No. 17-15533

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITIZENS FOR A BETTER WAY, et al.,

Plaintiffs-Appellants,

v.

RYAN ZINKE, et al.,

Defendants-Appellees.

On Appeal From The United States District Court
For The Eastern District of California
Case No. 2:12-CV-03021

REPLY BRIEF FOR APPELLANTS

Brian Daluiso
Perkins Coie LLP
11988 El Camino Real
Suite 350
San Diego, CA 92130
Telephone: (858) 720-5781
Facsimile: (858) 720-5799

Benjamin S. Sharp
Jennifer A. MacLean
Perkins Coie LLP
700 Thirteenth Street, NW
Suite 600
Washington, DC 20005
Telephone: (202) 654-6200
Facsimile: (206) 654-6211

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

ARGUMENT

I

The Trust Decision Under the IRA Is Arbitrary and Capricious Because the Secretary Failed to Establish His Trust Authority

The parties agree that the Secretary's authority to acquire land in trust in this case rests on whether the applicant constituted a "tribe" under federal jurisdiction in 1934. Where the parties differ is whether: (1) the Secretary actually addressed this issue in the Trust Decision; and (2) whether a Section 18 vote under the Indian Reorganization Act (IRA) is sufficient to establish the existence of a "tribe." The answer to both questions is no.

Section 5 of the IRA authorizes the Secretary to acquire land in trust for "Indians." 25 U.S.C. § 5108. The Trust Decision bases the Secretary's authority to acquire land in trust on the first definition of "Indian" in Section 19 of the IRA. ER 114. The Secretary had to establish that the applicant tribe satisfied the definition as "members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129. The Supreme Court held that "the term 'now under Federal jurisdiction' in [Section 5129] unambiguously refers to those tribes that

were under the federal jurisdiction of the United States when the IRA was enacted in 1934." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009).

Citizens does not claim that the Secretary erred in concluding that those residing on a federal reservation in 1934 were "under federal jurisdiction" in 1934. That conclusion reasonably follows, and has not been challenged. No, the Secretary's error was failing to address the question of whether those adult Indians living on the Enterprise Rancheria constituted a "tribe." In other words, there are (at least) two components that must be established to meet the first definition of "Indian" in Section 19—(1) being "under federal jurisdiction"; and (2) the existence of a "tribe"—and the Secretary did not establish the latter.[1]

Appellees' attempts at misdirection cannot mask what is an obviously inadequate and incorrect analysis. The "calling of a Section 18 election at the Tribe's Reservation" cannot "conclusively establish[] that

[1] Section 19 uses the phrase "recognized Indian tribe." Although the D.C. Circuit has wrongly concluded that "recognized Indian" does not modify "tribe," this Court need not reach that issue, as the Secretary failed to determine whether the adult Indians at the Enterprise Rancheria were a "tribe" in any respect.

the Tribe was under federal jurisdiction for *Carcieri* purposes," because it only answers one question—whether the residents of a reservation were "*under federal jurisdiction*" for *Carcieri* purposes. *See* ER 115 (emphasis added). Appellees' post hoc efforts to fill the gap in the Trust Decision fail as a matter of statutory interpretation, historical practice, and settled standards of APA review.

A. Section 19's definition of "tribe" cannot justify the challenged Trust Decision

Federal Appellees argue [at 36] that "[t]he residents of a reservation voting in a Section 18 election are a 'tribe' through the application of Section 19's definition of 'tribe' for IRA purposes as 'Indians residing on one reservation.'" The Enterprise Tribe makes a similar argument. *See* Enterprise Tribe's Brief (Tr. Br.) at 21. This argument fails for several reasons.

1. This explanation does not appear in the Trust Decision. A court's "review of an agency['s] decision is limited to the reasoning articulated by the agency." *Love Korean Church v. Chertoff*, 549 F.3d 749, 754-55 (9th Cir. 2008) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). The Court cannot be "compelled to guess at the theory

underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive." *SEC v. Chenery Corp.,* 332 U.S. 194, 196-97 (1947). Because the Secretary did not construe the word "tribe" when he issued his decision, the Court cannot affirm the Trust Decision on that basis.

In fact, the inadequacy of the Secretary's explanation is highlighted by Federal Appellees' request [at 37] for deference, where they argue "[w]hile we believe that the IRA's definition of 'tribe' is unambiguous, this Court should give deference to the Secretary's interpretation to the extent this Court finds any ambiguity." The Secretary did not construe that portion of Section 19; litigation counsel did. In any event, federal decision-makers are required to interpret the statutes they are tasked with implementing *before* they actually implement them—not years later in litigation. *See Bresgal v. Brock*, 843 F.2d 1163, 1168 (9th Cir. 1987), as amended (Mar. 31, 1988) ("The Department did not construe [the statute] until the onset of this litigation. The Secretary's construction is entitled to no more deference than is the interpretation of any party to the suit.").

