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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, PATTY JOHNSON, JOE TEIXEIRA, and LYNN WHEAT,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR, DAVID BERNHARDT, in his official capacity as Acting Secretary of the Interior, BUREAU OF INDIAN AFFAIRS, and TARA M. SWEENEY, in her official capacity as Assistant Secretary-Indian Affairs,

Defendants,

and

WILTON RANCHERIA, CALIFORNIA,

Intervenor-Defendant.

Civil Action No. 1:17-cv-00058-TNM

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM OF POINTS OF AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

In 2013, the Wilton Rancheria filed a fee-to-trust application asking the Bureau of Indian Affairs (BIA) to acquire a 282-acre parcel of land located near Galt, California to build a casino. For the next three years, BIA told the public that it was reviewing that proposal—first in a scoping notice published in the Federal Register and then in a public scoping hearing held in Galt. BIA published a scoping report in which it again identified the trust acquisition of the 282-acre Galt Site as the proposed action, and in the notice of availability and the draft environmental impact statement (EIS) that it prepared for the project, it did the same.

On December 14, 2016, however, BIA told the public that it was reviewing the Tribe's proposal to build its casino on a different site when it published the final EIS. Instead of considering the Tribe's proposal that BIA acquire the 282-acre Galt Site in trust for its casino, BIA was now considering a new proposal that BIA acquire a 36-acre parcel located in a different city—Elk Grove, California. One month later, on the eve of President Donald Trump's inauguration, BIA finalized its decision to approve the trust acquisition of the Elk Grove Site. In less than two days, BIA claims to have reviewed and responded to public comments on the final EIS, prepared a recommendation memorandum, and prepared a record of decision based on those materials—a process that normally takes an average of 15 months. BIA raced to decide an application that required an independent National Environmental Policy Act (NEPA) analysis without doing it, trampling public notice and participation requirements in the process, to prevent the incoming Administration from reviewing the underlying merits of the application or the extraordinary deficiencies in the process.

BIA did all of this for a Rancheria that was terminated in 1964, pursuant to the California Rancheria Act of 1958, and for which Congress declared "all statutes of the United States which affect Indians because of their status as Indians [to] be inapplicable to them." Pub. L. 85-671, § 10(b), 72 Stat. 619 (Aug. 18, 1958), as amended by the Act of August 11, 1964, Pub. L. 88-419, 78 Stat. 390 (1964). BIA claims that that prohibition does not apply to the Tribe, however.

According to BIA it "restored" its federal recognition in 2009—45 years after terminating it pursuant to federal law—in a stipulated settlement to a friendly suit filed by the Rancheria against the United States and funded by gaming investors.

Every step of BIA's review process was without precedent and without support in the law or the regulations governing NEPA, the fee-to-trust process, and the Administrative Procedure Act (APA). The Court should declare BIA's decision to acquire the Elk Grove Site in trust arbitrary, capricious, and contrary to law, vacate the decision and the subsequent acceptance of conveyance in trust for the benefit of the Wilton Rancheria, and order Defendants to record a rescission of that acceptance of conveyance.

STATEMENT OF FACTS

A. Factual Background

1. History of Wilton Rancheria

The United States established the Wilton Rancheria in 1928 after purchasing land "for use by the landless California Indians" living near Sacramento under the California Mission Indian Relief Act of 1891, as amended. AR8879-83. In November 1927, the Superintendent of the Sacramento Indian Agency identified approximately 37.88 acres of land located south-east of Sacramento, and in June 1928, the Commissioner of Indian Affairs approved the purchase of the land for the approximately 150 homeless Indians in the area. AR8882-3. The Wilton Rancheria was one of approximately 58 such rancherias. *See Request for opinion on "Rancheria Act" of August 18, 1958* (72 Stat. 619), U.S. Department of the Interior, Office of the Solicitor 1882, (Aug. 1, 1960) (1960 Solicitor Memorandum). Rancheria assignments such as Wilton's were "in the nature of revocable permits, or, at the most, possessory estates, terminating upon abandonment of possession." *Id.* at 1883.

a. Congressional Termination

By 1950, there was general agreement that the California Rancheria program should be liquidated. Termination of the rancherias was given extensive consideration by Congress, the

State of California, BIA and the Indians living on various rancherias throughout the State. *Id.* at 1883 (noting that "[f]ew congressional acts have received the amount of consideration as was given to the problem of liquidating the California rancheria"). On October 13, 1955, the residents at the Wilton Rancheria voted unanimously to "have the United States transfer to them fee title to their individual shares of" Rancheria land. AR8890. In 1956, a proposed bill "to carry out the expressed wishes of the Indian people on the rancherias" was prepared and submitted to the various rancheria groups. On October 27, 1956, conference with over 400 participants was held in San Francisco to consider termination legislation with respect to California Indians, in which all interested groups were represented. 1960 Solicitor Memorandum at 1883. Congress included the Wilton Rancheria as one of 41 rancherias to be terminated in the California Rancheria Act of 1958. Pub. L. 85-671, 72 Stat. 619.

Pursuant to the Act, BIA prepared "A Plan for the Distribution of Assets of the Wilton Rancheria," which the residents approved on August 18, 1958, and the Commissioner approved on July 6, 1959. AR26174-180; AR8892-94. On July 19, 1961, BIA certified the completion of various improvements and other requirements, and subsequently, it distributed fee title to the named distributees. AR26181. On September 22, 1964, the Secretary of the Interior published notice that federal supervision over the Indians of Wilton Rancheria was terminated. AR26183.

b. Restoration by Settlement

In September 2006, a group of Indians identifying themselves as the "Wilton Rancheria" submitted a development agreement to the National Indian Gaming Commission (NIGC) for approval.[1] Under the agreement, East-West Gaming was to provide the group financing to obtain federal recognition and start development of a gaming operation. *Id.*; *see also* AR48813 (discussing gaming investors funding attempts to obtain federal recognition to develop casinos).

[1] *See* NIGC Letter to Wilton Rancheria (Apr. 21, 2011), https://www.nigc.gov/images/uploads/ManagementReviewLetters/20110421WiltonRancheriaEastWestGamingLLC.pdf. For the Court's convenience, Plaintiffs will include this document in the joint appendix as Exhibit (Ex.) 1.

Eight months later, the Wilton Miwok Rancheria Interim Tribal Council, as the "Wilton Miwok Rancheria," sued the Department of the Interior seeking to be "restored" as a federally recognized tribe, alleging that the Department failed to provide certain improvements to roads, water, and sewers. *See* Complaint, *Wilton Miwok Rancheria v. Kempthorne*, No. 07-2681, ECF 1 (N.D. Cal. Filed May 21, 2007). The parties entered a stipulated settlement in June 2009 in which the Department "agree[d] that the Tribe was not lawfully terminated, and the Rancheria's assets were not distributed, in accordance with" the California Rancheria Act without further explanation. AR4389-4401; AR597-621. The Department agreed to add the Rancheria to the list of federally recognized tribes, to accept into trust land within the former Rancheria boundaries, and to restore to the members the individual and collective status they had prior to termination, among other things. *Id*.

2. BIA Review of the Galt Application

On November 21, 2013, the Tribe submitted a resolution to BIA requesting the trust acquisition of 282 acres of land near Galt, an unincorporated part of Sacramento County, for a casino. AR4100-01. The Tribe previously submitted a resolution for 160 acres of land near Galt on January 17, 2013. AR5714-16. BIA issued cooperating agency invitation letters to NIGC, EPA, Caltrans, Sacramento County, and the Tribe soon after. AR16159-63. It is not clear from the record why the Tribe changed the application from 160 acres to 282 acres or when BIA gave the cooperating agencies notice of the change.

In any case, BIA published a notice of intent to prepare an EIS under NEPA in the Federal Register, the Sacramento Bee, and the Galt Herald on December 4, 2013—two weeks after the Tribe submitted its resolution for the 282-acre Galt Site. AR4852. The public notice identified the trust acquisition of 282 acres in Galt for a casino as the proposed action BIA was considering and offered a 30-day public comment period, running from December 6, 2013, to January 6, 2014. *Id*. BIA also held a scoping meeting in Galt on December 19, *id*., and distributed maps of the Galt Site to the community and local press. AR775; AR16195; AR2109.

On January 6, 2014, Stand Up for California! (Stand Up) requested that the Regional Director "recuse herself and take action to ensure that someone that is not subject to her supervision or oversight take responsibility for overseeing the Wilton Project" because of her familial relationships with members of the Tribe. AR23-24. BIA did not address the potential conflict of interest until January 19, 2017—three hours before it issued the record of decision (ROD) challenged in this case. AR5691.

In February 2014, BIA issued a scoping report for the EIS. AR16272. The report identified seven alternatives that would be considered in the EIS. AR16281. Three were located on the Galt Site, two were located on land within the Historic Rancheria, one was the "no action" alternative, and the sixth alternative—Alternative F - Casino at Mall Site—was located on a 28-acre site in Elk Grove. *Id*. The 28-acre Alternative F Site was part of a 100-acre site that was partially developed as a regional mall that formed part of a comprehensively planned project called the Lent Ranch Marketplace project.[2] Consistent with California law, the terms of the development agreement for the mall project—including the City's regulatory and taxing authority and mitigation requirements—were recorded as a restrictive covenant on the deed to the land. AR6635-36.

BIA invited Galt to participate as a cooperating agency on February 4, 2014, AR2944, and provided notice of the scoping report to cooperating agencies and individuals who identified themselves as interested parties in response to BIA's December 2013 notice of intent. AR29335. BIA also posted the scoping report online. *Id.* On December 4, 2014, the Tribe submitted a request for a gaming eligibility determination for the Galt Site under the restored lands exception in the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2719. AR25965-984; AR6546. BIA published notice of availability of the draft EIS (DEIS) on December 29, 2015. The notice of

[2] *See* City of Elk Grove Staff Report, Oct. 8, 2014 at 1 (listed on FEIS Section 8.0 Refences list), AR11591, available at http://www.elkgrovecity.org/UserFiles/Servers/Server_109585/File/cityclerk/citycouncil/2014/attachments/10-08-14_9.1.pdf. For the convenience of the Court, Plaintiffs will include the Staff Report in the joint appendix as Ex. 2.

availability identified the acquisition of the 282-acre Galt Site for a casino as the proposed action. AR4143. BIA also held a public hearing at the Galt community center on January 29, 2016, AR1257, and provided a handout to the public describing the proposed action as acquiring the Galt Site in trust, AR29153.

