LAW OFFICE OF FRANK LAWRENCE
Frank Lawrence (CA Bar No. 147531)
578 Sutton Way, No. 246
Grass Valley, California 95945
Tel. (530) 478-0703
Fax (530) 478-0723
frank@franklawrence.com

Attorney for Defendants Jamul Indian Village Chairman Raymond Hunter, Penn National Gaming, Inc., San Diego Gaming Ventures, LLC, and C.W. Driver, Inc.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMUL ACTION COMMITTEE, et al.,

Plaintiffs,

vs.

JONODEV CHAUDHURI, et al.,

Defendants.

Case No. 2:13-cv-01920-KJM-KLN

TRIBALLY-RELATED DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A WRIT OF MANDATE AND FOR A PRELIMINARY INJUNCTION

Date: January 30, 2015
Time: 10:00 a.m.
Judge: Hon. Kimberly J. Mueller

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I. INTRODUCTION

Defendants Raymond Hunter, Chairman of the Jamul Indian Village ("Tribe"), the Tribe's devleopment partners Penn National Gaming, Inc. and its subsidiary, San Diego Gaming Ventures LLC, and the Tribe's general contractor C.W. Driver, Inc. (collectively "Tribally-Related Defendants") hereby oppose plaintiffs' motion for a writ of mandate[1] and a preliminary injunction.

Plaintiffs' motion should be denied for a host of reasons. It fails entirely to demonstrate any likelihood of success on the merits for at least four independent reasons. First, plaintiffs' motion is based on their claim that NEPA review of the Tribe's proposed management contract should happen before to the Tribe embarks on building its casino. Plaintiffs fail to grasp that the NIGC's environmental review, conducted as part of its process for approving or rejecting the management contract, has no bearing on the Tribe's right to continue constructing its casino. Put another way, casino construction does not require an approved management contract under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-21..

Second, plaintiffs fail to demonstrate a likelihood of success on the merits because there has been no final agency action yet on the only pending matter for which NEPA review is required: namely, the NIGC's review of the proposed management contract.

Third, the Tribe remains a required party under Rule 19. The Second Amended Complaint ("SAC") reasserts the same frivolous and previously adjudicated claims that the Tribe is not a tribe, that it lacks sovereign immunity, and that its Reservation is not a reservation. The SAC thus continues to attack the Tribe's fundamental interests, yet does not – because it cannot – join the Tribe as a party.

Fourth, plaintiffs cannot succeed on the merits against the Tribally-Related Defendants

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[1]Plaintiffs' motion only seeks mandamus as to the federal defendants. Therefore this brief only addresses the motion for a preliminary injunction.

because these defendants – including the tribal official defendants named solely in their individual capacities not yet properly served with summons and complaint – are legally incapable of affording plaintiffs any remedy.

Plaintiffs' arguments regarding the other injunction factors are similarly unavailing. Their claim of irreparable harm is based on the same flawed understanding already noted, namely, that the Supplemental Environmental Impact Study ("SEIS") at issue here is a legal prerequisite to the Tribe's right to continue casino construction. Plaintiffs have already had the environmental review they say they want – of the casino's impacts – pursuant to the Compact's environmental review requirements. Indeed, the Governor's Office has affirmed, in writing, the Tribe's full compliance with that process. Plaintiffs' decision to wait nearly a year after construction began to seek preliminary injunctive relief undermines their claim of imminent irreparable injury. Their claims of irreparable harm are further undermined by their failure to timely serve process on the new defendants under Rule 4.

Finally, plaintiffs fail to demonstrate that the balance of equities favors injunctive relief. They will have their opportunity to comment on the SEIS as part of the NIGC's review of the management contract. They already availed themselves of that opportunity with respect to the environmental review of the Tribe's casino project, under the Compact process. But no amount of environmental review will ever stop them from continuing their meritless attacks, legal and otherwise, on the Tribe's status as a tribe, on its sovereignty and sovereign immunity, and on its governmental rights over its federal trust Indian lands. On the other hand, the Tribe has been obstructed, delayed and attacked at every turn in its efforts to obtain the benefits of tribal government gaming as Congress intended in IGRA. The Tribe's Compact has been in effect for nearly 15 years and it has yet to open the doors to its casino. The Tribe has made a significant investment in its casino project, and the further delay suggested by plaintiffs' motion would cost approximately one million dollars a month if the Court were to enjoin construction. The equities are entirely against granting the requested injunction.

Finally, the public interest here weighs heavily against an injunction. Congress established the preemptive public interest calculus favoring tribal government gaming when it enacted IGRA in 1988. As noted, the public interest in environmental review has already been satisfied as to the impacts of the casino project through the Compact-mandated environmental review. The public interest in environmental review as to the management contract pending before the NIGC will be satisfied by the SEIS process outlined in the agency's Notice of Intent ("NOI"). Thus the public interest, like the first three injunction elements, weighs against granting an injunction here.

For all of these reasons, the Tribally-Related Defendants respectfully request that the Court deny plaintiffs' motion and dismiss the Second Amended Complaint for failure to timely serve summons and complaint.