Federal Appellees are no more entitled to deference than they are permitted to rely on post-hoc justifications. The Trust Decision must itself be sufficient or be vacated.

2. Nor does the IRA's broad definition of "tribe" control or supersede the first definition of "Indian." *See e.g.*, Federal Appellees' Brief (Fed. Br.) at 36; Tr. Br. at 21. The Supreme Court in *Carcieri* rejected the argument Appellees now make: "the Secretary and several *amici* argue that the definition of 'Indian' in § [5129] is rendered irrelevant by the broader definition of 'tribe' in § [5129] . . . ," but "[t]here simply is no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's authority under §§ [5108] and [5129]." *Carcieri*, 555 U.S. at 393.

The definition of "Indian" that the Secretary relied on refers to "any recognized Indian tribe," and that definition controls the Secretary's authority to acquire land in trust here. The subsequent definition of "tribe" is not relevant to the issue of trust authority.

3. Appellees' arguments that a Section 18 vote establishes the existence of a tribe fail not only as impermissible post hoc justifications

and under *Carcieri*, but as a matter of statutory interpretation. Section 18 of the IRA provides that the "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). Thus, holding an election under Section 18 of the Act establishes only that there was land under federal jurisdiction that the United States deemed a "reservation," and that "adult Indians" lived on it when Congress enacted the IRA.

Indeed, if the definition of "tribe"—"the Indians residing on one reservation"—controlled in the manner Appellees suggest, every reservation where the Secretary held a vote would constitute a "tribe." Tribes would be creatures of geography, which is clearly incorrect as a matter of law and fact. As the Interior Solicitor stated in 1934, "A tribe is not a geographical but a political entity." Brief for Appellants, Addendum A-19, Attachment 1 at 478. Nor can Congress create a tribe where none has existed before. *See U.S. v. Sandoval*, 231 U.S. 28, 46 (1913) (holding Congress may not "bring a community or body of people within the range of [its] power by arbitrarily calling them an Indian

tribe"). But that is the consequence of Appellees' Section 18 election argument.

The "adult Indians" voting in a Section 18 election may have been members of a recognized Indian tribe, but they could have as easily qualified under a different definition of "Indian"—a descendant residing on a reservation or a person of one-half or more Indian blood. 25 U.S.C. § 5129. But the mere fact that adult Indians were living on a reservation does not establish that a "tribe" existed for purposes of the first definition of "Indian" in Section 19.

The history of the Rancherias in California, which were purchased for homeless Indians generally, helps to underscore the distinctions Congress was dealing with in 1934 and the necessity of having the Secretary provide a reasoned explanation in the first instance today. In most cases, Rancherias were created for homeless Indians living in a particular area, without significant restriction. ER 316. In discussing the demographics of the Rancheria system, a BIA official in 1978 concluded that "[i]n the majority of cases . . . the rancheria lands [were] occupied by Indian people without regard to the tribal affiliation of their ancestors." ER 306, 308. The Trust Decision does not address this issue;

nor do Appellees explain how holding a Section 18 vote automatically converts unaffiliated Indians into a tribe, let alone a "recognized Indian tribe."

That interpretation, in fact, leads to perverse results. It is nonsensical to interpret the Act as automatically creating "tribes" out of groups of adult Indians voting to reject the IRA under Section 18. But more importantly, such an interpretation undermines Indian sovereignty. Apart from the fact that the Secretary's interpretation would seem to create sovereign entities where none may have existed, the Secretary's interpretation would strip tribes of a fundamental attribute of sovereignty. "A tribe's right to define its own membership for tribal purposes has long been recognized as central to its existence." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978). Courts cannot infringe on a tribe's "sovereign power to define its own membership." *Williams v. Gover*, 490 F.3d 785, 791 (9th Cir. 2007). Yet Federal Appellees' argument does just that by making the "adult Indians" living on a reservation a "tribe," without regard to sovereignty or the bilateral nature of citizenship. *See* Cohen's Handbook of Federal Indian Law § 3.03[3], at 176 (2012) ("Tribal membership is a bilateral

relation, depending for its existence not only on the action of the tribe, but also on the action of the individual concerned.").