3. The Switch to the Elk Grove Site

In June 2016, the Tribe announced that it wanted to build its casino in Elk Grove, instead of Galt. BIA did not publish a notice of a change in application, nor seek additional public comment in response to the change. Three months earlier, the Tribe submitted to BIA a supplement to its restored lands request stating that "the Tribe may request that the Elk Grove Site be taken into trust for the Tribe, rather than Alternative A - the Wilton Site" and arguing that the site also qualifies as "restored lands." AR5038-40. BIA was also aware that the Tribe was negotiating a deal with the owner of the Alternative F site in April. AR3972. BIA nevertheless completed the first administrative draft of the final EIS (FEIS) by May 1, 2016, while the Tribe was in the process of changing its proposed action. AR38023-39973 (withheld). Elk Grove requested cooperating agency status on May 13, 2016—almost two weeks after BIA completed its administrative draft FEIS. AR1279.

The Tribe filed a fee-to-trust request with BIA for a 36-acre parcel of land in Elk Grove on June 20, 2016, increasing Alternative F by eight acres. AR13215-230. On June 27, 2016, BIA emailed the environmental contractor that it had completed its review of the administrative draft FEIS. AR415. The administrative draft was sent to cooperating agencies for review on July 20, 2016. AR24063-69. On September 27, 2016, Plaintiffs submitted comments objecting that "BIA has not provided notice to the affected community of the change in the proposed action, the precise parcel of land involved, the environmental review process, nor any other information the community is entitled to under federal laws governing BIA's consideration of such applications." AR6616. BIA did not respond.

On November 17, 2016, BIA sent a Notice of (Gaming) Land Acquisition Application identifying the 36-acre Elk Grove Site to a list of 15 recipients. AR4031. BIA did not include the Tribe's fee-to-trust application, a map of the site, or other important information. AR3756. On December 14, 2016, BIA published a notice of availability for the FEIS, which states that "BIA will issue a Record of Decision (ROD) on the proposed action no sooner than 30 days after the date EPA publishes its Notice of Availability in the Federal Register." AR1582 (81 Fed. Reg. 90379). Two days later, EPA published a notice of availability of the EIS for the Wilton Rancheria, which identified January 17, 2017, as the end of the comment period. AR24411 (81 Fed. Reg. 91169). Based on EPA's notice, BIA was legally able to issue a final trust decision as early as January 17, 2017, which would trigger its obligation to immediately acquire title to the Elk Grove Parcel in trust. *See* 25 C.F.R. § 151.12(c); 40 C.F.R. § 1506.10(b)(2).

4. Plaintiffs' Efforts to Prevent the Immediate Transfer of Title

Plaintiffs contacted BIA on December 29, 2019, to request that it agree to delay the acquisition of title in trust after a final decision was issued long enough to allow them to seek emergency judicial relief pursuant to 5 U.S.C. § 705. AR6634 (expressing concern about "what clearly appears to be a rush on the part of BIA to issue a final decision on the Rancheria's application before January 20, 2017"). Plaintiffs were concerned that the transfer of title into trust would cut off legal proceedings related to the development agreement on the Elk Grove Site, including a lawsuit under the California Environmental Quality Act against Elk Grove and a petition to referend Elk Grove's approval of an ordinance eliminating the development agreement from the Elk Grove Site. AR3364-65. BIA did not respond. ECF 25 19-1. Plaintiffs contacted BIA again on January 6, 2017, asking BIA to confirm that it would delay transfer of title long enough for Plaintiffs to seek emergency relief. AR184. BIA refused. AR6630.

Plaintiffs ultimately filed a Complaint and Emergency Motion for a Temporary Restraining Order and Preliminary Injunction on January 11, 2017, citing the potential loss of rights arising under state law as irreparable harm. ECF 1; ECF 2 at 2-3. The Court denied

Plaintiffs' motion, in part because they could not establish that a final trust decision was imminent or that it would be adverse. *See* Minute Entry Denying Motion for Temporary Restraining Order (Jan. 13, 2017). BIA represented at the hearing that the timing of a final decision was uncertain, ECF 25 at 37:13-25; 40:13 – 41:4, and objected that Plaintiffs' requests that BIA stay the immediate transfer of title into trust did not constitute a formal request under 5 U.S.C. § 705, ECF 25 at 31:8-16. On January 17, 2017, the parties filed a Joint Status Report in lieu of briefing the preliminary injunction with the Court. *See* ECF 6. The Report stated that Plaintiffs filed a formal request with BIA for a stay under 5 U.S.C. § 705. *Id*. at 2.

BIA issued a ROD approving the acquisition of the Elk Grove Site in trust on January 19, 2017—less than two days after the close of the comment period of the FEIS. AR33011 (printing finals to "let Larry sign" at 4:29 pm); AR4487 (attaching "PDF of the Wilton letter, signature page of ROD, and signed FR notice" at 5:50 pm); AR4742 (transmitting Wilton approval and approval of another fee-to-trust casino request at 6:05 pm). BIA informed Plaintiffs on January 19 that it would not transfer title to the Elk Grove Site into trust before resolving their request under 5 U.S.C. § 705. AR5845.

B. Procedural History

After BIA issued the ROD, Plaintiffs contacted it to request a meeting and to discuss the possibility of seeking expedited review or of reaching an agreement to stay the transfer of title to the Elk Grove Site. ECF 33 at 12-13 of 29. BIA informed Plaintiffs that it would consider Plaintiffs' requests, but denied them on February 10, 2017, at approximately the same time it accepted title to the Elk Grove Site into trust. *Id.* at 13. Plaintiffs filed a Notice of Appeal, a Petition for Preliminary Relief, and a Statement of Reasons on February 21, 2017 with the Interior Board of Indian Appeals (IBIA), challenging the finality of ROD, the authority of BIA to acquire title to the Elk Grove Site in trust, and violations of the Federal Vacancies Reform Act. *Id.* at 13-14. The Court stayed proceedings in this case while Plaintiffs' appeal was pending. *Id.*

The Acting Assistant Secretary assumed jurisdiction of the appeal in March 2017 and dismissed on July 17, 2017. *Id.* at 15.

On August 2, 2017, the Court reset deadlines in the case, ECF 23, and Plaintiffs filed an amended complaint, ECF 26. On October 1, 2017, Plaintiffs moved for summary judgment, arguing that the Principal Deputy Assistant Secretary violated the Federal Vacancies Reform Act in issuing a trust decision that was final for the Department. ECF 33. The Court denied Plaintiffs' motion on February 28, 2018. ECF 54.

On April 16, 2018, Plaintiffs filed a Motion to Complete and/or Supplement the Administrative Record and for Leave to Conduct Discovery. ECF 57. The Court granted that motion in part on May 30, 2018, holding that Plaintiffs "made a *prima facie* showing of bad faith to warrant limited discovery." ECF 62 at 10- 11. The Court ordered Defendants to produce a privilege log. *Id.* at 10. BIA produced seven additional documents on June 1, 2017 (ECF 86-1), and a privilege log and 416 new documents on September 5, 2018 (ECF 86-2). After further proceedings, BIA produced 12 documents on October 11 (ECF 86-3), 228 documents on December 14 (ECF 86-4), and 37 additional documents on February 5, 2019 (ECF 86-5).

STANDARD OF REVIEW

This challenge proceeds under the Administrative Procedure Act's (APA) "arbitrary and capricious" standard of review. *See* 5 U.S.C. § 706(2)(A); *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc*., 462 U.S. 87, 97-98 (1983). The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

ARGUMENT

A. The Secretary violated the California Rancheria Act and the APA, which prohibits him from acquiring trust land for the Wilton Rancheria and authorizing gaming.

Under Section 10 of the California Rancheria Act of August 18, 1958, "all statutes of the United States which affect Indians because of their status as Indians [are] inapplicable" to the Indians of the Wilton Rancheria. Pub. L. 85-671, § 10, 72 Stat. 619. That includes Section 5 of

the Indian Reorganization Act of 1934, 25 U.S.C. § 5108, which authorizes the Secretary to acquire lands in trust for "Indians," and it is the authority the Secretary cited in acquiring the Elk Grove Site. AR13977, 989. BIA was prohibited from acquiring the Elk Grove Site in trust.

Congress enacted the California Rancheria Act in 1958 to terminate the trust relationship between the United States and the Indian people on 41 enumerated rancherias and reservations in California. Pub. L. 85-671, 72 Stat. 619. The Act required the Indians on the enumerated rancherias or the Secretary to prepare a plan for the distribution of rancheria property to the rancheria residents. *Id.*, § 2(a). Upon majority approval of the distribution plan by the Indians living on an enumerated rancheria, BIA was to transfer unrestricted fee title to rancheria lands according to the approved plan. *Id.*, §§ 2(c), 6.

Under Section 10(b) of the Act, Indians receiving a distribution of rancheria property cease to be eligible for federal services. Section 10(b) provides:

> After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, *all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them*, and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction.

Id., § 10(b) (emphasis added). Section 10(a) of the Act states that an approved distribution plan "shall be final" after distribution. Pub. L. 85-671, § 10(a), 72 Stat. 619, 621.

Congress terminated its relationship with the Indians on the Wilton Rancheria, at the request of the Indians living at the Wilton Rancheria.[3] On October 13, 1955, the Indians on the Wilton Rancheria voted unanimously to have the United States transfer to them fee title to Rancheria lands. AR8890. In 1958, the residents voted to approve the establishment of a road

[3] *Providing for distribution of land and assets of certain Indian rancherias and reservations in California*, Report No. 1129, 85th Cong. 1st, at 25 (1957) ("The 10 assignees on the rancheria asked by resolution dated October 13, 1955, that they be given fee title to their assignments after the road system has been completed, and an internal survey has been made on which to base the subdivision, and that the lien against the land be canceled.").

and other improvements. AR8890-91. The Wilton Rancheria distribution plan became final on September 25, 1959, after being accepted by the majority of the named distributees. AR0026174-180. Consistent with the Act, BIA repaired water systems on the Rancheria, cancelled debts, completed road construction, and satisfied training requirements. AR8890-91. On March 10, 1961, the Indians unanimously voted to repeal their constitution and by-laws, and on May 19, 1961, the constitution and by-laws were revoked. BIA conveyed unrestricted fee title to the distributees on March 30, 1961, recorded the deeds on March 31, and delivered the deeds to distributees on May 16 and 17. AR8892; *see also* AR8893-94.

On September 15, 1964, the Secretary published formal notice that "the Indians" of the Wilton Rancheria were "no longer entitled to any of the services performed by the United States for Indians because of their status as Indians[] and all statutes of the United States which affect Indians because of their status as Indians, shall be inapplicable to them." 29 Fed. Reg. 13146, 13146-47 (Sept. 22, 1964) (listing the Indians subject to the Act). As of 1964, the Secretary was without authority to acquire land in trust for the Indians of the Wilton Rancheria. Accordingly, BIA violated the California Rancheria Act by acquiring the Elk Grove Site in trust.

