomy [JA*(Doc. 115-1, p.8)], and there is a specific statutory method for doing so. *See* 25 U.S.C. § 5123. But under the district court's opinion, those adult Indians who voted in a Section 18 election would automatically constitute a tribe—regardless of their wishes—because the Secretary gave them a vote. This would effectively authorize the Secretary to create tribes for purposes of taking land into trust based merely on a group of Indians' location at a reservation. This would be directly contrary to law. *See U.S. v. State Tax Commission of State of Miss.*, 535 F.2d 300, 306 (5th Cir. 1976) ("We see nothing in the Acts of Congress conferring authority upon the Secretary of the Interior to create Indian tribes where none had theretofore existed.").

B. There is no evidence connecting the current North Fork Tribe back to the adult Indians who occupied the land in 1935

The district court attempted to link the Section 18 election to the North Fork Tribe by relying on the Secretary's statement that the election was held "at the Tribe's reservation." According to the district court, the Secretary considered "both the Section 18 election and the North Fork Tribe's possessive connection to its own 'Reservation' at the North Fork Rancheria." [JA*(Doc. 169, p.99).]

The district court's conclusion simply assumes, however, that the North Fork Rancheria was "the Tribe's reservation" in 1935 when the Section 18 election was held. But there is no evidence in the record to support such an assumption.

1. There is no evidence connecting the North Fork Tribe to the Rancheria in 1934

The Secretary did not determine that the Rancheria was the North Fork Tribe's reservation in 1934. To the contrary, the Secretary determined he had the authority to acquire the land without reference to Rancheria's purchase or the current status of the Rancheria land. To the extent he discussed the current ownership of the Rancheria, he did

so solely to demonstrate the Tribe's need for more land. [JA*(NF_AR_0041198-99) (discussing Secretary's obligations under 25 C.F.R. 151.10(b)).] While the Secretary references the purchase of the Rancheria, its termination pursuant to the California Rancheria Act, and its restoration through the *Hardwick* litigation, the entire discussion focused on the status of the Rancheria land itself. As to that status, the Secretary recognized that despite the Rancheria's restoration, "[t]o this day, none of the lands within the exterior boundaries of the North Fork Rancheria are owned by or held in trust for the Tribe." [JA*(NF_AR_0041199).]

During the application process the Tribe submitted excerpts of documents that purported to show the "purchase of the North Fork Rancheria was on behalf of 200+ North Fork Mono." [JA*(NF_AR_0041113).] But the excerpts do not mention "Mono" or any other specific Indian group. Rather, they speak of a group of Indians in geographical terms—"Indians of the North Fork vicinity," "Indians properly belonging to the North Fork vicinity band," and "Indians of the North Fork District." [JA*(NF_AR_0041113-14).] Moreover, none of this evidence is cited in the IRA Decision. The Secretary did not conclude

that the Rancheria was purchased for the North Fork Tribe. [JA*(NF_AR_0041198-99).]

Even if the Rancheria was purchased for a "tribe," the history of the Rancheria shows no connection between that purported "tribe" and the applicant North Fork Tribe.

Shortly after its purchase in 1916 the Rancheria was abandoned. A 1920 survey of the landless Indians of California found that "the tract is unoccupied." [JA*(NF_AR_0041092).] In 1933, seven individuals resided at the Rancheria. [JA*(Doc. 106-2, p.33).] In 1958, Congress determined that only a single adult Indian and her family held any interest in the Rancheria: "the Susan Johnson family has an assignment to the entire 80 acres. There is no approved [tribal] roll for this group." [JA*(Doc. 106-2, p.34).]

Congress adopted the California Rancheria Act in 1958 to terminate the trust relationship between the United States and the Indians on 41 Rancherias and reservations in California, including the North Fork Rancheria. Pub. L. 85-671, 72 Stat. 619. Under the act, Rancheria lands were distributed to the individual Indians residing on

them, and the distributees were no longer entitled to the services formerly available to them as Indians. *See Williams v. Gover*, 490 F.3d 785, 787-788 (9th Cir. 2007).

In 1966, the North Fork Rancheria was terminated pursuant to the California Rancheria Act. 31 Fed. Reg. 2911 (1966). The only Indian identified in the termination notice was Susan Johnson. *Id*. Moreover, the notice expressly stated that "this notice affects only Indians who are not members of any tribe or band of Indians." *Id.*

In short, the Secretary's statement that the Section 18 election was held "at the Tribe's reservation" is not supported by the evidence, which shows that whatever Indians were occupying the Rancheria in 1934 had long since dissipated and given up any interest in that land. Thus, even if the election is evidence that the voting Indians were part of a tribe—and it is not, *see* Part II.A., ante—absent some other evidence connecting those Indians to the North Fork Tribe, that election cannot be evidence that the Tribe was "under federal jurisdiction" at that time.

2. The *Hardwick* Stipulation is not evidence that the North Fork Tribe existed in 1934

The district court held that "the Secretary was not required to analyze the North Fork Tribe's continuing tribal existence when assessing [his] authority to acquire land on the Tribe's behalf because the Tribe's continuing tribal existence is encompassed firmly within its legal status as a federally-recognized tribe." [JA*(Doc. 169, p.125).] According to the district court, the *Hardwick* Stipulation, by which the Tribe gained federal recognition, is a "binding federal acknowledgement . . . that the 'North Fork band of landless Indians,' for whom the North Fork Rancheria was purchased in 1916, is an Indian tribe within the meaning of the IRA, that has continuously existed since that time." [JA*(Doc. 169, p.127).]

The *Hardwick* Stipulation, however, makes no such claims. The *Hardwick* Stipulation was issued in 1983. In addition to adding the North Fork Tribe to the list of federally recognized Indian tribes, it restored the individual Indian status of the "named individual plaintiffs and other class members" and the status of Rancheria lands as Indian country. [JA*(NF_AR_0001065).] The *Hardwick* Stipulation also provided that "[t]he Secretary of the Interior shall recognize the Indian

Tribe's, Bands, Communities or groups of the seventeen Rancherias . . . as Indian entities *with the same status they possessed prior to the distribution of the assets of these Rancherias under the California Rancheria Act*." [*Id.* (emphasis added).]

The district court's reliance on this stipulation to hold that the North Fork Tribe continuously existed since 1916 ignores the fact that "prior to the distribution of assets" under the California Rancheria Act, there was no tribe. There was only the Susan Johnson family, which both Congress and the Department had determined were not members of any tribe. [JA*(Doc. 106-2, p.34).] See 31 Fed. Reg. 2911 (1966). And even if Susan Johnson and her family were a tribe at the Rancheria when it was terminated, the Rancheria's history outlined above does not establish any connection to the North Fork Tribe. Indeed, there is no established connection between the Susan Johnson family and the existence of any tribe at the Rancheria in 1934.

The district court, however, focused on the description of the Rancheria's boundaries as stated in the Stipulation, which matched the 1916 boundaries, and on a provision authorizing the recently recognized Indian entity to convey "community-owned lands to the United States to

hold in trust for the benefit of the Tribe[], Band[], Community[] , or group . . . .'" [JA*(Doc. 169, p.127) (quoting *Hardwick* Stipulation).]

