UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, *et al.*, Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR, *et al*., Defendants.	Civil Action No. 1:17-cv-00058-TNM ORAL ARGUMENT REQUESTED

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO CROSS-MOTIONS FOR SUMMARY JUDGMENT

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Agencies should follow the same review process when evaluating proposed actions at the end of a presidential administration as they do at the start. Concerns regarding possible delay or the policy changes of an incoming administration might effect are not a legitimate reason for an agency to compress an internal deliberative process that takes on average 15 months into less than two days. But that is exactly what happened here.

The Bureau of Indian Affairs (BIA) approved a newly filed fee-to-trust application for a casino in a 42-hour, around-the-clock marathon, based on an environmental impact statement (EIS) that was prepared for a different proposed action. BIA not only failed to provide the public with notice that it was changing the proposed action after years of review, it refused to prepare a supplement to the EIS, flouting federal regulations requiring it to do so. The agency ignored state legal proceedings related to the proposed trust land, disregarded encumbrances that historically precluded acquisition, refused to address outstanding environmental questions, and was less than forthright with the Court regarding its intentions—all to prevent the incoming administration from deciding the Tribe's application.

BIA argues that all of this was fine, that the public could have figured out what the proposed action *really* was despite BIA's announcement that it was something else, and that the EIS it prepared for the first proposed action was legally sufficient for the second. None of the cases BIA cites allows an agency to substantially change the proposed action itself with no additional process. In the end, an agency's ability to select among alternatives says nothing about whether, in doing so, the agency might also have to prepare a supplemental EIS. That is a different question—one that the regulations answer affirmatively when there is a substantial change in the proposed action, as was the case here.

The legal deficiencies caused by BIA's failure to prepare a supplemental EIS were only compounded by its refusal to meaningfully consider any comments on the final EIS, including those addressing the hundreds of pages of new material BIA impermissibly added to the final EIS. There was no way BIA could, in good faith, address those comments, given the 48-hour

window it had to complete the EIS process and prepare a record of decision (ROD) before the clock ran out.

Mischaracterizing Plaintiffs' arguments should fool no one. BIA ignored legal limits on its authority to acquire land in trust, contravened fundamental procedural requirements, and undermined the fundamental purposes of the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA). There is a reason that agencies cannot change proposed actions at the last minute—if agencies are permitted to do that, the public will never know with any certainty what proposed actions the federal government has under review. Such an outcome would undermine "the values of public participation, fairness, and informed agency decisionmaking that the notice-and-comment process is designed to foster." *City of Idaho Falls, Idaho v. F.ERC*, 629 F.3d 222, 229 (D.C. Cir. 2011) (citing *Nat'l Elec. Mfrs. Ass'n v. Envtl. Prot. Agency*, 99 F.3d 1170, 1174 (D.C. Cir. 1996) (discussing the purposes of the APA's notice-and-comment requirements)).

Respectfully, the Court should vacate BIA's January 19, 2017, ROD and order BIA to remove the Elk Grove Site from trust.

A. BIA's and the Tribe's cross-motions do not answer Plaintiffs' argument that acquiring land in trust for Indians in Wilton violates the CRA

Plaintiffs' argument that the trust acquisition of the Elk Grove Site for Wilton Indians violates the California Rancheria Act (CRA) is straightforward. The CRA states that "all statutes of the United States which affect Indians because of their status as Indians" do not apply to Indians who receive Rancheria assets under the CRA.[1] Indians in Wilton received Rancheria assets under the CRA and, as a result, all federal statutes that affect the Indians in Wilton because of their status as Indians do not apply. Section 5 of the Indian Reorganization Act of 1934 (IRA) is such a statute.[2] By acquiring the Elk

[1] Pub. L. 85-671, § 10(b), 72 Stat. 619 (Aug. 18, 1958).

[2] 25 U.S.C. § 5108; *see also Carcieri v. Salazar*, 555 U.S. 379, 393 (2009).

Grove Site in trust for Indians in Wilton under Section 5 of the IRA, BIA violated the CRA.

BIA's and Wilton's oppositions side step the point. They assert that Plaintiffs have challenged Wilton's recognition or restoration or they claim that Plaintiffs have challenged their stipulation of settlement. But Plaintiffs have done none of those things; they only challenge BIA's authority under the IRA to acquire land in trust for the Wilton Rancheria, in light of the express prohibition in the CRA. Defendants' arguments are, accordingly, beside the point. The Court need not reach the Tribe's recognition, restoration, or stipulated settlement to conclude that the plain language of the CRA restricts the Secretary's trust acquisition authority.

1. Four of BIA's five arguments address why Plaintiffs cannot challenge Wilton's "recognition" and "restoration." *See* ECF 98-1 at 15-17. But Plaintiffs made no such challenge. There is no need for Plaintiffs to challenge the Tribe's recognition or restoration because an entity's status as a federally recognized tribe does not guarantee that BIA has authority under Section 5 of the IRA to acquire land in trust for it.

BIA is certainly aware that it cannot acquire land in trust for some federally recognized tribes. The Supreme Court reached that conclusion in *Carcieri v. Salazar*, where it held that the Secretary lacked authority to acquire land in trust for the Narragansett Tribe because the Tribe was not under federal jurisdiction in 1934. 555 U.S. 379, 382-83 (2009). Yet the Narragansett Tribe remains on the list of federally recognized tribes eligible to receive services from the United States. 84 Fed. Reg. 1200, 1202 (Feb. 1, 2019). The Secretary also lacks trust authority for the Mashpee Tribe under the IRA. *See Littlefield v. U.S. Dep't of Interior*, 199 F. Supp. 3d 391, 400 (D. Mass. 2016); *see also Mashpee Wampanoag Tribe v. Zinke*, No. 18-cv-02242-RMC, ECF 1 (Sept. 27, 2018) (BIA concluding that the Mashpee Tribe does not qualify for trust land). Yet the Mashpee Tribe, too, remains on the list of federally recognized tribes eligible to receive services. 84 Fed. Reg. at 1202.

The statutory definition of "Indian" under the IRA makes it possible that a federally recognized tribe may not be eligible to receive land in trust. The IRA authorizes BIA to acquire land in trust "for the purpose of providing land for *Indians*"—a limitation that applies to all federally recognized tribes. 25 U.S.C. § 5108 (emphasis added); *see Carcieri*, 555 U.S. at 393. Thus, if a tribe's *members* cannot meet the IRA's definition of "Indians" in Section 19 of the Act, 25 U.S.C. § 5129, the tribe cannot qualify for trust land under the IRA regardless of its status as a recognized or restored tribe.[3] Congress acknowledged that not all recognized tribes qualify for trust land under the IRA and maintained those limitations in the Indian Land Consolidation Act of 1983 (ILCA), 25 U.S.C. § 2202, which provides:

> The provisions of section 5108 of this title shall apply to all tribes notwithstanding the provisions of section 5125 of this title: *Provided, That nothing in this section is intended to supersede any other provision of Federal law which authorizes, prohibits, or restricts the acquisition of land for Indians* with respect to any specific tribe, reservation, or state(s).

