UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CITIZENS EXPOSING TRUTH ABOUT CASINOS ("CETAC"), Plaintiff, v. GAIL A. NORTON, et al., Defendants.	)	Civil Action No. 02-1754 (TPJ)

MEMORANDUM AND ORDER

Plaintiff Citizens Exposing Truth About Casinos ("CETAC"), a non-profit Michigan membership corporation, brings this action against defendants Gale Norton, Secretary of the United States Department of the Interior ("DOI"), and Neal A. McCaleb, Assistant Secretary of the DOI, Bureau of Indian Affairs ("BIA") (collectively referred to as "the Secretary" or "defendants") pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706. CETAC opposes the Secretary's decision to take 79 acres of farmland in Calhoun County, Michigan, ("the Sackrider Property") into trust for use by the Nottawaseppi Huron Band of Potawatomi Indians ("Hurons" or "Tribe") to construct and operate a class III gambling casino under the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701, et seq. and 18 U.S.C. § 1166.[1] The APA empowers a reviewing court to hold unlawful and set aside agency

[1] CETAC claims to have approximately 2,000 members living in (or in the vicinity of) Emmett Township in Calhoun County, the site of the proposed casino, who expect to be affected in multiple ways by its presence. There are 477 known members of the Tribe, most of whom reside in other counties.

The land is located in Southwest Michigan, 3.5 miles east of Battle Creek, Michigan.

actions, findings, and other conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

In its four-count complaint, CETAC contends that the Secretary's decision to take the land into trust is in excess of her authority or contrary to statutory law in several respects, and that her determination to dispense with preparation of an environmental impact statement ("EIS") pursuant to the National Environmental Policy Act (NEPA) of 1969, 42 U.S.C. § 4321 et seq., is arbitrary and capricious. The Hurons have joined the suit as intervenor-defendants, and both the State of Michigan and Calhoun County (Michigan) have filed submissions amici curiae supporting the casino.

The Secretary has filed a motion to dismiss the complaint, or in the alternative, for summary judgment on all counts. The Hurons raise substantially similar arguments for dismissal or judgment in their capacity as intervenors, as do Calhoun County and the State of Michigan as amici. The defendants largely concur with CETAC's characterization of the facts, but argue that as a matter of law, the deference due to the Secretary's decision to take the Sackrider Property into trust mandates that it be upheld.[2]

I.

The Hurons were acknowledged as a federally recognized tribe in 1995 pursuant to the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-475. On December 11, 1999, the Tribe submitted a trust application to the BIA, asking it to place a parcel of land – the Sackrider Property – into trust for the Tribe's use in establishing a gambling casino. See Pl.'s Ex. D, Trust

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[2] The IGRA requires the Secretary to place land into trust before a casino may be established on it. Once the land is in trust, the property is eligible for gaming upon a proclamation by the Secretary that the land is the "initial reservation," or the first parcel taken into trust by the Secretary for the Tribe. See 25 U.S.C. § 467.

Application, at 5. The Hurons' trust application describes the proposed gambling complex as a 210,000 square-foot structure, including retail space and food and beverage concessions, surrounded by parking for more than 3,000 cars and buses covering an additional 1.2 million square feet. The edifice would be situated on what is currently 79 acres of prime farmland.

CETAC's objective is to delay or, if possible, prevent the construction of the Tribe's proposed casino altogether. It alleges that numerous defects in the proceedings to date warrant either a permanent injunction, or at a minimum, a remand to the Secretary to remedy any non-compliance with the law.

CETAC asserts, inter alia, that because the Tribe lacks an indisputably valid gambling compact with the State of Michigan at the moment, any decision to place the Sackrider Property into trust would be contrary to law. It also contends that the IRA itself represents an unconstitutional delegation of legislative power to the Secretary; and that the Secretary erroneously designated the Sackrider Property an "initial reservation" to allow the Tribe to avail itself of a provision of the IGRA permitting gambling only on newly acquired Indian lands.[3]

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[3] Alone among the parties-defendant the Hurons question CETAC's "prudential" standing to maintain claims under the IRA or the IGRA. In addition to the general requirements for Article III standing, see Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992), prudential considerations dictate that a plaintiff challenging agency action under a given statute has standing only if "the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." Ass'n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970); see also Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987).

