UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 18-16830

STAND UP FOR CALIFORNIA!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God – Madera and Dennis Sylvester,

Plaintiffs and Appellants,

v.

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

Defendants and Appellees.

United States District Court, Eastern District of California,
Case No. 2:16-CV-02681 AWI-EPG
Hon. Anthony W. Ishii

Appellants' Reply Brief

SNELL & WILMER L.L.P.
Sean M. Sherlock, SBN 161627
Todd E. Lundell, SBN 250813
Jing (Jenny) Hua, SBN 294984
600 Anton Blvd, Suite 1400
Costa Mesa, California 92626-7689
Tel: 714.427.7000
email: ssherlock@swlaw.com

Attorneys for Appellants STAND UP FOR CALIFORNIA!, Randall Brannon, Madera Ministerial Association, Susan Stjerne, First Assembly of God – Madera and Dennis Sylvester

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As required by Circuit Rule 28-2.7, except for those attached to the addendum following Stand Up's Reply Brief, all applicable statutes, etc., are contained in the addendums of Appellant Stand Up's Opening Brief [Dkt. 13] and Appellees' Answering Briefs [Dkt. 21 and 23].

Introduction

Courts have uniformly found IGRA's remedial scheme to be "finely-tuned," "carefully crafted and intricate," and "meticulously detailed." *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 73-74 (1996); *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998); *Texas v. United States*, 497 F.3d 491, 494 (5th Cir. 2007). Appellees here strain to read into this carefully-crafted scheme unnecessary internal inconsistencies, ambiguities, and conflicts with other federal laws. And they do so for the sake of allowing the Tribe and its financial partner to maximize profits through slot machine gaming, which was illegal in most states when IGRA was enacted. Contrary to appellees' arguments, the most natural reading of IGRA—consistent with its plain language and Congress's purpose of balancing state and

tribal interests—is that Congress intended to allow slot machines when operated with a state's consent pursuant to a Tribal-State compact, but not under Secretarial Procedures in the absence of the state's consent.

Additionally, Appellees read into IGRA an inflexible requirement that prevents the Secretary from conforming Secretarial Procedures to comply with other federal laws, including NEPA and the Clean Air Act. Appellees fall far short of demonstrating, however, that compliance with NEPA or the Clean Air Act is "impossible," which is the standard required to allow the Secretary to avoid his obligations under those laws. *Jamul Action Comm. v. Chaudhuri,* 837 F.3d 958, 965 (9th Cir. 2016) ("*Jamul*").

For the reasons stated in the opening brief and this reply, the district court's judgment should be reversed.

Legal Discussion

I

The Secretarial Procedures Violate the Johnson Act by Allowing Slot Machines

A. The plain text of IGRA and the Johnson Act precludes the use of slot machines where gaming is conducted under Secretarial Procedures

1. The Johnson Act broadly prohibits the use of slot machines

As the district court correctly noted, "[t]he Johnson Act is clear in its broad prohibition of sale, 'transport[ation], possess[ion], or use [of] any [slot machine] . . . within Indian country,'" and "provides no exceptions relevant here." [1ER at 10, citing 15 U.S.C. § 1175(a).] In enacting IGRA, Congress knew the limitations imposed by the Johnson Act and expressly provided an exception to the prohibition of slot machines when gaming is conducted under a Tribal-State compact. [1ER at 10.] But Congress did not provide an exception when gaming is conducted under Secretarial Procedures. Moreover, Congress knew how to create the full equivalent to a Tribal-State compact, as IGRA provides that a proposed compact selected by a court-appointed mediator and consented to by the state "shall be treated as a Tribal-

State compact . . . .” 25 U.S.C. § 2710(d)(7)(B)(vi). [See also 1ER at 10.] There is no similar language treating Secretarial Procedures as a Tribal-State compact. Thus, as explained in the opening brief (at I.A and I.B), the plain language of the Johnson Act necessarily precludes slot machines in casinos operating pursuant to Secretarial Procedures.

The North Fork Tribe derisively calls this interpretation a “negative inference.”[1] [See NF RB at 14, 21-2; see also BIA RB at 21-22.] Contrary to the Tribe’s argument, however, the statutory language governs not through any “inference,” but by its plain language—by prohibiting an activity unless an exception applies. “[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.” *Hillman v. Maretta*, 569 U.S. 483, 496 (2013); see also *Baldwin v. United States*, 921 F.3d 836, 843 (9th Cir. 2019) (finding it “reasonable to conclude that ‘Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.’”). There is no statutory exception to the Johnson Act’s prohibition

[1] Courts use the term “negative implication” or the canon *expressio unius*. See *Marx v. General Revenue Corp.*, 568 U.S. 371, 392 (2013).

of slot machines for gaming conducted under Secretarial Procedures, and none should be implied.

The Tribe's reliance on *Marx*, 568 U.S. 371 is misplaced. There, the district court awarded costs to the prevailing defendant in a Fair Debt Collection Practices Act case without making a finding of bad faith. *Id.* at 373-375, 380, n. 5. The plaintiff argued that because the Fair Debt Collection Practices Act permits an award of costs to defendant upon a finding of bad faith, costs may not be awarded to a defendant in the absence of such a finding. *Id.* at 381. The Supreme Court disagreed, holding the provision allowing costs to a defendant when the action is brought in bad faith does not limit the district court's broader authority to award costs to a prevailing defendant under Rule 54(d)(1). *Id.* at 381-382. The Court observed, "[t]he force of any negative implication . . . depends on context." *Id.* at 381.

In *Marx*, the context was that the district court generally has authority to award costs to a prevailing defendant unless a statute or rule provides otherwise, and the Fair Debt Collection Practices Act did not provide otherwise. *Id.* at 381-82. Here, the context is that slot

machines are broadly prohibited on Indian lands under the Johnson Act unless a statute provides otherwise, and IGRA does not provide otherwise where a casino operates under Secretarial Procedures. Given the absence of clear statutory language or Congressional intent to exempt Secretarial Procedures from the Johnson Act's prohibition, the decision in *Marx* provides no basis for doing so.

2. IGRA does not require the Secretary to allow every form of Class III gaming

The Tribe points out that IGRA "does not say anywhere . . . that secretarial procedures may not permit tribes to engage in all forms of class III gaming," and infers that Secretarial Procedures must necessarily permit tribes to engage in all forms of Class III gaming. [NF RB at 23.] The Tribe further contends that IGRA must allow the use of slot machines because IGRA: (1) "requir[es] the Secretary to prescribe procedures 'under which class III gaming may be conducted' without imposing any limitation on the type of class III gaming" and (2) "requir[es] secretarial procedures to be 'consistent with the proposed compact selected by the mediator.'" [NF RB at 23.] Neither of these provisions override the explicit prohibition of the Johnson Act.

a. When Congress authorizes "Class III gaming," it does not require that tribes be allowed to conduct *all forms of* Class III gaming

Congress's command that the Secretary prescribe procedures "under which class III gaming may be conducted" [25 U.S.C. § 2710(d)(7)(B)(vii)(II)] does not mean that such procedures must include *all forms of* Class III gaming. In *Rumsey Indian Rancheria of Wintun Indians v. Wilson* ("*Rumsey*"), 64 F.3d 1250 (9th Cir. 1994), this court held that although section 2710(d)(1)(B) authorizes "Class III gaming" under a Tribal-State compact, that statute does not require states to allow *all forms of* Class III gaming under such a compact. *Id.* at 1258. Indeed, IGRA does not even require the states to negotiate over all forms of Class III gaming, only those which are permitted by the state. *Rumsey*, 64 F.3d at 1255-56; see also 25 U.S.C. § 2710(d)(1)(B) ("Class III gaming activities shall be lawful on Indian lands only if such activities are . . . located in a State that permits such gaming for any purpose by any person, organization, or entity . . . .").