ILCA, Pub. L. 97-459, Title II, 96 Stat. 2517 (Jan. 12, 1983) (emphasis added); *see also Carcieri*, 555 U.S. at 395 (stating that "we will not assume that Congress repealed the plain and unambiguous restrictions on the Secretary's exercise of trust authority in [the IRA] when it enacted § 2202").

Members of the Narragansett Tribe could not meet the definition of "Indians" because they are not members of a tribe under federal jurisdiction in 1934. *Carcieri*, 555 U.S. at 391-92. Similarly, members of the Mashpee Tribe could not meet multiple definitions of "Indians" because they, too, were not members of a tribe under federal jurisdiction in 1934, nor descendants of Indians who were members of a recognized tribe

[3] Under the IRA, acquisition of land in trust is only proper if the beneficiary is "Indian," defined in the IRA as "[1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction [in 1934], and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include [3] all other persons of one-half or more Indian blood." 25 U.S.C. § 5129.

under federal jurisdiction in 1934. *Littlefield*, 199 F. Supp. 3d at 399; *see also Mashpee Wampanoag Tribe*, No. 18-cv-02242-RMC, ECF 1. And members of the Wilton Tribe cannot meet the definition of "Indians" because "all statutes of the United States which affect *Indians* because of their status as *Indians*" are inapplicable to those who received a distribution of Rancheria property. Pub. L. 85-671, § 10(b), 72 Stat. 619 (emphasis added).[4]

Wilton's status as a federally recognized tribe cannot, of itself, establish BIA's trust authority. Accordingly, the Plaintiffs did not challenge—and did not need to challenge—Wilton's status as a federally recognized tribe to assert that BIA lacks authority to acquire the Elk Grove Site in trust. And this Court—like the Supreme Court, a federal district court, *and BIA* before it—need not address the Tribe's recognition to reach the same conclusion. Because the plain language of the CRA bars the trust acquisition in this case, the Court should conclude that acquisition of the Elk Grove Site was arbitrary, capricious, and contrary to federal law.

2. Not only are BIA's recognition and restoration arguments beside the point, they are incorrect and misleading. BIA conflates (at 15-16) "restoration" and "recognition," but the two concepts are quite different. "Recognition" occurs by treaty negotiations, legislation, the acquisition of land, or some other evidence, as BIA seems to acknowledge in the ROD where it concludes that the United States recognized Wilton in 1927 or 1935. AR14036-37. Section 103(3) of the Federal List Act, which BIA cites in the ROD [at AR14050] as confirmation "that a court-approved settlement agreement like

[4] BIA's reliance on *Stand Up for California! v. U.S. Dep't of Interior*, 204 F. Supp. 3d 212, 298 (D.D.C. 2016), *aff'd* 879 F.3d 1177 (D.C. Cir. 2018) is misplaced. In that case, the plaintiffs did not challenge the trust decision under the CRA; they argued that the Indians living on the North Fork Rancheria in 1934 were not the same Indians BIA restored in 1983 for purposes of establishing that they qualified for trust land under the IRA. *Id*. at 299. That decision has no application here. Plaintiffs do not question BIA's determination that the Indians living on Wilton Rancheria were the same Indians who received distributions of Rancheria property. And that BIA determination is what bars them from having land acquired in trust on their behalf.

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," acknowledges how tribes are *recognized*, not restored. Section 103(3) provides that tribes "presently may be *recognized* by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations . . . ; or by a decision of a United States court." Pub. L. 103-454, § 103(3), 108 Stat. 4791 (Nov. 2, 1994) (emphasis added).

"Restoration," by contrast, occurs when a formerly recognized tribe is terminated for a period of time and then restored to federal recognition. AR14038-39. And Congress clearly distinguished "recognition" and "restoration" in Section 103(5) of the List Act, where "*Congress* has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated." Pub. L. 103-454, § 103(5), 108 Stat. 4791 (emphasis added).[5] The List Act is not authority for BIA to restore terminated tribes, as BIA claims in the ROD [at AR14050], but it does underscore the distinction between "recognition" and "restoration." *See* AR14050; *see also* 25 C.F.R. § 83.4(c) (stating that BIA cannot acknowledge "[a]n entity that is, or an entity whose members are, subject to congressional legislation terminating or forbidding the government-to-government relationship").

This distinction matters for purposes of the legal standards that might apply, had Plaintiffs actually challenged Wilton's "restoration" or "recognition." By using the terms interchangeably, BIA misrepresents the applicable legal standards to distract from Plaintiffs' actual arguments. But because Plaintiffs do not challenge either, the Court

[5] Congress has restored tribes affected by the CRA to federal recognition, and the legislation not only declared the provisions of the CRA inapplicable to the tribes and their members, it declared the IRA applicable to them or authorized the acquisition of trust land. *See, e.g.*, Auburn Indian Restoration Act, 25 U.S.C. § 1300l (1994); Paskenta Band of Nomlaki Indians of California, 25 U.S.C. § 1330m-1 (1994); Graton Rancheria Restoration Act, 25 U.S.C. § 1330n-2 (2000). Wilton sought legislative restoration of federal recognition but was eliminated from the final bill. AR13219.

need not decide whether "a decision by the Department to recognize a tribe—at least one made outside the procedures of 25 C.F.R. Part 83—warrants judicial deference," as BIA argues [at 15]. For the same reason, the Court should ignore BIA's claims [at 16] that "if Plaintiffs lacked standing to challenge the Department's recognition of Wilton when it occurred, . . . they lack standing now" and that Plaintiffs' alleged challenge to Wilton's restoration is time-barred.

Plaintiffs challenged BIA's *trust decision*. Therefore, normal APA standards apply and there is no question that Plaintiffs have standing to challenge BIA's trust decision, or that their challenge is timely.[6]

3. BIA objects [at 14-15] that "Plaintiffs cannot challenge the court-approved stipulation restoring Wilton." Nor do they. *BIA* cited the stipulated settlement in the ROD as the basis for its authority to issue a gaming eligibility determination under IGRA, *see* AR14039-040, and a trust decision under the IRA, *see* AR14050-51. But BIA does not explain how a stipulated settlement allows it to circumvent the restrictions on its trust authority. Ultimately, the commitments BIA made in the stipulated settlement with Wilton cannot evade the statutory prohibition set forth in the CRA.