In 1934, the IRA authorized the "adult members of a tribe" *or* "the adult Indians residing on [the same reservation]" to organize for their common welfare and adopt a constitution, subject to Secretarial approval. June 18, 1934, ch. 576, § 16, 48 Stat. 987; Pub. L. 100–581, title I, § 101, Nov. 1, 1988, 102 Stat. 2938. The Enterprise Rancheria did not organize under Section 16, though other reservations did elect to organize under the Act. If Appellees' argument regarding the Section 19 definition of "tribe" were correct, however, it would render superfluous the language authorizing the "adult Indians residing on the same reservation" to organize under Section 16.[2]

Indeed, when Citizens raised [at 33-34] the history of the Quinault Reservation as an example of the problems Appellees' interpretation of

[2] Federal Appellees misrepresent M 27810 by saying the "Solicitor of the Interior explained in 1934" that "the IRA covered two kinds of tribes: groups recognized as tribes outside the IRA, and tribes newly recognized under Section 19's definition." Fed. Br. at 25. The Solicitor did not say that tribes could be recognized by Section 19's definition. Rather he explained that adult Indians residing on one reservation could elect under Section 16 to organize as a tribe—an election that the Enterprise Rancheria clearly did not make.

Section 18 creates, neither Enterprise nor Federal Appellees offered a cogent response. Although the Quinault, Chehalis, Chinook, and Cowlitz Indians all resided on the same reservation and collectively participated in a single Section 18 election, that election was not treated as establishing the existence of a "tribe." Citizens' Br. at 33. Federal Appellees responded [at 30] that the Section 18 election "did not foreclose the Quinault Tribe's ability to organize, or reorganize, under the IRA as a tribe that did not include the non-Quinault allottees." Of course it did not foreclose the Quinault because they were previously recognized as a tribe by treaty. But the point is that the Section 18 election *did not* establish that the variety of Indians living on the Quinault Reservation constituted a single "tribe" by virtue of the election. Federal Appellees admit as much when they argue [at 29] that the Quinault example is inapplicable because they claim there was no "multiple tribe problem" at the Enterprise Rancheria. The Trust Decision does not address who voted at the Rancheria, and the Section 18 election does nothing to resolve that deficiency. Given the demographics of California Rancherias, ER 306, 308, 316, and the historical documents in the administrative record, *see* Part I.B, *infra*,

the Secretary's failure to address this issue is an oversight that is fatal to his decision.

A Section 18 vote can no more transform individual Indians with no tribal affiliation into a tribe than it can transform Indians of different ethnological groups, such as those residing on the Quinault Reservation, into a single tribe. A Section 18 election does not establish the existence of a "tribe" under federal jurisdiction; it only establishes the presence of "adult Indians" under federal jurisdiction. And the two are not equivalent.

B. Appellees' other arguments in support of Enterprise's tribal existence in 1934 are not addressed in the Trust Decision and are inconsistent with the administrative record

1. Appellees' argument regarding the effect of a Section 18 election is contrary to past Department interpretations. As Federal Appellees have elsewhere conceded, "Nowhere in [Section 18] is there mention of a 'recognized tribe' voting on the IRA because the votes were conducted by reservation." ER 65. Eligibility to vote in a Section 18 election may have been based in some cases on tribal affiliation, but the Department has acknowledged that "other proofs of such right are

possible," including ownership of restricted property within the reservation and receipt of benefits from the Department. ER 376.

In fact, until the Trust Decisions for Enterprise and the North Fork Rancheria of Mono Indians—decided the same day—Federal Appellees never considered a Section 18 election to be held by "tribe," rather than by reservation as the plain language of the statute directs. Citizens' Br. at 28-31 (discussing M Opinions of the Solicitor, M 27810 and M 27796). And in neither decision did the Secretary acknowledge prior interpretations or explain his reasoning for deviating from them. *See Nat'l Cable & Telecom. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 1001 (2005) (holding that an agency may change its interpretation only if it "adequately justifies the change"). Under *Brand X*, the Secretary was required to justify his change, and because he did not, the decision must be vacated.

The three Interior Board of Indian Appeals (Board) decisions relied on by the Court below do not establish a consistent practice. In two of the cases Federal Appellees cite [at 34-35], the Board concluded that there were unique facts that established that a Section 18 election was offered to a specific tribe. In *Shawano County, Wisconsin. v. Acting*

Midwest Regional Director, the Board treated a Section 18 election as dispositive because the Tribe had been recognized by treaty and had lost lands through allotment. 53 IBIA 62, 64 (Feb. 28, 2011). Whether the Secretary had authority under the Act to hold an election in that situation was not challenged. The circumstances in *Village of Hobart, Wisconsin v. Midwest Regional Director*, were substantially similar. 57 IBIA 4, 10-12 (2013). The Section 18 election was dispositive there because that election was held on the basis of the long-standing legal relationship, which again included treaties, between the Tribe and the United States. No such analysis is available in the Trust Decision. In fact, the lack of an historical relationship comparable to those in *Hobart* and *Shawano* simply illustrates the necessity of evaluating the history of each applicant.