Because California has permitted slot machines under Tribal-State compacts with other California tribes, Section 2710(d)(1) requires

California to negotiate with tribes over slot machines. *Artichoke Joe's Cal. Grand Casino v. Norton*, 353 F.3d 712, 731 (9th Cir. 2003). That provision does not, however, require the state to *agree* to a compact that permits all forms of Class III of gaming, including slot machines. *Estom Yumeka Maidu Tribe of the Enter. Rancheria of Cal. v. California*, 163 F. Supp. 3d 769, 779 (E.D. Cal. 2016) (IGRA does not require a state "to negotiate with a tribe to conclude a compact, in the sense that there is no ultimate mandate that a [T]ribal-[S]tate [compact] be agreed upon"). If the state conducts negotiations in good faith, nothing prevents a state from negotiating any subject "directly related to the operation of gaming activities." 25 U.S.C. § 2710(d)(3)(C)(vii); *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, 602 F.3d 1019, 1032-1033 (9th Cir. 2010). A state may even negotiate unauthorized subjects so long as it makes a "meaningful concession" to the tribe. *Id.* at 1036-1037 (a "meaningful concession" that is "exceptionally valuable and bargained for" is evidence of good faith negotiation).

Congress's use of the term "a class III activity" in section 2710(d)(4) is further evidence that Congress envisioned that compact

negotiations may relate to specific types of Class III gaming, rather than *all forms* of Class III gaming. 25 U.S.C. § 2710(d)(4).

The point is, just as states are not required to permit all forms of Class III gaming despite statutory language generally allowing "Class III gaming" pursuant to a Tribal-State compact (§ 2710(d)(1)), neither is the Secretary required to permit all forms of Class III gaming simply because the Secretary must prescribe procedures "under which class III gaming may be conducted" (§ 2710(d)(7)(B)(vii)(II)).

Notably, while Congress authorized Class III gaming under Tribal-State compacts, it also saw the need to provide an express exemption to the Johnson Act for such compacts. 25 U.S.C. § 2710(d)(6). If, as the Tribe argues, Congress intended Class III gaming under IGRA to encompass all forms of Class III gaming (including slot machines), then Congress would have had no need to expressly exempt Tribal-State compacts from the Johnson Act. *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (statute should be construed to give effect to all provisions and to avoid superfluities).

Additionally, the Tribe's expansive argument ignores the fact that a Secretary could issue procedures that include only certain, but not all, Class III games and still fully comply with section 2710(d)(7)(B)(vii)(II). For example, if a Secretary prescribed procedures that allowed banked card games, but not slot machines, they would still be "procedures . . . under which class III gaming may be conducted." 25 U.S.C. § 2710(d)(7)(B)(vii)(II). The Tribe's argument that "class III gaming" necessarily means all forms of Class III gaming has no merit.

b. Appellees have not shown that the Secretary lacks flexibility to ensure procedures comply with other federal laws such as the Johnson Act

IGRA's requirement that Secretarial Procedures be "consistent with the proposed compact selected by the mediator" does not override the prohibitions in the Johnson Act as the Tribe argues. [NF RB at 24-28.] *First*, the Tribe's argument relies on factual assertions that are not supported by the administrative record—e.g. that slot machines are "the most common source of tribal gaming revenue or "the most prevalent form of class III gaming." [NF RB at 25, 28.] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29,

43 (1983) (holding the court may not "supply a reasoned basis for the agency's action that the agency itself has not given.").

Second, as Stand Up argued in its opening brief, IGRA's requirement that the Secretarial Procedures be "consistent with" the mediator-selected compact is not so inflexible as to prevent the Secretary from ensuring compliance with other federal laws such as the Johnson Act. [AOB at 41-48.] By adopting an unnecessarily cramped interpretation of the phrase "consistent with," both the Tribe's and the Federal Appellees' interpretation creates internal conflicts in the statutory language and conflicts with other federal laws. This court can avoid those conflicts by interpreting the phrase "consistent with" in a more flexible sense. *Asarco LLC v. Atl. Richfield Co.*, 866 F.3d 1108, 1125, n. 8 (9th Cir. 2017) (where possible, courts avoid construing statutes in a way that results in internal inconsistencies).

c. Appellees' interpretation of IGRA invites further abuse

This case presents an example of the potential abuse that can result when federal officers' hands are tied in the face of collusion by those who are not accountable to any branch of the federal government.

IGRA requires the mediator to "select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court." 25 U.S.C. § 2710(d)(7)(B)(iv). Thus, the mediator must select either the tribe's or the state's proposed compact and has no authority to modify either. Whether either or both of the proposed compacts run afoul of federal law is thus in the hands of the tribe and the state. Under Appellees' interpretation of IGRA, if the tribe and state both submit compacts that violate federal laws, nothing can be done.

While the Tribe finds it "[n]ot surprising[]" that both the Tribe's and the State's proposed compacts in this case included slot machines [NF RB at 26], the State's proposed compact ignored that the State's electorate overwhelmingly rejected the North Fork Tribe's compact authorizing a single casino with 2,000 slot machines. [3ER 267-68, 272.] The State's proposed compact submitted to the mediator, which allowed a larger project of two casinos and 2,500 slot machines, thus contravened the will of the electorate. [2ER 55, 74.] Moreover, the mediation process is not a public process, and lacks transparency beyond the mediator's written decision, which was less than two pages.

[2ER 54-55.] Thus, if the district court's opinion stands, it will enable states and tribes to collude behind closed doors to violate federal law. This certainly could not have been Congress's intent.

3. There is no need for this court to look beyond the statute's plain meaning

Where, as here, the plain meaning of a statute is unambiguous, the court need not look to the statute's purpose. *Rumsey*, 64 F.3d at 1258. *In Rumsey*, this court held that IGRA did not require the state to negotiate with the tribe over specific forms of Class III gaming, which included the use of slot machines, because those forms of Class III gaming were not permitted under California law. *Id.* at 1255-56. The Ninth Circuit refused to rehear the case en banc, despite concerns from the dissenting judges that the decision was a "near-nullification of IGRA," and "effectively frustrates IGRA's entire plan governing Class III Indian gaming." *Id*. at 1252-53. Here, as there, this court should defer to IGRA's plain meaning.