II. DISCUSSION

A. Preliminary Injunction Standards

A "preliminary injunction is an extraordinary and drastic remedy." *Munaf v. Geren*, 553 U.S. 674, 689 (2008). As such, the Court may only grant a preliminary injunction "upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat'l Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). "'A plaintiff seeking a preliminary injunction must establish that [1] he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.'" *Winter,* 555 U.S. at 20, 22. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). In considering the four factors, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24.

B. Plaintiffs Fail to Demonstrate Any Likelihood of Success on the Merits

The gravamen of plaintiffs' motion for a preliminary injunction is their desire for the NIGC to complete its NEPA review "before proceeding with construction of the Jamul casino." Plaintiffs' Opening Brief at 2:11-13. Plaintiffs claim that they "are likely to succeed on the merits of their NEPA claim that the draft SEIS should be finalized and circulated before the continued construction of the casino ...." *Id*. at 8:13-15.

Plaintiffs could not be more wrong. The SEIS is being conducted as part of the NIGC's review of a proposed *management agreement* between the Tribe and Penn, *not* construction of the Tribe's casino. *See* Order, Docket No. 50, at 22:25-28 (dismissing First Amended Complaint Aug. 5, 2014) ("Order") (*citing* 78 Fed. Reg. 21398-01). The federal action at issue that triggers environmental consideration under NEPA is the NIGC' approval or disapproval of that management contract.

The key point to understand – which plaintiffs cannot or will not grasp – is that the SEIS and approval of the management contract *are not prerequisites* to the Tribe's right to build a casino.

1. Casino Construction Does Not Require a Management Contract.

Plaintiffs fail to show a likelihood of success on the merits because their incessant claim that the Notice of Intent ("NOI") triggered construction is simply wrong. This Court's well-reasoned Order dismissing the First Amended Complaint ("FAC") found that "plaintiffs' allegations regarding construction are problematic considering plaintiffs bring this action under the APA, and the alleged Indian Lands Determination is contained in an ***NOI that specifically addresses approval of a gaming management contract, not a construction contract***." *See* Order at 22:25-28 (*citing* 78 Fed. Reg. 21398-01) (emphasis added).

The Second Amended Complaint ("SAC") simply ignores the Court's Order. Plaintiffs' claims remain firmly rooted in the NOI for the pending review of the management contract. *See* SAC at ¶ 2 ("This lawsuit was triggered by the [mention of Indian lands in the NIGC's] ...

Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Approval of a ***Gaming Management Contract*** ...") (emphasis added); *see id.* at ¶¶ 16, 63, 65, 66, 78, 135 (all referencing the Notice of Intent). IGRA permits, but does not require, gaming management contracts: "Subject to the approval of the Chairman, an Indian tribe ***may*** enter into a management contract ...." 25 U.S.C. § 2711(a)(1) (emphasis added). The NIGC "Chairman ***may*** approve any management contract entered into pursuant to this section only if he determines that it provides" the statutorily mandated protections for the tribe. *Id.* § 2711(b) (emphasis added). *See also Turn Key Gaming v. Oglala Sioux Tribe*, 164 F.3d 1092, 1094 (8th Cir. 1999) ("[T]he Act ***permits*** tribes to enter into management contracts ...") (emphasis added).

Moreover, the Court established at the hearing on defendants' motion to dismiss the FAC that federal approval of the management contract is not a precondition to the Tribe's right to build and operate the casino:

> COURT: "Is it possible that the casino, the facility and the infrastructure will be completed but then no contract awarded?"
>
> MS. RABINOWITZ: "It's entirely possible."
>
> MS. MARVIN: "Yes, your Honor. If I could address that as well. It is entirely possible. It is possible that the contract could be disapproved and the casino could still be operated, not by a third party management company but by the tribe itself."

Reporter's Transcript ("R.T."), p. 23, lines 8-17 (May 23, 2014). A true and correct copy of the relevant portions of the Reporter's Transcript are attached as Exhibit A to the Lawrence Declaration filed herewith.

> Counsel for the federal defendants reiterated the point later in the argument:
> MS. MARVIN: "The NEPA action is an independent action under the regulations that is required for approval of the final agency action. In this case, i.e. approval of the Gaming Management Contract. It is not a consequence of a short description in the NEPA document. Neither is construction. Construction is a consequence of construction. ***There has been no federal action, major federal action associated with construction***. This has been undertaken by the tribe independently, and so consequences have not yet flowed from the description that is in the non-final description, that is clearly a non-final NEPA document."

R.T. at 25:2-12 (emphasis added).

Thus the entire basis for plaintiffs' motion and the relief they seek rests on the false premise that approval of a management contract is a precondition to the Tribe's right to construct

a casino. It is not. The Tribe can, and did, begin constructing its casino without an approved gaming management contract. Indeed, the Tribe has every legal right to manage its own casino under IGRA. *See* http://www.nigc.gov/Portals/0/NIGC%20Uploads/aboutus/FAQ06032013vs2.pdf ("***If*** a tribe wishes to have management by a third party, the Commission must review and approve the management contract") (emphasis added); http://www.mnindiangamingassoc.com/faqs.html ("Most tribes operate their own casinos. Management contracts must be approved by the National Indian Gaming Commission (NIGC), and must ensure that the tribe is the primary recipient of gaming revenues").