Nor does the third decision help. In *Thurston County, Nebraska v. Acting Great Plains Regional Director*, the Board *declined* to consider the County's arguments that the Tribe was not under federal jurisdiction in 1934 because the Board held that the County had waived those arguments. 56 IBIA 62, 71 (2012). The Board relied on *Shawano* in a footnote to observe that "[b]y including the Tribe among those

tribes for which such elections were conducted, the Secretary determined that the Tribe was under Federal jurisdiction at that time." *Id.* at 71 n.11. But the tribal affiliation issue was not squarely before the Board, and the Board did not review the history of the Tribe.

Because the Secretary did not rely on historical facts to establish that those voting at the Enterprise Rancheria constituted a tribe, rather than a group of "adult Indians" under another definition, these cases are of no help.

2. The Secretary did not conduct a factual inquiry in the Trust Decision to determine that the applicant Tribe was "a[] recognized Indian tribe . . . under Federal jurisdiction" in 1934. The calling of the Section 18 election is the sole explanation proffered, and it must stand on its own. *Love Korean Church*, 549 F.3d at 754-55; *Ry. Labor Execs. Ass'n v. I.C.C.*, 784 F.2d 959, 974 (9th Cir. 1986) ("When the agency fails completely to offer any justification for its decision, we would be overstepping our authority were we to rummage around in the record below to find a plausible rationale to fill the void in the agency order under review.").

Appellees, however, respond with several post hoc arguments that purport to arise from Enterprise's history. Federal Appellees argue [at 24] that the Secretary "implicitly" determined the Tribe existed in 1934, simply by referring to the applicant in the Trust Decision as a "tribe" or "members" of a tribe. They further argue [at 31] that the Secretary did not need to make a factual determination because the Tribe's existence was obvious through its connection to the Rancheria. Enterprise argues the opposite [at 23], claiming that the Secretary actually *did* conduct a historical inquiry into the Tribe's existence. These arguments fail.

The Secretary's authority to acquire the land was contingent on his finding that Enterprise existed as a tribe in 1934. Mere use of the term "tribe" in the Trust Decision does not qualify as a reasoned analysis to support such a determination. Reasoned decision-making requires the Secretary "to articulate a satisfactory explanation for [his] action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). A claimed inference from a single word is not an explanation or reasoning. And in the Trust

Decision, the Secretary connected no facts to this inference that the Enterprise Indians were a tribe in 1934.

According to the Federal Appellees [at 31], the "connection [between applicant and reservation] is obvious in most cases, as it is here." Citing a 2007 Board decision that is not referenced in the Trust Decision and which predates *Carcieri*, Federal Appellees argue [at 31] that the Board rejected the argument that Enterprise 1 and Enterprise 2 comprised different Indian groups: "in holding [a Section 18] election for one collective group of Indians residing on one reservation, the Department treated this group as a single Tribe" (citing *Edwards v. Pac. Reg'l Dir.*, 45 IBIA 42, 51 (2007)). *Edwards*, however, did not analyze whether the residents constituted a "tribe" under the definition of "Indian"; rather, the Board simply assumed that a tribe existed. It is therefore inconsistent with *Carcieri*'s holding that the definition of "tribe" cannot be divorced from a controlling definition of "Indian." *Carcieri*, 555 U.S. at 393. Whatever the Board may have concluded two years before the Supreme Court decided *Carcieri* is not dispositive here.

Moreover, *Edwards* does more harm than good for Federal Appellees' case. The Board reached the factual conclusion that

Enterprise Rancheria (both 1 and 2) was purchased for the use of individual Indian families, not for any tribal groups. 45 IBIA at 42-44. The Board also stated that the roll of eligible voters the Secretary prepared for the Section 18 election, "was not based on membership in different tribes or in distinct 'organized bands.' Instead the 'tribe' consisted of Indians residing on or near one reservation comprised of two parcels." *Id.* at 51. The Board did not find facts leading to the conclusion that either parcel was purchased for a tribe or that the Indians that voted under Section 18 were a tribe, and it expressly declined to consider the question, relying instead on the incorrect legal conclusion that the Indians who voted were a tribe because they resided on the same reservation. *Id.* at 51 n.15.

Unlike Federal Appellees, who argue that an historical inquiry was unnecessary, Enterprise goes so far as to assert [at 23] that the Secretary "*did* conduct a thorough 'historical inquiry' regarding the Tribe and its reservation." The string citation Enterprise offers, without explanation, contains a single historical document—the 1935 voter list for the Section 18 election, which was not based on tribal membership. SER 1; *see also Edwards*, 45 IBIA at 51 (finding the 1935 voter roll was

not based on tribal membership). The rest of the citation references either unsupported assertions by the Tribe in its own application materials, ER 207-08, 217, 293-95, SER 362 563-64, or the conclusory assertions of the Department in the Gaming Decision and the final environmental impact statement (FEIS). ER 173-75, SER 589-90 (Gaming Decision), ER 382-85, 387-89 (FEIS). The Secretary's regulations (25 C.F.R. §151.10(a)) require that he establish his trust authority in the Trust Decision. None of the facts above are discussed or even cross-referenced in Section C of the Trust Decision that seeks to establish the Secretary's trust authority. ER 114-15.