Nor was the district court correct in concluding that Stand Up's interpretation of the Johnson Act and IGRA produced an absurd result. [1ER at 11.] The Supreme Court has held that courts should depart

from the plain text of a statute in the face of a purported "absurd result" "only in rare and exceptional circumstances. . . . And there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187, 188, n. 33 (1978) (internal quotation marks omitted) (refusing to depart from language of Endangered Species Act where government required to spend millions to avoid the loss of a species of small fish). The Supreme Court has also emphasized time and time again that "when [a] statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Sebelius v. Cloer*, 569 U.S. 369, 381 (2013), citing *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). This court must defer to the plain language of IGRA's remedial structure, which was "meticulously detailed," "carefully crafted and intricate." *Seminole Tribe of Fla.*, 517 U.S. at 73-74; *Texas*, 497 F.3d at 494.

It is also notable that Stand Up's interpretation of IGRA, which would prohibit the use of slot machines in gaming conducted under Secretarial Procedures, allows for other types of Class III. And as

further explained in Section I.C, post, Congress did not envision that IGRA would allow for the use slot machines in most states because slot machines were illegal in most states at the time IGRA was enacted. See Robert N. Clinton, *Enactment of the Indian Gaming Regulatory Act of 1988: The Return of the Buffalo to Indian Country or Another Federal Usurpation of Tribal Sovereignty*, 43 Ariz. St. L J. 17, 87 (2010).

a. The Secretary's past practices do not change IGRA's plain meaning

No deference is due to the Secretary's past practices unless the statute remains ambiguous after applying the "traditional tool[s]" of statutory construction, including the "canon against reading conflicts into statutes . . . ." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (rejecting the agency's interpretation of federal labor statutes). "When confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." *Id.* at 1624 (citations and quotations omitted). "A party seeking to suggest that two statutes cannot be harmonized, and that one displaces the other, bears the heavy burden of showing a clearly expressed

congressional intention that such a result should follow." *Ibid.* (citations and quotations omitted). The Tribe's cases are in accord. *Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Daniel*, 439 U.S. 551, 566 (1979) (holding deference is constrained by clear meaning of statute and finding agency's position was neither longstanding nor within outer limits of its authority); *Frankl v. HTH Corp.*, 650 F.3d 1334, 1353 (9th Cir. 2011) (text of the statute reinforced by agency's longstanding practice).

Here, Appellees' contend the Secretary's past practices support their position that the Johnson Act does not apply to Secretarial Procedures. [NF RB at 40-41; BIA RB at 6.] Not so. First, 56 Fed. Reg. 24,671, 24,996 (May 31, 1991) does not, as the Tribe contends, support the conclusion that the "Secretary has consistently interpreted IGRA to permit gaming devices under secretarial procedures." [NF RB at 40.] There, the federal government responded to comments that "objected to the Secretary's decision to permit casino gambling on the Mashantucket Pequot Reservation," by reiterating that the Secretary must allow casino gambling on the Reservation where "the compact chosen by the mediator was proposed by the State of Connecticut and included casino

gaming." 56 Fed. Reg. at 24,996. The federal government's response did not reference gaming devices or slot machines, much less analyze whether they would violate the Johnson Act.[2] *Ibid*. Rather than show the Secretary could not make any modifications to the mediator-selected compact, 56 Fed. Reg. at 24,996 shows that the Secretary "made some modifications in the procedures . . . based on the State's views as to what is necessary to provide sound gaming procedures."

Second, although the Tribe cites to a past Secretarial Procedure for the Rincon Band of Luiseno Indians, which allowed for slot machines, there is no indication the application of the Johnson Act was even raised, much less analyzed. See, e.g, *Rincon Band of Luiseno Mission Indians of Rincon Reservation*, 602 F.3d at 1023; *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, No. 04CV1151 WMC, 2008 WL 6136699, at *1 (S.D. Cal. Apr. 29, 2008).

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[2] Nor would the Secretary have had reason to consider the Johnson Act. As the Tribe notes [at NF RB at 40], the Secretarial Procedures for the Mashantucket Pequot Tribe did not initially allow for slot machines because they were not permitted under Connecticut law.

Finally, the Federal Appellees cite 63 Fed. Reg. 3289, 3292 (Jan. 22, 1998) for the proposition that the "Department of the Interior has long articulated the view that, once they are issued, Secretarial procedures 'are properly viewed as a full substitute for' a tribal-state compact." [BIA RB at 6.] This "full substitute" position, however, was articulated as part of a proposed rule (25 C.F.R. Part 291) that courts later rejected as beyond the agency's authority to promulgate. The rules under Part 291 purported to allow the Secretary to issue Secretarial Procedures in the absence of any judgment finding that a state failed to negotiate in good faith. The Secretary viewed these rules as necessary because the Supreme Court had held that states could avoid such a judgment by asserting sovereign immunity from suit. *Seminole Tribe of Florida,* 517 U.S. at 44. But the Tenth Circuit invalidated the Part 291 rules, holding they overreached the agency's authority under IGRA, and the Secretary only has authority to issue Secretarial Procedures after a state is formally adjudged to have failed to negotiate a compact in good faith. *New Mexico v. Department of Interior*, 854 F.3d 1207, 1226 (10th Cir. 2017); see also *Texas*, 497 F.3d at 508-09. In short, the Secretary's statement that Secretarial Procedures "are properly viewed as a full

substitute for the compact" should be accorded no weight, as that statement was published in the Federal Register only as part of a larger contention regarding the Secretary's authority that proved incorrect.

b. The Indian canon of construction does not change IGRA's plain meaning

Finally, the "Indian canon of construction" does not change this result. [See NF RB at 39-41; DOI RB at 32] When there is doubt on the proper interpretation of an ambiguous provision enacted for the benefit of an Indian tribe, the canon calls for the provision to be interpreted to benefit the Indian tribe. *Artichoke Joe's*, 353 F.3d at 729. Application of the canon, however, requires the existence of an ambiguity in the statute, and does not apply where, as here, the presumption favoring tribes "would contradict the plain words of the statute." *Ibid.*, citing *Rumsey*, 64 F.3d at 1257.

B. Stand Up's reading of IGRA and the Johnson Act is consistent with IGRA's other provisions

Appellees contend that Secretarial Procedures "must provide the same scope of gaming that a tribe would be entitled to under a compact" because any other interpretation would make key provisions of IGRA

"nonsensical." [NF RB at 28.] Appellees focus on two IGRA provisions, which we address in turn.

1. Stand Up's reading of IGRA and the Johnson Act is consistent with Section 2710(d)(1)

Section 2710(d)(1)(C) provides that "[C]lass III gaming activities shall be lawful on Indian lands only if such activities are . . . conducted in conformance with a Tribal-State compact . . . ." Citing this provision, Appellees reason that if Secretarial Procedures were not the equivalent of a Tribal-State compact, Secretarial Procedures could not allow for Class III gaming. [NF RB at 28-29; see also BIA RB at 28-30.] Not so. As Stand Up explained in its opening brief (at 31-33), Section 2710 separately authorizes Class III gaming pursuant to a Tribal-State compact through subsection (d)(1), and Class III gaming pursuant to Secretarial Procedures in subsection (d)(7)(B)(vii). Under section 2710(d)(1), Class III gaming is prohibited on Indian lands without a Tribal-State compact. But Section 2710(d)(7)(B)(vii) specifically creates an exception allowing Class III gaming under Secretarial Procedures. Additionally, section 2710(d)(7)(B)(iv) creates an exception when the

State consents to the mediator-selected compact. There is no need to "harmonize" these two provisions.