As discussed above, however, there were no community-owned lands at the North Fork Rancheria prior to distribution of assets under the California Rancheria Act, nor does the administrative record indicate there had ever been community-owned land at any time. The only acknowledged assignment in the record is to an individual Indian. The fact that the Rancheria boundaries were "described with particularity . . . matching the description of the land purchased in 1916 for the Indians belonging to the North Fork band" [JA*(Doc. 169, p.127)] speaks only to the status of the land and not the status of an Indian tribe, if any, allegedly residing there.

Contrary to the district court's conclusion, the Ninth Circuit has held that the *Hardwick* Stipulation is not an acknowledgment that a tribe recognized by the Stipulation has continuously existed since the Rancheria's purchase.

The Mooretown Rancheria was one of those tribes recognized by the *Hardwick* stipulation. In *Williams v. Gover*, supra, plaintiffs

"claim[ed] they are descended from people who were named as members of the Mooretown Rancheria Indian tribe in either a 1915 census or a 1935 [Section 18] tribal voter list." 490 F.3d at 787. But the plaintiffs did not reside at the Rancheria when it was terminated by the California Rancheria Act and were not distributees under that Act. *Id.* at 788. The newly organized Mooretown Rancheria chose to limit its membership to those Indians who were distributees and their "heirs, legatees or successors in interest," which excluded plaintiffs from tribal membership. *Id.* at 790. The Ninth Circuit rejected plaintiffs' claims to be tribal members, holding that Indian tribes can determine their membership as they see fit, and "although the plaintiffs are Concow–Maidu Indians descended from people who have lived at Mooretown Rancheria for a very long time, they lack the rights of full members of the Mooretown Rancheria tribe." *Id.* at 788.

Williams demonstrates that there is no inevitable connection between a tribe that emerged from the *Hardwick* Stipulation and those residing on a Rancheria in 1934. *Williams*' holding further precludes interpreting the *Hardwick* Stipulation as a binding federal acknowledgement of the North Fork Tribe's continuous existence since

1934. The Stipulation spoke only of distributees, and their heirs, legatees, and successors. It made no mention of Indians for whom the Rancheria was purchased. The stipulation cannot bridge the evidentiary gap between the current applicant North Fork Tribe and the Indians who occupied the land in 1935 and voted in the election.

C. Relief sought

This court should hold as a matter of law that the Secretary had no authority to take land into trust for the North Fork Tribe because there is no evidence the Tribe was an Indian tribe under federal jurisdiction in 1934. *See* 25 U.S.C. §§ 5108, 5129; *Carcieri*, 555 U.S. at 382. The district court's order granting summary judgment to defendants should be reversed, and this court should direct the district court to grant Stand Up's motion for summary judgment.

III

The Secretary's Determination That Gaming Would Not Be Detrimental to the Surrounding Community Violated IGRA

As explained above, subject to limited exceptions, IGRA prohibits gaming on trust land acquired after 1988. 25 U.S.C. § 2719(a). The exception applicable to this case is the so-called two-part determination

exception, which requires the Secretary to determine among other things that the proposed casino "would not be detrimental to the surrounding community . . . ." 25 U.S.C. § 2719(b)(1)(A). The Department defines "surrounding community" to mean "local governments and nearby tribes located within a 25-mile radius of the proposed gaming establishment." 25 C.F.R. § 292.2.

Here, the FEIS concluded the Tribe's proposed casino would have significant adverse environmental and socioeconomic impacts on the surrounding community. It will, for example, create new problem gamblers. [JA*(NF_AR_0030197).]

Despite these acknowledged detriments, the Secretary concluded that "[t]he weight of the evidence in the record strongly indicates that the Tribe's proposed gaming facility would not be detrimental to the surrounding community." [JA*(NF_AR_0040534).] The Secretary's conclusion was arbitrary, capricious, and an abuse of discretion.

A. The two-part determination exception should be construed narrowly

It is well-settled that statutory exceptions to a general rule must be construed narrowly so as to avoid swallowing the rule. *Commissioner*

of Internal Revenue Serv. v. Clark, 489 U.S. 726, 739 (1989). In the IGRA context, courts have sometimes broadly construed IGRA's exceptions to the prohibition of gaming on newly acquired land in deference to IGRA's purpose of promoting tribal economic development and self-sufficiency. [JA*(Doc. 169, p.67) (citing *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 468 (D.C. Cir. 2007)).]

Those cases, however, address only the so-called "equal footing" exceptions. Those exceptions apply primarily to benefit newly-recognized tribes by "ensuring that tribes lacking reservations when IGRA was enacted [were] not disadvantaged relative to more established ones." *City of Roseville v Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003); *see also Citizens Exposing Truth*, 492 F.3d at 467 (initial reservation exception); *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of U.S. Atty. for Western Div. of Michigan*, 369 F.3d. 960, 971 (6th Cir. 2004) (restored lands exceptions). For tribes that qualify, these are not so much exceptions to the rule as they are prescriptions to acquire land for disadvantaged tribes that had none at the time IGRA was enacted.

This broad view should not be applied to the two-part determination exception. Unlike the equal footing exceptions, the two-part determination expressly incorporates protections for the surrounding community. As one federal district court noted, the two-part determination exception privileges state interests in limiting off-reservation gaming over tribal interests in gaming. *See Confederated Tribes of Siletz Indians of Oregon v. U.S.*, 841 F.Supp. 1479, 1490-91 (D. Or. 1994), *aff'd on other grounds*, 110 F.3d 688 (9th Cir. 1997) ("The meaning of § 2719(b)(1)(A) is unmistakably clear; Congress made the state's interests paramount by granting the Governor veto power of the DOI's determination."). Thus, this exception should be interpreted narrowly.

B. Weighing non-mitigation benefits against detriments swallows the general prohibition

The Secretary stated that he employed "heavy scrutiny" to "ensure that [off-reservation gaming] do[es] not result in detrimental impact to communities surrounding the proposed gaming site." [JA*(NF_AR_0040532).] In fact, however, the Secretary based his conclusions largely on his determination that the economic benefits of gaming at the site, some of which the Tribe agreed to share with the

community, *outweigh* the detriments. [JA*(NF_AR_0040534).] The district court held this approach was proper because the Secretary's analysis "necessarily requires a holistic evaluation of the proposed development, and properly encompasses consideration of both the anticipated benefits the gaming establishment would bring to the surrounding community and its potential adverse consequences." [JA*(Doc. 169, p.69).] By emphasizing the economic benefit from payments by the Tribe that are entirely unrelated to mitigating the acknowledged harm that will befall the community from the casino development, however, the Secretary avoided any real scrutiny of the extent of the actual detriments.

For example, the Tribe agreed to contribute over a million dollars to various foundations, "which are not directly associated with the Resort," and to pay the City of Madera over four million dollars for purposes "not associated with costs of direct impacts of the Project . . . ." [JA*(NF_AR_0040527).] Such contributions, the Secretary found, "would provide substantial benefits to the County and the surrounding community." [*Id.*] In making the final determination, the Secretary listed the "[k]ey beneficial effects" the casino is "reasonably expect to

result in . . . for Madera County, City of Madera, and the Tribe." [JA*(NF_AR_0040536-40537).] Significant among these effects, "Madera County would collect increased revenues of approximately $1,008,683 over accrued costs," and "City of Madera would collect increased revenues of approximately $856,771 over accrued costs." [JA*(NF_AR_0040537).]