Central to Appellees' arguments is a statement in the Gaming Decision that the "Tribe has been recognized by the United States at least since April 20, 1915." Fed. Br. at 26 (quoting ER 174); Tr. Br. at 20, 22 (citing ER 173-75). There is no reference to this in the Trust Decision and no citation for this conclusion in the Gaming Decision. It seems to be based solely on Enterprise's three-paragraph summary of its history in its fee-to-trust application, ER 293-94, which was included without analysis in the FEIS, SER 393-94, and then repeated in the Gaming Decision, ER 174. Nowhere in the chain, however, is there any

reference to historical facts indicating such recognition. But whatever the basis for this statement in the Gaming Decision, the Secretary chose not to rely on it as a source of his authority in the Trust Decision, and the limited historical materials in the administrative record contradict such a conclusion. An agency decision, challenged under the APA, cannot be justified based on facts picked from the administrative record by the litigants or the court where those facts are not a part of the Secretary's reasoned basis for decision. *State Farm*, 463 U.S. at 43 (holding that the court must consider whether the agency considered the relevant factors and may not "supply a reasoned basis for the agency's action the agency itself has not given").

There is no evidence in the record that the 1915 census was a tribal census. Rather, the document states that it is a "[c]ensus of the Indians in and near Enterprise, in Butte County California" in July 1915. ER 387. Enterprise was the name of a construction camp built during the gold rush, and according to the census, fifty-one Indians were living in the camp's *vicinity* at the time. The census identified fourteen families, but did not indicate any relationship between families. *Id.* The census did not identify any of the fifty-one individuals

as members of a tribe. *Id; see also* ER 306, 308 (stating that California Rancherias were generally occupied by Indians with no tribal affiliations).

Despite Enterprise's assertion in its application materials that the two separate Rancheria parcels were purchased in 1915-16 for members of the Tribe, ER 293-94, the record demonstrates that the purchases were for two individual Indian families, not for any band or tribe. Enterprise 1 was purchased for the Walters family so that "[Emma Walters] and other Indians related to [her] may have a permanent home on this land." ER 384. Enterprise 2 was purchased for the Martin family so that "[Nancy Martin, her] son, George, and his entire family may have a permanent home on this land." ER 385. Additionally, the record indicates that the Enterprise Tribe has never held an interest in the Rancheria lands. Citizens' Br. at 37.

Finally, there is no indication in the record that anything changed between the 1915 census and the 1935 Section 18 election. Indeed, the Board in *Edwards* reached the same conclusion based on the record there. *Edwards*, 45 IBIA at 44 ("There is no information in the record concerning the Enterprise community of Indians over the next 20

years"). The sole record document contemporaneous to the Section 18 election, the voter roll, is a list of individual Indians with no mention of any Indian tribe. SER 1.

The Secretary did not rely on any fact other than the calling of a Section 18 election for the "adult Indians" residing at the Rancheria. Appellees' attempts to justify the decision on other grounds only further reveal the Trust Decision's flaws. The Court should hold that the Secretary lacked authority to acquire the Yuba Site in trust.

C. There is no basis for Appellees' claim that Citizens waived its challenge to the Secretary's trust authority

Citizens could not reasonably anticipate that the Secretary would choose to base his trust authority solely on a Section 18 election. The Secretary had never done so before, and his current interpretation of Section 18 is inconsistent with prior M Opinions of the Solicitor. Citizens' Br. at 28-31. And contrary to Appellees' assertions, Citizens raised the issue of whether the Enterprise Indians qualified for trust land with the Department during the administrative process with sufficient specificity to put the Secretary on notice.

In a March 6, 2009, letter, Stand Up for California! addressed comments to the Department that go to the heart of the issue here—whether Enterprise existed as a tribe in 1934:

> In 1994, the land based Rancheria Tribes were "administratively elevated" to the federal list of recognized Tribes. In the view of many, the Pacific Regional Office of the [Bureau of Indian Affairs] misconstrued the List Act Statute of 1994. Many of these groups organized as Tribes for the very first time . . . . Enterprise Rancheria is one such Tribal group.

SER 289. Stand Up expressed concern that the Indians of the Enterprise Rancheria became a tribe only recently—sometime well after 1934. Accordingly, Stand Up stated, just weeks after the *Carcieri* decision, that "[a]s a result the Enterprise Tribe . . . [is] vulnerable to the recent *Carcieri v. Salazar* ruling," which like this case, turned on whether the tribe satisfied the first definition of "Indian." *Id.* Stand Up unequivocally put the Secretary on notice that in light of *Carcieri*, the applicant did not qualify as an "Indian tribe . . . under Federal jurisdiction" in 1934.