As Stand Up also explained in its opening brief (at 33), Stand Up's reading of IGRA is consistent with the "well-established" canon of statutory interpretation that the "specific governs the general," which is "perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). Here, IGRA's specific remedial process, which explicitly allows for Class III gaming according to Secretarial Procedures, is the exception to the general rule that Class III gaming be allowed only pursuant to a Tribal-State compact.

2. Stand Up's reading of IGRA and the Johnson Act is consistent with 18 U.S.C. § 1166

Nor does Stand Up's reading of the statutes conflict with 18 U.S.C. § 1166, also known as Section 23. Section 23 makes violations of a state's gambling laws in Indian country into violations of federal law,

subject to exceptions for class I or II gaming regulated by IGRA, and Class III gaming conducted under a Tribal-State compact. 18 U.S.C. § 1166(a)-(c). Section 23 also gives the federal government "exclusive jurisdiction over criminal prosecutions of violations of State gambling laws" made applicable under Section 23. 18 U.S.C. § 1166(d); see also *Spokane Tribe of Indians*, 139 F.3d at 1299 ("A different section of IGRA [Section 23] makes it a federal crime to violate state gambling law in Indian country unless authorized by a compact. *See* 18 U.S.C. § 1166. Only the federal government, not the state, may enforce this provision.").

The Supreme Court has held that California has no regulatory jurisdiction over gaming on Indian lands—only criminal jurisdiction. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987). "As a response to the *Cabazon* decision, Congress enacted IGRA as a means of granting states some role in the regulation of Indian gaming." *Artichoke Joe's*, 353 F.3d at 715. "Through the IGRA, Congress has permitted the states to negotiate with the tribes through the compacting process to shape the terms under which tribal gaming is conducted. The states have no authority to regulate tribal gaming under

the IGRA unless the tribe specifically consents to the regulation in a compact." *Wyandotte Nation v. Sebelius*, 337 F. Supp. 2d 1253, 1257 (D. Kan. 2004), vacated in part on other grounds, 443 F.3d 1247 (10th Cir. 2006). Thus, when a state and tribe agree to Class III gaming pursuant to a Tribal-State compact and thus agree to the state's ability to regulate gambling, there is no need for the state's gambling laws to be coopted by the federal government or for the federal government to have exclusive jurisdiction. See 18 U.S.C. § 1166(c)(2). In contrast, where a state has not consented to a tribe conducting Class III gaming, and Secretarial Procedures are prescribed, under 18 U.S.C. § 1166(a) the federal government will coopt the state's gambling laws as its own and 18 U.S.C. § 1166(d) provides that the federal government will have exclusive jurisdiction over prosecution of the state's gambling laws. Because Secretarial Procedures must be consistent with "the relevant provisions of the laws of the State," conflicts between Secretarial Procedures and Section 23 are avoided. 25 U.S.C. § 2710(d)(7)(B)(vii)(I).

The Tribe argues that because California law prohibits Class III gaming without a compact, Section 23 would bar all Class III gaming under Secretarial Procedures unless those procedures are equivalent to

a compact. [NF RB at 24-26.] The Tribe's argument cuts against its earlier assertion that the phrase "consistent with" in section 2710(d)(7)(B)(vii)(I) does not allow the Secretary to make substantive modifications to the mediator-selected compact. If "consistent with" leaves no room for substantive deviation, then because IGRA also requires Secretarial Procedures to be "consistent with" California law, which allows Class III gaming only pursuant to a Tribal-State compact, the Tribe's argument would require Secretarial Procedures to bar all Class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vii)(I); Cal. Const., art IV, § 19(f). Secretarial Procedures undeniably override the absence of a compact, and the Tribe's argument once again seeks to inject conflict into the statute.

Further, if Congress intended Secretarial Procedures to be equivalent to a Tribal-State compact, then the exception in section 1166(c)(2) for Tribal-State compacts must also apply to Secretarial Procedures. 18 U.S.C. § 1166(c)(2). As a consequence, upon the issuance of Secretarial Procedures, the federal government would lose exclusive jurisdiction over gaming even though the state rejected its opportunity

to compact and the Secretarial Procedures are issued by a federal officer rather than the state. 18 U.S.C. § 1166(d). *That* would be nonsensical.

C. Stand Up's reading of IGRA and the Johnson Act is also consistent with IGRA's purpose

Although this court need not look to IGRA's purpose or history (*Rumsey*, 64 F.3d at 1258), both support Stand Up's position. IGRA's purpose was two-fold—to promote "tribal economic development, self-sufficiency, and strong tribal governments" (25 U.S.C. § 2702(1)) and "as a means of granting states some role in the regulation of Indian gaming" in the wake of the *Cabazon* decision. *Artichoke Joe's,* 353 F.3d at 715.

The Tribe's argument (at 33) that Stand Up's eviscerates IGRA's remedy for tribes acknowledges only the first of IGRA's purposes, but ignores IGRA's intent to enable states to regulate tribal gaming. See *Spokane Tribe of Indians*, 139 F.3d at 1298 ("[IGRA] gave states considerable say over gambling in Indian country, but [IGRA] was not an unmitigated defeat for tribes. Rather the law closely balanced the interests of states and tribes.") As this court has recognized, "IGRA shifted power to the states—a major blow to tribal interests," and

represents a "carefully-crafted scheme balancing the interests of the tribes and the states." *Id*. at 1299-1300.

IGRA's legislative history confirms that Congress's purpose was to balance the interests of tribes and states. See, e.g., 134 Cong. Rec. 23883, at 24024 (1988). Senator Reid of Nevada was "particularly active during the debate over S. 555" and "concerned about the relationship of the bill to the Johnson Act prohibitions on gambling devices." Clinton, 43 Ariz. St. L J. at 88.[3] He requested Senator Inouye, the bill's sponsor, confirm that IGRA would provide only a "limited waiver" to the Johnson Act when a compact is formed. *Id*. Senator Inouye confirmed the bill, consistent with the report by the Senate committee, "would not alter the effect of the Johnson Act except to provide for a waiver of its application in the case of gambling devices operated pursuant to a compact" and was "not intended to amend or otherwise alter the Johnson Act in any

[3] Appellees have not addressed this source, which was cited in Stand Up's opening brief (at 40).

way." *Id*. at 88-89.[4] That confirmation satisfied Senator Reid, who had strongly opposed the expansion of Indian gaming. *Id*. at 89.

Contrary to the Tribe's argument that Stand Up's interpretation would enable a state to veto slot machine gaming without any consequence [NF RB at 36], the consequence is that the state loses jurisdiction and the ability to regulate gaming under Secretarial Procedures. On the other hand, the ability to operate slot machines under a Johnson Act exception provides tribes incentive to reach a compact with the state.

As Stand Up explained in its opening brief (at 37-41), Congress's choice to waive the Johnson Act only when states explicitly approve the use of slot machines in a compact comports with the its attempt to

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[4] Courts have recognized these types of statements by the bill sponsor during the hearing colloquy are among "the most authoritative and reliable materials of legislative history." *Disabled in Action of Metro. N.Y. v. Hammons*, 202 F.3d 110, 124 (2d Cir. 2000). Moreover, those comments are not contradicted by reports of both Houses and statements from other Congressmen as in *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979). And unlike in *Consumer Prod. Safety Comm'n v. GTE Sylvania*, Inc., 447 U.S. 102, 118 (1980) where a congressman made statements after the law was already in effect, Senator Inouye's statement was made during a debate on the floor of the Senate.