BIA asserts that it does, in fact, have such authority because BIA entered into a settlement agreement restoring the Wilton Rancheria and relieving them "from the application of section 10(b) of the Act" in 2009. *Restoration of Wilton Rancheria*, 74 Fed. Reg. 33468 (July 13, 2009). According to BIA, "the Tribe's federally recognized status is beyond dispute and not subject to challenge" because BIA restored its relationship with the Rancheria "in 2009 and the Tribe was thereafter included in all official Federal Register lists of federally recognized tribes," which "conclusively establishes the federally recognized status of an Indian tribe." AR14049-050. BIA also claims that Section 103(3) of the Federally Recognized Indian Tribe List Act, 108 Stat. 4791 (1994), "confirms that a court-approved settlement agreement like that entered by the Federal court here is a decision of a United States court that can restore an Indian tribe's federally recognized status." *Id*. (internal quotation marks omitted).

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Plaintiffs did not challenge BIA's inclusion of the Wilton Rancheria on the list of federally recognized tribes.[4] They challenged BIA's authority to acquire land in trust for the "Indians" of the Wilton Rancheria under the IRA in light of a federal statute that declares "all statutes of the United States which affect Indians because of their status as Indians" inapplicable to the Indians of the Wilton Rancheria. *See* Pub. L. 85-671, § 10(b), 72 Stat. 619; *also* 29 Fed. Reg. at 13146-47. BIA cannot violate a federal statute because it agreed to the action by stipulation.[5] Parties cannot "agree to take action that conflicts with or violates the statute on

[4] BIA is incorrect, in any case. BIA's decision to add a tribe to the list of federally recognized tribes is not conclusive in every case; if it were, it would violate the non-delegation doctrine. *Cf. South Dakota v. U.S. Dep't of Interior*, 69 F.3d 878 (8th Cir. 1995) (holding that Secretary's trust authority violates the non-delegation doctrine if not subject to judicial review), *vacated*, 519 U.S. 919 (1996) (granting certiorari, vacating, and remanding based new Departmental policy to allow judicial review before acquiring title to land in trust); *see also Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) (rejecting argument that Quiet Title Act bars APA challenge to trust decision). BIA acknowledges this in claiming that "the time for third party challenges to the Tribe's listing have long since passed"—which is also incorrect. AR14050. Under Article III, third parties cannot file suit unless they suffer a concrete injury. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Adding a tribe to a list is not a concrete injury. BIA cannot shield illegal conduct by citing a ministerial action that third parties cannot challenge—not without creating the same constitutional deficiencies the Eighth Circuit identified in *South Dakota*. *Cf. Wind River Min. Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991) (adopting the D.C. Circuit's approach of allowing challenges "after a limitations period has expired if the ground for challenge is that the issuing agency acted in excess of its statutory authority" because it "strikes the correct balance between the government's interest in finality and a challenger's interest in contesting an agency's alleged overreaching") (listing cases).

Nor does Section 103(3) of the Federal List Act "confirm[] that a court-approved settlement agreement like that entered by the Federal court here is a decision of a United States court that can restore an Indian tribe's federally recognized status." AR14050 (internal quotation marks omitted). Section 103(3) merely acknowledges that tribes can be recognized "by a decision of a United States court"; it says nothing about agreements that violate federal law.

[5] *See* Stipulation for Entry of Judgment, *Wilton Miwok Rancheria et al. v. Salazar*, No. 07-cv-02681-JF, ECF 61 at 7 of 26 (N.D. Cal. Filed Jun. 8, 2009) (stating that the parties "enter into the following Stipulation for the purpose of reaching a compromise and final settlement of the claims alleged by said Plaintiffs in *Wilton Miwok Rancheria et al. v. Kenneth L. Salazar et al*., No. C-072681 JF, and *Me-Wuk Indian Community of Wilton Rancheria v. Kenneth L. Salazar*, C-075706 JF"). The court entered the Stipulation for Entry of Judgment and proposed order unchanged and without comment. *Id.* at ECF 62 (Filed Jul. 16, 2009).

which the complaint was based." *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 526 (1986) (observing "the fact that the parties have consented to the relief contained in a decree does not render their action immune from attack"); *cf. Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316 (D.C. Cir. 2008) (reversing district court approval of settlement that violated federal statutory requirement). As the Solicitor for the Department explained in 1960, "the acquisition by the United States of the rancheria land was for occupancy during a temporary period of Federal supervision. Congress has indicated that the program has now served its purpose. *It is the sole judge of the extent of guardianship and of its duration*." 1960 Solicitor Memorandum at 1886 (citing *United States v. Hellard*, 322 U.S. 363, 367 (1944); *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903)) (emphasis added). BIA cannot circumvent the plain language of the California Rancheria Act 45 years after the fact by stipulated settlement.[6]

B. BIA's "bait-and-switch" and failure to deliberate violated NEPA and the APA.

BIA violated explicit NEPA requirements in approving the trust acquisition of the Elk Grove Site and flouted the underlying purposes of the Act. BIA misled the public for almost three years by claiming that it was reviewing a fee-to-trust request for a casino in Galt when it knew that the Tribe wanted to build a casino in Elk Grove. At a minimum, BIA was obligated to provide the public notice and initiate a new EIS process when the Tribe filed a new fee-to-trust request for the Elk Grove site and withdrew its application for Galt. And when the public

[6] BIA's stipulated settlement also conflicts with IGRA. The settlement *requires* the Secretary to acquire in trust any lands located within or adjacent to its historic Rancheria as restored lands under IGRA, 25 U.S.C. § 2719(b)(1)(B)(iii). Judgment, *Wilton Miwok Rancheria et al. v. Salazar*, No. 5:07-cv-02681-JF, ECF 62 at 5-6 of 22 (N.D. Cal. Filed Jul. 16, 2009). The settlement also states, however, that "nothing herein shall preclude … other lands from being deemed 'restored lands.'" *Id.* at 6. Under IGRA, however, tribes cannot have two separate parcels qualify as "restored lands." 25 C.F.R. § 292.12(c) (requiring land to be "included in the tribe's first request for newly acquired lands"). The settlement agreement directly conflicts with that regulation. The Tribe initially requested a gaming determination under 25 U.S.C. § 2719(b)(1)(A)—the more rigorous two-part determination test. AR14035; *see also* 25 C.F.R. Part 292, Subpart C (two-part process).

objected. It did not. Not only did BIA refuse to prepare an EIS or an SEIS for the Elk Grove request, it did not communicate to the public what was happening or respond to concerns regarding legal restrictions on the proposed trust land. In fact, BIA did not pause to meaningfully deliberate on the request or the public comments on the FEIS. It took less than two days to issue a decision that normally takes on average 15 months—all so that it could prevent the incoming Administration from reviewing the Tribe's request and BIA's illegal conduct.

Congress did not enact the APA so that BIA could play "hide the ball." It did so to "'reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies.'" *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1044 (D.C. Cir. 1987) (quoting *Batterton v. Marshall*, 648 F.2d 694, 703 (D.C. Cir. 1980)). This Circuit does not allow agencies to trample the procedural rights Congress created in enacting NEPA; to the contrary, strict compliance with NEPA regulations is required. *See, e.g.*, *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1109 (D.C. Cir. 1971) (NEPA "provisions . . . establish a strict standard of compliance."); *Young v. Gen. Services Admin.*, 99 F. Supp. 2d 59, 74 (D.D.C. 2000) (referring to "the D.C. Circuit's requirement of 'strict compliance' with NEPA's 'inflexible' procedural requirements").[7] BIA did not strictly comply with NEPA's "inflexible" procedural requirements; it flouted them.

1. BIA violated NEPA's public notice and disclosure requirements.

An agency cannot announce a new proposed action in a FEIS without contravening NEPA's notice requirements and vitiating participatory rights. The first step in preparing an EIS is for an agency to "make sure the proposal which is the subject of an [EIS] is *properly defined*." 40 C.F.R. § 1502.4(a) (emphasis added). The agency must then publish notice that it intends to prepare an EIS, and that notice must "[d]escribe the *proposed action* and possible alternatives." 40 C.F.R. §§ 1501.7(a), 1508.22(a).

[7] *See also Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 536 (D.C. Cir. 2018) (noting that "NEPA is a purely procedural statute and taking . . . an approach [that treats a violation as merely a "procedural deficienc[y]"] would vitiate it.").

There is no mystery to these requirements—how an agency defines a proposed action influences the entire review process, including who might be an interested party, the location for public hearings, identification of cooperating agencies, and other critical aspects of review. Even more fundamentally, how an agency identifies a proposed action determines *what the public is given notice of*. A notice that does not identify the actual proposed action under review violates NEPA because it does not allow for informed public participation and decision-making. Without adequate notice, the public cannot know that it is interested. The D.C. Circuit has observed that a "deficient notice is a fundamental flaw that almost always requires vacatur."[8]

BIA's NEPA notice that it was considering acquiring the Elk Grove Site was not deficient—it was non-existent. On December 4, 2013, BIA published a notice announcing its intent to prepare an EIS to evaluate "an application . . . requesting the placement of approximately 282 acres of fee land [within the City of Galt Sphere of Influence Area] in trust by the United States upon which the Tribe would construct a gaming facility." AR4852 (78 Fed. Reg. 72928 (Dec. 4, 2013)). The notice expressly identified "the proposed action for the Department" as "the acquisition requested by the Tribe," and the acquisition BIA identified was for seven parcels of land—identified by parcel number—totaling 282 acres in Galt. *Id*.

Based on BIA's notice, interested parties "ma[d]e themselves known to the BIA official in writing"—as BIA regulations require.[9] BIA held a public scoping hearing at the Galt community center on December 19, 2013, and subsequently invited the City of Galt to

[8] *Oglala Sioux Tribe*, 896 F.3d at 536 (discussing vacatur as the normal remedy for deficient notice in APA cases, which the court discussed as "comparable" to NEPA claims).

[9] *See, e.g.*, AR2900 (requesting updates on Galt application). BIA "requires interested parties . . . to make themselves known to the BIA official in writing in order to receive written notice of the BIA official's decision." 78 Fed. Reg. 67928, 67930 (Nov. 13, 2013). It is essential that BIA correctly identify the proposed action in a NEPA notice because interested parties must rely on that notice for information. BIA does not publish notice of a pending application under the trust regulations.

participate as a cooperating agency.[10] AR16278; AR2944. When BIA published a notice of availability of the DEIS two years later, it identified the proposed action under review as the acquisition of the Galt Site for a casino. AR21670. BIA held a second public hearing at the Galt community center on January 29, 2016. AR1257; AR29153. BIA even made a hard copy of the DEIS available for public review at the Galt Branch of the Sacramento Public Library.[11] AR21670. Everything BIA said and did indicated that it was evaluating a request to acquire 282 acres of land in Galt in trust.