BIA tries to shift blame by arguing that Plaintiffs are "attempt[ing] to circumvent the plain language of the CRA while ignoring the 'fundamental postulate' that the statute is 'to be liberally construed, and all doubts resolved in' Wilton's favor." ECF 98-1 at 18-19 (quoting *Duncan v. Andrus*, 517 F. Supp. 1, 5 (N.D. Cal. 1977) (collecting cases on the Indian canon of construction and applying it to the CRA)). It is unclear how the Indian canon could dictate an intent not to terminate when the legislation seeking

[6] BIA's argument here is similar to that rejected by the Court in *Patchak v. Zinke*, 138 S. Ct. 897, 913-14 (2018)—that an APA challenge to a trust decision was really a suit to quiet title barred by the Federal Quiet Title Act. The Court disagreed and held that the challenge was a straightforward claim under the APA to BIA's trust decision. Here too, Plaintiffs challenge BIA's trust decision under the APA, Wilton's recognition or restoration.

termination was actively sought by the enumerated rancherias, including Wilton.[7] Even so, the Indian canon only applies when statutory language is *ambiguous*, and BIA does not identify any ambiguous language. *See South Carolina v. Catawba Indian Tribe, Inc*., 476 U.S. 498, 506 (1986) (stating that "[t]he canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist").

The CRA is plain as day. Section 1 states that "the lands, including minerals, water rights, and improvements located on the lands, and other assets of the [enumerated] rancherias and reservations in the State of California *shall be distributed* in accordance with the provisions of this Act." Pub. L. 85-671, § 1, 72 Stat. 619 (emphasis added). Congress's intent that rancheria assets be distributed is unambiguous. An approved distribution plan "*shall be final*, and the distribution of assets pursuant to such plan shall not be the basis for any claim against the United States by an Indian who receives or is denied part of the assets distributed." *Id.* § 10(a) (emphasis added). After distribution:

> 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). This language plainly prohibits BIA from taking land into trust on behalf of Indians who received any part of Wilton assets.

In citing the Indian canon, BIA does not ask the Court to interpret the CRA in its favor; it asks the Court to ignore Section 10(b) of the CRA entirely. But there is no ambiguity in this language, nor question that Wilton Indians received distributions of

[7] The congressional record indicates that the enumerated rancherias sought termination and approved the legislation. *See e.g.*, Providing for distribution of land and assets of certain Indian rancherias and reservations in California, H. Rep. No. 1129, 85th Sess. 1st, 4 (Aug. 13, 1957); *see id.* at 23 (noting that Wilton wanted immediate action); *see also id.* at 25.

Rancheria assets. What BIA is really arguing is that an express statutory prohibition does not apply because BIA wishes to circumvent it by a stipulated settlement that undoes the effect of the CRA, decades after BIA implemented it. The Indian canon does not help. As the Supreme Court clarified in *Chickasaw Nation v. United States*, the Indian canon does not apply where it "would produce an interpretation that [the Court concludes] would conflict with the intent embodied in the statute Congress wrote" and may have less force in the statutory context. 534 U.S. 84, 94-95 (2001).

BIA cites three district court cases to support its position that it has the power to defy a federal statute by stipulated settlement. ECF 98-1 at 19-20 (citing *Duncan*, 517 F. Supp. at 4-6; *Smith v. United States*, 515 F. Supp. 56, 60 (N.D. Cal. 1978); *Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 260-61 (N.D. Cal. 1981)). In those cases, the court approved allowing distributees to regain federal benefits—a remedy proposed by BIA and the distributees. *Duncan*, 517 F. Supp. at 6. The court concluded that BIA violated the CRA, based on BIA's admission and a reading of the CRA that relied heavily on the Indian canon, which it deemed "'a fundamental postulate'" that applied with "particular force" to the CRA. *Id*. at 5-6 (quoting *Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655, 660 (9th Cir. 1975)). But those cases predate *Chickasaw Nation*, where the Court stated that the Indian canon is not a mandatory rule and refused to apply it where it would result in an interpretation of statutory language that conflicts with Congressional intent. 534 U.S. at 94-95. And none of the cases explored the question presented here—whether BIA can transfer newly-acquired land in trust under the IRA to Indians to whom federal statutes are inapplicable because of their status as Indians.[8] *See MCI Telecomms. Corp. v. FCC*, 712 F.2d 517, 535 (D.C. Cir. 1983) (an agency cannot

[8] In *Table Bluff Band of Indians*, the government did not believe that it had authority to re-acquire distributed land in trust. 532 F. Supp. at 262. The court overruled the government's objection, but only to the extent that it conflicted with its order "permitting plaintiffs to reconvey legal title to the distributed land back to the United States." *Id.*

"flout the mandates" of a federal statute); *see also Can-Am Plumbing, Inc. v. Nat'l Labor Relations Bd.*, 321 F.3d 145, 153 (D.D.C. 2003) (when one federal statute conflicts with another, the enforcing agency cannot ignore the other statute).

This Court has not previously interpreted the CRA, and it should conclude that the CRA unambiguously bars acquiring land in trust for Wilton, whose members received Rancheria assets decades ago.

B. BIA violated unambiguous NEPA regulations and acted contrary to the underlying purposes of the Act

1. BIA was required to prepare a supplemental EIS, at a minimum, because it made substantial changes to the proposed action

This case is not about an agency's ability to select a preferred alternative. It is about whether NEPA permits an agency to substantially change the *proposed action itself* in a final EIS. It does not. NEPA regulations expressly require 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." 40 C.F.R. § 1502.9(c)(1) (emphasis added). Wilton withdrew its fee-to-trust application for the Galt Site and submitted a new fee-to-trust application for the Elk Grove Site. BIA then changed the proposed action from a casino in Galt to a casino in Elk Grove. That change is obviously a "substantial change[] in the proposed action" that is relevant to environmental concerns for which a supplemental EIS is required.

Strict compliance with NEPA's procedural requirements is required. *See 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."). BIA's refusal to provide any meaningful process after the Tribe filed a new application and BIA changed the proposed action was not mere technicality or harmless error. It was a major procedural violation requiring vacatur of BIA's decision.

a. BIA has no credible response to Plaintiffs' argument that the change in the proposed action from a casino on the Galt Site to a casino on the Elk Grove Site is a "substantial change[] in the proposed action." BIA argues that swapping out proposed actions was not necessarily a substantial change based on two cases. ECF 98-1 at 36 (citing *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011), and *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1097 (10th Cir. 2004)). These cases do not support BIA's claim.

Neither case involved a change to the proposed action itself. In *Russell Country Sportsmen*, the court concluded that the Forest Service did not have to prepare a supplemental EIS when its final decision made "only minor changes" to *alternatives* it considered which were "qualitatively within the spectrum of the alternatives discussed in the draft EIS." 668 F.3d at 1039-40. The Forest Service's proposed action was "a proposal to develop a travel management plan to regulate motorized and non-motorized travel on roads and trails on lands administered by [three districts]." 70 Fed. Reg. 55815-01 (Sept. 23, 2005). Changes in the alternatives did not change the proposed action.

The same is true of *Friends of Marolt Park*, where the court held that the Department of Transportation did not have to prepare a supplemental EIS when "the two options approved by the Agency had been fully examined in the *supplemental draft EIS* and the final EIS." 382 F.3d at 1097 (emphasis added). The proposed action in that case was "for transportation improvements for the area of S.H. 82 known locally as the "'Entrance To Aspen,'" including potential transit improvements to Snowmass Village." 59 Fed. Reg. 8670-03 (Feb. 23, 1994). After the Department circulated a draft EIS, it added an alternative that involved phasing the project and *it issued a draft supplemental EIS for public review*. *Friends of Marolt Park*, 382 F.3d at 1092. Not only was there no change to the proposed action, the agency issued a supplemental EIS.