2. There Has Been No Final Agency Action

Plaintiffs also fail to demonstrate a likelihood of success on the merits because their lawsuit is based on the supposed Indian Lands Determination ("ILD") in the NOI, which is not final agency action. "'[T]wo conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decision making process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.'" *Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 591 (9th Cir. 2008) (*quoting Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (internal citations and quotation marks omitted)). "[F]inality is a jurisdictional requirement to obtaining judicial review under the APA ...." *Id.*

The supposed ILD in the NOI is not "the consummation of the agency's decision making process," but rather is plainly an initial step along the way to the NIGC's decision to approve or disapprove the pending gaming management contract. As already noted, the action at issue is the pending approval of the management contract.[2]

[2]The SAC's claim that the NIGC has already approved the management contract is entirely false and without any support whatsoever. The NIGC publishes a listing of approved management contracts, and Jamul's is conspicuously absent. *See* nigc.gov/http://www.nigc.gov/Reading_Room/Management_Contracts/Approved_Management_Contract

IGRA expressly provides that "decisions made by the Commission pursuant to sections ... 2711 ("Management Contracts") ... shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5". 25 U.S.C. § 2714. The "decision" for the NIGC to make under section IGRA's section 2711 is to approve or disapprove a gaming management contract. The NIGC's compliance with NEPA is a preliminary step in the process of making that decision.[3]

This Court highlighted this plain fact in its opening question at the hearing on defendants' motions to dismiss the FAC: "THE COURT: First, looking at the federal defendants' motion to dismiss ... if the management contract ultimately is approved and there is a final action ... would you then concede that plaintiffs could then challenge the ILD as part of the overall final decision?" R.T. at 3:24 – 4:4. "MS. RABINOWTIZ: At that juncture, once there is a final determination on the Gaming Management Contract, plaintiffs can certainly challenge." *Id.* at 4:11-13.

At some point, the NIGC will make a decision to either approve or reject the pending management contract. That decision will be final agency action that is reviewable under the Administrative Procedures Act. *See* 25 U.S.C. § 2014. At that point, plaintiffs will need to either file a new lawsuit or seek leave of this Court once again to amend the complaint. Either way, plaintiffs cannot succeed on the merits of this SAC.

3. The Tribe Remains a Required Party Under Rule 19

Plaintiffs also fail to demonstrate a likelihood of success on the merits because the Tribe remains a required party under Rule 19 that cannot be joined because of its sovereign immunity.

This Court previously held that the "Tribe is a necessary party to this action because it has an interest in how the NOI is interpreted with regard to the land at issue. The Tribe has a legal

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s.aspx.

[3] *See* http://www.nigc.gov/Reading_Room/NEPA_Compliance.aspx ("The NIGC is required to comply with NEPA and make decisions in accordance with the Council on Environmental Quality (CEQA) regulations (40 C.F.R. Parts 1500-1508)").

interest in the reservation," noting the Tribe's "efforts to protect its interest through similar litigation involving opposition to development of the parcel into a gaming facility." Order at 25:2-6. The Court also noted that "judgement in favor of plaintiffs would not be binding on the Tribe, which could continue to assert sovereign powers over the reservation ...." *Id.* at 25:6-7. "Because the Tribe is a sovereign entity" that is "immune from nonconsensual actions in ... federal court," the Court analyzed the four factors under Rule 19(b) to determine whether the case should be dismissed. *Id*. at 25:14-19 (internal quotations omitted). It found all four Rule 19(b) factors weighed in favor of dismissal. *See id.* at 25:26 – 27:20. Thus the Court held that "the Tribe is a required party under Rule 19," *id*. at 23:18-19, and granted the federal defendants' motion to dismiss "for failure to join a required party." *Id*. at 27:22-23.

The SAC completely ignores the Court's holding that the Tribe is a required party under Rule 19. The Tribe is "not named as a defendant," SAC at ¶ 14, even though the SAC attacks the construction of the Tribe's casino project "under the color of JIV governmental authority" *id.* at ¶ 13, and it seeks a judicial declaration that the Tribe's Reservation is not "trust land under JIV's government control ...." Prayer for relief at ¶ B. In direct conflict with the Court's Order, the SAC claims that the Tribe "is not a federally recognized Indian tribe," *id.* at ¶ 44.

Finally, prior courts, including the Ninth Circuit, have held that the Tribe is a necessary and indispensable party – now a "required" party -- under Rule 19 in cases brought by plaintiffs' counsel Patrick Webb and on behalf of parties in privity with plaintiffs, making the same attacks on the status of the Tribe's sovereignty and its federal Indian lands. *See, e.g., Rosales VII*, 73 Fed. App'x. 913 (9th Cir. Aug. 11, 2003); *Rosales v. United States* ("*Rosales IX*"), Case No. 3:07-CV-624, *9-10, pp. 10-11 of 18 (S.D. Cal. 2007) (RJN in support of Tribe's motion for leave to file amicus brief in this case, Ex. 10, Docket No. 22-5); *Rosales v. United States* ("*Rosales X*"), 89 Fed. Cl. 565, 586 (Fed. Cl. 2009).