The Secretary's focus on economic benefits unrelated to mitigating the detrimental impacts of the casino is not consistent with the two-part determination's explicit language or the statute's limitation on off-reservation gaming that will be detrimental to the surrounding community. The statutory test is not whether the casino would be in the *best interests* of the tribe and/or surrounding community. Rather, the statute requires the Secretary to find the casino "would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A).

The Secretary's analysis threatens to expand the two-part determination exception to swallow the general rule prohibiting off-reservation gaming. Economic benefits that are not connected to and will not mitigate the casino's undisputed detrimental impacts cannot simply cancel out those detrimental impacts. Indeed, if such non-

mitigation payouts can be balanced against the harm caused by a gaming establishment in making a two-part determination, proposed casinos will almost always meet the two-part determination so long as the Indian tribe agrees to share the profits with the community. Indeed, the bigger the casino, the easier it will be to pass the two-part determination because there will be more profits to cancel out the harm the casino will inevitably create.

Allowing the exception to swallow the rule would be contrary to the statutory scheme created by Congress. On this ground alone, the Secretary's decision should be considered arbitrary, capricious, and an abuse of discretion.

C. The Secretary's finding that the project would not be detrimental is arbitrary, capricious, and an abuse of discretion

1. The Secretary conflated the analysis of environmental impacts under NEPA with the required findings under IGRA

In concluding that the casino project would not be detrimental to the surrounding community, the Secretary did not offer any reasoned discussion about what constitutes detriment, whether it can be weighed against economic benefits from a casino, or to what extent "mitigation"

falls within the meaning of Secretary's mandate to find that gaming will not be detrimental. [JA*(NF_AR_0040533-34).] Rather, to avoid the difficulties inherent in the required statutory findings, the Secretary simply accepted the findings of the FEIS regarding mitigation without analysis or discussion. [JA*(NF_AR_0040534).] Substituting the FEIS analysis, which is required by NEPA, for the substantive findings required by IGRA was not reasoned decisionmaking.

The NEPA analysis contained in the FEIS and the findings required by IGRA serve different purposes. Under NEPA, the FEIS and its mitigation discussions are governed by the statement of "purpose and need." 40 C.F.R. § 1502.13. In this case, the stated purpose and need was to promote "tribal economic development, tribal self-sufficiency, and strong tribal government." [JA*(NF_AR_0029823) (quoting 25 U.S.C. § 2701(4)).] By contrast, and as discussed above, the Secretary's obligation to determine that the casino will not be detrimental to the surrounding community serves to limit the expansion of off-reservation gaming, even where it might serve the tribe's interest.

NEPA is a procedural statute that "does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 350 (1989). NEPA requires agencies to take a "hard look" at a proposed action's environmental impacts. *National Audubon Society v. Dep't of the Navy*, 422 F.3d 174, 185 (4th Cir. 2005). It requires at least "a thorough investigation into the environmental impacts . . . and a candid *acknowledgment of the risks that those impacts entail*." *Id.* (emphasis added). As part of the "hard look," NEPA requires an environmental impact statement to address the extent to which mitigation measures *can minimize* adverse impacts on the environment. *Robertson*, 490 U.S. at 351-352. NEPA does not, however, require that identified mitigation measures be legally enforceable. *National Parks Conservation Ass'n v. U.S. Dep't of Transp.*, 222 F.3d 677, 681, n. 4 (9th Cir. 2000).

The "hard look" is necessary to provide enough information for decision makers to weigh competing values and make an informed decision. If adverse environmental effects are discovered, as long as they are properly evaluated—not necessarily remedied—"the agency is

not constrained by NEPA from deciding that other values outweigh the environmental costs." *Robertson*, 490 U.S. at 350.

IGRA by contrast requires a substantive determination. In contrast to NEPA's procedural requirement to provide adequate information, IGRA requires a substantive finding that the proposed off-reservation casino will not be detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A).

It is true, as the district court pointed out [JA*(Doc. 169, pp.71-72)], that in making the two-part determination, the Secretary must consider the FEIS and other information required by NEPA, including the mitigation measures identified. *See* 25 C.F.R. §§ 292.18(a), 292.21(a). But this is a starting point, not an ending point, if the Secretary is to comply with IGRA's mandate. Here, the Secretary never got beyond this starting point.

2. The Secretary's finding that the casino would not be detrimental was arbitrary, capricious, and an abuse of discretion

a. The Secretary's finding that the casino's acknowledged detriment would be mitigated is not supported by the evidence

The Secretary's IGRA Decision states, "All practicable means to avoid or minimize environmental harm . . . have been identified and adopted. The following mitigation measures and related enforcement and monitoring programs have been adopted as part of this decision." [JA*(NF_AR_0040475).] But for significant detriments to the surrounding community, the decision fails to provide any discussion or evidence that the mitigation measures will be effective.

The FEIS estimated that the North Fork Tribe's casino will create approximately 531 new problem gamblers. [JA*(NF_AR_0030198).] It further recognized the substantial detriment such problem gamblers have on the community: "Problem gambling disorders can result in a host of social ills . . . including the increased likelihood of bankruptcy, suicide, divorce." [JA*(NF_AR_0030197).] The FEIS went on to conclude that "problem gambling *may* be attenuated, or *possibly* reversed, through the expansion of problem gaming services."

[JA*(NF_AR_0030198) (emphasis added).] In support, the FEIS cites a study that concluded "the major difference between states with increased and decreased gambling problems was the availability of services for problem gamblers." [*Id.*]

The Secretary responded to the FEIS's conclusions by requiring the Tribe to adopt certain mitigation measures as part of the project. However, none of those measures include the "expansion of problem gaming services," which is the only measure the FEIS concluded *might* alleviate problem gambling. [JA*(NF_AR_0030198).] Instead, the Secretary requires the Tribe to (i) train staff to recognize and address problem gamblers, (ii) refuse service to problem gamblers, (iii) provide problem gamblers with information about treatment programs, (iv) implement procedures to allow for "voluntary self-exclusion" for problem gamblers, (v) display materials describing the risks and signs of problem gambling along with treatment information, and (vi) offer insurance coverage for gambling treatment to its employees. [JA*(NF_AR_0040488-89).] The FEIS says nothing about whether these measures will have any impact in reducing the detriment from problem gamblers, and the Secretary provides no other evidence or discussion to

support such a conclusion. This listing of mitigation measures without analysis is insufficient. *Sierra Club v. Mainella*, 459 F.Supp.2d 76, 103 (D.D.C. 2006) ("NPS failed adequately to explain its conclusion that impacts from nearby surface drilling activities would not result in an impairment of park resources and values. Those decisions are therefore arbitrary and capricious under the APA.").