Because *none* of the cases BIA cites [at 36-37] involved any significant change to the proposed action itself, they are inapposite. Each of the cases BIA cites involves new information about the proposed action or slight changes to the chosen alternative.[9]

BIA does not direct the Court to a single case where a private applicant changed its proposed action from one site to another at the last minute, the agency went straight to a final EIS without additional process, and a court sanctioned the approach. That is almost certainly because most agencies understand that action to violate NEPA. There is no case where BIA changed the proposed action under consideration from one site to another in a final EIS—its action here is without precedent. The trust application, which must identify a specific parcel of land, 25 C.F.R. § 151.9, triggers the NEPA analysis and dictates identification of the proposed action, 25 C.F.R. § 151.10(g); 40 C.F.R. § 1502.4(a).[10]

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[9] *Davis v. Latschar*, 202 F.3d 359 (D.C. Cir. 2000) (holding that new information made available after final EIS was prepared would not affect the preferred alternative provided in final EIS for the proposed deer management plan); *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360 (1989) (holding that a supplemental EIS was not required for the proposed dam construction project based on allegedly new information that was not relevant to environmental concerns of the project); *City of Olmstead Falls v. Fed. Aviation Admin.*, 292 F.3d 261, 274 (D.C. Cir. 2002) (ruling that FAA's alleged failure to disclose that the proposed airport redevelopment project would not meet certain water quality standards did not require the FAA to supplement EIS); *Ark. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 431 F.3d 1096, 1103-04 (8th Cir. 2005) (upholding the Army Corps of Engineers' decision not to issue a supplemental EIS because the new irrigation projects raised as possible additions to the larger proposed irrigation project were speculative and thus not significant); *Airport Impact Relief, Inc. v. Wykle*, 192 F.3d 197, 204 (1st Cir. 1999) (holding that changes to the details of a roadway/tunnel construction project, but not to the proposed action itself, did not require supplemental EIS); *Half Moon Bay Fishermans' Marketing Ass'n v. Carlucci*, 857 F.2d 505 (9th Cir. 1988) (rejecting plaintiff's argument that the Army Corps' of Engineers was required to prepare a supplemental EIS where the agency chose one alternative over another, both of which were still consistent with the proposed action, and sufficiently explained the changes to the chosen alternative) and 52 Fed. Reg. 1373 (Jan. 13, 1987) (notice of intent to prepare a draft supplemental EIS for the proposed action at issue in *Half Moon Bay Fishermans' Marketing Ass'n*).

[10] BIA cannot dictate a tribe's trust application; unlike with most permits or other regulatory actions taken by federal agencies, BIA lacks any authority to condition, alter, or otherwise modify a proposed action. *See Carcieri v. Kempthorne*, 497 F.3d 15, 38 n.18 (1st Cir. 2007) ("The Secretary takes the position that he has no authority to impose restrictions on land taken

If BIA were permitted to change its proposed actions from one casino site to another without—at a minimum—preparing and circulating a supplemental draft EIS, the public would never know with any certainty what proposed action BIA is actually considering. The public *depends* on BIA's NEPA notices for information, because the fee-to-trust regulations do not otherwise require BIA to provide public notice. *See generally* 25 C.F.R. Part 151. A key purpose of an EIS is to "guarantee[] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). No information is more relevant than knowing what proposed action is under consideration—particularly in the context of proposals submitted by private applicants. It is not enough to make that information available in a final EIS because doing so deprives the public of its right to participate in the decisionmaking process. *See Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) ("[A]n agency's failure to disclose a proposed action before the issuance of a final EIS defeats NEPA's goal of encouraging public participation in the development of information *during* the decision making process."); *State of California v. Block*, 690 F.2d 753, 771 (9th Cir. 1982) ("By refusing to disclose its Proposed Action until after all opportunity for comment has passed, an agency insulates its decision-making process from public scrutiny. Such a result renders NEPA's procedures meaningless.").

b. BIA's justification of its action relies on the specious argument that because the EIS assessed environmental impacts of alternative sites, its choice of an alternative site cannot require further environmental assessment or NEPA compliance. *See, e.g.*, ECF 98-1 at 21-23. It may be true that NEPA encourages agencies to select among alternatives as a means of comparing environmental impacts. *See City of*

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into trust under the IRA, absent a statutory directive imposing such restrictions."), *rev'd on other grounds, Carcieri v. Salazar*, 555 U.S. 379 (2009).

Alexandria, Va. v. Slater, 198 F.3d 862, 866 (D.C. Cir. 1999). NEPA *also* requires agencies to prepare supplemental EISs when they make substantial changes to their proposed actions. 40 C.F.R. § 1502.9(c)(1). There is no tension between these two directives. If identification of a preferred alternative does not entail a substantial change to the proposed action, an agency does not have to prepare a supplemental EIS. If identification of the agency's preferred alternative does entail a substantial change, a supplement is required. In either event, an agency is free to identify its preferred alternative.[11]

BIA complains that having to prepare a supplement somehow "turns the agency's analysis of alternatives into a sham" or "has the potential to turn the Act into an infinite loop of environmental analysis." Nonsense. ECF 98-1 at 22, 23. Agencies regularly prepare supplements without becoming trapped in an endless loop of environmental analysis. The regulations actually encourage supplements, by *requiring* them when there are "substantial changes to proposed actions" or "significant new circumstances or information" and *encouraging* them when agencies "determine[] that the purposes of the Act will be furthered by" preparing a supplement. 40 C.F.R. § 1502.9(c)(1), (2). No court

[11] BIA cites numerous cases that support the uncontroversial proposition that NEPA encourages agencies to choose among alternatives. *See* ECF 98-1 at 24. BIA, however, elides the distinction between "proposed actions" with "preferred alternatives." Identification of the "proposed action" is the foundation of any NEPA analysis, which is why it must be "properly defined." 40 C.F.R. § 1502.4(a). Proposed actions include the "[a]pproval of specific projects" and "actions approved by permit or other regulatory decision." *Id.* § 1508.18(b)(4). Identification of a "proposed action" triggers the EIS process, including scoping and public notice requirements. *Id.* §§ 1501.7(a), 1508.22(a).

An agency's identification of its "preferred alternative," by contrast, is the alternative that the *agency* thinks would best "fulfill its statutory mission and responsibilities." *See* CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 16027-28 at #4a (March 23, 1981). Agencies typically identify their "preferred alternatives" at the end of the NEPA process, and they do not have to match the "proposed action." *Id.*, #5a.

has found that the supplemental EIS requirement turns an agency's alternatives analysis into a sham.