"balance the interests of tribal governments, the states, and the federal government." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1548 (10th Cir. 1997). At a time when Nevada was one of only a few states that allowed slot machines, its senator exacted a confirmation from the bill's sponsor, on the record, that IGRA's waiver of the Johnson Act would be "limited" and would not "amend or otherwise alter the Johnson Act in any way." 134 Cong. Rec. 23883, at 24024 (1988); see also Clinton, 43 Ariz. St. L J. at 87. In other words, Congress intended exactly what the plain language of IGRA says—that the Johnson Act's prohibition on slot machines is waived only when the states specifically consent through a compact.

D. Courts' application of the Johnson Act to Class II gaming has no bearing on its application of the Johnson Act to Class III gaming

Appellees' citation to case law regarding the Johnson Act's application, or rather lack of application, to Class II gaming is inapposite. [NF RB at 37-38; Federal RB at 29]. In *Seneca-Cayuga Tribe of Oklahoma v. National Indian Gaming Commission*, 327 F.3d 1019 (10th Cir. 2003), the Tenth Circuit held that technological aids to non-bingo Class II games such as pull-tabs are exempt from the Johnson

Act. *Id*. at 1032. In so holding, the Court cited to a passage of congressional report that stated it was the "Committee's intent that with the passage of [IGRA], no other Federal statute, such as those listed below [including the Johnson Act] will preclude the use of otherwise legal devices used solely in aid of or in conjunction with bingo or lotto or other such gaming on or off Indian lands." *Id*. at 1033.

In *United States v. 103 Electronic Gambling Devic*e, 223 F.3d 1091, 1099, 1101-1102 (9th Cir. 2000), this court held the Johnson Act does not apply to electronic bingo aids where IGRA's definition of Class II gambling device explicitly included "bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)" at §2703(7)(A)(i)). The court thus concluded that the "[t]he text of IGRA quite explicitly indicates that Congress did not intend to allow the Johnson Act to reach bingo aids." *Id*. at 1101.

The relevant issue in the Tribe's final case, *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), was whether electronic pull-tab machines were Class III games. *Id*. at 542-53. Although the court muses electronic pull-tab machines could only be

operated pursuant to a compact or Secretarial Procedures if they were Class III games, its musing is dicta at best. *Id*. at 542. There was no compact, and no indication of any Secretarial Procedures. *Id*. at 537. Nor did the court even consider the existence, much less the effect, of the Johnson Act.

This court has recognized, however, that Congress intended to treat Class II and Class III gaming different. As this Circuit noted in *Rumsey*:

> [Congress] intended that tribes have "maximum flexibility to utilize [Class II] games such as bingo and lotto for tribal economic development," S.Rep. No. 466, 1988 U.S.C.C.A.N. at 3079, and indicated that Class II gaming would be conducted largely free of state regulatory laws. *Id*. at 3079, 3082. Congress was less ebullient about tribes' use of Class III gaming, however, and indicated that Class III gaming would be more subject to state regulatory schemes.

64 F.3d at 1259.

II

The Secretary Violated Both NEPA and the Clean Air Act

A. The Secretary did not comply with NEPA

1. The issuance of Secretarial Procedures is a major federal action requiring compliance with NEPA and not excused by the "Rule of Reason"

In arguing the issuance of Secretarial Procedures is not a major federal action subject to NEPA, Appellees do not deny that the Tribe cannot conduct Class III gaming at the Madera Site without authorization under the Secretarial Procedures. Nor do they deny that the Secretarial Procedures approved a larger casino project than that analyzed in connection with the earlier two-part determination and fee-to-trust transfer. Appellees instead conflate the question of whether the Procedures constitute a major federal action with the question of whether the rule of reason exempts Secretarial Procedures from NEPA. [See NF RB at 42.]

In any event, Appellees do not dispute that *if* the Secretary has discretion to make any changes to the Secretarial Procedures to address environmental concerns, then the prescription of Secretarial Procedures is subject to NEPA and the Secretary's failure to comply with NEPA

would not be excused by the "Rule of Reason." Both cases cited by Appellees—*Department of Transp. v. Public Citizen*, 541 U.S. 752 (2004) (*Public Citizen*) and *Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015) (*Alaska Wilderness*)—turn on the court's finding that the agency had "no ability to prevent" the environmental effects of its action. *Public Citizen*, 541 U.S. at 770; *Alaska Wilderness*, 788 F.3d at 1225; see also NF RB at 44.

In contrast, the remedial scheme of IGRA requires the Secretary to "prescribe . . . procedures . . . which are consistent with" the mediator-selected compact, IGRA, and relevant state laws and "under which class III gaming may be conducted." 25 U.S.C. § 2710(d)(7)(B)(vii)(I). This provision does not present the Secretary with a binary decision of approving or rejecting the mediator-selected compact. Indeed, IGRA requires the Secretary exercise discretion in prescribing procedures to make sure that the resulting procedures are "consistent with" not only the mediator-selected compact, but also IGRA and state laws. Appellees interpret section 2710(d)(7)(B)(vii)(I), through negative implication, to mean the Secretary may not consider anything other than the items listed, even though nothing in IGRA prohibits the

Secretary from considering NEPA, the Clean Air Act, or any other federal laws.

The central question thus remains whether the Secretary had any discretion to make any changes to the Secretarial Procedures in order to address environmental concerns. It did.

a. The Secretary can prescribe Secretarial Procedures that comply with NEPA without deviating from gaming terms proposed by the Tribe and chosen by Mediator

Even if this court accepts the Tribe's assertion that the Secretary "has 'no ability categorically to prevent' class III gaming or choose among alternative gaming projects based on environmental or other consideration" [NF RB at 46], the Secretary could still comply with NEPA. "Alternatives" need not be limited to alternative gaming proposals, but can include mitigation measures. 40 CFR § 1508.25(b)(3). The Tribe fails to even acknowledge the possibility of mitigation measures, much less explain why the Secretary could not require them. [AOB at 48.] As we explained in our opening brief (at 46), the Secretary could have required mitigation of emissions and other environmental impacts. 40 CFR §§ 1502.14(f), 1502.16(h), 1508.25(b)(3). Mitigation

need not affect gaming, and may involve repairing, rehabilitating or restoring the affected environment, or replacing or providing substitute resources or environments. 40 CFR § 1508.20(c), (e). Mitigation may also be implemented by including appropriate conditions in grants, permits, or other approvals. 40 CFR § 1505.3(a). NEPA requires the agency to summarize in its Record of Decision "whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not," and summarize its monitoring and enforcement program for mitigation measures. 40 CFR § 1505.2(c). Thus, the Secretary could have complied with federal law while issuing procedures that were "consistent with" the mediator-selected compact.

b. There is no "irreconcilable and fundamental conflict" between NEPA and the IGRA provision governing Secretarial Procedures

The Rule of Reason does not excuse compliance with NEPA because there is no "irreconcilable and fundamental conflict" between NEPA and the IGRA provision governing the prescription of Secretarial Procedures. Appellees' reliance on *Jamul* is misplaced.