Before publishing the notice of availability of the FEIS on December 16, 2016, AR24411 (81 Fed. Reg. 91169), BIA did not inform the public that it was considering acquiring 36 acres of land in Elk Grove in trust.[12] BIA never published notice that the Tribe requested the trust acquisition of the Elk Grove Site, never published a notice of intent to prepare an EIS for that proposed action, and never engaged with the Elk Grove community as it did with Galt.[13] AR9083-84. BIA's notices indicated that it was considering a single proposed action—the acquisition of the Galt Site in trust for a casino—and everything that BIA did served to generate interest in *that* proposed action.

BIA violated fundamental NEPA requirements when it substituted the Elk Grove Site as the new proposed action in the FEIS. BIA asserts that there is nothing wrong with swapping in a new proposed action for the original in a FEIS, then approving that new proposed action 30 days

[10] NEPA regulations recommend that agencies hold a scoping hearing "when the impacts of a particular action are confined to specific sites." 40 C.F.R. § 1501.7(b).

[11] BIA also made the DEIS available for review at the Pacific Regional Office in Sacramento and online. AR21669.

[12] BIA sent a Notice of (Gaming) Land Acquisition Application on November 17, 2016, to a limited distribution list. *See* AR4031-43; AR8952-58. It did not publish notice of the new application for the Elk Grove Site to allow potentially interested parties to identify themselves or to clarify public confusion. *See* AR8945-46.

[13] In fact, BIA has never published notice of its decision in the Federal Register, another fundamental notice requirement. The fee-to-trust regulations require the Secretary to "[p]romptly publish in the Federal Register a notice of the decision to acquire land in trust under this part." 25 C.F.R. § 151.12(c)(2)(ii).

later. But NEPA doesn't work that way. Agencies must "properly define[]" the proposed action under consideration and provide the public with notice. 40 C.F.R. §§ 1502.4, 1501.7(a), 1508.22. If they do not—by using confusing language or convoluted references, for example—they violate NEPA.[14] Agencies cannot fulfill the underlying purposes of NEPA or the APA if they mislead the public regarding the proposed actions under consideration. Actions that undermine public participation and obscure the actual proposed action under review—such as BIA's actions here—violate fundamental NEPA requirements.[15]

a. BIA argues, however, that the public knew or should have known that it might acquire the Elk Grove Site because it identified a smaller, 28-acre Elk Grove site as "Alternative F—Casino Resort at Mall Site." *See* AR14069. In BIA's view, "[a]lternatives considered in an EIS are chosen for reasonableness, and thus Alternative F's inclusion means that the potential for its implementation could be reasonably anticipated." AR14318; AR14324.

That argument has no merit as a matter of law. As the Council on Environmental Quality (CEQ) has explained, EIS alternatives *do not* have to be something "the proponent or applicant likes or is itself capable of carrying out"; they need only be "practical or feasible from the technical and economic standpoint."[16] The Seventh Circuit has similarly explained that the fact that an applicant "does not now own an alternative site is only marginally relevant (if it is

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[14] The Ninth Circuit underscored the importance of defining the proposed action properly in *California, ex rel. Lockyer v. U.S. Forest Serv.*, 465 F. Supp. 2d 942 (N.D. Cal. 2006), which involved the adoption of a management plan for the Giant Sequoia National Monument. In defining the proposed action, the Forest Service redundantly referred to the purposes of the monument designation and to other documentation in a manner that was "incomprehensible and not readily understandable." *Id.* at 949. By "fail[ing] to 'clearly define' the 'proposal,'" the Forest Service "broadly violate[d] NEPA." *Id.*

[15] *See also* Indian Affairs NEPA Guidebook (Aug. 2012) at § 2.1 (emphasizing that "[t]he NEPA process is intended *to facilitate public participation and disclosure* in the Federal planning process") (emphasis added); § 2.4 ("Public disclosure and involvement is a key requirement of NEPA."), https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/59_IAM_3-H_v1.1_508_OIMT.pdf.

[16] *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, #2a, https://www.energy.gov/sites/prod/files/2018/06/f53/G-CEQ-40Questions.pdf.

relevant at all) to whether feasible alternatives exist to the applicant's proposal."[17] In fact, agencies frequently review alternatives applicants cannot implement to allow for a useful comparison of impacts. *See, e.g.*, 40 C.F.R. §§ 1502.4, 1502.14.

BIA regularly does this when reviewing fee-to-trust requests because such requests are limited to land a tribe already owns or is able to purchase. Every fee-to-trust request is required to include a "description of the land to be acquired," and BIA can acquire land in trust only if "the tribe already owns an interest in the land." 25 C.F.R. §§ 151.9, 151.3(a)(2). If BIA limited its NEPA alternative analysis to land a tribe owned or had an option to purchase, however, there would seldom be more than two alternatives to consider—the proposed action and the no action alternative—which is not sufficient. As the D.C. Circuit has observed, "[t]he discussion of reasonable alternatives . . . becomes an empty exercise when the only alternatives addressed are the proposed project and inaction." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 210 (D.C. Cir. 1991).

BIA's identification of the Elk Grove Site as the sixth of seven alternatives in an EIS does not mean that the public could have reasonably anticipated its implementation. The public has no realistic way to discover what land a tribe might be able to purchase; it *depends* on BIA's identification of the proposed action for that information.[18] And when an agency knows but withholds that information from the public—as BIA did here—it violates NEPA and the APA.

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[17] *Van Abbema v. Fornell*, 807 F.2d 633, 638-39 (7th Cir. 1986). The D.C. Circuit disagreed with the Seventh Circuit's analysis of how agencies should define the purpose of a proposed action, but it did not disagree with the court's conclusion that reasonable alternatives include those an applicant may not be able to implement. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 198 (D.C. Cir. 1991).

[18] BIA's argument that it "mention[ed] the Mall site as an alternative" in various publications is unpersuasive. AR14321. None of the notices stated that "Alternative F—Casino Resort at Mall Site" was located in Elk Grove. Nor did BIA identify Elk Grove as an alternative in its notice of intent, despite being required to "briefly describe . . . possible alternatives" in such notices. 40 C.F.R. § 1508.22. BIA's notice only stated that the EIS "will also evaluate a range of reasonable alternatives." AR16306.

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b. There is another reason that the public could not have "reasonably anticipate[d]" that BIA might acquire Alternative F in trust. Public information showed that the land was to be developed as an outdoor mall. The 28-acre site BIA identified as Alternative F was part of a 100-acre site on which a 1.1 million square foot open-air regional mall was to be built pursuant to the 2007 development agreement between Elk Grove and General Growth Properties (GGP). Under California law, development agreements are recorded on deeds as restrictive covenants that mandate how land is to be developed. AR8624-28 (discussing laws applicable to site).

The more curious question is how *BIA* knew to identify 28 acres of that 100-acre site as a reasonable alternative by January 17, 2014—the date of the map in the scoping report. The Howard Hughes Corporation (HHC) assumed GGP's master-planned communities, mixed-use developments, and undeveloped land—including the Elk Grove regional mall property—in 2010 under GGP's bankruptcy reorganization.[19] HHC assumed all obligations set forth in the 2007 development agreement.[20] In addition, a number of buildings had already been constructed, including several located on the 28-acre site. *See* Figure 1.

Figure 2: 2007 Development Plan Review Approved for the Regional Mall

[19] *See* Petition, *In re General Growth Properties, Inc.*, Ch. 11 No. 09-11977-alg (S.D. N.Y. Apr. 16, 2009); *also see* City of Elk Grove Staff Report, Ex. 2.

[20] Ex. 2 at 10.

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Figure 1. Elk Grove Planning Commission Staff Report Re: The Outlet Collection at Elk Grove at 9 (October 8, 2014).[21]

Yet BIA carved out 28 acres from the 100-acre site (transecting at least two existing buildings) to create "Alternative F - Casino at Mall Site." *See* Figure 2 (AR16289).

Figure 2. Map of Alternative F — Casino Resort at Mall Site (BIA February 2014 Scoping Report). AR16289.

Public review proceedings in Elk Grove further refute BIA's claim that the public could have reasonably anticipated that BIA would acquire Alternative F. In October 2014, the Elk Grove Council approved an amendment to the 2007 development agreement authorizing HHC to develop the 100-acre parcel in two phases.[22] The first phase involved developing an outlet mall on the southern portion of the site (a modification from the regional mall); the second phase was "required to fall within the approved uses"—which did not include a tribal casino. *See* Figure 3.

[21] Ex. 2 at 9.

[22] *See* City Council of the City of Elk Grove Ordinance No. 29-2014, Agenda Item No. 8.7, http://www.elkgrovecity.org/UserFiles/Servers/Server_109585/File/cityclerk/citycouncil/2014/attachments/10-22-14_8.7.pdf. For the convenience of the Court, Plaintiffs will include this document in the joint appendix as Ex. 3.

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Given these proceedings, the public could not possibly have known that the Tribe would purchase the land to transfer it to BIA.

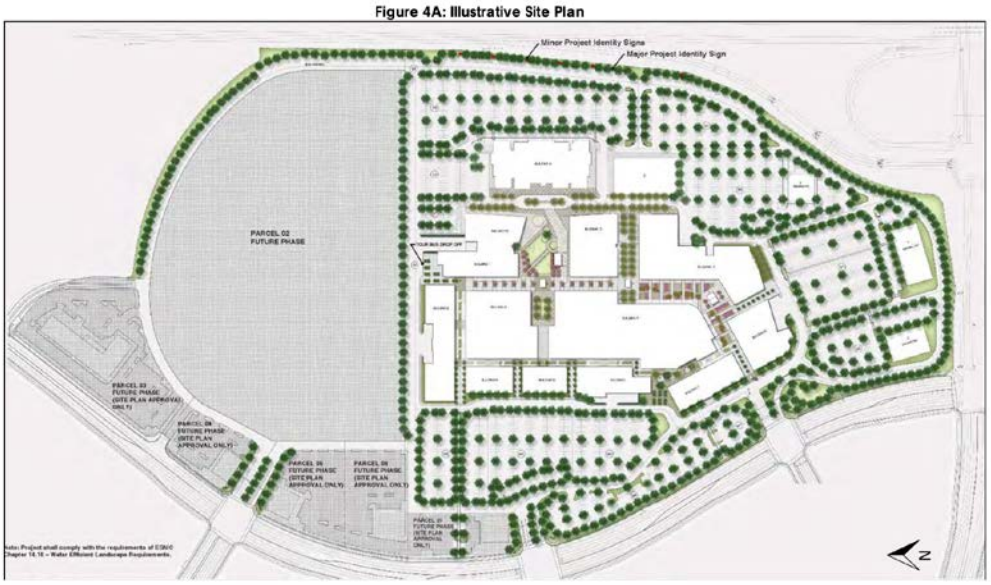

Figure 3. Elk Grove Planning Commission Staff Report Re: The Outlet Collection at Elk Grove at 16 (October 8, 2014).[23]

BIA, however, obviously knew something in January 2014 that the public did not—that HHC would make the 28-acre northern portion of the site available to the Tribe and that the Tribe would want it. BIA could not have identified the 28-acre Mall Site as an alternative without that information. In fact, approved development is usually evaluated as a cumulative impact. 40 C.F.R. § 1508.7 (defining cumulative impacts to include "reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions"). Yet BIA chose not to disclose that information to the public or indicate that Alternative F might become the proposed action. Nor did BIA provide public notice two years later when it published the DEIS. The record at that point indicates that BIA internally viewed the proposed action as acquiring the Galt Site or the Elk Grove Site.[24] At best, BIA misled the

[23] Ex. 2 at 16.