True, the Tribe initially entered into an MOU with the County of Madera to provide $50,000 annually for "alcohol education and the treatment and prevention of problem gambling and gambling disorders." [AR*(NF_AR_0030198).] The FEIS concluded, however, that this payment was less than the amount needed to fund a treatment program and the shortfall "would result in a potentially significant impact." [*Ibid.*] Although the FEIS states that this potential would be mitigated by certain listed mitigation measures, it does not provide any discussion of how those measures would, in fact, mitigate the harm. [JA*(NF_AR_0030198).] Thus, by simply adopting the FEIS, the Secretary failed to account for the "potentially significant impact" resulting from the lack of funds to create the treatment programs necessary to mitigate the casino's harm. *See* 25 C.F.R. § 292.18

(requiring the Secretary to consider the costs of treatment programs for problem gamblers and sources of revenue to address those costs).

Further, even assuming the County of Madera takes upon itself to expand problem gambling services in accordance with the FEIS studies, those services will not eliminate the substantial detriment that comes from problem gamblers. That is because, as the FEIS itself recognizes, 80 percent of the new problem gamblers created by the Tribe's casino will never even attempt to get the help that might alleviate their problems. [JA*(NF_AR_0030198).] In other words, even with the Secretary's mitigation plan, and even assuming the County has the funds to expand problem gambling services (something the Secretary did not consider), Madera County will still be stuck with more than 400 new gamblers and the attendant increase in "bankruptcy, suicide, divorce." The Secretary ignored this significant detrimental impact to the surrounding community.

b. The Secretary improperly relied on MOUs that were not effective at the time of decision and never became effective

The Secretary's IGRA decision relies heavily on the Tribe's MOUs with the County and City of Madera, and the Madera Irrigation District

to conclude that the casino's detrimental impacts will be mitigated. [JA*(NF_AR_0040533-40534).] The various MOUs identify potential impacts and costs to the surrounding community, and then provide a source of revenue to mitigate them. [E.g., NF_AR_0040515-40524.] Based on the MOUs, the Secretary concluded that, "[A]ny financial burdens imposed upon Madera County and local units of government are sufficiently mitigated by provisions contained in separate MOUs executed between the Tribe and Madera County, between the Tribe and the City of Madera . . . ." [JA*(NF_AR_0040533).]

The problem is that the MOUs were expressly contingent on the State of California entering into a compact with the Tribe. [JA*(NF_AR_0001313 (County MOU)); JA*(NF_AR_0003701-02 (City MOU)).] At the time the Secretary made the two-part determination, the State and the Tribe had not entered into a tribal-state compact. [NF_AR_0040525.] Nor was it certain that they would. IGRA requires that a state negotiate a compact with an Indian tribe, but it does not require a state to enter into a compact with an Indian Tribe. 25 U.S.C. § 2710(d)(3)(A); *Warren v. U.S.*, 859 F.Supp.2d 522, 532-33 (W.D.N.Y 2012); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 74-75 (1996). In

fact, the compact California ultimately negotiated with the Tribe was nullified by a California election and never went into effect. [JA*(Doc. 169, p.23), (NF_AR_0001313, 0003701-3702).]

Because the MOUs were contingent on a compact that was not effective at the time of decision and never became effective, the Secretary's reliance on those MOUs to find that there would be no detriment to the surrounding community was arbitrary, capricious, and an abuse of discretion.

c. The district court's rationale cannot save the Secretary's decision

The district court rejected any argument that the Secretary failed to consider or establish mitigation to alleviate the harm that comes from problem gambling. The court held that Stand Up's argument (i) "ignores the FEIS' references to studies supporting the effectiveness of mitigation measures," and (ii) "fails to account for the thousands of pages of quantitative and qualitative analyses, attached as appendices to the FEIS that provide the bases for other various mitigation measures" adopted in the IGRA decision. [AR*(Doc. 169, p.72).] The district court is wrong on both counts.

First, the study cited by the FEIS only led to the conclusion that problem gambling "*may be* attenuated, or *possibly* reversed" by the expansion of problem gaming services. [JA*(NF_AR_0030198).] That is very different from the finding required by IGRA that the casino "*would not be* detrimental to the surrounding community . . . ." 25 U.S.C. § 2719(b)(1)(A) (emphasis added). This is insufficient under NEPA, let alone under IGRA. *See South Fork Band Council of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009) ("though NEPA does not require that these harms actually be mitigated, it does require that an EIS discuss mitigation measures, with 'sufficient detail to ensure that environmental consequences have been fairly evaluated.'").

Moreover, the studies cited by the FEIS say nothing about the substantial detriment that will be created by the 400 problem gamblers who will not seek treatment. The Secretary has not addressed that detriment at all.

Second, regarding the "thousands of pages" that the district court cited as discussing the effectiveness of mitigation measures, those are only traffic studies, and do not address the problem gambling

detriment. [JA*(Doc. 169, p.72), (NF_AR_0031378-31800, 31804-33606).]

In sum, the IGRA decision is wholly inadequate in addressing the detriment to the surrounding community that the FEIS explicitly recognizes will occur as a result of the Tribe's casino project. IGRA demands more.

D. Relief sought

This court should hold that the Secretary's finding that the North Fork's casino would not be detrimental to the surrounding community was arbitrary, capricious, and an abuse of discretion. The district court's order granting summary judgment to defendants on Stand Up's second claim for relief should be reversed, and this court should direct the district court to grant Stand Up's motion for summary judgment.

IV

The Secretary Violated the Clean Air Act's Conformity Determination Requirement

A. Defendants failed to comply with required notice procedures, and the failure was prejudicial

1. The Clean Air Act's notice provisions

The Clean Air Act requires states to adopt a federally-enforceable State implementation plan, which contains the strategies the state has developed to attain and maintain ambient air quality standards. *See generally Utility Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2435 (2014). Section 176 of the Act prohibits any federal agency from approving a project that does not conform to the state's implementation plan:

> No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan after it has been approved or promulgated under section 7410 of this title. . . . The assurance of conformity to such an implementation plan shall be an *affirmative responsibility* of the head of such department, agency, or instrumentality.

42 U.S.C. § 7506(c) (emphasis added). The purpose of this provision is to prevent the federal government from interfering with the states'

abilities to comply with the Clean Air Act. *Department of Transportation v. Public Citizen*, 541 U.S. 752, 758 (2004).

The Environmental Protection Agency ("EPA") has promulgated regulations to implement this mandate. 40 C.F.R. §§ 93.150-93.165; 42 U.S.C. § 7506(c)(4)(A). The EPA regulations require federal agencies to estimate the air pollutant emissions to be generated by a proposed project and evaluate those emissions for consistency with the applicable state implementation plan. 40 C.F.R. §§ 93.153(b), 93.158(a). Importantly, the EPA regulations impose obligations on federal agencies to provide notices of their draft and final conformity determinations and to consider comments from any interested parties. 40 C.F.R. §§ 93.154-93.156.

Specifically, the regulations require two separate notices of a federal agency's draft conformity determination:

1. Under 40 C.F.R. § 93.155(a), the agency must provide a 30-day notice (the "§ 93.155(a) Notice") to the regional EPA office(s), state and local air quality agencies, and any federally-recognized Indian tribal government within the nonattainment or maintenance area. This

§ 93.155(a) Notice must describe the agency's proposed action and its draft conformity determination.

2. Under 40 C.F.R. § 93.156(b), the agency must publish a notice (the "§ 93.156(b) Notice") of its draft conformity determination in a daily newspaper in the affected area and provide 30 days for written public comment prior to taking any formal action on the draft determination.