4. The Tribally-Related Defendants Cannot Afford Plaintiffs Any Relief

Plaintiffs further fail to demonstrate a likelihood of success on the merits because the

Tribally-Related Defendants lack the capacity to afford plaintiffs the relief they seek. The Tribal leader defendants are only sued in their individual, personal capacities. *See* SAC at ¶ 13.[4] In their individual capacities, the tribal leader defendants cannot take any official action on behalf of the Tribe. As the Court previously held:

> "To the extent plaintiffs bring this action against defendant Hunter in his ***individual capacity***, the allegations in the first amended complaint suggest he is entitled to tribal sovereign immunity because initiating construction of the Tribe's casino presumably falls under the chairman's duties in his ***representative capacity rather than his individual capacity***."

Id. at 19:23-26 (emphasis added). The Court recognized that only when acting in his official capacity as Tribal Chairman could defendant Hunter take official tribal actions related to construction of the casino. IGRA requires and provides for official tribal governmental action, not action by individuals, to develop and own a casino. *See, e.g.,* 25 U.S.C. § § 2702, 2703(5), 2710(d); *see also* Compact §§ 1, 3, 4.

The SAC is devoid of any substantive allegations that the Tribally-Related Defendants are individually capable of authorizing or staying development of the Tribe's casino on the Tribe's Indian lands, nor could there be. The right to develop and own a tribal casino belongs only to federally-recognized tribal governments. Congress' primary purpose in enacting IGRA was "to provide a statutory basis for the operation of gaming by Indian Tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702(1). Congress found that "Indian tribes have the exclusive right to regulate gaming activity on Indian lands ...." *Id.* § 2701(5). IGRA provides that only tribal governments may conduct gaming on Indian lands. *See id.* at § 2710(b)(1), (d)(1)-(2). "[N]et revenues from any tribal gaming are not to be used for purposes other than – (i) to fund tribal government operations or programs; (ii) to provide for the general welfare of the Indian tribe and its members; (iii) to

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[4]The SAC names Chairman Hunter – and adds additional tribal members – in their individual, rather than official, capacities: "Defendants RAYMOND HUNTER, CHARLENE CHAMBERLAIN, ROBERT MESA, RICHARD TELLOW, and JULIA LOTTA are council members or officials of the JIV. ***They are being sued in their personal capacity***...." SAC at ¶ 13 (emphasis added).

promote tribal economic development; (iv) to donate to charitable organizations; or (v) to help fund operations of local government agencies." *Id.* § 2710(b)(2)(B). Chairman Hunter, in his individual capacity, lacks the ability to start or stop the process of the Tribe developing and operating a government gaming enterprise. The same is true as to the other Tribally-Related Defendants.

Moreover, as to the tribal officials named in their individual capacities, they - like Chairman Hunter – retain their sovereign immunity even though named in their individual capacities. "In our circuit, the fact that a tribal officer is sued in his individual capacity does not, without more, establish that he lacks the protection of tribal sovereign immunity." *Murgia v. Reed*, 338 F. App'x 614, 616 (9th Cir. 2009) (*citing Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479-80 (9th Cir. 1985) (despite defendants' being named in their individual capacities, tribal sovereign immunity applied because they were "acting within the scope of their delegated authority"). "If the Defendants were acting for the tribe within the scope of their authority, they are immune from Plaintiff's suit regardless of whether the words 'individual capacity' appear on the complaint." *Id.*

For these reasons, plaintiffs fail to demonstrate a likelihood of success on the merits.

C. Plaintiffs Also Fail to Demonstrate Any Irreparable Harm

Plaintiffs' claim they will suffer "irreparable harm if the casino is constructed without being studied in an SEIS and without public comment or appropriate mitigation in response to those comments." Plaintiffs' Opening Brief at 8:24-27. This claim is wrong for several reasons.

First, as explained above, the SEIS is being conducted as part of the NIGC's review and approval of a management contract, after which plaintiffs will undoubtedly file another APA lawsuit. *See* R.T. at 4:11-13. It is not legally relevant whatsoever to the Tribe's construction of its casino. *See discussion supra* at § II(B)(1) of this brief. Plaintiffs will have an opportunity to review and comment on the draft SEIS when the NIGC circulates it for public comment, prior to the NIGC's approval or rejection of the management contract.

Second, plaintiffs also fail to demonstrate irreparable harm because the environmental review of the casino's impacts – as distinct from the management contract – is governed by the Tribe's Compact. *See* Compact § 10.8. The Tribe has fully complied with its Compact obligations, as confirmed by the Governor's Office:

> "It is my understanding that the Tribe has complied with its specific obligations under [Compact] Section 10.8.2(a), which describe the period prior to the commencement of a project, to inform the public of the Project; identify potential adverse off-Reservation environmental impacts; submitting environmental impact reports to the appropriate state and local government agencies; consulting with the board of supervisors; and affording the affected members of the public an opportunity to comment."