Likewise, BIA's assertion that "Plaintiffs' version of NEPA would render all of the work required by NEPA meaningless, to be redone for absolutely no reason" is baseless. ECF 98-1 at 22. Plaintiffs do not argue that NEPA compliance requires it to redo each study; Plaintiffs argue that BIA must follow the regulations by "prepar[ing], circulat[ing], and fil[ing] a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council."[12] 40 C.F.R. § 1502.9(c). Moreover, there is a reason to restart the process or prepare a supplemental EIS—doing so ensures that the public is properly apprised of *the actual proposed action under consideration*. *See, e.g., Nat. Res. Def. Council, Inc. v. Envtl. Prot. Agency*, 863 F.2d 1420, 1429 (9th Cir. 1988) (Under 5 U.S.C. § 553, an agency "must provide notice sufficient to 'fairly apprise interested persons of the subjects and issues before the Agency'") (citation omitted)). That way, the public has the opportunity to identify issues of concern specific to that project—not a proposed action an applicant has abandoned. *See* 40 C.F.R. § 1501.7 ("There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action."); *id*. at (c) ("An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action."). Obviously, BIA may use any studies it previously prepared in revising and supplementing the draft EIS. NEPA allows agencies

[12] As Plaintiffs argued in their motion for summary judgment, the proposed acquisition of the 36-acre Elk Grove Site is a new major Federal action that separately triggers NEPA. ECF 91 at 31. 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." 42 U.S.C. § 4332(C). The regulations governing supplemental EISs do not require agencies to reinitiate scoping. 40 C.F.R. § 1502.9. Treating the Elk Grove Site as a substantial change in the proposed action would, therefore, reduce BIA's obligations.

to use studies they have previously prepared. *See* 40 C.F.R. § 1506.3(a) ("An agency may adopt a Federal draft or final environmental impact statement or portion thereof provided that the statement or portion thereof meets the standards for an adequate statement under these regulations").

BIA's resort to hyperbole does not mask its straightforward violation of an unambiguous regulation requiring a supplemental EIS when there is a substantial change in the proposed action. *See* 40 C.F.R. § 1502.9(c)(1). Changing the proposed action from a casino in one town to a casino in another town is—at the least—a substantial change in the proposed action, if not a new major action that triggers either a supplemental EIS or a new EIS. *Cf.* 42 U.S.C. § 4332(C) (requiring an EIS for "every ... major Federal action[ ] significantly affecting the quality of the human environment"); *see also* ECF 91 at 31.

2. By changing the proposed action in the final EIS, BIA undermined NEPA's public participation purposes and the final EIS

NEPA requires the public to be provided "relevant information and an opportunity to participate in agency decisionmaking." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 301 F. Supp. 3d 50, 74 (D.D.C. 2018). Although BIA acknowledges [at 25] this requirement, it fails to appreciate that identification of the proposed action is highly "relevant information." Until BIA issued the final EIS, the agency had not informed the public that the proposed action under consideration was acquiring the Elk Grove Site into trust. Its failure to do so undermined at least one of NEPA's two key purposes: "guarantee[ing] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Robertson*, 490 U.S. at 349.

a. BIA argues that the public had ample opportunity to participate in the process and cites the scoping and draft EIS proceedings. ECF 98-1 at 25-28. That is not correct. Throughout the proceedings, the public understood—based on BIA's representations—that the proposed action was the acquisition of the Galt Site in trust for a casino. *See, e.g.*, AR4852 (notice of intent to prepare an EIS identifying Galt as proposed action); AR21670 (notice of availability of

EIS identifying Galt as proposed action). The fact that the Elk Grove Site was the sixth of seven alternatives does not mean that the public understood that BIA might actually acquire the Elk Grove Site in trust or that additional comments would not have been submitted if Elk Grove had been identified as the proposed action.[13] The public is entitled to rely on an agency's public notices, all of which identified the Galt Site as the proposed action. By regulation, 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. They are not permitted to "turn the provision of notice into a bureaucratic game of hide and seek." *MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1141-42 (D.C. Cir. 1995) (citing *Small Refiner Lead Phase–Down Task Force v. Envtl. Prot. Agency*, 705 F.2d 506, 550 (D.C. Cir. 1983); *Connecticut Light and Power Co. v. NRC*, 673 F.2d 525, 530 (D.C. Cir. 1982); *American Bus Ass'n v. United States*, 627 F.2d 525, 528 (D.C. Cir. 1980)).

In fact, the record indicates that the public did not know that the Elk Grove Site could be the proposed action. As Plaintiffs explained in their opening brief, the public understood that an outlet mall was to be built on the Mall site—including the 28 acres identified as Alternative F—a project that had been reviewed as recently as October 8, 2014. ECF 91 at 28. To the extent that BIA relies on the Tribe's representations during public meetings, many members of the public did not attend those meetings, nor would they have had any idea from BIA's publications identifying the Galt Site as the proposed action that their community was in any way involved. AR4852; AR21670. BIA's failure to inform the public of the actual proposed action violated NEPA and the APA.

b. BIA is also incorrect in claiming that the draft EIS analyzed the Elk Grove alternative at the same level of detail as the proposed action in Galt. ECF 98-1 at 26. The Tribe admits as much, arguing that there is "nothing in NEPA that requires an agency to look past a

[13] Stand Up's comments are clear evidence of this; Stand Up, which is very familiar with the fee-to-trust process in California, focused its comments on the Galt Site. AR2622. Caltrans' comments on the draft EIS identified the Galt Site as the proposed action and focused on the alternatives at site. AR1347. The same is true of the California Department of Fish and Wildlife and the United States Fish and Wildlife. *See* AR1411; AR21706.

party's application to initiate a costly and burdensome environmental review of an alternative the agency thinks an applicant might wind up preferring." ECF 97 at 33. The disparity in BIA's review is evident not only from the Tribe's argument, but also from the draft EIS and the number of new studies it appended to the final EIS.

For example, in the draft EIS, BIA evaluated *three* alternative scenarios for the Galt Site: a full-scale casino resort, a reduced intensity casino resort, and a non-gaming commercial retail development. AR26359-360. BIA evaluated only a full-scale casino resort at the Elk Grove Site as Alternative F, even after it changed the proposed action to the Elk Grove Site. AR26360; AR16281. BIA did not consider a reduced intensity development on the Elk Grove Site, ostensibly because "the environmental effects on the Mall site are already likely to be relatively low since the site is already partially developed." AR26477. But that conclusion is not credible; empty buildings on part of the Elk Grove Site were the only sign of development, which is a far cry from either a full-scale or reduced intensity casino resort. A reduced intensity development would have gaming-related impacts, reduced traffic and water impacts, employment and housing impacts, and other impacts that the "partially developed" site did not have. BIA also refused to consider a non-gaming retail development at the Elk Grove Site because of "retail market saturation," increased socioeconomic effects on other retailers, and that a retail development was unlikely to make Wilton enough money. AR26477-78. Yet the entire site was slated for retail development and BIA reviewed a non-gaming alternative for the Galt Site, even though it is in the same market. AR26462; AR13995-96.