In *Jamul*, this court held that the National Indian Gaming Commission was not required to comply with NEPA before it approved an Indian tribe's gaming ordinance. 837 F.3d at 965. This court recognized, however, that it has been "reticent to find a statutory conflict between NEPA and other provisions of the U.S. Code" in light of "Congress's intent that NEPA apply broadly." *Id.* at 964. This court nevertheless reasoned that because IGRA required the NIGC to approve a gaming ordinance or resolution no later than 90 days after submission, and it is "impossible" for an EIS to be prepared in 90 days, there was an "irreconcilable and fundamental conflict" between IGRA and NEPA. *Id.* at 963, 965. Such an irreconcilable and fundamental conflict does not exist here, however, because—unlike in *Jamul*—there is no "unyielding statutory deadline for agency action." *Id.* at 964; see also, e.g., *Forelaws on Bd. v. Johnson*, 743 F.2d 677, 683 (9th Cir. 1984) (NEPA compliance required when agency, not Congress, imposes a deadline).

The Tribe asserts that NEPA conflicts with "IGRA's remedial scheme" because it "is designed to permit a tribe to game 'on an expedited basis' if it prevails against a state in remedial litigation." [NF

RB at 52, citing *Rincon Band*, 602 F.3d at 1041.] This citation to *Rincon Band* is merely dicta, in a decision about whether IGRA's good faith requirement "is to be evaluated objectively or subjectively." *Rincon Band*, 602 F.3d at 1041. Indeed, *Rincon Band* dealt with the legality of the state's demand for payments in renegotiating an existing Tribal-State compact and had nothing to do with the remedial scheme. *Id*. at 1022. To the extent the court in *Rincon Band* perceived IGRA to require approval of gaming "on an expedited basis"—language that does not appear in IGRA—it was not at the expense of violating other federal laws.

The North Fork Tribe also cites the timeline of the remedial scheme, which provides 60 days for the tribe and state to conclude a compact once a court finds that the state has not negotiated in good faith (25 U.S.C. § 2710(d)(7)(B)(iii)), 60 days for the state to consent once a mediator selects a compact (25 U.S.C. § 2710(d)(7)(B)(iv-vii)), and 45 days for the Secretary to approve a compact selected by the mediator and consented to by the state (25 U.S.C. § 2710(d)(8)(C)). But notably, as Appellees are forced acknowledge [NF RB at 54; BIA RB at 42], Congress provided no deadline in which the Secretary must prescribe

procedures. See 25 U.S.C. § 2710(d)(7)(B)(vii). Stand Up does not dispute that the Secretary need not comply with NEPA had the state consented to the mediator-selected compact. [NF RB at 53.] That is because IGRA provides a 45-day deadline for the Secretary to approve a mediator-selected compact that has been consented to by the state. 25 U.S.C. § 2710(d)(8)(C). Such a compact would thus fall squarely into the holding of *Jamul*.

The disparate treatment of compacts consented to by the state and Secretarial Procedures prescribed by the Secretary makes sense. The former is a product of consent. The latter is forced on a state. It is not unreasonable for Congress (and therefore IGRA) to treat the two differently, and it is not for the courts to recalibrate IGRA's "finely-tuned balance between the interests of the states and the tribes." *Spokane Tribe of Indians*, 139 F.3d at 1301.

2. The previous EIS did not satisfy the Secretary's NEPA obligation

The previous EIS did not satisfy the Secretary's NEPA obligations in connection with the Secretarial Procedures because: (1) the Secretary expressly disclaimed any reliance on the prior EIS [3ER 273]; and (2)

the Secretarial Procedures approved a larger casino project than considered in the previous EIS. [Compare 2ER 211] (single casino with a single "247,180 square foot gaming and entertainment facility") and 3ER 289 (up to two gaming facilities with no explicit size limitation.]

Appellees cite 43 CFR § 46.120(c) in support of their argument that the earlier EIS suffices, but that regulation underscores exactly why the earlier EIS does not suffice. That regulation specifically limits the agency's reliance on an earlier EIS to situations in which "the Responsible Official determines, with appropriate supporting documentation," that it adequately assessed the environmental effects of the proposed action. It requires a "record" that must contain an evaluation of whether there are new circumstances, new information, or "changes in the action" not previously analyzed. Here, the Secretary cannot rely on the earlier EIS because he did not comply with any of these necessary requirements.

The Secretarial Procedures also cut against reliance on the previous EIS. The Secretarial Procedures provide: "Before the commencement of any Project . . .other than the Preferred Alternative

[i.e., the project evaluated in the earlier EIS] . . . the Tribe shall cause to be prepared a comprehensive and adequate tribal environmental impact report (TEIR) . . .” [3ER 349.] At page 57, footnote 11 of its brief, the Tribe argues that it does not have plans for a second facility, and acknowledges the Secretarial Procedures require the Tribe to prepare a tribal environmental impact report before doing so. Thus, the Tribe effectively concedes the Secretarial Procedures permit an expanded project beyond the scope of what was contemplated in the previous EIS. And the agency may not delegate NEPA compliance to the applicant. See *State of Idaho v. I.C.C.*, 35 F.3d 585, 595 (D.C. Cir. 1994).

3. The Secretary’s modification of the mediator-selected compact was substantive and not required by IGRA

Appellees continue to assert the Secretary had no discretion to modify the mediator-selected compact to comply with NEPA, despite that the Secretary in fact modified that compact in other respects by allowing the State to opt-in to regulate gaming rather than impose regulation on the State. [Compare NF RB at 27, n. 5 and BIA at 40-42.] The Tribe contends, in a footnote, that the modification was “procedural” and necessary to comply with IGRA without mentioning

the Secretary's past practice of amending procedures by, among other things, adding limitations to the size of casinos. [NF RB at 27, n. 5, AOB at 62-63.] The Federal Appellees also contend modification was necessary to comply with IGRA, but argue the Secretarial Procedures issued to govern gaming by other tribes did not "intend[] to minimize the environmental impacts of gaming on a parcel." [BIA RB at 41.] Neither of these justifications should lead the court to conclude the Secretary had no discretion to comply with NEPA.

First, the Secretary's modification to the procedures in this case was indeed substantive—it gives the State jurisdiction over the Tribe's gaming where it otherwise would have none. *Cabazon Band of Mission Indians*, 480 U.S. at 209.

Second, as Stand Up made clear in its opening brief (at 58-61), nothing in IGRA provides that a state cannot be compelled to take "*any* gaming-related action with respect to an Indian tribe." Appellees adopt the district court's unsupported leap that because a state cannot be

compelled to *negotiate*[5] with an Indian tribe toward entering a compact, that it cannot be compelled to take *any* action. Again, the prohibition against such compelled action comes from the Tenth Amendment's prohibition against anti-commandeering, not IGRA. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475-77 (2018). Here, Stand Up does not ask the Secretary to commandeer the State for any purpose, but only to take action to comply with NEPA.