Exhibit B to Lawrence Dec. filed herewith (Letter from Office of the Governor to Chairman Hunter, August 27, 2013). Of course, plaintiffs know all of this, as they submitted comments and received responses in that environmental review process.[5]

Third, plaintiffs' assertion of irreparable harm is undermined by their nearly year-long delay in seeking injunctive relief. "A preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action . . . ." *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984) (internal quotation marks and citation omitted) ("A delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief."); *Oakland Tribune, Inc. v. Chronicle Publ'g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm").

Here, plaintiffs' FAC recognized that construction had already begun when it was filed in February, 2014, and that NEPA review regarding the management contract was not complete. *See* FAC ¶ 8, Docket No. 15 ("Given that construction on the casino has been initiated ..."); *id.* ¶ 88 ("construction on the casino has already been initiated"). The Court's Order also noted these

[5] *See http://jamulindianvillage.com/relevant-documents/* (Tribe's web publishing environmental review documents including public comments and responses).

facts. *See* Order at 4:11-12. The Court's Order noted that plaintiffs first amended complaint alleged that "the NOI 'triggered' construction on the parcel" and that "construction has already commenced." Order at 4:10-14 (*quoting and citing* FAC at ¶¶ 8, 14, and 88). JAC's counsel conceded at the hearing in March, 2014 that construction had already begun: "Since they started construction and they started this process, we almost have no choice." R.T. at 9: 11-12. Plaintiff's counsel added that "there has been the initiation of construction of the casino in violation of federal law." R.T. at 16:22-24. As illustrated by the Exhibits to the Declaration of C.W. Driver Project Director Brent Hughes, filed herewith, the project is well underway with significant excavation and construction already completed, reflecting the fact that construction has been ongoing for nearly a year. *See* Ex. A-E to Hughes Dec.

This is not reflective of true imminent irreparable harm. Plaintiffs' significant delay, waiting nearly a year after construction began to seek an injunction, weighs heavily against granting an injunction now.

Plaintiffs' claim of imminent irreparable injury is further undermined by their failure to timely serve the newly-named defendants under Federal Rule of Civil Procedure 4(m). The burden is on plaintiffs to demonstrate timely service. The facts will show that a process server did not serve the Executive Committee members personally, but rather attempted substituted service by dropping copies of summons and complaint on the ground in the parking lot of the Tribal Office on December 24, 2014. That date was 120 days after plaintiffs filed the SAC on August 26, 2014. *See* Docket No. 51. Two days later, on December 26, 2014, plaintiffs mailed copies of summons and complaint to the Executive Committee members at the Tribal Office. Service was complete 10 days after mailing, *see* Cal. Code Civ. Proc. § 415.20(a), which was more than 120 days after the SAC was filed. Thus defendants Charlene Chamberlain, Robert Mesa, Richard Tellow and Julia Lotta were not served within 120 days. *See* Fed. R. Civ. P. 4(m).

Rule 4(m) permits the Court to dismiss the case for failure to timely serve, or alternatively, extend the time within which plaintiffs must effectuate service. Where a plaintiff

fails to perfect service within the 120 day period, the burden is on the plaintiff to demonstrate that sufficient "good cause" exists to excuse the delay. *Townsel v. County of Contra Costa, California*, 820 F.2d 319 (9th Cir.1987) (a suit shall be dismissed if service is not perfected in 120 days after the filing of the complaint unless the plaintiff can show good cause why service was not made); *see McWherter v. CBI Servs., Inc.*, 153 F.R.D. 161, 164 (D. Haw. 1994) *aff'd,* 105 F.3d 665 (9th Cir. 1997).

Under this Court's Local Rules, a request for an extension of time must be filed as soon as the need for it becomes apparent. *See* Local Rule 144(d) ("Counsel shall seek to obtain a necessary extension ... as soon as the need for an extension becomes apparent. Requests for Court-approved extensions brought on the required filing date for the pleading ... are ... disfavor[ed]"). Thus plaintiffs once again have flouted this Court's rules. In any event, plaintiffs' failure to timely serve summons and complaint is further evidence of a lack of imminent irreparable injury.

This factor weighs heavily against the pending motion for injunctive relief.

D. The Balance of Equities Tips Sharply Against Granting the Motion

Plaintiffs' argument regarding the balance of equities focuses solely on the impacts of casino construction. *See* Plaintiffs' Opening brief at 9:7-20. But as noted above, the SEIS at issue relates to the NIGC review of the management contract, and is not a prerequisite to casino construction. Plaintiffs will have an opportunity to comment on the SEIS before NIGC approves or disapproves the management contract. *See* 78 Fed. Reg. 21398-01.[6] The environmental impacts of casino construction and operation are the subject of an entirely different environmental review, conducted pursuant to the Compact, not NEPA. *See* Compact § 10.8; Ex. B to Lawrence Dec.