[24] BIA knew by November 5, 2015, at the latest, that the Elk Grove Site was a proposed action. In an internal memorandum, BIA identified Galt as the "Proposed Project site" and stated that "[a]n alternative project site is within the City of Elk Grove," distinguishing those two sites from

public regarding the nature of the proposed action, despite its obligation to "[e]ncourage and facilitate public involvement." 40 C.F.R. § 1500.2.

c. BIA also insists that the public knew what was going on because various newspapers reported that the Tribe was interested in the Elk Grove Site. AR14321-22. The record belies that claim.[25] Regardless, NEPA imposes procedural obligations on *federal agencies*—not on newspapers. *See, e.g.*, 40 C.F.R. § 1500.3 (making NEPA "regulations applicable to and binding on all Federal agencies"). Nothing in the Act suggests that agencies need not "properly define[]" the proposed actions under consideration or provide notice if a newspaper prints articles speculating about possible changes in proposed actions. Strict compliance with NEPA requirements is required. *See Calvert Cliffs' Coordinating Comm.*, 449 F.2d at 1109.

If BIA knew by January 2014 that the Elk Grove Site was a possible proposed action—as it appears—it was obligated to initiate scoping for the Elk Grove Site or at least modify the proposed action under review to be "the acquisition of 282 acres of land in Galt *or* 28 acres of land in Elk Grove in trust for a casino." It did neither. And if BIA did not know that the Elk Grove Site was actually under consideration when it identified the Elk Grove Site as an alternative, then BIA cannot attribute to the public information that BIA did not itself have. Either way, BIA violated NEPA and the APA by failing to inform the public of the proposed action under consideration.

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the other five alternatives. AR4429. The DEIS, however, notes that the Tribe did not have an agreement to purchase the mall site. *See* AR26480.

[25] *See, e.g.*, AR3380-81 (objecting that Tribe's June 9, 2016 press release "was the first I and most Elk Grove residents heard that a location in Elk Grove was being considered"); AR2348; AR3795-97 (comments on FEIS objecting to the lack of transparency and misleading process); AR3768.

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2. BIA's refusal to prepare an EIS for the Elk Grove Site violated NEPA.

BIA was obligated to prepare a new EIS when the Tribe withdrew its fee-to-trust request for the Galt Site and submitted a new fee-to-trust request for the Elk Grove Site.[26] BIA's trust regulations require tribes "desiring to acquire land in trust status [to] file a written request for approval of such acquisition with the Secretary." 25 C.F.R. § 151.9. That request must also include "a description of the land to be acquired." *Id.* Under NEPA, the "[a]pproval of specific projects" with significant effects is a "major Federal action." 40 C.F.R. § 1508.18(b)(4). NEPA requires agencies to prepare an EIS for "*every* ... major Federal action[ ] significantly affecting the quality of the human environment."[27] 42 U.S.C. § 4332(C) (emphasis added). But because the acquisition of the Elk Grove Site in trust for a casino is a "specific project" with significant effects, BIA was statutorily *required* to prepare an EIS for that request. [28]

a. BIA would like to justify its failure to prepare an EIS for the Elk Grove Site by treating "proposed actions" the same as "alternatives." AR14324. But they are not the same under NEPA; an alternative is—by definition—not the proposed action. *See, e.g.*, 42 U.S.C. § 4332(C)(iii) (requiring agencies to consider "alternatives to the proposed action"). The distinction between the two is crucial, because the proposed action triggers and shapes the entire review process. NEPA emphasizes the importance of "agency cooperation early in the . . . process," 40 C.F.R. § 1501.6, and defines cooperating agencies to include local governments with "jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) . . . ," *id.* § 1508.5. Yet BIA did not invite Elk Grove to

[26] The Tribe withdrew its application for the Galt Site and authorized a new application for the Elk Grove Site on June 20, 2016. AR4717-18; AR13215. The Tribe submitted a new fee-to-trust application identifying the Elk Grove Site on June 30, 2016. *See* AR3198-3213.

[27] "Proposals" and "federal actions" are the same thing. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004).

[28] BIA's procedures for reviewing fee-to-trust requests make clear that each application is reviewed separately. *See generally* https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf (identifying application requirements).

be a cooperating agency, and it refused to allow Elk Grove to review the preliminary DEIS. *See* AR1729. Elk Grove eventually requested cooperating agency status on May 13, 2016. AR1279.

BIA focused its public outreach on Galt because BIA defined the proposed action as the Tribe's fee-to-trust request for 282 acres of land in Galt for a casino. BIA held a scoping hearing in Galt because the regulations recommend a scoping hearing "when the impacts of a particular action are confined to specific sites," and the impacts would be felt primarily in Galt. 40 C.F.R. § 1501.7(b)(4). Unsurprisingly, the issues the public identified in response to the scoping notice related to Galt. *See, e.g.*, AR16313-347. BIA also asked Galt to participate as a cooperating agency because the regulations define cooperating agencies to include local governments with jurisdiction by law—i.e., Galt has jurisdiction over the proposed Galt Site. *See* 40 C.F.R. § 1508.5. Even the alternatives BIA selected were heavily weighted towards Galt. BIA created three Galt-specific alternatives: (1) Alternative A – Proposed Action; (2) Alternative B – Reduced Intensity Casino on the same 282-acre site; and (3) Alternative C – Retail on the same 282-acre site. AR13995-96.

By contrast, no one identified issues related to Elk Grove during scoping; no one even mentioned Elk Grove. BIA did not invite Elk Grove to participate as a cooperating agency. AR16159-63; AR2944. And BIA did not consider multiple alternatives of varying intensity or use on the Elk Grove Site; it considered only one. AR16281. The distinction between a proposed action and an alternative is self-evident—the proposed action triggers and shapes the NEPA analysis; an alternative does not.

b. BIA insists that it did not have to conduct any additional analysis because agencies can select alternatives rather than the proposed action without violating NEPA (assuming that the DEIS adequately addressed environmental concerns, which it did not here). In circumstances where proposed actions are broadly defined, that may be true. Agencies frequently choose among alternatives when considering whether to approve a forest management plan, a mining operations plan, or the eventual location of a transmission line, pipeline, or highway. But

the alternatives the Forest Service might consider when approving a forest management plan are all variants on how to manage that forest. For example, the Forest Service can select an alternative when the proposed action is for a travel management plan that would "regulate motorized and non-motorized travel on roads and trails on lands … of the Lewis and Clark National Forest," and all alternatives were different means of managing the same forest land. 70 Fed. Reg. 55815 (Sept. 23, 2005); *see Russel Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1040 (9th Cir. 2011). Likewise, BLM can select among alternatives when it has defined as the proposed action a mining operations plan that "permit[s] the construction, operation and reclamation of . . . silver/copper mine project and associated power transmission line" and the alternatives "consist[ed] of modifications of, or changes to various elements comprising the proposal." 70 Fed. Reg. 40686, 40687 (Jul. 14, 2005). *See also Save Our Cabinets v. U.S. Dep't of Agriculture*, 254 F. Supp. 3d 1241, 1247 (D. Mont. 2017).

Here, the proposed action wasn't to build a casino in California or even Sacramento County. The proposed action was to build a casino in Galt, California on 282 acres of land identified by parcel number. The Tribe asked BIA to acquire that *specific parcel* of land in trust, and BIA identified that specific request as the proposed action. When the proposed action is so precisely defined, changing the proposed action to an entirely different location requires reinitiating the NEPA process.

Had BIA required the Tribe to submit a request for the Elk Grove Site in February of 2014, when BIA knew the Tribe might purchase the site, it theoretically could have reviewed *both* applications—one for the 282 acres of land in Galt and one for 28 acres or 36 acres of land in Elk Grove—in a single EIS. BIA would have had to identify both applications as proposed actions under review, offer scoping hearings in both cities, and invite both Galt and Elk Grove to participate as cooperating agencies. Doing so would have helped BIA to gather accurate information regarding Alternative F's impacts and allowed the public a meaningful opportunity to comment. Failing to do that, however, BIA was required to prepare an EIS for the Elk Grove

Site when the Tribe submitted a fee-to-trust application for the Elk Grove Site (expanded to 36 acres).

3. BIA was obligated to prepare an SEIS after the Tribe submitted a new fee-to-trust request for the Elk Grove Site.

At the very least, BIA had to prepare a SEIS in this case. NEPA requires agencies to "prepare supplements to either draft or final [EISs] if the agency makes substantial changes in the proposed action that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1).

BIA claims that "[n]either of these situations apply to the Wilton FEIS." AR14302. That claim is not credible. When an agency changes the proposed action from acquiring one site for a casino to acquiring another site, the agency has self-evidently made a "substantial change[] in the proposed action." 40 C.F.R. § 1502.9(c)(1)(i). Both BIA and the Tribe understood that the fee-to-trust application for the Elk Grove Site was a new proposed action. *See* AR10881-82 (FEIS identifying Elk Grove as new proposed action); *see also* AR4089 (acknowledging that Galt was the original proposed action). These changes are relevant to environmental concerns.

There were also "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). As an initial matter, the Tribe increased the acreage of the Elk Grove Site from 28 acres in Alternative F to 36 acres in the FEIS, and added a 1,966-space parking garage. AR10884-85. But more importantly, BIA's discussion of Alternative F's impacts on various resources in the DEIS was superficial or simply wrong, requiring substantial revisions. For example, BIA failed to identify the correct parcel of land, to provide correct information on groundwater levels, or to identify the correct agency responsible for providing water to the site. AR1061. A project's impacts on water are a fundamental part of an EIS, particularly in California. Yet BIA did not get the basic factual information right about water levels and providers, let alone analyze Alternative F's impacts on water resources, as the law requires. *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 09-

cv-00407, 2011 U.S. Dist. LEXIS 47661, at *30-31 (E.D. Cal. May 4, 2011); *see also* AR1064 (noting failure to analyze indirect effects of utility infrastructure improvements); AR1074 (commenting that DEIS did not analyze sufficiency of water supply, impacts on system, or impacts on wastewater).