The regulations are clear that both of these notices must be given *before* the agency approves the project. 40 C.F.R. § 93.150(b).

2. The Secretary failed to comply with the notice requirements before the project was approved, but the district court allowed post-approval notice

Here, the Secretary failed to comply with the required notice procedures before approving the project. When defendants initially adopted the conformity determination in June 2011, they failed to provide the § 93.155(a) Notice. [JA*(Doc. 63-1, p.2); (Doc. 63-2, pp.3-4).] Federal defendants discovered their error during this litigation, and filed a motion asking the district court to stay the litigation to allow

them to fix their error. [JA*(Doc. 63).] The district court granted the motion. [JA*(Doc. 77, p.8).]

Defendants sent the § 93.155(a) Notices on January 23, 2014—nearly three years after the Secretary finally adopted the conformity determination, and more than a year after approval of the final project. [JA*(NF_AR_NEW_0001178-1221).] Defendants consciously chose not to republish the § 93.156(b) Notices. [JA*(NF_AR_NEW_0001176).]

In response to this notice, defendants received comments, and prepared a response. [JA*(NF_AR_NEW_0001422-26, 1427-1572, 1573-85); JA*(NF_AR_NEW_0001945-55).] Then, on April 9, 2014, defendants issued a "Reissued Notice of Final Conformity Determination," stating that no changes were made to the Final Conformity Determination as a result of the comments. [JA*(NF_AR_NEW_0001768-69).] Defendants appear to have mailed notices of this reissued Final Conformity Determination under 40 C.F.R. § 93.155. [JA*(NF_AR_NEW_0001957-61)], but they did not publish any public notice of the Final Conformity Determination under 40 C.F.R. § 93.156.

3. The post-approval notice procedure failed to comply with Clean Air Act

By providing the § 93.155(a) Notices nearly three years after they adopted the Final Conformity Determination, defendants failed to comply with the Clean Air Act regulations. The regulations explicitly require defendants to make the conformity determination "in accordance with the requirements of this subpart *before* the action is taken." 40 C.F.R. § 93.150(b) (emphasis added). The regulations are clear that defendants "must follow the requirements in §§ 93.155 through 93.160 . . . and must consider comments from any interested parties." 40 C.F.R. § 93.154.

Here, defendants issued their decision to take the land into trust on November 26, 2012, and took the land into trust on February 5, 2013. [JA*(NF_AR_0041206); (Doc. 105, p.8).] Yet they did not provide the § 93.155(a) Notice until *after* those actions were taken. Rather than set aside the actions, and go back to comply with the procedures before making their decision, defendants treated the notice requirements as a perfunctory exercise that they could perform after the decision was made.

4. Failure to provide notice was not harmless

This court has "not been hospitable" to claims of harmless error where a government agency failed to give the notice required by the APA. *Allina Health Services v. Sebelius*, 746 F.3d 1102, 1109 (D.C. Cir. 2014) ("We have not been hospitable to government claims of harmless error in cases in which the government violated § 553 of the APA by failing to provide notice."). Rather, this court has held that "an utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of that failure." *Sugar Cane Growers Co-op. of Florida v. Veneman*, 289 F.3d 89, 96-97 (D.C. Cir. 2002). This is true even where the party challenging the administrative action "cannot identify any additional arguments they would have made in a notice-and-comment procedure" that the agency did not already consider. *Ibid.* (holding that such an argument would "virtually repeal" the notice requirement).

Here, there is unquestionably "uncertainty" as to the effect of the Secretary's failure to give the required notice. In *Alabama Power Co. v. F.E.R.C.*, 160 F.3d 7 (D.C. Cir. 1998), this court rejected a harmless error argument under remarkably similar circumstances. There, the

Federal Energy Regulatory Commission was required to give certain State agencies notice "*before* prescribing any rules or requirements" to govern the depreciation accounting of regulated utilities. *Id.* at 10 (emphasis added). The Commission failed to meet this requirement, but gave notice after issuing a new rule. The Commission argued that the failure to timely give notice was harmless because the States who were required to receive notice did not respond to the tardy notice that was actually given. *Id.* This court had no trouble rejecting that argument, holding that "we think it is impossible to conclude that no State commission would have had objections, or at least comments, if they had been presented with a proposal rather than a *fait accompli*." *Id.* at 10-11.

The court should reach the same result here. As in *Alabama Power*, it is impossible to conclude that more interested parties would not have responded to the notice had it not been presented as a *fait accompli*, *after* the Secretary had already taken the land into trust for the Tribe. And plaintiffs do not have the burden to show some additional argument that would have been made had notice properly been given. *Sugar Cane Growers*, 289 F.3d at 96-97; *Utility Solid Waste*

Activities Group v. E.P.A., 236 F.3d 749, 755 (D.C. Cir. 2001) (holding that government's harmless error argument "seems to us merely another way of saying that the change in the rule was unimportant, having no significant impact").

The court's decision in *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011 (D.C. Cir. 1978), is also instructive. There, plaintiffs sought review of an order by the EPA establishing waste water discharge limitations under the Clean Water Act. This court upheld all but one of the limitations. *Id.* at 1019. As to that one, the court found that it must be remanded to the agency because the agency failed to follow the proper notice and comment procedures. *Id.* at 1028-1031. The court remanded despite observing "that in general the Agency appears to have bent over backwards to accommodate public participation in, and understanding of, the promulgation of the effluent limitations before us." *Id.* at 1028-1029. Notably, the court rejected the agency's claim of harmless error, holding that the limitations were "the result of a complex mix of controversial and uncommented upon data and calculations," and "we cannot be sure that further and ultimately convincing public criticism of

those changes would not have been forthcoming had it been invited by the Agency." *Id.* at 1030-1031. The same is true here.

The district court concluded that the Secretary's failure to give notice was not prejudicial because "[s]ection 93.155 simply provides for notice; it does not provide for comment . . ." [JA*(Doc. 169, p.162).] The district court overlooks section 93.154, which provides that "[i]n making its conformity determination, a Federal agency must follow the requirements in §§ 93.155 through 93.160 . . . and must consider comments from any interested parties." 40 C.F.R. § 93.154. It defies reason and any conceivable regulatory purpose to conclude that federal agencies must provide notice, but may ignore comments.

B. The conformity determination is not based on the latest emission estimation methods

EPA regulations require that the conformity analysis be based upon "the latest and most accurate emission estimation techniques available." 40 C.F.R. § 93.159(b). For vehicle emissions, the most current version of the vehicle emissions model specified by the EPA and available for use in preparation or revision of state implementation plans in that state *must* be used for the conformity analysis. 40 C.F.R.

§ 93.159(b)(1). The most current version applicable here is California's EMFAC2011, which was approved by the EPA in March, 2013. *See* 78 Fed. Reg. 14533 (2013).

The Secretary's conformity determination does not, however, use this latest emission model. Rather, the conformity determination is based upon *an earlier version*, EMFAC2007, which was approved by the EPA on January 18, 2008. *See* 73 Fed. Reg. 3464 (2008).