As noted in the Tribe's prior motion for leave to file its amicus brief, plaintiffs and those

[6]The NOI expressly includes "Directions for Submitting Public Comments ..." 78 Fed. Reg. 21398-01.

in privity with them have attacked the Tribe's casino project for decades. *See* Docket No. 22. Plaintiffs continue to raise the same frivolous arguments time and time again, and continue to do so here. The SAC once again claims that the Tribe is not a tribe and that the Tribe's Reservation is not a reservation, *see* SAC ¶¶ 14, 20, 34-35, 44, 46, 75, 77, 87, 93, 97, 119, despite this Court's contrary holding in this case, *see* Order at 7:13, and despite those issues having been fully and finally determined in prior cases. *See*, e.g., *Rosales VII*, 73 Fed. App'x. 913; *Rosales IX*, Case No. 3:07-CV-624, *9-10, pp. 10-11 of 18 (RJN in support of Tribe's motion for leave to file amicus brief in this case, Ex. 10, Docket No. 22-5); *Rosales X*, 89 Fed. Cl. at 586. Plaintiffs also continue to claim that the Tribe does not possess sovereign immunity, *see* SAC ¶¶ 19,[7] despite this Court's contrary holding, *see* Order at 7:13-14, 25:14-15, 27:19-20, and despite the Ninth Circuit's express holding that the ***"Village enjoys sovereign immunity from suit*** and cannot be forced to join this action without its consent." *Rosales v. United States*, 73 F. App'x 913, 914 (9th Cir. 2003) (emphasis added). For plaintiffs to so blatantly disregard clear, direct Orders of both this Court and the Ninth Circuit, and then to claim the equities are in their favor, strains their credibility to the breaking point and beyond.[8]

As the Tribe explained to the Court previously, plaintiffs' history demonstrates that they will do anything they can think of to try to kill the Tribe's casino project, including abusing the judicial system, ignoring the orders of federal courts, and serially filing vexatious legal challenges, initiated not with any genuine belief in the merits but rather with the malicious,

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[7]Plaintiffs' SAC alleges that while the "United States waived sovereign immunity" in the APA, "[t]he other Defendants do not have immunity from suit." SAC ¶ 19.

[8]*See also* Fed. R. Civ. P. 11(b) ("By presenting to the court a pleading, written motion, or other paper ... an attorney ... certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery ...").

ulterior motive of delaying and ultimately depriving the Tribe of its federally-guaranteed rights under IGRA and the Compact. *See* Docket No. 22. These factors weigh heavily against granting plaintiffs' requested injunction here.

The Tribe obtained its federal trust lands in 1978 and 1982. *See* Docket No. 22. It had its federal right to engage in gaming for governmental purposes in confirmed in 1988 when Congress enacted IGRA. It took more than a decade after IGRA's passage to obtain a compact with California. *See* 65 Fed. Reg. 31189 (May 16, 2000). And the Tribe has been working diligently since then for a decade-and-a-half to develop, build and open a casino to seek the benefits Congress intended. These equities weigh heavily on the Tribe's side in this matter.

As the declarations of Michael Carroll and Brent Hughes make clear, the injunction plaintiffs seek would be tremendously expensive for the Tribe, with a cost estimated at nearly one million dollars per month for the first month such an injunction existed. *See* Carroll Dec. at ¶¶ 3-5 ; Hughes Dec. at ¶ 5. Weighed against that is plaintiffs call for an opportunity to comment on a draft SEIS for approval of the management contract. Plaintiffs will get that opportunity prior to the NIGC's determination on the contract.

Plaintiffs failure to comply with this Court's Standing Order in filing this motion is another equitable factor weighing against granting the motion. This Court's Civil Standing Order provides that "Prior to filing a motion ... counsel shall engage in a pre-filing meet and confer to discuss thoroughly the substance of the contemplated motion and any potential resolution." Civil Standing Order. The purpose of this requirement is to allow counsel to "resolve minor procedural or other non-substantive matters during the meet and confer." *Id.* In addition, the Court's Order requires that "[n]otices of motions shall certify that meet and confer efforts have been exhausted and briefly summarize the meet and confer efforts." *Id.* Here, had plaintiffs' counsel complied with this Court's Order, the parties might have had an opportunity to address plaintiffs' failure to timely serve the newly named defendants, and perhaps even avoided the need to brief and argue the instant motion. Plaintiffs' failed entirely to attempt to comply

with these requirements. *See* Docket No. 60 (Notice of Motion lacks required certification).

The equities here tip sharply against granting the motion.

E. The Public Interest Weighs Heavily Against Granting the Motion

Plaintiffs' "public interest" argument again ignores the fact that the project under review is the management contract. They argue that "a preliminary injunction enjoining the Defendants from constructing the Jamul casino until the NEPA process is complete is obviously in the public interest." Plaintiffs' Opening Brief at 9:20-22. But as discussed above, the casino construction does not require a management contract or the associated NEPA review. *See* discussion *supra* at § II(B)(1) of this brief.

The public interest here weighs heavily against granting an injunction. Congress has established the pre-emptive public interest with respect to tribal government gaming. In IGRA, Congress found that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). IGRA's first "purpose" is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." *Id.* at § 2702(1). Thus the public interest favors the Tribe's project and weighs heavily against enjoining its construction.