Other judges of this district court, however, have held that citizen groups, like CETAC, have potential injuries that fall within the zone of interests protected by IGRA and IRA, reasoning that, "[a]lthough neither IGRA nor the regulations create a cause of action for private parties, IGRA provides for the consideration of effects on surrounding communities and the regulations provide for consideration of land use conflicts and NEPA requirements." Taxpayers Of Michigan Against Casinos (TOMAC) v. Norton, 193 F. Supp. 2d 182, 190 (D.D.C. 2002) (citing 25 C.F.R. §§ 151.10, 151.11); see also City of Roseville v. Norton, 219 F. Supp. 2d 130, 157-58, 165 (D.D.C. 2002) aff'd 348 F.3d 1020 (D.C. Cir. 2003). For similar reasons, the Court rejects the Tribe's challenge to plaintiff's standing.

CETAC's principal contention, however, is that the Secretary's decision to forego preparation of a full-scale Environmental Impact Statement in accordance with NEPA, 42 U.S.C. § 4321 et seq., in reliance upon an Environmental Assessment finding the effect of the casino upon the environment to be of minimal significance, was arbitrary, capricious, and an abuse of discretion.

II.

IGRA provides that "Class III gaming activities shall be lawful on Indian land only if . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . that is in effect." 25 U.S.C. § 2710(d)(1)(C). The record reveals that between 1997 and 1998, the Governor of Michigan and the Hurons negotiated a compact to allow the Tribe to operate a casino with class II and III gaming. It was thereafter approved by the Michigan legislature, and the Secretary of the Interior gave her approval in February, 1999. In January 2002, however, a Michigan circuit court declared the compact invalid under the Michigan constitution. A Michigan intermediate court of appeals reversed that decision the following November, see Taxpayers of Mich. Against Casinos v. State, 657 N.W.2d 503 (Mich. Ct. App. 2002), and the issue is now pending before the Michigan Supreme Court.

According to CETAC, if the Tribal-State compact is ultimately voided, class III gambling on the Sackrider Property would be unlawful. Despite the questionable validity of the Tribe's gaming compact, however, the Court declines to vitiate the Secretary's decision on that ground. Initially, it notes that other courts, including other judges of this district court, have concluded that federal law does not require that a valid tribal-state gaming compact be in place before the Secretary can take land into trust for tribe. See TOMAC, 193 F. Supp. 2d at 193; Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Engler, 173 F. Supp. 2d 725, 727-28 (W.D.

Mich. 2001), aff'd 304 F.3d 616 (6th Cir. 2002); cf. also Kansas v. United States, 249 F.3d 1213, 1223-24 (10th Cir. 2001) (NIGC's approval of a casino project necessarily precedes a tribe's negotiation of a compact with the state). Indeed, under IGRA, a state is only obligated to negotiate a class III gaming compact with an Indian tribe after the tribe has acquired jurisdiction over the proposed casino site, i.e., after the land has been taken in trust by the Secretary. See TOMAC, 193 F. Supp. 2d at 192-93.

CETAC also challenges, on federal constitutional grounds, that provision of the IRA authorizing the Secretary to acquire real property for the benefit of Indians, contending that it does not provide sufficient standards to guide the Secretary's action.[4] According to CETAC, Section 5 "simply directs the Secretary in neutral fashion to acquire lands 'for Indians,' without providing any direction to the Secretary on when, how, or for what purpose he or she should exercise that authority." Opp'n at 86.

CETAC's primary authority for the argument is South Dakota v. United States

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[4] Section 5 of the IRA, 25 U.S.C. § 465, provides, in relevant part:

> The Secretary of the Interior is hereby 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.

While Congress may not delegate its legislative powers, it may, of course, delegate decisionmaking authority to an administrative agency as long as it "clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." Mistretta v. United States, 488 U.S. 361, 372-73 (1989) (internal citations and quotations omitted). To effect a valid delegation, Congress must "'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928)). If standards for agency action are absent, or too vague to be "intelligible," the delegation is unconstitutional and invalid under the non-delegation doctrine. See id.