Similarly, in a March 13, 2009, letter, Citizens stated, "On February 24, 2009 the Supreme Court *Carcieri* decision put even further concern over the validity of Enterprise Rancheria [sic] attempt

for a casino." SER 299. Citizens further noted that it was unclear whether the Tribe was in fact recognized as having a government-to-government relationship with the United States. *Id.* Citizens' comments also raised questions about whether the Secretary has the authority to acquire land under the IRA for Enterprise. *Id.*

The Federal Appellees are simply wrong to claim [at 24] that Citizens did not present "developed arguments challenging the Secretary's authority to take land into trust for Enterprise Rancheria during the subsequent three years before the IRA ROD was issued." They suggest [at 24] that the comment letters were insufficiently developed because the Secretary could not "anticipate in detail all of the arguments Citizens would subsequently make in this litigation," but Citizens is not required to be clairvoyant. Citizens could not predict the precise basis for the Secretary's decision, nor anticipate that the Secretary would invent a new theory for his trust authority that is inconsistent with the controlling M Opinions that existed prior to 2012.

To satisfy the exhaustion requirement, "a claimant need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue raised." *Lands*

Council v. McNair, 629 F.3d 1070, 1076 (9th Cir. 2010). A claimant fully satisfies the requirement "if the agency has been given 'a chance to bring its expertise to bear to resolve the claim.'" *Id.* (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002)). Courts in this circuit generally "will not invoke the waiver rule . . . if an agency has had the opportunity to consider the issue . . . even if the issue was considered sua sponte by the agency or was raised by someone other than the petitioning party." *Portland Gen. Elec., Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007).

Citizens raised questions regarding the Secretary's authority to acquire land in trust, raised the *Carcieri* decision, and referenced the history of the Rancherias. That is all that the law requires. There is no waiver here.

II

The Gaming Decision Violated IGRA by Failing to Ensure Necessary Mitigation Measures Would Be Implemented and Enforced

The Secretary determined that gaming at the Yuba Site would not be detrimental to the surrounding community, "*subject to the implementation of mitigation measures* identified in" the FEIS and the

Gaming Decision. ER 193 (emphasis added). Consistent with that determination, if the mitigation measures identified in the FEIS and the Gaming Decision are not implemented, gaming would be detrimental to the surrounding community.

Contrary to Enterprise's arguments [at 7, 25], the number of pages devoted in the FEIS to discussing mitigation is irrelevant if mitigation measures are never actually implemented. Without some mechanism for ensuring that the mitigation measures are implemented—e.g., enforcement or monitoring—the conclusion that gaming would not be detrimental to the surrounding community is not supported by the record. The issue here is not whether detrimental impacts *can* be mitigated, but whether they *will* be mitigated. If the necessary mitigation measures are not actually implemented, detrimental impacts will remain.

The problem of mitigation is unique in this context. Tribes are immune from suit, leaving detrimentally impacted communities powerless to force compliance. Tribes are not immune from actions filed by the United States, but the administrative record here establishes that the Department does not believe that it can enforce mitigation,

contrary to the litigation position Federal Appellees now adopt. The only way the Secretary can ensure implementation is to determine that the necessary mitigation is reliable and capable of being enforced. Citizens' Br. at 51-52. Many of the mitigation measures upon which the Secretary relied in the Gaming Decision do not meet these requirements, nor did the Secretary provide any plan to enforce the implementation of mitigation measures.

Accordingly, the determination that gaming at the Yuba Site would not be detrimental to the surrounding community is arbitrary and capricious.

A. Appellees do not refute Citizens' argument that the Secretary improperly relied on illusory mitigation

The Secretary violated IGRA by failing to implement enforceable mitigation to address the detrimental impacts of the casino. Citizens identified [at 46] the insufficiency of mitigation measures in several areas, including transportation and traffic, air emissions, flood control, and waste water. In regard to traffic impacts, in particular, Citizens demonstrated [at 47-50] that a number of the necessary mitigation measures—such as traffic impact fees, "fair share" payments, future

agreements with California Department of Transportation and other third parties—did not exist when the Secretary issued the Gaming Decision and cannot be compelled by the Secretary or the affected jurisdictions if they are not implemented.

Federal Appellees respond [at 40] that "Citizens does not challenge . . . the adequacy of the mitigation measures" and "instead speculates that the Tribe might not actually implement the mitigation measures." "The Tribe has represented that it will implement the mitigation measures," Federal Appellees argue [at 40], "and there is no reason to believe that the Tribe will not." Essentially, Federal Appellees' argument is that their decision is not arbitrary and capricious because they took Enterprise's word for it.