The public interest in environmental review of major federal actions has been and will continue to be upheld in this matter. The NIGC has given notice that it intends to supplement the existing EIS related to the review of the management contract. *See* 78 Fed. Reg. 21398-01. Moreover, the Tribe itself has completed a substantial Tribal Environmental Evaluation of the gaming project, as required by the Tribe's Compact. *See* Compact § 10.8 (publicly available on the NIGC's website at http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026601.pdf, and the California Gambling Control Commission's website at http://www.cgcc.ca.gov/documents/compacts/original_compacts/Jamul_Compact.pdf). As noted

above, the Governor's Special Advisor for Indian Gaming documented the Tribe's full compliance with the Compact's environmental review provisions, as well as his extensive personal involvement therein, in a letter to Tribal Chairman Hunter dated August 27, 2013. *See* Lawrence Dec. Ex. B.

In sum, the public interests at issue here weigh against granting the injunction plaintiffs request.

F. If the Court Were to Consider Granting an Injunction, It Should Require a Sufficient Bond

Except for the United States, no party may be granted a preliminary injunction without first posting security "in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. Proc. 65(c). Although the amount of the bond is discretionary and may be waived, "the district court must expressly address the issue of security before allowing any waiver and cannot disregard the bond requirement altogether." *Pashby v. Delia*, 709 F.3d 307, 332 (4th Cir. 2013). *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005).

"The instances in which a bond may not be required are so rare that the requirement is almost mandatory." *Frank's GMC Truck Center, Inc. v. General Motors Corp.,* 847 F.2d 100, 103 (3rd Cir. 1988). *See Habitat Ed. Ctr. v. United States Forest Service,* 607 F.3d 453, 457 (7th Cir. 2010) (nonprofit organizations not exempt from bond requirement); *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.,* 174 F.3d 411, 421 (4th Cir. 1999) ("failure to require bond upon issuing preliminary injunction is reversible error"); *but see Save our Sonoran*, 408 F.3d at 1126 (recognizing waiver for public interest litigation, and noting necessity of case-by-case determination).

The purpose of the bond requirement is threefold: (1) to discourage the moving party from seeking preliminary injunctive relief to which it is not entitled; (2) to assure that if an injunction is erroneously granted, the moving party will bear the cost of the error rather than the wrongfully-enjoined party; and (3) to provide a wrongfully-enjoined party a source from which it

may easily collect damages without further litigation and without regard to the moving party's solvency. *See Nintendo of America, Inc. v. Lewis Galoob Toys, Inc.*, 16 F.3d 1032, 1037 (9th Cir. 1994); *see Continuum Co., Inc. v. Incepts, Inc.* 873 F.2d 801, 803 (5th Cir. 1989). When setting the amount of security, "district courts should err on the high side . . . (A)n error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond." *Mead Johnson & Co. v. Abbott Labs,* 201 F.3d 883, 888 (7th Cir. 2000).

Here, the declarations of Michael Carroll and Brent Hughes establish that a wrongfully issued injunction would cost the Tribe a minimum of approximately one million dollars in the first month, and perhaps close to that amount for future months as well, in construction-related costs alone. *See* Carroll Dec. at ¶¶ 3-5 ; Hughes Dec. at ¶ 5. Those figures do not include economic harm to the Tribe resulting from a delay in opening the casino, which would be many times more than the construction delay costs outlined in those declarations, but which at this stage are difficult to quantify.

Thus, to even begin to fairly protect the Tribe from the harm of a wrongfully issued injunction, the Court should require a bond of at least one million dollars, to be supplemented if the injunction were to remain in effect for more than one month.

G. JAC's Showing of Hardship is Inadequate to Justify a Nominal Bond

A wrongfully enjoined party is presumptively entitled to a bond inclusive of all provable damages. *Nintendo of America*, 16 F.3d at 1032. A plaintiff may rebut the presumption by proving that he or she is indigent or will endure hardship that outweighs the defendant's burden in bearing the cost of an improperly granted injunction. *See Walker v. Pierce*, 665 F. Supp. 831, 844 (N.D. Cal. 1987) (reducing bond for indigent tenants); *Marsellis-Warner Corp. v. Rabens*, 51 F. Supp. 2d 508, 535 (D.N.J. 1999) (rejecting hardship argument where plaintiff was not "an impecunious party"). To rebut that presumption, plaintiffs must make a clear showing of severe financial hardship. *Waldron v. George Weston Bakeries, Inc.*, 575 F. Supp. 2d 271, 279 (D. Me.

2008), *aff'd*, 570 F.3d 5 (1st Cir. 2009); *see Alshafie v. Lallande*, 171 Cal. App. 4th 421, 434, 89 Cal. Rptr. 3d 788, 799 (2009) (requiring plaintiffs to provide "detailed financial information" such as that required to obtain *in forma pauperis* status).