Department of Interior, 69 F.3d 878 (8th Cir. 1995), in which a divided panel of the Eighth Circuit found Section 5 of the IRA to violate the non-delegation doctrine, the majority observing rhetorically, "[b]y its literal terms, the statute. . . would permit the Secretary to purchase the Empire State Building in trust for a tribal chieftain as a wedding present." Id. at 882.

The Eighth Circuit's decision in South Dakota was vacated by the Supreme Court on other grounds. See United States Dep't of Interior v. South Dakota, 519 U.S. 919 (1996). The decision, therefore, has no precedential value and, in fact, the proposition for which CETAC cites it has been expressly repudiated in this district, as well as in other circuit and district courts. See City of Roseville v. Norton, 219 F. Supp. 2d 130, 154-55 (D.D.C. 2002) aff'd 348 F.3d 1020 (D.C. Cir. 2003); TOMAC, 193 F. Supp. 2d at 191-92; City of Sault Ste. Marie, Michigan v. Andrus 458 F. Supp. 465, 473 (D.D.C. 1978); see also United States v. Roberts, 185 F.3d 1125, 1136-37 (10th Cir. 1999); Confederated Tribes of Siletz Indians of Oregon v. United States, 110 F.3d 688, 698 (9th Cir. 1997); City of Lincoln City v. United States Dep't of Interior, 229 F. Supp. 2d 1109, 1128 (D. Or. 2002); Shivwits Band of Paiute Indians v. Utah, 2001 WL 1806986, *3 (D. Utah 2001). This Court is likewise unpersuaded that Section 5 of the IRA represents an unconstitutional delegation of legislative power.

CETAC's final attempt to convince the Court that the Secretary's decision is contrary to some other provision of law rests upon what it says is an erroneous finding to the effect that the Sackrider Property will be the Tribe's "initial reservation." With several exceptions, IGRA prohibits gaming on lands acquired in trust after October 17, 1988. See 25 U.S.C. § 2719(a)-(b). Here, the relevant exception would allow gaming on lands taken into trust as part of the "initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment

process." 25 U.S.C. § 2719(b)(1)(B)(ii).[5] In the case of the Hurons, the Secretary determined that the Sackrider Property would qualify as the Tribe's "initial reservation" for the purposes of the § 2719(b)(1)(B)(ii) exception.

Synthesizing its arguments to the contrary to some extent, the Court understands CETAC's first contention to be that the Sackrider Property is not the Tribe's initial reservation because the Tribe already has a "state reservation," the Pine Creek Indian Reservation, located elsewhere in Michigan. Moreover, CETAC insists that Pine Creek must be deemed a reservation for the purposes of IGRA because it is, in fact, the Tribe's residential center.

The record reveals that Pine Creek's status as a state reservation is a matter of some disagreement. See State of Mich. Br. Amicus Curiae at 2-4 (disavowing reservation or trust status of the land); AR HURON01 at 0420; 0575; 0577-78; Huron Intervenor Br. at 17 (stating that the Pine Creek area has been "held in trust for their benefit by the State" since the mid-1800's).

Regardless of Michigan's treatment of the Pine Creek property, however, it is undisputed that the property is not a reservation under federal law, and therefore does not fall under the purview of IGRA, § 2719(b)(1)(B), which permits gaming on reservations that are taken into trust as part of "(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process." Id. (emphasis supplied). Therefore, the Secretary's conclusion that the Sackrider Property would be the Hurons' first reservation under federal law would appear to be correct.

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[5]These statutory exceptions were intended to ensure parity between newly acknowledged or restored tribes which lacked a reservation prior to 1988 and existing tribes that had reservations on which they could legally conduct gaming activities. See Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the W. Dist. of Mich., 46 F. Supp. 2d 689, 698 (W.D. Mich. 1999).