Third, the Federal Appellees attempt to distinguish the Secretary's past practice of deviating from the mediator-selected compact by noting that no changes were made to avoid environmental impacts. But there is no reason why the governing statutes should be interpreted to allow the Secretary authority to make a host of modifications,[6] except those modifications necessary to comply with the Johnson Act or environmental protection statutes.

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[5] Stand Up ignores for the moment that the district court's premise is false. Although IGRA does not compel states to enter a compact, it *does* compel states to negotiate. *Estom Yumeka Maidu Tribe*, 163 F. Supp. 3d at 779

[6] Changes made include those to correct errors, clarify terms, and make substantive changes (such as limiting the size of a casino). See AOB at 62-63.

B. The Secretary did not comply with the Clean Air Act

Stand Up included its Clean Air Act arguments with its NEPA arguments because the district court relied on the same reasoning—that the Secretary lacked the ability to deviate from the mediator-selected compact—to conclude that Clean Air Act compliance was impossible. [1ER at 23.] For the reasons stated in Section II.A, there is likewise no fundamental conflict between IGRA and the Clean Air Act. Under the Clean Air Act, the conformity regulations require mitigation by, among other options, acquiring emissions offsets. 40 CFR § 93.158(a)(2), 93.160. Thus, compliance with the conformity regulations need not affect the gaming proposed in the mediator-selected compact. Moreover, the Tribe acknowledges that compliance with the Clean Air Act could be completed in "several months." [NF RB at 58.]

The Federal Appellees contend that IGRA predates section 176 of the Clean Air Act, suggesting that the Clean Air Act's failure to make specific requirements to IGRA is a relevant factor. [BIA RB at 45, citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976).] But unlike in *Radzanower*, where the two statutes contained conflicting venue

provisions (*id.* at 149-50), only one statute here governs conformity determinations—the Clean Air Act.

Finally, in arguing that the conformity determination regulations for the Clean Air Act exempt "[r]ulemaking and *administrative adjudications*," the Federal Appellees misquote 40 CFR § 93.153(c)(2)(iii). [BIA RB at 45 (emphasis added).] Section 93.153(c)(2)(iii) instead exempts "rulemaking and *policy development and issuance*." (Emphasis added).

In any event, while the Federal Appellees assert, with no authority, that the prescription of Secretarial Procedures "is a type of rulemaking or administrative adjudication," they do not even explain which category the procedures fall into—rulemaking or administrative adjudications. [*Ibid.*] Both case law and the Administrative Procedures Act show, however, that the prescription of procedures does not constitute rule making.

First, this court has interpreted § 93.153(c)(2)(iii) to apply "only to the process of developing and issuing federal regulations, as opposed to the substantive result produced by the actual implementation." *Pub.*

Citizen v. Dep't of Transp., 316 F.3d 1002, 1031 (9th Cir. 2003) (finding the exception is "[a]nother clue as to the proper interpretation of the de minimis exception" provided by § 93.153(c)(2)), reversed on other grounds in *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752 (2004).

Second, the Administrative Procedures Act governing rule making includes a myriad of specific requirements with which the agency has not complied. 5 U.S.C. § 553. These include, among other things, notice in the Federal Register so that the public can participate in the rule making proceedings. 5 U.S.C. § 553(b)(1); see also *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1220 (10th Cir. 2017) (challenged regulations were promulgated through a formal rule-making process). This did not occur here. Even ignoring that § 93.153(c)(2)(iii) provides no exemption for administrative adjudication, the agency did not follow its requirements, which include noticed hearings for an agency hearing and submissions by the parties to make their case. 5 U.S.C. § 554.

Conclusion

For the foregoing reasons, this court should reverse the district court's order.

Dated: June 13, 2019

SNELL & WILMER L.L.P.
Sean M. Sherlock
Todd E. Lundell
Jing (Jenny) Hua

By: /s/ Sean M. Sherlock
Sean M. Sherlock
Attorneys for Appellants

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FOR THE NINTH CIRCUIT

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Addendum of Statutes and Regulations

Statutes

Regulations

Statutes

5 U.S.C. § 553. Rule Making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice;

or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule

making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved--

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a[1] administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of--

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for--

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not--

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply--

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

Regulations

40 C.F.R. § 93.158(a)(2). Criteria for determining conformity of general Federal actions

(a) An action required under § 93.153 to have a conformity determination for a specific pollutant, will be determined to conform to the applicable SIP if, for each pollutant that exceeds the rates in § 93.153(b), or otherwise requires a conformity determination due to the total of direct and indirect emissions from the action, the action meets the requirements of paragraph (c) of this section, and meets any of the following requirements:

(1) For any criteria pollutant or precursor, the total of direct and indirect emissions from the action are specifically identified and accounted for in the applicable SIP's attainment or maintenance demonstration or reasonable further progress milestone or in a facility-wide emission

budget included in a SIP in accordance with § 93.161;

(2) For precursors of ozone, nitrogen dioxide, or PM, the total of direct and indirect emissions from the action are fully offset within the same nonattainment or maintenance area (or nearby area of equal or higher classification provided the emissions from that area contribute to the violations, or have contributed to violations in the past, in the area with the Federal action) through a revision to the applicable SIP or a similarly enforceable measure that effects emissions reductions so that there is no net increase in emissions of that pollutant;

(3) For any directly-emitted criteria pollutant, the total of direct and indirect emissions from the action meets the requirements:

(i) Specified in paragraph (b) of this section, based on areawide air quality modeling analysis and local air quality modeling analysis; or

(ii) Meet the requirements of paragraph (a)(5) of this section and, for local air quality modeling analysis, the requirement of paragraph (b) of this section;

(4) For CO or directly emitted PM—

(i) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (b) of this section, based on local air quality modeling analysis; or

(ii) Where the State agency primarily responsible for the applicable SIP determines that an areawide air quality modeling analysis is appropriate and that a local air quality modeling analysis is not needed, the total of direct and indirect emissions from the action meet the requirements specified in paragraph (b) of this section, based on areawide modeling, or meet the requirements of paragraph (a)(5) of this section; or

(5) For ozone or nitrogen dioxide, and for purposes of paragraphs (a)(3)(ii) and (a)(4)(ii) of this section, each portion of the action or the action as a whole meets any of the following requirements:

(i) Where EPA has approved a revision to the applicable implementation plan after the area was designated as nonattainment and the State or Tribe makes a determination as provided in paragraph (a)(5)(i)(A) of this section or where the State or Tribe makes a commitment as provided in paragraph (a)(5)(i)(B) of this section:

(A) The total of direct and indirect emissions from the action (or portion thereof) is determined and documented by the State agency primarily responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would not exceed the emissions budgets specified in the applicable SIP;

(B) The total of direct and indirect emissions from the action (or portion thereof) is determined by the State agency responsible for the applicable SIP to result in a level of emissions which, together with all other emissions in the nonattainment (or maintenance) area, would exceed an emissions budget specified in the applicable SIP and the State Governor or the Governor's designee for SIP actions makes a written commitment to EPA which includes the following:

(1) A specific schedule for adoption and submittal of a revision to the SIP which would achieve the needed emission reductions prior to the time emissions from the Federal action would occur;

(2) Identification of specific measures for incorporation into the SIP which would result in a level of emissions which, together with all other emissions in the nonattainment or maintenance area, would not exceed any emissions budget specified in the applicable SIP;