Stand Up and the Table Mountain Tribe brought this to the Department's attention in response to defendants' notice of the draft conformity determination under 40 C.F.R. § 93.155(a), which was served in January 2014. [JA*(NF_AR_NEW_0001422, 0001427, 0001573-74).] In response, defendants acknowledged that the emissions estimation technique used in the draft conformity determination is not the latest and most accurate available. [JA*(NF_AR_NEW_0001946).] Nonetheless, defendants took the position that because the initial 2011 conformity determination used the then-current emissions model, defendants need not use the latest model to estimate emissions when re-approving the Final Conformity Determination in 2014. [*Id.*]

Defendants' position is not only contrary to the regulations, but is at odds with a recent Ninth Circuit Court of Appeals decision. In *Sierra Club v. U.S. Environmental Protection Agency*, 762 F.3d 971 (9th Cir. 2014), an applicant applied to the EPA for a permit under the Clean Air Act. Although the EPA had a statutory duty to either grant or deny the application within one year, it failed to do so. After the deadline passed, but before the EPA took final action on the permit, the EPA tightened the applicable air quality standards. As a result of litigation with the applicant, the EPA decided to grandfather the application under the prior air quality standards and issued the permit subject to the outdated standards. Petitioners challenged the EPA's issuance of the permit under the outdated standards, and the Ninth Circuit vacated the EPA's decision. *Id*. at 984. The Ninth Circuit cited *General Motors Corp. v. United States*, 496 U.S. 530, 540 (1990) as "support for the same basic principle that EPA is bound to enforce administrative guidelines in effect when it takes final action." *Sierra Club*, 762 F.3d at 980.

Here, the Secretary was obligated under the Clean Air Act and the EPA's implementing regulations to base its conformity determination on "the latest and most accurate emission estimation techniques

available." 40 C.F.R. § 93.159(b). And the Secretary was bound to follow the "guidelines in effect when it [took] final action," which final action did not occur until the Secretary reissued its final conformity determination in April 2014. The Secretary's refusal to follow the latest guidelines was arbitrary, capricious, an abuse of discretion, and not in accordance with law. 5 U.S.C. § 706(2)(A).

The district court rejected this argument in a single sentence, holding that because the conformity determination analysis *was begun* prior to September 6, 2013, defendants were not required to use the latest EMFAC2011 model. [JA*(Doc. 169, pp.163-164).] The district court's decision is based on a misinterpretation of 40 C.F.R. § 93.159(b)(1)(ii) and the EPA's Notice of Availability approving EMFAC2011.

40 C.F.R. § 93.159(b)(1)(ii), provides:

> A grace period of 3 months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used unless EPA announces a longer grace period in the Federal Register. *Conformity analyses for which the analysis was begun during the grace period or* ***no more*** *than 3 months before the Federal Register notice of*

> *availability* of the latest emission model may continue to use the previous version of the model specified by EPA. (emphasis added).

According to defendants, their analysis began in 2010. [JA*(Doc. 112-1, p.72).] The Federal Register notice of availability for EMFAC2011 was published on March 6, 2013. 78 Fed. Reg. 14,533-01 (2013). Because defendants' conformity analysis began more than three months before that date, they may not avail themselves of the grandfathering under section 93.159(b)(1)(ii).

The district court concluded that defendants were not required to use the EMFAC2011 model in their conformity analysis because the analysis was begun prior to September 6, 2013. [JA*(Doc. 169, pp.163-164).] As support for this interpretation the district court cited to the Federal Register notice of availability, which states as follows:

> When the grace period ends on September 6, 2013, EMFAC2011 will become the only approved motor vehicle emissions model for all new regional and CO, PM10 and PM2.5 hot-spot transportation conformity analyses across California. In general, this means that all new HC, NOX, PM10, PM2.5, and CO regional conformity analyses and CO, PM10 and PM2.5 hot-spot analyses started after the end of the 6-month grace period must be based on EMFAC2011, even if the [State Implementation

> Plan] is based on an earlier version of the EMFAC model. 78 Fed. Reg. 14,533-01 (Mar. 6, 2013) at Part II.F.

When read in context, however, it is clear that language was not intended to grandfather any and all analyses begun before the end of the grace period.

First, simply because the EPA states that certain types of analyses begun after the end of the grace period must use the new EMFAC2011 model, does not mean that all analyses begun before the end of the grace period may use the old EMFAC2007 model. Second, the conformity analysis in this case was a project-level NOx and reactive organic gas analysis that does not fit into either category described by the EPA in its statement (i.e., it is neither a "new HC, NOX, PM10, PM2.5, and CO regional conformity analys[i]s" nor a "CO, PM10 and PM2.5 hot-spot analys[i]s"). [JA*(NF_AR_0039266).] Third, the district court's interpretation of the statement conflicts with EPA's promulgated regulation at 40 C.F.R. § 93.159(b)(1)(ii), which is clear that only conformity analyses begun "during the grace period or *no more* than 3 months before the Federal Register notice of availability of the latest

emission model may continue to use the previous version of the model specified by EPA." 40 C.F.R. § 93.159(b)(1)(ii) (emphasis added).

Accordingly, the district court erred in approving defendants' use of the outdated EMFAC2007 model when they approved the re-issued conformity determination in April, 2014. Defendants have violated the Clean Air Act.

It cannot be said that this violation was harmless. As the Supreme Court has emphasized, the harmless error rule is "not . . . a particularly onerous requirement." *Shinseki v. Sanders*, 556 U.S. 396, 410 (2009). This court has refused to find harmless error where it "is impossible to discern" what the result may be on remand, but "[i]t is entirely possible that" the result may be different. *PDK Laboratories Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004).

Here, it is impossible to know precisely what the outcome of the Secretary's conformity determination would have been had the latest emissions model been used, but it is entirely possible that the new model would have created a different result. What we do know is that the Secretary has steadfastly refused to update its emissions

calculations, and has continuously fought to maintain reliance on an outdated standard. The Secretary possesses the necessary data, the model, and the expertise to update the conformity determination using the latest standard. By contrast, as citizen plaintiffs, Stand Up does not have the resources or expertise to do so.

To find harmless error under these circumstances would effectively insulate violations of the Clean Air Act from review by the court. If the Secretary can simply apply an outdated emissions model and then be protected from judicial review unless a plaintiff can get the data and determine what the outcome would be under the new emissions model, then the Clean Air Act requirements would be virtually eviscerated. Cf. *Sugar Cane Growers*, 289 F.3d at 96-97 ("if the government could skip those [notice] procedures, engage in informal consultation, and then be protected from judicial review unless a petitioner could show a new argument—not presented informally—section 553 obviously would be eviscerated."). The rule requiring the Secretary to use the latest emissions model should not be so easily undercut.

C. Defendants' failure to comply with the Clean Air Act requires their decision be vacated and set aside

An agency's failure to comply with EPA's regulations requires the agency's action be held unlawful and set aside. 5 U.S.C. § 706(2)(A), (D); *see, e.g.*, *Sierra Club v. Johnson*, 436 F.3d 1269, 1280 (11th Cir. 2006) (vacating EPA's decision refusing to object to state's issuance of Title V permit when state failed to comply with notice requirement under CAA); *Anchustegui v. Department of Agriculture*, 257 F.3d 1124 (9th Cir. 2001) (Forest Service's cancellation of grazing permit invalid due to government's failure to follow notice procedure).