Such decisions by the Secretary are presumably examined in light of Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 843-44 (1984), under which deference is given to an agency's interpretation of statute it is charged with administering if the statute is silent or ambiguous as to Congress' intent, and the agency's interpretation is reasonable. See id.; see also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). CETAC responds, simply, that the statute is not the Secretary's to administer, a proposition for which it cites the Tenth Circuit's decision in Sac and Fox Nation of Missouri v. Norton, 240 F.3d 1250 (10th Cir. 2001), holding that the Secretary lacked authority to interpret the term "reservation" under a related exception – the "contiguous lands" exception, 25 U.S.C. § 2719(a)(1) – to the prohibition on gaming. According to the Sac and Fox court, the IGRA charged the National Indian Gaming Commission ("NIGC"), rather than the Secretary of the Interior, with regulatory oversight of Indian gaming. See Sac and Fox, 240 F.3d at 1265. CETAC also cites a text entitled Handbook of Federal Indian Law as well as the Sac and Fox decision for the proposition that the modern meaning of the term "reservation" in context has been fixed since the 1880s as land set aside to provide a residence for Indians. See Felix Cohen, Handbook of Federal Indian Law 34 (1982); Sac and Fox, 240 F.3d at 1267.

The Court disagrees. Contrary to CETAC's assertions, there appears to be no statutory or regulatory requirement that land must contain housing in order for the Secretary to proclaim it a reservation under the IRA and for it to qualify as an initial reservation under IGRA. When taking property into trust, the Secretary acts pursuant to the IRA, not, as CETAC suggests, the IGRA, and regulations promulgated under the IRA define a reservation as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. § 151.2(f). It is altogether reasonable, therefore, for the Secretary to adopt the definition of

reservation contained in the regulations promulgated pursuant to the statute under which she acts. The Court concludes that the Secretary has authority to interpret the phrase "initial reservation" as she has done. See Arizona v. Public Service Co. v. EPA, 211 F.3d 1280, 1293 (D.C. Cir. 2000).[6]

III.

The National Environmental Protection Act requires federal agencies to prepare a detailed Environmental Impact Statement ("EIS") for major federal actions they contemplate that will "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(2)(C). To determine whether the casino project would call for an EIS, BIA made an initial Environmental Assessment ("EA"). Environmental Assessments can yield two possible outcomes: the agency may either make a finding of no significant impact ("FONSI") or, if significant impact appears likely, conduct a full environmental impact study before deciding whether to allow the project to proceed. See generally 42 U.S.C. § 4321, 4331-4335, 4341-4347.7; 25 C.F.R. § 151.

In July 2001, the BIA published a draft EA. A notice-and-comment period followed during which CETAC submitted its description of the significant environmental impacts that it foresaw would result if the trust application were granted, and asked the Secretary to reject the application, or, in the alternative, at least to make a finding of significant impact and conduct a

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[6] It is noteworthy that shortly after Sac and Fox was decided Congress passed the Department of the Interior and Related Agencies Appropriations Act, which recites in pertinent part: "The authority to determine whether a specific area of land is a 'reservation' for purposes of 25 U.S.C. §§ 2701-2721 was delegated to the Secretary of the Interior on October 17, 1988." Pub. L. No. 107-63, § 134 (2001).

In enacting the IGRA, moreover, Congress did not delegate the authority to administer the IGRA solely to the NIGC: Both the NIGC and the Secretary of the Interior are directed to perform specified functions under IGRA. The Secretary, for example, approves per capita revenue allocation plans, see 25 U.S.C. § 2710(b)(3)(B); approves Tribal-State class III gaming compacts, see id. at § 2710(d)(8)(A)-(D); and prescribes procedures to negotiate a compact in the event a state and a tribe are at an impasse, see id. at § 2710(d)(7)(B)(vii).

full environmental impact study before granting it.

The BIA released its final version of the EA in February 2002, on the basis of which the Secretary issued a FONSI for the project on July 31, 2002. Having concluded that the casino would not create any significant environmental impacts, the FONSI pretermitted the obligation to prepare the EIS for which CETAC had contended. On August 9, 2002, the Secretary published a notice in the Federal Register stating that the casino site would be placed in trust in 30 days, whereupon, on August 30, 2002, CETAC filed the instant lawsuit. The parties have stipulated to await the outcome.

The significance of an environmental impact is a substantive determination left to the discretion of the agency as long as there is no procedural fault. Procedurally, NEPA's implementing regulations describe generally what an EA must contain. Most relevant for present purposes is "sufficient evidence and analysis" to support its conclusion to issue either a FONSI or EIS, and a "brief discussion of the need for the proposal, alternatives [and] the environmental impacts of the proposed action and alternatives." 40 C.F.R. § 1508.9(a)-(b).