BIA also prepared many new studies related to the Elk Grove Site which are attached to the final EIS, but were not subject to public comment, including new mitigation agreements (AR11608-665), supplemental economic reports (AR11666-1712), supplemental biological reports (AR11713-741), supplemental cultural studies (AR11742-43), supplemental traffic studies (AR11744-47), supplemental environmental site assessments (AR11748-1974), and revised air quality monitoring (AR11975-12505). Agencies are not permitted to add significant new studies to a final EIS. A draft EIS "must fulfill and satisfy to the fullest extent possible the

requirements established for final statements," 40 C.F.R. § 1502.9(a), whereas a final EIS "shall respond to comments as required . . . [and discuss] any responsible opposing view which was not adequately discussed in the draft statement." *Id.* § 1502.9(b). As the Seventh Circuit observed, "[t]his regulatory scheme front-loads the EIS's analytic process, and contemplates publication of a final EIS that addresses issues raised about the draft." *Habitat Educ. Center, Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 527 (7th Cir. 2012). "Strictly construed, NEPA and the CEQ regulations permit an agency to issue a final EIS that does no more than incorporate a previously issued draft EIS and respond to comments received regarding that draft." *Id.* Again, that is why the regulations require agencies to prepare supplemental EISs, not only when there is a substantial change to the proposed action, but also when "[t]here 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).

The fact that some members of the public and government entities commented on the Elk Grove Site does not mean that the public understood it to be the proposed action or that others would not have commented if notice were given that Elk Grove was the proposed action. Nor does it render harmless the substantive deficiencies in the final EIS that resulted from the Department's rush to approve the trust acquisition before the change in Administrations, without giving the new proposed action the "hard look" that NEPA requires.

3. BIA's procedural violations lead to a deficient EIS

BIA's procedural violations are not harmless error; they directly contributed to substantive deficiencies in the EIS. Had BIA provided the public with proper notice when it changed the proposed action to a casino in Elk Grove and offered the opportunity for public comment on a revised draft EIS or supplemental EIS, BIA could have addressed the deficiencies. Although that approach may have delayed a decision by several months, it would have given the public adequate notice and allowed for a legally sufficient EIS. There were several non-

burdensome routes for complying with NEPA here.[14] But BIA's priority was timing, not taking the "hard look" NEPA demands.

BIA argues [at 41-42] that its "end of the Administration" rush "provides no basis for concluding that the Department failed to take a 'hard look' at the comments." It asserts that the facts of *North Carolina Alliance for Transportation Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 676 (M.D.N.C. 2001) are inapposite. There, the court held that the Federal Highway Administration's "cursory one-day review" of a ROD prepared by the North Carolina Department of Transportation "indicate[d] a complete disregard for [NEPA's] 'hard look' requirement." *Id*. BIA says that those circumstances are "[n]othing like those circumstances [that] pertain here." ECF 98-1 at 42.

But the facts of *North Carolina Alliance* are closely analogous. The Federal Highway Administration issued a ROD after one day of review so that the project would meet a funding deadline. *North Carolina Alliance*, 151 F. Supp. 2d at 675. BIA issued a ROD—a decision that normally takes 15 months—in less than two days after the NEPA comment period closed to beat the incoming Administration. The parallels are obvious. Here, BIA reviewed and responded to comments on the final EIS *and* issued the ROD in less than two days, whereas the North Carolina Department of Transportation at least took a month to review comments on the final EIS. *Id.* at 676. A decisionmaker's previous involvement and familiarity with the matter were not sufficient to justify the rushed decisionmaking process in *North Carolina Alliance*, and they should not be sufficient here, particularly because there is no record evidence that the decisionmaker actually reviewed the EIS or the ROD. As the court noted in *North Carolina Alliance*, "[w]hen considered in combination with [the funding deadline], Federal Defendants'

[14] Alternatively, the Tribe could have submitted applications for both sites, allowing BIA to give the public notice that the proposed action was to acquire either site into trust, thus completely avoiding the need to reinitiate the process when the proposed action changed. As BIA acknowledges, the NEPA regulations explicitly allow an agency to evaluate multiple proposals in the same EIS if "'related to each other closely enough to be, in effect, a single course of action.'" ECF 98-1 at 34 n.22 (quoting 40 C.F.R. § 1502.4).

one-day review of the ROD constitutes bad faith in performing a statutorily imposed duty." *Id.* at 676. And when considered in combination with the change of Administrations, the Department's two-day review of the ROD similarly constitutes bad faith.[15]

The outstanding title and encumbrance issues at the time of the decision only strengthen that conclusion. BIA and the Tribe attempt to characterize Plaintiffs' discussion of encumbrances on the Elk Grove Site as independent claims challenging the federal title examination process or BIA's consideration of title issues under NEPA. ECF 98-1 at 43-46; ECF 97 at 45-47. But Plaintiffs focused on BIA's rushed treatment of these encumbrances to emphasize BIA's unwillingness to allow anything to delay its decision. ECF 91 at 43-46. The fact that there were still serious title issues and ongoing litigation when BIA issued its decision is evidence that BIA did not take its statutorily imposed duty seriously. BIA and the Tribe argue that Plaintiffs fail to establish "predetermination," ECF 98-1 at 41-45; ECF 97 at 42, but what Plaintiffs actually argued is that in BIA's rush to a decision, it could not have given environmental impacts the required "hard look," and BIA's rush establishes its "unalterably closed mind." ECF 91 at 38-46. BIA's refusal to meaningfully consider any of Plaintiffs' comments on the final EIS is further evidence of its "bad faith" and the inadequacy of the EIS.

a. BIA failed to take a "hard look" at the project's water impacts

BIA makes several arguments defending its analysis of water impacts, but none is persuasive. First, it argues that water supply impacts were properly considered because the applicable local water management plan accounts for commercial use of the site and the ROD requires the Tribe to enter into a service agreement to pay the local water utility the costs of extending water to the project. ECF 98-1 at 47-48; AR10894; AR24779-80. But that does not address the argument that Plaintiffs actually made. Plaintiffs explained that the estimated water

[15] Contrary to suggestions by BIA [at 42] and the Tribe [at 54 n.19], the agency's determination to re-open the decision in *North Carolina Alliance* was not essential to the court's holding. *See* 151 F. Supp. 2d at 676 ("The decision to reopen the entire NEPA process, which alone would not indicate bad faith conduct, provides *further evidence* …") (emphasis added).

demand of the casino is not comparable to the amount budgeted for commercial use of the Elk Grove Site in the applicable local water management plan; casino demands are three times higher. *See, e.g.*, ECF 91 at 48; ECF 95 at 6 n.2. BIA was required to consider the effects of the project's water demands on the regional water supply, but did not. A measure to mitigate the costs of water service is not equivalent to an analysis of the sufficiency of the local water supply.