Moreover, under the APA, procedural defects are treated no differently than substantive errors. *Hawaii Longline Ass'n. v. National Marine Fisheries Service*, 281 F.Supp.2d 1, 25-26 (D.D.C., 2003); *see also Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978) ("we cannot be sure that further and ultimately convincing public criticism of those changes would not have been forthcoming had it been invited by the Agency."). Thus, the Secretary's decisions here must be vacated.

D. Relief sought

This court should hold that the Secretary violated the Clean Air Act and that those violations require vacatur of all project approvals. The district court's order granting summary judgment to defendants should be reversed, and this court should direct the district court to grant Stand Up's motion for summary judgment on their fourth claim for relief.

CONCLUSION

For the foregoing reasons, the district court's judgment should be reversed, and the matter remanded with instructions to grant summary judgment to Stand Up.

March 14, 2017

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Addendum of Statutes and Regulations

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Statutes

Regulations

Statutes

5 U.S.C. § 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that--

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter--

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include--

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;[1] and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

25 U.S.C. § 2701. Findings

The Congress finds that--

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

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

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

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

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

25 U.S.C. § 2702. Declaration of policy

The purpose of this chapter is--

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

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

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

25 U.S.C. § 2710(d)(1). Tribal Gaming Ordinances

. . .

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and

submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

> **(i)** the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or
>
> **(ii)** the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.
>
> Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

> **(D)(i)** The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render

class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-

State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity

located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

> **(I)** a Tribal-State compact has not been entered into under paragraph (3), and
>
> **(II)** the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,
>
> the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a

compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

25 U.S.C. § 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

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

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

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

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

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

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

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

(b) Exceptions

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

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

(c) Authority of Secretary not affected

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

(d) Application of Title 26

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

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

25 U.S.C. § 5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

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

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: *Provided*, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5123. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(a) Adoption; effective date

Any Indian tribe shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, and any amendments thereto, which shall become effective when--

(1) ratified by a majority vote of the adult members of the tribe or tribes at a special election authorized and called by the Secretary under such rules and regulations as the Secretary may prescribe; and

(2) approved by the Secretary pursuant to subsection (d) of this section.

(b) Revocation

Any constitution or bylaws ratified and approved by the Secretary shall be revocable by an election open to the same voters and conducted in the same manner as provided in subsection (a) of this section for the adoption of a constitution or bylaws.

(c) Election procedure; technical assistance; review of proposals; notification of contrary-to-applicable law findings

(1) The Secretary shall call and hold an election as required by subsection (a) of this section--

(A) within one hundred and eighty days after the receipt of a tribal request for an election to ratify a proposed constitution and bylaws, or to revoke such constitution and bylaws; or

(B) within ninety days after receipt of a tribal request for election to ratify an amendment to the constitution and bylaws.

(2) During the time periods established by paragraph (1), the Secretary shall--

(A) provide such technical advice and assistance as may be requested by the tribe or as the Secretary determines may be needed; and

(B) review the final draft of the constitution and bylaws, or amendments thereto to determine if any provision therein is contrary to applicable laws.

(3) After the review provided in paragraph (2) and at least thirty days prior to the calling of the election, the Secretary shall notify the tribe, in writing, whether and in what manner the Secretary has found the proposed constitution and bylaws or amendments thereto to be contrary to applicable laws.

(d) Approval or disapproval by Secretary; enforcement

(1) If an election called under subsection (a) of this section results in the adoption by the tribe of the proposed constitution and bylaws or amendments thereto, the Secretary shall approve the constitution and bylaws or amendments thereto within forty-five days after the election unless the Secretary finds that the proposed constitution and bylaws or any amendments are contrary to applicable laws.

(2) If the Secretary does not approve or disapprove the constitution and bylaws or amendments within the forty-five days, the Secretary's approval shall be considered as given. Actions to enforce the provisions of this section may be brought in the appropriate Federal district court.

(e) Vested rights and powers; advisement of presubmitted budget estimates

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and

to negotiate with the Federal, State, and local governments. The Secretary shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act--

> **(1)** each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section; and
>
> **(2)** nothing in this Act invalidates any constitution or other governing document adopted by an Indian tribe after June 18, 1934, in accordance with the authority described in paragraph (1).

25 U.S.C. § 5125. Acceptance optional

This Act shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

25 U.S.C. § 5129. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone,

the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

42 U.S.C. § 4321. Congressional declaration of purpose

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. § 7506. Limitations on certain Federal assistance

. . .

(c) Activities not conforming to approved or promulgated plans

(1) No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to an implementation plan

after it has been approved or promulgated under section 7410 of this title. No metropolitan planning organization designated under section 134 of Title 23, shall give its approval to any project, program, or plan which does not conform to an implementation plan approved or promulgated under section 7410 of this title. The assurance of conformity to such an implementation plan shall be an affirmative responsibility of the head of such department, agency, or instrumentality. Conformity to an implementation plan means--

(A) conformity to an implementation plan's purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and

(B) that such activities will not--

(i) cause or contribute to any new violation of any standard in any area;

(ii) increase the frequency or severity of any existing violation of any standard in any area; or

(iii) delay timely attainment of any standard or any required interim emission reductions or other milestones in any area.

The determination of conformity shall be based on the most recent estimates of emissions, and such estimates shall be determined from the most recent population, employment, travel and congestion estimates as determined by the metropolitan planning organization or other agency authorized to make such estimates.

. . .

(4) Criteria and procedures for determining conformity

(A) In general

The Administrator shall promulgate, and periodically update, criteria and procedures for determining conformity (except in the case of transportation plans, programs, and projects) of, and for keeping the Administrator informed about, the activities referred to in paragraph (1).

Regulations

25 C.F.R. § 151.10 On-reservation acquisitions.

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

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

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

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

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

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

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

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

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

25 C.F.R. § 292.2 How are key terms defined in this part?

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

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

BIA means Bureau of Indian Affairs.

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

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

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

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

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

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

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

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

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

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

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

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

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

Reservation means:

> (1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;
>
> (2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;
>
> (3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or
>
> (4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

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

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

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

Secretary means the Secretary of the Interior or authorized representative.

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

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

25 C.F.R. § 292.18 What information must an application contain on detrimental impacts to the surrounding community?

To satisfy the requirements of § 292.16(f), an application must contain the following information on detrimental impacts of the proposed gaming establishment:

(a) Information regarding environmental impacts and plans for mitigating adverse impacts, including an Environmental Assessment (EA), an Environmental Impact Statement (EIS), or other information required by the National Environmental Policy Act (NEPA);

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

(c) Anticipated impacts on the economic development, income, and employment of the surrounding community;

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

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

(f) If a nearby Indian tribe has a significant historical connection to the land, then the impact on that tribe's traditional cultural connection to the land; and

(g) Any other information that may provide a basis for a Secretarial Determination whether the proposed gaming establishment would or would not be detrimental to the surrounding community, including memoranda of understanding and inter-governmental agreements with affected local governments.

25 C.F.R. § 292.21 How will the Secretary evaluate a proposed gaming establishment?

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

(b) If the Secretary makes an unfavorable Secretarial Determination, the Secretary will inform the tribe that its

application has been disapproved, and set forth the reasons for the disapproval.