Upon judicial review of an EA, the Court's task, as prescribed by the D.C. Circuit, is to ascertain: 1) whether the agency identified the relevant areas of environmental concern; 2) whether the agency took a "hard look" at the problem; 3) as to the problems identified and studied, whether the agency made a convincing case that the impact was insignificant; and 4) if there is an impact of true significance, whether the agency convincingly established that changes in the project sufficiently reduced it to a minimum. Sierra Club v. Peterson, 717 F.2d 1409, 1413 (D.C. Cir. 1983). The court's "limited role is to ensure, primarily, that no arguably significant consequences have been ignored; evaluating the 'impact' of those consequences on the 'quality of the human environment,' . . . is 'left to the judgment of the agency.'" Public Citizen v. Nat'l

Highway Traffic Safety Admin., 848 F.2d 256, 267 (D.C. Cir. 1988) (quoting Sierra Club, 753 F.2d at 128). That said, an agency's decision nevertheless must be "fully informed" and "well-considered," i.e., researched and explained in order to warrant judicial deference.

There is no doubt that the EA in this case, totaling 124 pages with over 600 pages of appendices, examines in detail many aspects of the casino project. CETAC argues that its very length is testimonial to the significance of the casino's impact on the adjacent environment. See 46 Fed. Reg. 18,026 at Q 55, 36(b) (environmental assessment should normally be no more than 15 pages in length, except in rare cases, and "a lengthy EA indicates that an EIS is needed."). Length and complexity, however, can just as easily obviate the need for an EIS as not. See Sierra Club v. Marsh, 769 F.2d 868, 874-75 (1st Cir. 1985).

CETAC challenges the adequacy of the EA's analysis in several respects. It disputes conclusions regarding the casino's direct impacts as well as its indirect impacts, defined as those that "are caused by the action and are later in time or farther removed in the distance, but are still reasonably foreseeable [including] growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8. CETAC also takes issue with the EA's conclusions regarding cumulative impacts, i.e., those that "result from the incremental impact of an action when added to other past, present, and reasonably foreseeable future actions, regardless of what agency . . . or person undertakes [them.]" 40 C.F.R. § 1508.7, as well as its discussion of reasonable alternatives, proposed mitigating factors, and the possible invalidity of the tribal-state compact.

The Court finds that the EA fails to support the Secretary's conclusion that the project entails no significant environmental impact in several respects.

First, it proceeds a priori from two premises: a casino -- only a casino -- is needed because only a casino will alleviate the "problem," namely, the Tribe's economic woes, see Administrative Record, HURON01 [hereinafter AR HURON01] at 2941, and that only a casino of the proportions the Tribe proposes to build will be economically viable, id. at 2949.[7] Thus, the only "alternatives" considered were other sites for such a casino -- five other tracts of land in Calhoun County (because the Tribal-State Compact so requires). Id. at 2950. Throughout the remainder of the EA, once the other tracts are dismissed as possibilities, the Sackrider Property is referred to as the Preferred Alternative: A casino, somewhere, of precisely the dimensions the Tribe desires, appears to be a forgone conclusion from the inception.

Second, the site for the proposed casino -- the so-called Preferred Alternative -- is at present a tract of active farmland, most recently planted in a soybean crop. CETAC alleges that erecting a casino on such land will entail a multitude of significant direct impacts, as indeed it appears it will. The area is currently zoned as farmland, and according to the EA would remain so for at least five to ten years but for the casino and its growth-accelerating affect.

Architectural plans for the casino have yet to be drawn; other than that it will "reflect Indian character and traditions" of the Tribe, little is known of its appearance. Whatever the appearance, however, it will ultimately consist of a structure totaling approximately 200,000 square feet, accommodating 1,200 to 1,400 slot machines and 60 gaming tables. Adjacent parking lots will provide parking for over 3,100 motor vehicles, including buses and recreational vehicles. Id. at 2960-61. The casino is expected to operate 24 hours a day, 365 days a year. Id. at 3038 At maturity it will generate over four tons of solid waste, and 90,000 gallons of waste

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[7] Although the latter premise is purportedly based upon "extensive gaming market analysis," that data does not appear elsewhere in the EA.

water per day. Id. at 3023-24.