(3) A demonstration that all existing applicable SIP requirements are being implemented in the area for the

pollutants affected by the Federal action, and that local authority to implement additional requirements has been fully pursued;

(4) A determination that the responsible Federal agencies have required all reasonable mitigation measures associated with their action; and

(5) Written documentation including all air quality analyses supporting the conformity determination;

(C) Where a Federal agency made a conformity determination based on a State's or Tribe's commitment under paragraph (a)(5)(i)(B) of this section and the State has submitted a SIP or TIP to EPA covering the time period during which the emissions will occur or is scheduled to submit such a SIP or TIP within 18 months of the conformity determination, the State commitment is automatically deemed a call for a SIP or TIP revision by EPA under section 110(k)(5) of the Act, effective on the date of the Federal conformity determination and requiring response within 18 months or any shorter time within which the State or Tribe commits to revise the applicable SIP;

(D) Where a Federal agency made a conformity determination based on a State or tribal commitment under paragraph (a)(5)(i)(B) of this section and the State or Tribe has not submitted a SIP covering the time period when the emissions will occur or is not scheduled to submit such a SIP within 18 months of the conformity determination, the State or Tribe must, within 18 months, submit to EPA a revision to the existing SIP committing to include the emissions in the future SIP revision.

(ii) The action (or portion thereof), as determined by the MPO, is specifically included in a current transportation plan and transportation improvement program which have been found to conform to the applicable SIP under 40 CFR part 51, subpart T, or 40 CFR part 93, subpart A;

(iii) The action (or portion thereof) fully offsets its emissions within the same nonattainment or maintenance area (or nearby area of equal or higher

classification provided the emissions from that area contribute to the violations, or have contributed to violation in the past, in the area with the Federal action) through a revision to the applicable SIP or an equally enforceable measure that effects emissions reductions equal to or greater than the total of direct and indirect emissions from the action so that there is no net increase in emissions of that pollutant;

(iv) Where EPA has not approved a revision to the relevant SIP since the area was designated or reclassified, the total of direct and indirect emissions from the action for the future years (described in § 93.159(d)) do not increase emissions with respect to the baseline emissions:

(A) The baseline emissions reflect the historical activity levels that occurred in the geographic area affected by the proposed Federal action during:

(1) The most current calendar year with a complete emission inventory available before an area is designated unless EPA sets another year; or

(2) The emission budget in the applicable SIP;

(3) The year of the baseline inventory in the PM–10 applicable SIP;

(B) The baseline emissions are the total of direct and indirect emissions calculated for the future years (described in § 93.159(d)) using the historic activity levels (described in paragraph (a)(5)(iv)(A) of this section) and appropriate emission factors for the future years; or

(v) Where the action involves regional water and/or wastewater projects, such projects are sized to meet only the needs of population projections that are in the applicable SIP.

(b) The areawide and/or local air quality modeling analyses must:

(1) Meet the requirements in § 93.159; and

(2) Show that the action does not:

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

(ii) Increase the frequency or severity of any existing violation of any standard in any area.

(c) Notwithstanding any other requirements of this section, an action subject to this subpart may not be determined to conform to the applicable SIP unless the total of direct and indirect emissions from the action is in compliance or consistent with all relevant requirements and milestones contained in the applicable SIP, such as elements identified as part of the reasonable further progress schedules, assumptions specified in the attainment or maintenance demonstration, prohibitions, numerical emission limits, and work practice requirements.

(d) Any analyses required under this section must be completed, and any mitigation requirements necessary for a finding of conformity must be identified before the determination of conformity is made.

40 C.F.R. § 93.160. Mitigation of air quality impacts

(a) Any measures that are intended to mitigate air quality impacts must be identified and the process for implementation and enforcement of such measures must be described, including an implementation schedule containing explicit timelines for implementation.

(b) Prior to determining that a Federal action is in conformity, the Federal agency making the conformity determination must obtain written commitments from the appropriate persons or agencies to implement any mitigation measures which are identified as conditions for making conformity determinations.

(c) Persons or agencies voluntarily committing to mitigation measures to facilitate positive conformity determinations must comply with the obligations of such commitments.

(d) In instances where the Federal agency is licensing, permitting or otherwise approving the action of another governmental or private entity, approval by the Federal agency must be conditioned on the other entity meeting the mitigation measures set forth in the conformity determination.

(e) When necessary because of changed circumstances, mitigation measures may be modified so long as the new mitigation measures continue to support the conformity determination. Any proposed change in the mitigation measures is subject to the reporting requirements of § 93.156 and the public participation requirements of § 93.157.

(f) Written commitments to mitigation measures must be obtained prior to a positive conformity determination and such commitments must be fulfilled.

(g) After a State or Tribe revises its SIP or TIP and EPA approves that SIP revision, any agreements, including mitigation measures, necessary for a conformity determination will be both State or tribal and federally enforceable. Enforceability through the applicable SIP or TIP will apply to all persons who agree to mitigate direct and indirect emissions associated with a Federal action for a conformity determination.

40 C.F.R. § 1502.16. Environmental consequences

This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) as is necessary to support the comparisons. The discussion will include the environmental impacts of the alternatives including the proposed action, any adverse environmental effects which cannot be avoided should the proposal be implemented, the relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible or irretrievable commitments of resources which would be involved in the

proposal should it be implemented. This section should not duplicate discussions in § 1502.14. It shall include discussions of:

(a) Direct effects and their significance (§ 1508.8).

(b) Indirect effects and their significance (§ 1508.8).

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local (and in the case of a reservation, Indian tribe) land use plans, policies and controls for the area concerned. (See § 1506.2(d).)

(d) The environmental effects of alternatives including the proposed action. The comparisons under § 1502.14 will be based on this discussion.

(e) Energy requirements and conservation potential of various alternatives and mitigation measures.

(f) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(g) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(h) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(f)).

40 C.F.R. § 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.10) or, if appropriate, its recommendation to Congress, each agency shall prepare a concise public record of decision. The record, which may be integrated into any other record prepared by the agency, including that required by OMB Circular A–95 (Revised), part I, sections 6 (c) and (d), and part II, section 5(b)(4), shall:

(a) State what the decision was.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why they were not. A monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation.

40 C.F.R. § 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) 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. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or commenting agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, make available to the public the results of relevant monitoring.

40 C.F.R. § 1508.20 Mitigation.

Mitigation includes:

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

40 C.F.R. § 1508.25 Scope.

Scope consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§§ 1502.20 and 1508.28). To determine the scope of environmental impact statements, agencies shall consider 3 types of actions, 3 types of alternatives, and 3 types of impacts. They include:

(a) Actions (other than unconnected single actions) which may be:

(1) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(i) Automatically trigger other actions which may require environmental impact statements.

(ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.

(iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

(2) Cumulative actions, which when viewed with other proposed actions have cumulatively significant impacts and should therefore be discussed in the same impact statement.

(3) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the best way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(b) Alternatives, which include:

(1) No action alternative.

(2) Other reasonable courses of actions.

(3) Mitigation measures (not in the proposed action).

(c) Impacts, which may be:

(1) Direct;

(2) indirect;

(3) cumulative.