The DEIS had major holes in its analysis of land use impacts and existing restrictions. BIA did not discuss sensitive air quality receptors near Alternative F, such as the Sterling Meadows residential project, because BIA did not correctly identify major residential developments in the immediate vicinity of the site. AR1061. The DEIS states, for example, that the casino would be over a half-mile from any residential concentration, but the existing Hampton Oaks neighborhood is 1,500 feet away. *Id*. BIA also ignored several approved residential developments within 1,000 feet of the site, which are critical for a sound cumulative effects analysis. *Id*. In fact, BIA's table of cumulative development did not include a residential project adjacent to the mall site that includes 976 single family units and 200 multifamily units or the Southeast Policy Area with development potential of 4,790 dwelling units and 23,410 jobs. AR1064. BIA did not correctly identify land use designations of the site or how building a 12-story hotel would affect the mall area (which has a 100-foot maximum height), as well as the surrounding residential developments, which were approved as part of a larger regional development plan—the Lent Ranch Special Planning Area. AR1061-62; AR1063. The EIS does not actually discuss any of the cumulative effects these developments will have, along with the casino. A cumulative effects analysis "must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum." *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 342 (D.C. Cir. 2002). Because BIA's did not, it violated NEPA. *See Am. Rivers v. Fed. Energy Regulatory Comm'n*, 895 F.3d 32 (D.C. Cir. 2018) (holding that a "cumulative impact analysis [that] left out critical parts of the equation . . . fell far short of the NEPA mark").

The DEIS ignored other crucial issues, such as Alternative F's impacts on police services, loss of sales tax and other revenues from removing the land from the tax rolls and the City's taxing jurisdiction or its effects on public facilities or relocation impacts. AR1059-060. These developments have major effects on traffic, which BIA also described incorrectly in the DEIS. *See* AR1072-73. BIA's economic analysis of the project only analyzed impacts on Galt. AR1063; AR1070-71. These are not minor issues; these are key impacts BIA was required to analyze *in the DEIS* so that the public could properly review impacts. NEPA requires a DEIS to "fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act." 40 C.F.R. § 1502.9(a). The regulations make clear that "[i]f a [DEIS] is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion." *Id*.

BIA prepared a number of supplemental reports, including new mitigation agreements (AR11608-665), supplemental economic reports (AR11666-1712), supplemental biological reports (AR11713-741), supplemental cultural studies (*see* AR11742-43), supplemental traffic studies (AR11744-47), supplemental environmental site assessments (AR11748-1974), and revised air quality monitoring (AR11975-12505). Many of these reports still fail to adequately assess impacts on critical resources, but they are clearly "significant new . . . information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii).

Yet BIA did not even stop to consider whether it should prepare and circulate an SEIS so that the public had the opportunity to review and comment on the new information BIA presented in the FEIS. The Tribe submitted a new fee-to-trust request on June 30, 2016. AR3198-3213. By July 5, 2016, BIA had concluded that it would go straight to a FEIS. *See* AR1276 (BIA responding to email that it would review Tribe's application for Elk Grove Site in FEIS). Agencies are required, however, to take a second look at their projects and produce a

SEIS when there have been substantial changes to the proposed action or significant new circumstances have developed.[29]

At a minimum, an agency must prepare an evaluation before determining that a SEIS is not required. In this Circuit, the agency has the burden of demonstrating that it "(1) accurately identif[ied] the relevant environmental concern; (2) [took] a 'hard look' at the problem …; (3) [made] a 'convincing case' that the potential environmental impact is not significant enough to require a SEIS; and (4) show[ed] that 'even if there is an impact of true significance, [a SEIS] is unnecessary because changes or safeguards in the project sufficiently reduce the impact to a minimum." *Lemon v. McHugh*, 668 F. Supp. 2d 133, 138 (D.D.C. 2009) (citations omitted). BIA did not meet this burden because there is no evidence it took a hard look at the problem. BIA's conclusory statements in the ROD—that, "the environmental impacts of Alternative F … are already analyzed within the Draft EIS…" and that "NEPA regulations do not require preparation of a Supplemental EIS as none of the thresholds to prepare a Supplemental EIS are met in this case"—fall far short of the "convincing case" that is required. AR14317-18; *Kunaknana v. U.S. Army Corps of Eng'rs*, 23 F. Supp. 3d 1063, 1091 (D. Alaska 2014).

The fact that Elk Grove and Galt both objected to the adequacy of the DEIS on a number of issues underscores the point. Both considered the DEIS deficient. AR1059-76 (Elk Grove objections); AR679-745 (Galt objections). Galt, in particular, was highly critical of the DEIS and the FEIS. AR1151-82 (Galt objecting that BIA failed to allow it to participate as a cooperating

[29] *See, e.g.*, *Lemon v. McHugh*, 668 F. Supp. 2d 133 (D.D.C. 2009) (holding that the Army Corps must either produce a SEIS to address the environmental effects of a new development plan for a decommissioned army base or show that the new plan presented no new significant impacts); *Kunaknana v. U.S. Army Corps of Eng'rs*, 23 F. Supp. 3d 1063, 1092 (D. Alaska 2014) (requiring preparation of a SEIS where, between the issuance of the FEIS and the ROD, the Army Corps made substantial changes to the preferred alternative for a drill site, including relocation of the drill pad and an increase in the number of wells); *W. Expl., LLC v. U.S. Dep't of the Interior*, 250 F. Supp. 3d 718, 749 (D. Nev. 2017), *appeal docketed*, No. 17-16220 (9th Cir. June 13, 2017) (holding that BLM and the Forest Service must prepare a SEIS because the public could not have "reasonably anticipated" from the DEIS that the agencies would designate certain lands as critical habitat in the FEIS).

agency to the extent the regulations require and identifying deficiencies in FEIS). An agency ignores the comments of cooperating agencies at their peril. *See, e.g.*, *Int'l Snowmobile Mfrs. Ass'n v. Norton*, 340 F. Supp. 2d 1249, 1262 (D. Wyo. 2004) (ignoring the expertise of cooperating agencies and failing to involve them in significant decisions does "not indicate good faith cooperation with cooperating agencies"); *Wyoming v. U.S. Dep't of Agriculture*, 277 F. Supp. 2d 1197, 1219 (D. Wyo. 2003) ("the agency undertaking the action shall engage with other governmental entities in an open and public manner . . . [and] that participation and delegation of duty must be meaningful.").

4. BIA rushed to a decision without addressing significant impacts and without serious deliberation, violating NEPA and the APA.

"Allowing the public to submit comments to an agency that has already made its decision *is no different from prohibiting comments altogether*." *Nehemiah Corp. of Am. v. Jackson*, 546 F. Supp. 2d 830, 847 (E.D. Cal. 2008) (emphasis added). It is also problematic "if the public perceives that the agency will disregard its comments, [because] there may be a chilling effect that causes the public to refrain from submitting comments as an initial matter." *Id.*; *see also Air Transp. Ass'n v. Nat'l Mediation Bd.*, 663 F.3d 476, 487 (D.C. Cir. 2011) ("Decisionmakers violate the Due Process Clause and must be disqualified when they act with an 'unalterably closed mind' and are 'unwilling or unable' to rationally consider arguments.") (citing *Ass'n of Nat'l Advertisers, Inc. v. Fed. Trade Comm'n*, 627 F.2d 1151, 1170, 1174 (D.C. Cir. 1979).

The outcome of BIA's review process was never in doubt. The only real question was whether BIA would be able to *physically complete* the documents it needed to before the presidential inauguration on January 20, 2017. BIA's commitment to resolving an application that had been pending for only two months in a two-day turnaround is itself evidence that BIA had predetermined its outcome.

But that is far from the only evidence of BIA's impermissible predetermination. BIA's decision not to clarify the actual proposed action, its refusal to conduct any additional process or engage with the public, its willingness to overlook major title problems, and its extraordinary

dismissal of the 14,800 Elk Grove citizens exercising their rights under federal law and the California Constitution all indicate that BIA was not going to allow *anything*—no matter how meritorious—to prevent it from approving the Tribe's application. And BIA's actions only became more urgent after the November 7, 2016, election. BIA decided then that the application must be approved before January 20, 2017, apparently because it assumed that the incoming Administration would be less friendly to tribal interests or less forgiving of BIA's procedural violations (or both). It was so obvious that BIA was racing to approve the casino that the Plaintiffs sought emergency relief from this Court ten days *before* BIA approved the Elk Grove casino.[30] ECF 2; *see also* AR9083-9133. And the administrative record confirms that the Plaintiffs were right.

An agency does not issue a decision that normally takes on average 15 months *in less than two days* unless that agency has already decided what that decision will be. An agency cannot take the "hard look" NEPA requires and render a considered decision in that little time. That BIA was acting with an "unalterably closed mind" and was "'unwilling or unable' to rationally consider arguments" is also evident from the deficient EIS used in reaching its decision. BIA's cursory and inaccurate consideration of the project's impacts on water, traffic, and public health and safety impacts—in addition to the cumulative effects problems identified *supra*—independently violates NEPA and warrants vacatur.

[30] Plaintiffs requested that the Court enjoin BIA from transferring title to the land upon issuance of the ROD long enough for Plaintiffs to seek a preliminary injunction. ECF 2 at 1. BIA decided on the evening of January 19, 2017, to delay the transfer of title. ECF 17 ¶ 3; ECF 17-3. Because Plaintiffs filed a request with BIA that it stay the title transfer under 5 U.S.C. § 705—at BIA's recommendation—they could not seek emergency relief while that request was pending. BIA informed Plaintiffs that it denied their request on February 10, 2017, after BIA accepted the title conveyance. ECF 17 ¶ 8; ECF 17-7, 17-8.

a. BIA's race to a decision prevented it from taking the "hard look" NEPA requires.

1. On average, BIA takes 15 months from the close of the comment period on a FEIS to review and respond to comments and issue a ROD.[31] BIA issued this ROD in *40 hours*. BIA did not consider in good faith any of the comments on the Tribe's fee-to-trust application or the FEIS. It is impossible that the agency completed all of its statutory and regulatory responsibilities in so little time.

NEPA requires that an agency take a "hard look" at the environmental consequences of a proposed major action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). A "hard look" takes time, as the court explained in *N.C. Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transp.*, 151 F. Supp. 2d 661, 676 (M.D.N.C. 2001). In that case, the court held that the Federal Highway Administration's (FHWA) "cursory one-day review" of a ROD prepared by the North Carolina Department of Transportation (NCDOT) "indicates a complete disregard for [NEPA's] 'hard look' requirement." *Id*. The court reached that conclusion even though FHWA and NCDOT spent over a month reviewing comments on the FEIS before NCDOT issued the ROD that FHWA quickly approved. *Id.* A less than 2-day review of public comments—particularly for a FEIS where the agency has substituted one proposed action for another and attached hundreds of pages the public has not seen before—does not satisfy NEPA's "hard look" requirement.