CETAC submits that life in Emmett Township, a nearby community of 12,000 people, will be quite significantly changed by a massive casino building surrounded by over 27½ acres of pavement for parking, attracting an average of about 8500 visitors a day, or over two-thirds of the current permanent population of Emmett Township. At the least, the project will exponentially increase traffic: an anticipated 10,600 vehicle trips a day coming and going from the casino, will rise to almost 13,000 a day during July and August. Id. at 2981.

Defendants respond that such data actually attests to the sufficiency of the EA; CETAC, they say, is unable to point to any impacts that were not considered. The EA, they observe, is replete with discussion of such factors as traffic, noise, cultural resources, socioeconomic conditions, as well as potential changes in visual aesthetics and lighting. The Court agrees that the EA amply documents the type and number of direct impacts it discusses. What it finds most troubling is the absence of any convincing explanation or "evidence and analysis" for why these impacts are not to be regarded as significant.

For its conclusion that the casino's direct impacts will not be significant, the EA relies almost exclusively on the Emmett Township Master Plan, a non-binding forecast of future development created by land use planners, that predicts the area will experience such major commercial growth in the foreseeable future that the no-action alternative will in due course result in similar types of impacts as to render those wrought by the proposed casino of no consequence. See AR HURON01 at 2971, 2975, 2985, 2991, 2994, 3002, 3004, 3009, 3011-12, 3015, 3017. In other words, the defendants assert, the aggressive commercial growth envisioned by the Master Plan is inevitable, and will in time effectively reduce any incremental effects the casino might have produced by then to de minimis status. Although Emmett Township has a

population of only 12,000 today, it is only 3.5 miles from the City of Battle Creek with a population of 53,000, see id. at 2943, and thus "[t]he picture painted by CETAC is not accurate... the Tribe's casino is a consistent component of this development." Calhoun County Br. Amicus Curiae at 10.

The Secretary's reliance on the Master Plan is problematic in a number of ways. She is certainly entitled to consider local planning documents such as the Master Plan as evidence supporting her conclusion. Cf. City of Carmel-by-the-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1162 (9th Cir. 1997)(upholding use of a Master Plan in an EIS); Laguna Greenbelt v. United States Dep't of Transp., 42 F.3d 517, 526 & n.9 (9th Cir. 1994) (same). However, the Master Plan may not simply be invoked in a perfunctory manner as the principal justification for the EA's conclusions, not merely because it is both hypothetical and mutable, but because it does not by itself explain why a FONSI is warranted.[8]

The EA uses the Master Plan to gloss over impacts which the casino, qua casino, might cause, as well as the potential cumulative impacts, claiming that they will, in effect, be rendered inconspicuous over time by the development anticipated to occur naturally. There is scant analysis to support this conclusion.

For example, nowhere does the EA discuss with any specificity the amount or exact type of development the Master Plan envisions, but instead refers vaguely to generic "commercial development." It is unclear from the record whether the Master Plan itself even provides this

[8] See 40 C.F.R. § 1508.9(a)-(b) (requiring evidence and analysis for a FONSI); Cf. Coalition for Canyon Preservation, 632 F.2d at 782 & n.3 (EIS violated NEPA where it contained unsupported, conclusory statement that pollution would increase with or without project); City of Davis v. Coleman, 521 F.2d 661, 674-77 (9th Cir. 1975) (failure to prepare EIS violated NEPA where agency simply stated highway was accessory to inevitable industrial development)

information. It seems self-evident that a massive complex devoted entirely to around-the-clock commercial gambling and complementary diversions for a host of transient visitors is a unique species of "development" bearing little resemblance to shopping malls, auto dealerships, office buildings, and the like. Without a discussion of the type and quantity of development to occur naturally, the EA could not have looked at all the relevant information.[8]

The EA also does not adequately examine the transforming effect the casino might have on what follows after the casino is in operation, but before the expected other commercial development begins. Even if extensive development of some sort is inevitable, it seems that the casino will, for some period of time, be the dominant commercial activity in the area, perhaps permanently. Yet the EA omits any comparative analysis as to how casinos have affected the evolution of environs elsewhere. The type of commercial development the casino's presence is likely to precipitate may well be of a vastly different sort than that which the Master Plan envisions as the consequence of ordinary and gradual development.