An unenforceable promise to mitigate impacts, or to develop third-party agreements to mitigate impacts, is not sufficient. Agencies generally are not permitted to rely on mitigation that is not "more than a possibility" or that will not be adequately policed when issuing findings of no significant impact, the consequence of which is less procedure. *See e.g.*, *Wetlands Action Network v. U.S. Army Corps of Eng'rs,* 222 F.3d 1105, 1121 (9th Cir. 2000) (citing *Greenpeace Action v.*

Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)). Yet here, where mitigation is the difference between a major casino and no development, the Secretary argues that Enterprise's promise suffices.

The Federal Appellees' reliance [at 40] on *City of Lincoln City v. U.S. Department of the Interior*, 229 F. Supp. 2d 1109, 1127 (D. Or. 2002), is misplaced. It is correct that the court in *Lincoln City* held that the Secretary was entitled to rely on the Tribe's representations regarding mitigation for purposes of an environmental assessment. But it did so where the stated purpose of the trust application was to develop the land consistent with a development plan the City had previously reviewed and approved. *Id.* at 1113. It was not a substantive finding under IGRA, which is obviously more significant. Moreover, the Department does not take the same position. Appellants' Further Excerpts of Record (FER) 002 ("If mitigation measures are required to keep impacts below a significant level, they must be made binding and enforceable.").

Federal Appellees' argument is particularly problematic, given the onus the Supreme Court has placed on potentially affected parties. In *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024 (2014), a

tribe opened a class III gaming facility on off-reservation fee land, which it contended qualified as "Indian land" under IGRA. *Id.* at 2029. The tribe built a casino and began to conduct gaming, prompting the State of Michigan to file an action to enjoin the tribe's illegal gaming. Although the Department agreed that the gaming was illegal, it refused to take action to stop the tribe's illegal gambling. *Id.* The Court held that Michigan could not sue the tribe because of the tribe's sovereign immunity. *Id.* at 2028.

The same problem arises here. If for any reason Enterprise does not to carry out the required mitigation, Citizens, the State and its subdivisions can do nothing; and under the Gaming Decision, the casino would be detrimental to the surrounding community. While Appellees note that tribes are not immune from suit by the federal government, Fed. Br. at 45 n.14; Tr. Br. at 28 n.5, they make no argument about what potential suit or enforcement action the federal government could bring against the Tribe for failing to implement necessary mitigation. And, as discussed below, none is set forth in the Gaming Decision. Moreover, in *Bay Mills*, the Secretary demonstrated an inclination not to take action against an illegal gaming operation. Federal Appellees

offer no argument or assurances as to how the situation here would be different, but merely state that Citizens' argument is somehow "speculation" and that Citizens should trust the Tribe and the Secretary.

The Enterprise Tribe misrepresents [at 31] Citizens' argument as follows: "Interior was required to find that the Project will not have any detrimental effects of any kind anywhere in the surrounding community." But that clearly is not Citizens' position. Rather, Citizens argues that where the Secretary has expressly found the casino will have a number of detrimental impacts—e.g., traffic, air emissions, flood control, and waste water—IGRA requires the Secretary to propose a plan to mitigate those specific detriments. Where the Secretary itemizes specific detriments, IGRA does not permit a finding that, on average, benefits may outweigh detriments, or that the Tribe or the Secretary will surely address any future problems. If IGRA means anything, it requires that the Secretary have a plan for enforceable mitigation of the specific detriments the Secretary has determined will follow if they are not mitigated.

Federal Appellees' argument that it is in the Tribe's own interest to mitigate [at 41], that the "casino would generate sufficient revenue to pay for the mitigation" [at 43], or that Yuba County, Marysville, and Caltrans have not challenged the no-detriment determination [at 44-46] is no response. The Secretary's failure to require enforceable mitigation means that the casino *might* not be detrimental to the surrounding community, not that it *will* not be detrimental, and that is not what the law requires.[3]

B. The Gaming Decision does not provide for enforcement of mitigation measures

Appellees argue that because the Gaming Decision "adopted" all mitigation measures identified in the FEIS, those measures are necessarily enforceable. Fed. Br. at 39, 43; Tr. Br. at 28. They also contend that both the Gaming Decision and the FEIS expressly provide for the enforcement of mitigation measures. Fed. Br. at 43-44. These positions cannot be supported.

---

[3] Also, the quibble that Citizens "incorrectly reads . . . the word 'necessary'" to mean needed, Fed. Br. at 41, n.13, does not undermine the point that the Secretary's "necessary mitigation" is needed in order to mitigate the detrimental effects that were identified by the Secretary.

According to the Federal Appellees, when an agency chooses to adopt mitigation measures as part of a decision, it must implement those measures, which are fully enforceable. Fed. Br. at 43 (citing *Pac. Coast Fed'n of Fishermen's Ass'n v. Blank*, 693 F.3d 1084, 1104 n.16 (9th Cir. 2012); 40 C.F.R. § 1505.3); *see also* Tr. Br. at 40. That position is directly contrary to the administrative record, where the Acting Deputy Secretary asked about who will monitor the situation subsequent to acquiring the land in trust, the enforcement mechanisms available to deal with non-compliance, and the inability of most of the community to ensure compliance. FER 002. The Secretary never addressed these concerns.