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

40 C.F.R. § 93.150 Prohibition.

(a) No department, agency or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve any activity which does not conform to an applicable implementation plan.

(b) 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.

(c) [Reserved by 75 FR 17272]

(d) Notwithstanding any provision of this subpart, a determination that an action is in conformance with the applicable implementation plan does not exempt the action from any other requirements of the applicable implementation plan, the National Environmental Policy Act (NEPA), or the Clean Air Act (Act).

(e) If an action would result in emissions originating in more than one nonattainment or maintenance area, the conformity must be evaluated for each area separately.

40 C.F.R. § 93.154 Federal agency conformity responsibility.

Any department, agency, or instrumentality of the Federal government taking an action subject to this subpart must make its own conformity determination consistent with the requirements of this subpart. In making its conformity determination, a Federal

agency must follow the requirements in §§ 93.155 through 93.160 and §§ 93.162 through 93.165 and must consider comments from any interested parties. Where multiple Federal agencies have jurisdiction for various aspects of a project, a Federal agency may choose to adopt the analysis of another Federal agency or develop its own analysis in order to make its conformity determination.

40 C.F.R. § 93.155 Reporting requirements.

(a) A Federal agency making a conformity determination under §§ 93.154 through 93.160 and §§ 93.162 through 93.164 must provide to the appropriate EPA Regional Office(s), State and local air quality agencies, any federally-recognized Indian tribal government in the nonattainment or maintenance area, and, where applicable, affected Federal land managers, the agency designated under section 174 of the Act and the MPO, a 30–day notice which describes the proposed action and the Federal agency's draft conformity determination on the action. If the action has multi-regional or national impacts (e.g., the action will cause emission increases in excess of the de minimis levels identified in § 93.153(b) in three or more of EPA's Regions), the Federal agency, as an alternative to sending it to EPA Regional Offices, can provide the notice to EPA's Office of Air Quality Planning and Standards.

(b) A Federal agency must notify the appropriate EPA Regional Office(s), State and local air quality agencies, any federally-recognized Indian tribal government in the nonattainment or maintenance area, and, where applicable, affected Federal land managers, the agency designated under section 174 of the Clean Air Act and the MPO, within 30 days after making a final conformity determination under this subpart.

(c) The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business

information shall be controlled by the applicable laws, regulations, security manuals, or executive orders concerning the use, access, and release of such materials. Subject to applicable procedures to protect restricted information from public disclosure, any information or materials excluded from the draft or final conformity determination or supporting materials may be made available in a restricted information annex to the determination for review by Federal and State representatives who have received appropriate clearances to review the information.

40 C.F.R. § 93.156 Public participation.

(a) Upon request by any person regarding a specific Federal action, a Federal agency must make available, subject to the limitation in paragraph (e) of this section, for review its draft conformity determination under § 93.154 with supporting materials which describe the analytical methods and conclusions relied upon in making the applicability analysis and draft conformity determination.

(b) A Federal agency must make public its draft conformity determination under § 93.154 by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action and by providing 30 days for written public comment prior to taking any formal action on the draft determination. This comment period may be concurrent with any other public involvement, such as occurs in the National Environmental Policy Act (NEPA) process. If the action has multi-regional or national impacts (e.g., the action will cause emission increases in excess of the de minimis levels identified in § 93.153(b) in three or more of EPA's Regions), the Federal agency, as an alternative to publishing separate notices, can publish a notice in the Federal Register.

(c) A Federal agency must document its response to all the comments received on its draft conformity determination under §

93.154 and make the comments and responses available, subject to the limitation in paragraph (e) of this section, upon request by any person regarding a specific Federal action, within 30 days of the final conformity determination.

(d) A Federal agency must make public its final conformity determination under § 93.154 for a Federal action by placing a notice by prominent advertisement in a daily newspaper of general circulation in the area affected by the action within 30 days of the final conformity determination. If the action would have multi-regional or national impacts, the Federal agency, as an alternative, can publish the notice in the Federal Register.

(e) The draft and final conformity determination shall exclude any restricted information or confidential business information. The disclosure of restricted information and confidential business information shall be controlled by the applicable laws, regulations or executive orders concerning the release of such materials.

40 C.F.R. § 93.159 Procedures for conformity determinations of general Federal actions.

(a) The analyses required under this subpart must be based on the latest planning assumptions.

(1) All planning assumptions must be derived from the estimates of population, employment, travel, and congestion most recently approved by the MPO, or other agency authorized to make such estimates, where available.

(2) Any revisions to these estimates used as part of the conformity determination, including projected shifts in geographic location or level of population, employment, travel, and congestion, must be approved by the MPO or other agency authorized to make such estimates for the urban area.

(b) The analyses required under this subpart must be based on the latest and most accurate emission estimation techniques available as described below, unless such techniques are inappropriate. If such techniques are inappropriate, the Federal agency may obtain written approval from the appropriate EPA Regional Administrator for a modification or substitution, of another technique on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program.

(1) For motor vehicle emissions, the most current version of the motor vehicle emissions model specified by EPA and available for use in the preparation or revision of SIPs in that State must be used for the conformity analysis as specified in paragraphs (b)(1)(i) and (ii) of this section:

(i) The EPA must publish in the Federal Register a notice of availability of any new motor vehicle emissions model; and

(ii) A grace period of 3 months shall apply during which the motor vehicle emissions model previously specified by EPA as the most current version may be used unless EPA announces a longer grace period in the Federal Register. Conformity analyses for which the analysis was begun during the grace period or no more than 3 months before the Federal Register notice of availability of the latest emission model may continue to use the previous version of the model specified by EPA.

(2) For non-motor vehicle sources, including stationary and area source emissions, the latest emission factors specified by EPA in the "Compilation of Air Pollutant Emission Factors" (AP–42, http://www.epa.gov/ttn/chiefs/efpac) must be used for the conformity analysis unless more accurate emission data are available, such as actual stack test data from the stationary sources which are part of the conformity analysis.

(c) The air quality modeling analyses required under this subpart must be based on the applicable air quality models, data bases, and other requirements specified in the most recent version of the "Guideline on Air Quality Models." (Appendix W to 40 CFR part 51).

(1) The guideline techniques are inappropriate, in which case the model may be modified or another model substituted on a case-by-case basis or, where appropriate, on a generic basis for a specific Federal agency program; and

(2) Written approval of the EPA Regional Administrator is obtained for any modification or substitution.

(d) The analyses required under this subpart must be based on the total of direct and indirect emissions from the action and must reflect emission scenarios that are expected to occur under each of the following cases:

(1) The attainment year specified in the SIP, or if the SIP does not specify an attainment year, the latest attainment year possible under the Act; or

(2) The last year for which emissions are projected in the maintenance plan;

(3) The year during which the total of direct and indirect emissions from the action is expected to be the greatest on an annual basis; and

(4) Any year for which the applicable SIP specifies an emissions budget.

40 C.F.R. § 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.

4851-0449-5173

CERTIFICATE OF SERVICE

I certify that on March 14, 2017, the document described as **Stand Up Plaintiffs' Opening Brief** was electronically filed with the Clerk of the Court using the ECF System which will distribute an electronic copy to all counsel of record.

Dated: March 14, 2017

/s/ Sean M. Sherlock

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