In the normal fee-to-trust case, BIA reviews and responds to comments on the FEIS; the Regional Office prepares a recommendation memorandum for the Assistant Secretary and the Office of Indian Gaming; the Office of Indian Gaming and the Office of the Solicitor review the FEIS and the regional recommendation memorandum; both offices prepare a draft ROD; and the

[31] *See* Declaration of Sheri Pais (Dec. 4, 2018) (ECF 74-1), at ¶ 2 and Exhibit A (chart depicting the typical time frame at the BIA from the close of a comment period on a final environmental impact statement (EIS) to the issuance of the ROD).

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Assistant Secretary reviews the materials, makes changes, and issues a ROD. BIA completes the environmental review process *before* it begins to prepare an analysis and notice of decision.[32]

BIA cannot complete all of these steps and conduct the sort of deliberate and fully informed analysis the law requires in 40 hours. The record demonstrates that BIA did not give public comments careful consideration because it was in a race to beat the clock. *See, e.g.*, AR48310 (asking attorney to "do a very quick review" and attorney responding by asking "[w]hen do we need to get this back to OIG? Like, do we have an another hour or should it be more like 30 mins"). The Solicitor's Office was worried about being blamed if the decision was not made before the end of the Administration. AR5791. The decision-maker—Larry Roberts—could not have seriously considered the issues or the ROD. At best, he had little time to review the decision (if he reviewed it at all).[33] In fact, the only way that BIA can issue a ROD in less than 40 hours is if BIA pre-prepared all of the decision documents—which it did.[34] BIA had obviously decided the outcome of the application before completing its NEPA review.

2. BIA never intended to give the comments serious consideration in the first place. BIA's clear goal was to approve the Tribe's Elk Grove casino before the end of the Obama Administration. The record is replete with evidence establishing that BIA planned to approve the Tribe's request before President Trump entered office and that it would not allow for delay of

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[32] Fee-to-Trust Quick Reference Guide, U.S. Dep't of the Interior (Jun. 16, 2014), https://www.bia.gov/sites/bia.gov/files/assets/bia/ots/pdf/Fee-to-Trust_Quick_Reference_Guide.pdf; *see also* Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee to Trust Handbook), U.S. Dep't of the Interior (2016), https://www.bia.gov/sites/bia.gov/files/assets/public/raca/handbook/pdf/Acquisition_of_Title_to_Land_Held_in_Fee_or_Restricted_Fee_Status_50_OIMT.pdf at 48. AR31831 (email transmitting draft recommendation document); AR31854 (forwarding the final recommendation memorandum for signature 11 hours before close of comment period).

[33] The record does not show that Mr. Roberts was involved in any aspect of the final review process, provided any comments at all, or even reviewed the decision.

[34] AR51847 (sending draft of ROD on January 9, 2017); AR51588 (transmitting drafts of the ROD and recommendation memorandum on January 5, 2017); AR50780 ("waiting to get a copy of the draft Record of Decision from the Gaming Office for legal review" on December 29, 2016).

that. When the Senate Committee on Indian Affairs, on behalf of Senator Harry Reid, contacted BIA in December to stress the importance of meeting publication deadlines that would "allow land to be put into trust by January 19, 2017," BIA responded that it had every intention of meeting the deadlines.[35] AR5627. BIA refused to grant the State of California more than a week extension to provide comments on the Tribe's fee-to-trust application, despite its failure to provide the State important documents for several weeks. AR3945-47. BIA refused the State its request without explanation. AR3945 ("At this time, we are unable to grant further extension of time for comments.").[36] The reason is clear. Had BIA granted California a 30-day extension on December 21, it could not have issued its decision on January 19. BIA's conduct deprived the public of meaningful input in the process. *See, e.g., Idaho ex rel. Kempthorne v. U.S. Forest Serv.*, 142 F. Supp. 2d 1248, 1260-62 (D. Idaho 2001) (holding that confusing information given to the public and hurried process "deprived the public of any meaningful dialogue or input into the process—an obvious violation of NEPA").

At the same time, BIA was working closely with the Tribe on timing and getting the necessary documents in order. The Tribe's title company was informed that BIA wanted to take the land in trust before January 20. In an email to BIA, the title company stated that Tom Farrell of Boyd Gaming Corporation "has also indicated to us that the BIA would like to have the land

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[35] In fact, the Committee threatened BIA with Senator Reid's involvement if BIA did not meet the deadline for publishing notice of the FEIS: "we are closing up shop here and need an answer asap. Senator Reid will need get [sic] involved soon if we don't hear back today." AR5807. *Compare D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1245 (D.C. Cir. 1971) (discussing unacceptable political pressure). Boyd Gaming was also a significant contributor to Senator Reid. *See, e.g.*, https://www.opensecrets.org/members-of-congress/contributors?cid=N00009922&cycle=2014&type=I (contributing $53,450 in 2014).

[36] The State complained on December 21, "We requested an additional 30 days to allow for a proper review of documents, including documents that we requested from BIA—but still have not received. BIA only permitted an extension of seven days, to January 7, 2017; however, we still have not received the documents requested to allow for a full review by our office. I am asking that BIA please provide the remaining documents requested which are the attachments to the Tribe's Application, then allow us the additional 30 days to review those documents after they are received." AR3945.

taken into trust before 1/20/17 and we would like to confirm the steps required for the fee-to-trust conveyance and related timing, so that the acquisition can be scheduled in time for the fee-to-trust conveyance." AR3248. Based on his weekly calls with BIA, Farrell obviously understood that BIA would approve the Tribe's request.

In fact, that is the only reasonable explanation for the Tribe's sudden risk tolerance. In November, the Tribe repeatedly urged BIA to resolve title issues on an expedited basis, stressing that "everything needs to get done [fast] or [the Tribe] will lose money!"[37] AR32248. The Tribe was concerned that [redacted] Yet the Tribe exercised its option to purchase the Elk Grove Site for $36 million, nine days before the trust decision.[38] A risk-averse tribe would not have purchased the land unless it knew that BIA would acquire it; there was no reason to—it still had months left to exercise the option. The Tribe purchased the land because it knew, just as the title company said in its December 21, 2016, email, that BIA would acquire the land before January 20.

3. BIA's refusal to address the public controversy regarding the development agreement and its disregard for the public proceedings also indicate that it was unwilling to allow anything to delay its decision. Under BIA guidance, applicants must clear objections identified in BIA's preliminary title opinions before preparing an analysis and notice of decision.[39] On November 8, 2016, the Solicitor issued a qualified endorsement that required confirmation that "the documents related to the development of the regional mall are no longer valid or have been terminated." *See, e.g.*, AR3707-3708. Those documents—which gave the City the right to grant or deny land use approvals, impose taxes and utility charges, apply regulations to protect public

[37] The Tribe was in nearly constant contact with BIA between November and January 19, 2017. *See, e.g.*, AR31283-84.

[38] AR32173-74 (identifying date of the executed Purchase and Sale Agreement as January 10, 2017); *see also* AR31731 (title insurance document dated January 11, 2017 identifying escrow account); AR32166-67 (accommodation instructions and indemnity dated January 11, 2017).

[39] *See* Fee-to-Trust Quick Reference Guide, U.S. Dep't of the Interior (Jun. 16, 2014); *see also* Fee to Trust Handbook, U.S. Dep't of the Interior (2016), at 18-19.

health and safety, and other powers, AR8946-47—were not eliminated by the time of BIA's decision. Under California law, a city must enact an ordinance approving the execution of a development agreement, which is then recorded as an encumbrance on the title to the property. AR9064. The City tried to eliminate the encumbrances resulting from the development agreement via ordinance, but approximately 14,800 citizens signed a petition to referend the ordinance, as authorized under the California Constitution. AR8947. At the time of the decision and BIA's eventual acquisition, the encumbrances remained on the land.

BIA did not disclose the development agreement in its NEPA analysis, even though the encumbrances on the land related to environmental concerns, economic impacts on the community, and health and safety regulations. Their elimination from the land has environmental implications. BIA's failure to address this issue—one that it was aware of at least as early as April 2016, AR3972—violates NEPA. An agency must "consider every significant aspect of the environmental impact of a proposed action." *Balt. Gas & Elec. Co.*, 462 U.S. at 97. It also did not disclose the existence of an Army Corps of Engineers permit, which included mitigation requirements (the purchase of 3.015 credits of seasonal wetlands, establishment and maintenance of 1.4 acres of wetlands, recordation of deed restrictions for the preserve, and monitoring). *See* AR3707. "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b); *N.M. ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 708 (10th Cir. 2009) ("Informed public input can hardly be said to occur when major impacts of the adopted alternative were never disclosed."). Information about the Army Corps permit is clearly information relevant to any NEPA analysis, yet BIA did not disclose its existence. AR11265.

In the ROD, BIA attempts to dismiss the title encumbrances by claiming, in effect, that it's none of Plaintiffs' business. *See, e.g.*, AR14062-63 (explaining that title concerns the United States only and is a problem only when the encumbrances make title to the land unmarketable or create a potential liability for the United States). But that is not correct. The existence of the

restrictive covenants resulting from the development agreement prevented the site from qualifying as "Indian lands" available for gaming under IGRA, 25 U.S.C. § 2703(4), and interfered with tribal governance under 25 C.F.R. § 151.11(b). *See, e.g.*, AR9063-65 (discussing how the encumbrances prevent the tribe from exercising governmental authority over the land); AR9568.[40] BIA ignored both of these arguments, which violates the APA. *See, e.g.*, *Butte County, Cal. v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010); *see also SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983) (citations omitted) (requiring an agency to cogently explain why it has exercised its discretion in a given manner).

Moreover, it is simply not true that title only affects the United States. The existence of required mitigation and monitoring from the Army Corps' permit directly affects the environment and is a public concern. And the rights and mitigation included as restrictive covenants on the land were the result of an extended review process under State law that reflected the input of the Elk Grove community. To the extent that proposed trust land might include private rights (*e.g.*, easements, rights-of-way, etc.), it is critical that those property rights be protected. BIA cannot run roughshod over private or public property rights by acquiring land in trust, particularly because the Quiet Title Act bars challenges involving Indian trust lands. *See, e.g., Match-E-Be-Nash-E-Wish*, 567 U.S. 209, 215-16 (2012) (explaining that the Quiet Title Act does not waive the government's immunity for challenges directly to Indian title).

BIA's efforts to downplay the significance of the problem are belied by the record. BIA and the Tribe both knew that the development agreement was a major problem.[41] On April 8,

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[40] *See also* Letter from Assistant Secretary-Indian Affairs to Governor, Pueblo of Jemez (Sept. 1, 2011), https://bia_dev.opengov.ibmcloud.com/sites/bia.gov/files/assets/public/pdf/idc015052.pdf.