Moreover, reliance on case law under NEPA is misplaced. Under NEPA regulations, "[m]itigation . . . and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency." 40 C.F.R. § 1505.3.[4] But the means by which agencies implement such mitigation are not

[4] This regulation appears in Federal Appellees' Addendum at Add. 26.

applicable to actions involving fee-to-trust transfers for casino developments. The regulation directs the agency to condition grants, permits or other approvals, or funding on mitigation, or make monitoring publicly available. *See id.* § 1505.3(a)-(d). Those measures do not apply to lands acquired in trust.

In fact, once the Secretary makes a favorable two-part determination and acquires the land in trust, the only remaining requirement for gaming to occur is for the tribe and state to enter into a gaming compact, but the Secretary cannot reject a compact based on non-compliance with mitigation promises. *See* 25 U.S.C. § 2710(d)(1)(C). The Secretary may disapprove a compact "only if" it violates IGRA, other federal law, or the United States' trust obligations to Indian tribes. 25 U.S.C. § 2710(d)(8)(B). IGRA does not authorize the Secretary to condition compact approval on implementation of mitigation measures.

Appellees also point to language in the Gaming Decision and the FEIS, which gives lip-service to enforcing mitigation. The Gaming Decision states, "Where applicable, mitigation measures will be monitored and enforced pursuant to Federal law, tribal ordinances, and

agreements between the Tribe and appropriate governmental authorities, as well as this decision." ER 147-48. This statement was adopted from the FEIS's Mitigation, Monitoring, and Enforcement Program (MMEP). SER 501. But nowhere does the Gaming Decision or the MMEP provide for how federal law or the Gaming Decision itself may be used to enforce mitigation.

The MMEP may use the term "enforcement," but merely sets forth the mitigation measures, the entity responsible for monitoring each measure, the timing, and verification. SER 502. Nothing provides for a situation in which mitigation or monitoring fails to occur. Under the MMEP, the Enterprise Tribe *alone* is responsible for monitoring the majority of mitigation measures. And for mitigation measures involving traffic impacts, the Tribe shares monitoring obligations with Yuba County, the California Department of Transportation, and the City of Wheatland. SER 544-545. As discussed above, this mitigation cannot be compelled or enforced. Accordingly, the MMEP is more accurately characterized as a set of goals than an enforceable mitigation plan.

Contrary to Appellees' assertions, the Secretary's "adoption" of all mitigation measures identified in the FEIS does not establish that those

measures can be or will be enforced. And in determining that gaming at the Yuba Site would not be detrimental to the surrounding community, the Secretary discussed neither. Thus the Gaming Decision was arbitrary and capricious and should be rescinded.

CONCLUSION

For the foregoing reasons and those in Citizens' opening brief, the district court's judgment should be reversed, and the matter remanded with instructions to grant summary judgment to Citizens.

Respectfully submitted.

October 18, 2017

s/Brian Daluiso
Brian Daluiso, CSBA No. 287519
bdaluiso@perkinscoie.com
Perkins Coie LLP
11988 El Camino Real, Suite 350
San Diego, California 92130
Telephone: (858) 720-5781
Facsimile: (858) 720-5799

Benjamin S. Sharp
Jennifer A. MacLean
Perkins Coie LLP
700 Thirteenth Street, NW, Suite 600
Washington, DC 20005
Telephone: (202) 654-6200
Facsimile: (206) 654-6211

Attorneys for Plaintiffs-Appellants Citizens for a Better Way, Stand Up For California!, Grass Valley Neighbors, William F. Connelly, James M. Gallagher, Andy Vasquez, Dan Logue, Robert Edwards, and Roberto's Restaurant

Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-15533

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief.*

I certify that (*check appropriate option*):

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☒ This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.
The brief is [6794] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1) ☐ separately represented parties; (2) ☐ a party or parties filing a single brief in response to multiple briefs; or (3) ☐ a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the longer length limit authorized by court order dated [ ]
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R .App. P. 32(a)(5) and (6).

☐ This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

☐ This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.
The brief is [ ] words or [ ] pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant: s/ Brian Daluiso

Date: Oct. 18, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I hereby certify that on the 18th of October 2017, I have caused service of the foregoing Reply Brief for Appellants to be made by electronic filing with the Clerk of the Court using the CM/ECF System, which will send a Notice of Electronic Filing to all parties with an e-mail address of record, who have appeared and consent to electronic service in this action.

DATED: October 18, 2017

/s/ Brian Daluiso
Brian Daluiso