BIA claims [at 48] that Plaintiffs have waived their ability to challenge BIA's conclusion that the Sacramento County Water Agency (SCWA) has sufficient capacity to supply water to the project. That is obviously incorrect. Elk Grove raised the question of the adequacy of the SCWA's water supply, noting that the draft EIS did not actually analyze whether the "SCWA's distribution system has the capacity or not within the service area." AR1074. Plaintiffs also commented that the final EIS included no analysis of the capacity of the water supply system "to meet anticipated demand for domestic water use under Alternative F." AR24615. BIA cannot refuse to perform any analysis at all, and then object that Plaintiffs did not comment on specific details of a non-existent analysis.

That BIA is now impermissibly attempting to conduct the analysis it refused to do during the administrative proceedings is an admission that it failed to take the "hard look" NEPA requires. *See Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) ("the courts may not accept . . . *post hoc* rationalizations for agency action.") (citation omitted); *see also Genuine Parts Co. v. Envtl. Prot. Agency*, 890 F.3d 304, 314 (D.C. Cir. 2018) (courts "may only uphold a rule on the basis articulated by the agency in the rule making record" and "post hoc rationalizations for agency action carry no weight with the court.") (internal quotation marks and citation omitted). BIA now argues [at 49] that "the impact is negligible in the context of the 113,064 acre-feet per year budgeted district-wide for 2030." One cannot know the answer to the water capacity question that BIA failed to consider, and its post hoc speculation does not satisfy NEPA requirements. The fact that the local water agency did not object to the project, and that state law might govern any water service agreement, as BIA claims [at 49], does not relieve BIA of its obligations to analyze water impacts under NEPA.

Wilton also attempts a post hoc analysis of the issue in its brief, ECF 97 at 49-50, again underscoring BIA's failure to take the "hard look" NEPA requires. But Wilton goes a step further. It argues [at 49] that Plaintiffs cannot rely on the 2005 Master Plan because it is not in the administrative record. BIA, however, relied on the 2005 Master Plan in the EIS, AR11600, and represented to this Court that documents cited in the EIS are incorporated by reference and are freely citable, ECF 60 at 12-13. Wilton also argues [at 49] that Plaintiffs cannot justify comparing the estimated water demand of the casino project to the average per acre demand allocated to commercial development in the 2005 Master Plan, but that is taken directly from the final EIS itself. *See* AR10729 ("The existing planned commercial use at the Mall site is included in Sacramento County's General Plan and is comparable to the use under Alternative F."). Wilton then asserts [at 49] that "it is far from clear" how the SCWA accounted for the Mall site in its water planning. But that statement serves to confirm Plaintiffs' argument and undermines BIA's assumption in the final EIS that the water usage planned for the site is "comparable" to that of the casino project.

Finally, Wilton disputes [at 50 n.16] that the March 6, 2017, SCWA memorandum establishes that SCWA's water supply portfolio was fully allocated, arguing that the SCWA memorandum accounts for the Elk Grove casino and that the memorandum concerns completely new commercial and residential development. Even if true, that is robbing Peter to pay Paul. The issue is not whether SCWA has additional water resources available that could be developed with additional infrastructure to meet additional needs, or even whether the costs of additional infrastructure would be mitigated; the question is whether the casino project will exceed SCWA's current planned water supply, thereby impacting the existing water system or requiring the development of additional infrastructure, with corresponding environmental impacts. We do not know, and Wilton's arguments only underscore the need for the comprehensive analysis that BIA entirely omitted from the EIS.

b. BIA did not adequately address the public safety impacts of Suburban Propane

BIA contends that NEPA does not require the evaluation of terrorism risks because such risks are generally speculative. ECF 98-1 at 51-52. It cites three cases it claims generally support the proposition that agencies need not consider terrorism risks in certain circumstances. *Id.* (citing *Committee of 100 on Federal City v. Foxx*, 87 F. Supp. 3d 191, 215-216 (D.D.C. 2015), *New Jersey Dept. of Env. Prot. v. U.S. Nuclear Regulatory Comm'n*, 561 F.3d 132, 139-140 (3rd Cir. 2009), and *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 544 (8th Cir. 2003)). That argument fails for two reasons.

First, this is an impermissible post hoc justification for BIA's failure to review the updated studies Plaintiffs provided. *See Nat'l Shooting Sports Found., Inc. v. Jones*, 716 F.3d 200, 214 (D.C. Cir. 2013) (A court "may not uphold agency action based on speculation . . . or on the *post hoc* rationalization of the agency's appellate counsel," and it does not "defer to an agency's 'conclusory or unsupported suppositions'") (citations omitted); *see also* AR24573, 24576-96, 24638, 24641-44, 24659. BIA cannot first introduce in litigation explanations that it failed to make in response to Plaintiffs' request.

Second, BIA (inadequately) reviewed the terrorism risk in the EIS. *See* AR24782; AR11175-76. It cannot now claim that such risks were too speculative. BIA concedes [at 51] that it must address reasonably foreseeable effects. "Effects are reasonably foreseeable if they are sufficiently likely to occur that a person of ordinary prudence would take them into account in reaching a decision." *Sierra Club v. Federal Regulatory Comm'n*, 867 F.3d 1357, 1371 (D.C. Cir. 2017) (internal quotation, brackets and citation omitted). The risk of an attack on the Suburban Propane facility is not just reasonably foreseeable; the facility was the target of a terrorist plot in 1999. The risks to the facility and to the surrounding community were evaluated in the 2001 Lent Ranch Environmental Impact Report (Lent Ranch EIR), which BIA discussed in the EIS. AR24781-82. The Lent Ranch EIR relied on four studies which quantified the annual risk of fatalities, and BIA evaluated those reports in the ROD. *Id.*

Having analyzed the risks posed by the Suburban Propane facility, BIA cannot now claim that it had no obligation to review the updated information Plaintiffs provided. Plaintiffs submitted a report that detailed the previously unrecognized risk of a chain reaction triggered by the smaller, pressurized tanks that are adjacent to the main storage tanks at the Suburban Propane facility—an unevaluated risk relevant to accidents as well as criminal acts. BIA's response in these proceedings is only that the report "did not alter its conclusions." ECF 98-1 at 50 (citing AR24782). That is not the reasoned explanation NEPA requires. *Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1313 (D.C. Cir. 2014) ("the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.") (quoting *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43). Because BIA failed to explain *why* the updated information Plaintiffs submitted "did not alter its conclusions," it failed to provide the reasoned explanation the law requires.[16]

Like BIA, Wilton also asserts that terrorism falls outside the scope of NEPA, arguing that the risks are associated with the propane facility, not the casino. ECF 97 at 51. That argument ignores the fact that BIA considered the issue worthy of evaluation, as well as the fact that the casino will congregate large numbers of people within the blast zone of the propane facility.[17] Wilton also suggests that the mere "*risk* of an accident is not an effect on the physical environment" that must be considered. ECF 97 at 51 (quoting *Metro. Edison Co. v. People*

[16] Wilton simply labels [ECF 97 at 52] the report "histrionic" and asserts that the report and other information submitted by Plaintiffs do not seriously call BIA's analysis into question. It further claims that it is just not reasonable to expect BIA to respond to objections "point-by-point." ECF 97 at 53. That is also not correct in that it is deliberately misleading. While it is true that BIA need not respond point-by-point to every objection, it must give a reasoned response to all legitimate concerns. *See Chem. Weapons Working Grp. v. U.S. Dep't of Def.*, 655 F. Supp. 2d 18, 35 (D.D.C. 2009) (an agency takes a sufficient "hard look" when it, among other things, "responds to all legitimate concerns that are raised") (internal quotation marks and citation omitted).