Where multiple plaintiffs seek an injunction, each plaintiff must individually prove indigence or hardship prior to the court's order reducing or waiving an injunction bond. *See Elliott v. Kiesewetter*, 98 F.3d 47, 60 (3d Cir. 1996). To the extent payment of an injunction bond may chill a plaintiff's willingness to seek preliminary relief, that "barrier fulfills one of the purposes of the bond requirement" by deterring "rash applications for interlocutory orders [by] caus[ing] plaintiff to think carefully beforehand." *Hoxworth v. Blinder, Robinson & Co.*, 903 F.2d 186, 210-11 (3d Cir. 1990) (concluding district court abused its discretion in waiving security requirement).

Here, plaintiffs suggest that JAC cannot pay for both its basic expenses and an injunction bond. *See* Declaration of Marsha Spurgeon ¶ 8. If any other Plaintiff has the means to post the security bond, JAC's purported indigency is irrelevant. *See Venice Canals*, 72 Cal. App. at 685, 140 Cal. Rptr. at 366; *Elliot*, 98 F.3d at 60. To qualify for a reduced bond or waiver, all of the Plaintiffs must make a clear showing of financial hardship. *Elliot*, 98 F.3d at 60.

Even with respect to JAC alone, Ms. Spurgeon's declaration does not provide a clear picture of JAC's finances. Rather, it is a conclusory statement unsupported by facts. Moreover, it is facially inconsistent with JAC's robust litigation agenda attacking the Tribe's project, both in this case as well as in *JAC v. CDFW*, Case No. C078024 (pending in the 3rd Dist. Ct. of App.), and *JAC v. Caltrans***,** Case No. C077806 (pending in the 3rd Dist. Ct. of App.), and *Rosales v. Caltrans*, Fourth District Court of Appeal, San Diego, Case No. D066585 (pending in the 4th Dist. Ct. of App.) (brought by Patrick Webb, JAC's counsel of record in this case).

To meet their burden of proof, the plaintiffs should provide detailed financial information showing income and expenditures for each plaintiff, as well as the inability for each plaintiff to cover both existing obligations and the security bond, whether individually or through a surety

insurer. Further, each plaintiff should demonstrate that no other person in his or her household or nuclear family can assist in paying the security bond. *See Alshafie*, 171 Cal. App. at 435 n. 10, 89 Cal. Rptr. at 799.

Thus if the Court were to consider granting an injunction, it should require plaintiffs to provide the detailed financial information outlined above, enabling the court to make a reasoned determination as to whether it can afford to post a sufficient bond. After this opportunity to cure its deficient waiver request, if the showing of indigency is weak or incomplete, the Court may provide a reasoned denial of Plaintiffs' request. Such a ruling would only be disturbed by a reviewing court if it is deemed an abuse of discretion. *See Save Our Sonoran*, 408 F.3d at 1120-21 ("A district court's order with respect to preliminary injunctive relief is subject to limited review and will be reversed only if the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact") (internal quotation marks omitted)); *Hoxworth*, 903 F.2d at 109.

III. CONCLUSION

For the foregoing reasons, the Tribally-Related Defendants respectfully request that the Court deny plaintiffs' motion for a preliminary injunction and writ of mandate. The Tribally-Related Defendants further request that the Court dismiss the Second Amended Complaint for failure to timely serve summons and complaint under Federal Rule of Civil Procedure 4(m).

Dated: January 16, 2015

Law Office of Frank Lawrence
By /s/
Frank Lawrence
Attorney for Defendants Raymond Hunter, Penn National Gaming Inc., San Diego Gaming Ventures, LLC, and C. W. Driver Inc.

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF NEVADA)

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 578 Sutton Way, No. 246, Grass Valley, California 95945. On January 16, 2015 I caused the foregoing document described as **TRIBALLY-RELATED DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A WRIT OF MANDATE AND FOR A PRELIMINARY INJUNCTION** to be served on the interested parties in this action, identified below, by electronic filing and service pursuant to Local Rule 135 (Fed. R. Civ. P. 5), Case Management / Electronic Case Files docketing and file system of the above referenced court:

KENNETH R. WILLIAMS, State Bar No. 73170, Attorney at Law, 980 9th St., 16th Floor, Sacramento, CA 95814, Attorney for Plaintiff

ROBERT G. DREHER, Acting Assistant Attorney General, Environment & Natural Resources Division, United States Department of Interior

BARBARA M.R. MARVIN, Natural Resources Section, Environment & Natural Resources Division, United States Department of Justice, 601 D. Street, NW, Washington DC 20530

JUDITH RABINOWITZ, Indian Resources Section, Environment and Natural Resources Division, United States Department of Justice, 301 Howard Street, Suite 1050, San Francisco, CA 94105

JENNIFER TURNER, U.S. Department of the Interior, Office of the Solicitor, Division of Indian Affairs, Branch of Environment and Lands, Washington DC 20240

JOHN HAY, National Indian Gaming Commission, Office of General Counsel, 1441 L. Street NW, Washington, DC 20005
Attorneys for Federal Defendants

[x] ELECTRONIC SERVICE pursuant to Local Rule 135 (Fed. R. Civ. P. 5), Case Management / Electronic Case Files docketing and file system.

Executed on January 16, 2015, at Nevada City, California.

s
Frank Lawrence