The defendants were aware not only that such information would be relevant, but that it was also available. They examined data from a casino in California in connection with their calculations of noise the casino would generate. AR HURON01 at 2993. They also studied employment statistics from eight other Indian gaming enterprises already in operation elsewhere in Michigan, id. at 3006, and mention the fact that there are some 20 gambling facilities altogether in the state, in connection with a discussion of local crime rates. Id. at 3031-32. What

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[8] The EPA and BIA seem to have recognized this shortcoming in the EA when commenting on the EA in its draft form. Both agencies asked for additional proof in the final EA, including "specific examples" of other development and a "short list of commercial projects that are now in planning or have been constructed by someone else in the past few years. . . ." AR HURON02 at 0401. While the final EA claims to have included such examples in its introductory pages, in fact none are to be found.

may have been their cumulative effects otherwise upon the environment at any of these sites, however, or a comprehensive discussion of the aggregate of their environmental impacts, positive and negative, is nowhere to be found in the EA. Defendants attempt to downplay the significance of the casino's influence by arguing that the local authorities can control the pace of future development. However, local authorities' willingness and ability to closely control the course of future development is notoriously far from assured. Cf. Mullin v. Skinner, 756 F. Supp. 904, 921 (E.D.N.C. 1990) (noting lack of assurance that city authorities could control development).

Finally, the Court finds that in some instances the analysis leading to certain specific conclusions of the absence of significant impact is wanting. See AR HURON01 at 3035-40. Nowhere does it explain why. For example, with respect to the impact on geology and soils, the EA states: "[t]he [casino] is not expected to result in any substantial geotechnical hazards or impacts related to the construction of structures and parking lots . . . . Therefore, no significant cumulative impacts to local geology or soils or aquifers will occur." Id. at 3035-36. Or, in the discussion of hydrology and water quality, the EA dismissively finds that "[p]umping tests indicate that there will be no significant cumulative impacts to area groundwater levels as a result of the [casino]." Id. at 3035. What about these tests so indicates? Likewise, the discussion of traffic contains the following conclusory remarks: "The cumulative effect on traffic has been taken into consideration and it was concluded that the existing road system would be sufficient with minor improvements." Id. at 3036. No reasons are given. With respect to noise, the EA states: "[w]hen evaluated together with future projected increases in ambient noise in the vicinity, there will be some increase in noise, but it will probably not be measurable." Id. at 3036. How so?

IV.

CETAC raises a number of other alleged deficiencies in the EA. The Court finds that the Secretary sufficiently complied with the law and thus defers to her decisions on these matters. Assuming consideration of the other possible sites for the casino represents a sufficient universe of alternatives, the EA adequately discusses reasonable alternatives to the Sackrider Property. See City of Roseville, 219 F. Supp. 2d at 170 (citing Citizens Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991) (an EA is adequate with respect to alternatives "so long as the alternatives are reasonable and the agency discusses them in reasonable detail."). It adequately addresses mitigation by describing measures the Tribe will take, see City of Lincoln, 229 F. Supp. 2d at 1127, citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352 ("[b]ecause NEPA imposes no substantive requirement that mitigation measures actually be taken, it should not be read to require agencies to obtain an assurance that third parties will implement particular measures"). And it complies with the Farmland Protection Policy Act of 1981 (FPPA), 7 U.S.C. §§ 4201-4209, because, as required, it discusses the casino's impact on prime farmlands (though its explanation for why impact to such land is insignificant is lacking, as previously explained).

Conclusion

In accordance with the forgoing, it is, this 23rd day of April, 2004,

ORDERED, that defendants' motions to dismiss or for summary judgment are granted in part, and Counts II, III, and IV of the Complaint are dismissed with prejudice; and it is

FURTHER ORDERED, that the motions to dismiss Count I are denied; the Secretary is temporarily enjoined from taking the Sackrider Property into trust, and this action is remanded for further elaboration of the Environmental Assessment in the particulars noted, or in the

alternative, for preparation of an Environmental Impact Statement.

/s/
Thomas Penfield Jackson
United States District Judge