[17] BIA's assertion that the half-mile distance between the facilities somehow attenuates the chain of causality beyond the scope of NEPA is nonsense, given that the radius of the blast zone is more than one mile and the risk of flying debris is as much as 2.6 miles. ECF 98-1 at 52; AR24616, 24642-43.

Against Nuclear Energy, 460 U.S. 766, 775 (1983)). But *Metro. Edison* only held that NEPA did not extend to the mental distress, anxiety, and psychological health damage caused by the perception of the risk of accident at a nuclear power plant; the agency still considered the risk of an accident. 460 U.S. at 775 n.9. *Metro. Edison* does not support Wilton's argument.

BIA concluded that the terrorism risks associated with the Suburban Propane facility were reasonably foreseeable and capable of evaluation in the EIS. But it refused to consider the new information Plaintiffs presented regarding the effects that will occur if previously unrecognized risks are realized, including new estimates of the effects of flying tank fragments.[18] AR24642. By failing to consider new information regarding both the probability of an explosion and the expected consequences of such an explosion, BIA violated NEPA.

c. BIA's analysis of traffic impacts was inadequate

BIA and the Tribe each mischaracterize Plaintiffs' traffic objections as suggesting that the loss of access to parking in the remainder of the Mall property will increase traffic generated by the casino. *See* ECF 98-1 at 52-53, ECF 97 at 53. That is not what Plaintiffs argued. *See* ECF 91 at 50. In the draft EIS, BIA stated that a total of 1,690 parking spaces would be provided on the then 28-acre site, with additional parking provided by the adjacent mall. AR26360. In the final EIS, BIA announced that Wilton added eight acres to the Elk Grove Site and would build a three-story parking garage, and that there would be 3,403 parking spaces on the now 36-acre site. AR10885. BIA did not consider the impacts of the increased parking or construction because it concluded that the square footage of the gaming floor, which drives customer visitation rates, did not change. AR24771-74. In the ROD, BIA disclosed that parking on the Mall site would not be permitted. AR24771. Plaintiffs argued that BIA failed to consider whether doubling the number

[18] The Tribe also cites [at 51] *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1466-67 (9th Cir. 1996), which, citing *Metro. Edison*, held that an increased risk of bicycle accidents from a trail plan that crowded bicyclists onto fewer trails is not an impact on the physical environment subject to NEPA. Here, however, Defendants' decision will directly impact the physical environment by resulting in the construction and operation of a casino resort that will congregate large numbers of people into the blast zone of the Suburban Propane facility.

of parking spaces on the 36-acre site might result in an overall cumulative increase in traffic by allowing a significantly higher number of people to visit the outlet mall and the casino at the same time. ECF 91 at 50. The addition of eight acres for parking is a change with significant consequences that were not considered, and therefore required a supplemental analysis, contrary to Wilton's assertions. *See* ECF 97 at 41.

The fact is, BIA did not disclose that casino parking would not be permitted on the Mall site in the final EIS. *Compare* AR10885 (final EIS) *with* AR24771 (ROD). The public did not know from the final EIS that the overall parking capacity at the casino and the Mall site would increase by approximately 1,700 spots—which means potentially 1,700 more visitors to the Mall site and casino, 1,700 more cars on the surrounding roads, and increased noise, congestion, pollution, etc. The public had no opportunity to comment on the traffic impacts of this shift before the final decision, violating NEPA.

d. BIA's analysis of various other impacts was inadequate

Finally, BIA objects that Plaintiffs do not explain how the "laundry list" of additional deficiencies in the draft EIS required the preparation of a supplemental EIS, ECF 98-1 at 37, 39-40, but Plaintiffs did precisely that, and at length, ECF 91 at 34-38. Plaintiffs described how BIA failed to provide sufficient or even correct information regarding Alternative F's impacts on various resources in the draft EIS, including: the correct parcel of land; correct information on groundwater levels; the correct water supply agency; major residential developments nearby that are sensitive air quality receptors and critical for a cumulative analysis of noise impacts; correct land use designations and height restrictions; the cumulative effects associated with surrounding residential developments; the effect on police services, loss of sales tax and other revenues; the effects on public facilities or relocation impacts; fiscal and economic impacts specific to Elk Grove (as were provided for Galt) rather than only regionally. *Id*. Plaintiffs also noted that the numerous supplemental reports that BIA provided in the final EIS (many of which were still deficient) were "significant new . . . information relevant to environmental concerns and bearing

on the proposed action or its impacts," thus requiring a supplemental EIS. ECF 91 at 36 (quoting 40 C.F.R. §1502.9(c)(1)(ii). Plaintiffs further discussed BIA's failure to prepare an evaluation before determining that a supplemental EIS was not necessary, as required in this Circuit. ECF 91 at 37 (citing *Lemon v. McHugh*, 668 F. Supp. 2d 133, 138 (D.D.C. 2009)).

BIA attempts to side-step the four-factor test set forth in *Lemon* by including a string citation of pages in the draft EIS, ECF 98-1 at 39, ECF 97 at 40-41. BIA argues [at 40-41] that this Court only applied that test in *Lemon*, because the agency in that case documented its decision not to prepare a supplemental EIS in a separate "Record of Environmental Consideration," rather than the ROD BIA prepared in this case. AR14317-18. BIA offers no other reason why it is relieved of the requirement to "take a 'hard look' at the problem," 668 F. Supp. 2d at 138, and no rebuttal to Plaintiffs' argument that the bare, conclusory statements in the ROD fall far short of meeting the four-factor test. ECF 91 at 37.[19] BIA therefore failed to take the required "hard look" in determining that a supplemental EIS was not required.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court grant Plaintiffs' motion for summary judgment and deny Defendants' and Intervenor-Defendant's cross-motions for summary judgment, vacate the January 19, 2017, Record of Decision and the February 10, 2017 acceptance of conveyance of the Elk Grove Site in trust for the benefit of the Wilton Rancheria, and order BIA to record a rescission of that acceptance of conveyance.

[19] The Tribe also attempts to distinguish *Lemon*, arguing that it does not require an agency to prepare "a special analysis whenever an alternative that was discussed in a draft EIS becomes the proposed action by the end of the NEPA process." ECF 97 at 41. But what Plaintiffs cited *Lemon* for is the four-factor test this Court requires an agency to meet before deciding a supplemental EIS is not required. BIA's conclusory statements in the ROD do not meet this test.

Dated this 13th day of June 2019

Respectfully submitted,

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