[41] *See, e.g.*, AR50882 (Boyd representative asking "are you aware of unrecorded restrictive covenants on property to be acquired in trust ever being considered a lien or encumbrance that would disqualify the land from acquisition?"); AR50850 (tribe called in a "panic" about encumbrances); AR50776-777 (discussing encumbrances on the site, including Corps permit issue); AR50483-84 (preparing language for Mr. Miskinis on title issue); AR49751 (refusing to

2016, the Tribe emailed BIA regarding encumbrances on the property title, which it knew was a "huge issue." AR1206; *see also* AR4086. In the fall, the Tribe promised BIA that it would "require all of the exceptions noted in the cover letter to be removed BEFORE [t]he Tribe acquired the property from Howard Hughes, so that when the Tribe conveyed the property onto BIA, there will be clean title." AR3752. BIA asked the Tribe if the development agreement could be eliminated or if Elk Grove and the developer could revoke the agreement. AR214-215; *see also* AR213. BIA worked throughout the day it issued the ROD trying to resolve title issues, including several with environmental consequences. AR3386-87 (discussing need for statement from tribe that agreement would not interfere with uses and need for drainage pond); AR50427.

In any case, when the outcome of the decision is not already determined, BIA always resolves these concerns prior to approving an application. Here, it covered them up, ignored questions from the public, disregarded the ongoing legal proceedings, and issued its decision by January 19—as planned. BIA's failure to address major problems indicates an inalterable mind. *See, e.g.*, *New York v. U.S. Dep't of Commerce*, 351 F. Supp. 3d 502, 663 (S.D.N.Y. 2019) ("a decision-maker who was fairly and honestly considering the evidence before him would have been more likely to heed the legal obstacles in his path").

b. BIA failed to address major deficiencies in the EIS in its race to a decision.

As a general matter, the EIS is at best a cursory listing of impacts with virtually no analysis. The Cities of Elk Grove and Galt both commented that BIA failed to analyze how resources would be impacted. AR1074 (noting that the wastewater analysis stated that there was capacity without analyzing and identifying impacts). BIA simply concluded that there would be impacts, but they would be mitigated satisfactorily. That is not sufficient.

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insure land and asking whether there is any way to terminate the Agreement other than going through the referendum process and she said the reason for the Referendum was that they had proposed to eliminate the application of the Agreement to the half of the property being purchased by the Tribe by revising the Agreement).

1. BIA violated NEPA by failing to adequately address the impacts of a casino in Elk Grove on the region's water supply. BIA's "analysis" of the project's impacts on the regional water supply is limited to: (1) estimating the average daily water consumption to be approximately 260,000 gallons per day; (2) stating that the Sacramento County Water Agency (SCWA) has the capacity to meet anticipated demand and would supply the project; and (3) noting that the Tribe would resubmit water improvement plans to SCWA and pay water development fees. BIA's analysis was not only insufficient, it was wrong.

First, NEPA requires agencies to consider how a proposed project will affect the regional water supply. *See, e.g.*, *San Luis & Delta-Mendota Water Auth. v. Salazar*, No. 09-cv-00407, 2011 U.S. Dist. LEXIS 47661, at *30-31 (E.D. Cal. May 4, 2011). Consideration of a project's impacts on the regional water supply is particularly important in California, which has been in drought conditions for years and requires local water agencies to develop groundwater sustainability plans. *See, e.g.*, AR1317-18 (discussing drought conditions and California legal requirements); AR1074 (Elk Grove commenting that DEIS did not address impacts on water supply); AR14162 (Stand Up commenting that FEIS water supply analysis is inadequate). BIA's response to these concerns is limited to referencing the section of the DEIS that states that SCWA "has capacity to meet anticipated demand for domestic water use under Alternative F," AR10703-04, and that "mitigation measures would be implemented to ensure a less-than-significant impact on off-site . . . water purveyors," AR10724. The EIS does not address SCWA's water capacity, the impact the proposed project will have on SCWA's capacity, or the cumulative effects of the casino project and the surrounding development. BIA failed to take the "hard look" NEPA requires.[42]

[42] *See, e.g.*, *Gov't of the Province of Manitoba v. Salazar*, 691 F. Supp. 2d 37, 47-48 (D.D.C. 2010), *clarified on denial of reconsideration sub nom. Gov't of Province of Manitoba v. Salazar*, No. CV 02-2057 (RMC), 2010 WL 11595314 (D.D.C. June 17, 2010) (finding that the Bureau of Reclamation did not take the requisite "hard look" at the cumulative impacts on the Missouri River and Lake Sakakawea when the agency only considered the proposed project's water withdrawal in isolation−not in combination with other existing water withdrawal projects).

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Second, BIA's conclusory statement that SCWA has the water capacity to serve the casino project was wrong. BIA accessed SCWA's 2005 Water Supply Master Plan for Zone 40 ("2005 Master Plan")—the area serving Elk Grove—at some point in May 2014 in the course of preparing the EIS.[43] It does not appear, however, that BIA actually read the 2005 Master Plan. The 2005 Master Plan indicates that the SWCA allocated to "mixed use" developments no more than 2.51 acre-feet/acre/year. 2005 Master Plan at 2-5, 2-7. The proposed project, as revised, has a total project area of 35.9 acres. AR10996 at n.1. Under the 2005 Master Plan, SWCA budgeted 90.36 acre-feet per year for the site—about 80,668 gallons per day.[44]

The casino project, however, is estimated to require 260,000 gallons per day—three times what SCWA budgeted. AR11000. The statement in the FEIS that the "existing planned commercial use at the Mall site . . . is comparable to the use under Alternative F" is wrong. AR10729.

Subsequent analyses underscores BIA's failure to adequately consider this issue. Two months after BIA approved the project, the SCWA acknowledged that its "water supply portfolio is fully allocated" in Zone 40 and that it could not serve the area without procuring additional water supplies and building additional infrastructure, including groundwater treatment and storage facilities, water wells, and transmission and distribution mains. Ex. 4.[45] This information would have been available prior to the FEIS, if BIA had consulted with SCWA or addressed the comments highlighting the inadequacy of the analysis in the EIS.

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[43] *See* http://www.waterresources.saccounty.net/scwa/Documents/Z40_WSMP.pdf. (listed on the FEIS Section 8.0 Refences list, AR11600). For the convenience of the Court, Plaintiffs will include the 2005 Master Plan in the joint appendix as Ex. 4. SCWA is responsible for providing wholesale water to Zone 40, which includes the City of Elk Grove. 2005 Master Plan at 1-3; *see also id*. at 1-7 (service area boundary map showing SCWA as service provider for Lent Ranch site). The casino project area falls within the "Zone 41" retail service area, which is part of Zone 40. AR27257 (Water and Wastewater Feasibility Study at 19).

[44] There are approximately 325,851 gallons per acre-foot of water.

[45] Plaintiffs concurrently move for reconsideration of the Court's denial of Plaintiffs' motion to supplement the record with this document. ECF 62 at 8-9.

2. BIA also violated NEPA by failing to consider new information regarding the public safety risks related to the nearby Suburban Propane storage facility, one of the country's largest such facilities, and the previous target of a foiled terrorist plot. AR24781-82 (ROD Responses to Comments). The DEIS failed to address of these risks at all, despite the fact that the casino project was proposed to be located within the blast radius of the Suburban Propane facility. AR6626. The FEIS was little better, including only a cursory dismissal of the issue by citing an analysis in a 2001 Environmental Impact Report (EIR), prepared for the Lent Ranch development under the California Environmental Quality Act (CEQA), and an unreported 2004 state appellate court decision upholding that EIR. AR11175-76.

In their comments on the FEIS, Plaintiffs pointed out that the FEIS failed to consider new information that post-dates the February 2001 EIR, including any reevaluation of terrorism risks after the terrorist attacks of September 11, 2001, information in Suburban Propane's April 2, 2016 letter regarding the risks of potential criminal acts,[46] and the 2003 risk evaluation report it cites. AR24616-17; AR24573, 24576-96. Plaintiffs also cited a 2015 report regarding a proposed propane terminal in Portland, Oregon, which discussed in considerable detail the potential for a deliberate attempt to set off a chain reaction at the Suburban Propane facility by targeting the smaller, pressurized storage tanks—rather than the main storage tanks themselves—a previously unevaluated tactic. *See* AR24638, 24641-44, 24659; AR24573.

BIA did not consider this new information in the ROD; instead, it relied exclusively on the February 2001 EIR and the 2004 state appellate court decision upholding it.[47] AR24781-82. But a "non-NEPA document—let alone one prepared and adopted by a state government—

[46] The ROD asserts that this letter was not available for review, AR24781, but in fact the letter was submitted by Plaintiffs to BIA and is found in the record at AR36 and AR24578.

[47] The ROD asserts that the appellate court reevaluated terrorism risks after 9/11. AR24782. The state appellate court, of course, did no such thing: although the decision post-dates 9/11, the court only evaluated and upheld the February 2001 EIR, which pre-dates 9/11. *South Coast Citizens for Responsible Growth v. City of Elk Grove*, No. C042302, 2004 WL 219789 (Cal. App. 3rd, Feb. 5, 2004) (unpublished). The EIR was approved by the City Council on June 27, 2001, also before 9/11. AR11591.

cannot satisfy a federal agency's obligations under NEPA." *South Fork Band Council of Western Shoshone Of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) (citing *Klamath–Siskiyou Wildlands Center v. Bureau of Land Mgmt.*, 387 F.3d 989, 998 (9th Cir. 2004)). With respect to the Portland terminal report Plaintiffs provided, BIA responded only that "the conclusions in the EIS do not need to be changed," without explaining why. AR24782. This is insufficient. 40 C.F.R. § 1502.9(c)(ii) (requiring SEIS when there is significant new information relevant to environmental concerns and bearing on the proposed action and its impacts).

3. BIA was similarly dismissive of comments regarding the change in Alternative F from 28 acres to 36 acres and how that change was relevant to traffic impacts. In the DEIS, BIA stated that a total of 1,690 parking spaces would be provided on-site, with additional parking provided by the adjacent mall. AR26360. In the FEIS, BIA announced that the Tribe added eight acres to the site and would build a three-story parking garage, among other changes, and that 1,437 surface parking spaces and 1,966 garage parking spaces would be provided (for a total of 3,403 spaces), with additional parking provided by the adjacent mall. AR10885. BIA concluded that the additional acreage and on-site parking did not affect the evaluation of impacts because the gaming floor square footage, which drives customer visitation rates, did not change. AR24771-74. In the ROD, however, BIA disclosed that the owner of the outlet mall site—HHC—decided not to allow the casino-resort to share parking with the adjacent mall. AR24771. The FEIS does not consider whether by doubling the number of parking spaces on the casino site, that might increase overall traffic by allowing a significantly higher number of people to visit the outlet mall and the casino at the same time.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for summary judgment, vacate the January 19, 2017, Record of Decision and the

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February 10, 2017 acceptance of conveyance of the Elk Grove Site in trust for the benefit of the Wilton Rancheria, and order Defendants to record a rescission of that acceptance of conveyance.

Dated this 1st day of April 2019

Respectfully submitted,

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