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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMUL ACTION COMMITTEE and the JAMUL COMMUNITY CHURCH, Plaintiffs, v. JONODEV CHAUDHURI, Acting Chairman of the National Indian Gaming Commission, et al., Defendants.	CASE NO. 2:13-cv-01920-KJM-KJN **FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A WRIT OF MANDATE AND FOR A PRELIMINARY INJUNCTION** Date: January 30, 2015 Time: 10:00 a.m. Place: Courtroom No. 3, 15th Floor Before: Honorable Kimberly J. Mueller

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Defendants, the United States Department of the Interior, the National Indian Gaming Commission, and Tracie Stevens, Jonodev Chaudhuri, Dawn Houle, S.M.R. Jewell, Kevin Washburn, Paula L. Hart, Amy Dutschke, and John Rydzik in their official capacities, (collectively, "Federal Defendants"), respectfully submit this opposition to Plaintiffs' Motion for a Writ of Mandate and for a Preliminary Injunction & Memorandum in Support of Motion (Pls.' Mem.") ECF No. 60-1.

I. INTRODUCTION

In this case, in their original complaint filed in September 2013, and their subsequent First Amended Complaint, Plaintiffs challenged the NIGC's publication in the Federal Register of a Notice of Intent ("NOI") to prepare a Supplemental Environmental Impact Statement ("SEIS") under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370h, in connection with the approval of a management contract for a casino for the Jamul Indian Village ("the Tribe") on the Tribe's Reservation in Jamul, California. Plaintiffs alleged that the NOI is, or includes, an "Indian lands" determination pursuant to a different statute, the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, and that the Federal Defendants' alleged approval of the supposed determination was a final agency action that was arbitrary and capricious and contrary to law in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706. First Am. Compl. for Declaratory & Injunctive Relief ¶¶ 1, 10, ECF No. 15. They further alleged that the supposed Indian lands determination violates IGRA and the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-494a, and that the Federal Defendants violated NEPA by failing to prepare an environmental assessment or otherwise comply with NEPA before they allegedly approved the supposed determination. First Am. Compl. ¶ 139.

On August 5, 2014, the Court granted motions to dismiss the First Amended Complaint filed by the Federal Defendants and the Tribe's Chairman, Raymond Hunter, but allowed

Plaintiffs' leave to amend. Order 28, ECF No. 50.[1] Thereafter, Plaintiffs filed their current, Second Amended Complaint for Declaratory & Injunctive Relief. ECF No. 51. This complaint includes several additional defendants and two additional claims for relief.[2] Additionally, Plaintiffs re-allege claims under the APA, IGRA, the IRA, and NEPA. In re-stating their NEPA claim, however, they allege that the Federal Defendants were required, but failed to prepare an environmental assessment or otherwise comply with NEPA not only prior to approving the alleged Indian lands determination, but also before approving the Tribe's gaming ordinance for Class III gaming and the management contract for the casino (which remains under consideration by the NIGC), and before beginning construction of the casino, which is now ongoing. *See* ECF No. 51 at 25-29. In their motion, which seeks the extraordinary remedies of mandamus and a preliminary injunction, Plaintiffs focus on the construction of the casino and rely on the false premise that, under NEPA, the construction cannot not occur until after the SEIS for the proposed gaming management contract between the Tribe and San Diego Gaming Ventures LLC is completed.

Plaintiffs' revised arguments are unfounded and unavailing. As a threshold matter, Plaintiffs have not perfected or even attempted service on several of the defendants who were first named in the Second Amended Complaint, and therefore, the Court is without jurisdiction to grant the relief that Plaintiffs seek with respect to those individuals in their individual capacities.[3]

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[1] As to Federal Defendants' motion, the Court held that Plaintiffs had failed to join the Tribe, which is a required party under Federal Rule of Civil Procedure 19. Order 23, ECF No. 50.

[2] *See* ECF No. 51 at 24-25 (Fourth Claim for Relief alleging public nuisance and nuisance pro se under California state law); 29-30 (Sixth Claim for Relief alleging violation of compact between the Tribe and the State of California).

[3] In submitting this opposition, Federal Defendants respectfully note that neither Tracie Stevens, the former Chairwoman of the National Indian Gaming Commission ("NIGC"), nor Dawn

Moreover, the gravamen of Plaintiffs' claims against the named federal officials is action that would have been taken in their official capacities, and therefor suit against them individually is improper.

Second, neither the BIA nor the NIGC has any mandatory, non-discretionary duty to undertake and complete a supplemental environmental analysis prior to construction of the casino. Absent such a duty, a court cannot compel an agency to take actions under section 706(1) of the APA. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (*SUWA*), and accordingly, the Court lacks subject matter jurisdiction to review the claims upon on which Plaintiffs base their request for relief.

Finally, even if Plaintiffs' claims were properly before the Court, Plaintiffs have entirely failed to satisfy any of the four prerequisites for injunctive relief: First, they have not shown – and cannot show – that they are likely to succeed on the merits of their NEPA claims, because contrary to their misapprehension, construction of the casino on the Tribe's land does not involve any federal action, let alone any "major federal action." Thus construction does not require NEPA review. Moreover, Plaintiffs have not shown that they will suffer irreparable harm in the absence of an injunction; indeed, their long delay in seeking injunctive relief undermines their

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Houle, the NIGC's former Chief of Staff, are current employees of the NIGC, and that Jonodev Chaudhuri, Acting Chairman of the NIGC, has been substituted for former Chairwoman Stevens pursuant to Federal Rule of Civil Procedure 25(d). In their Second Amended Complaint, Plaintiffs have now named these individuals and the other federal officials: S.M.R. Jewell, Secretary of the Department of the Interior, Kevin Washburn, Assistant Secretary – Indian Affairs, Paula L. Hart, Director of the Office of Indian Gaming, Amy Dutschke, Regional Director, BIA, and John Rydzik, Chief, Environmental Division, BIA, in their respective individual capacities. However, to the best of Federal Defendants' knowledge, Plaintiffs have not perfected service of the current Second Amended Complaint, which was filed on August 26, 2014, on any of the officials sued individually as is required by the Federal Rules of Civil Procedure. *See* Fed. R. Civ P. 4(i)(3). Accordingly, these defendants in their individual capacities are not included as "Federal Defendants" and are not before the Court for purposes of this motion.

claim that they face irreparable harm. Plaintiffs also have not shown that the balance of hardships weighs in their favor or that the public interest favors injunctive relief.

For all of these reasons, the Court should deny Plaintiffs' motion.

II. FACTUAL BACKGROUND

In accordance with IGRA's requirements, *see* 27 U.S.C. §2710.the Tribe first submitted a proposed ordinance setting terms for Class II gaming to the NIGC for review and approval in November 1993 The NIGC's Chairman issued a letter to the Tribe approving the ordinance in January 1994. The Tribe later added terms for Class III gaming and submitted a proposed amended ordinance in accordance with the NIGC's regulations. In 2000, the Department of the Interior approved the Tribe's gaming compact with the State of California and published notice of the approval in the Federal Register. Notice of approved Tribal-State Compacts, 65 Fed. Reg. 31,189 (May 16, 2000). Two years later, in 2002, the Tribe submitted a request to Interior to have a 101-acre area outside the boundaries of its Reservation taken into trust on its behalf. *See* Notice of Intent to Prepare an EIS for the Proposed Jamul Indian Village 101 Acre Fee-to Trust Transfer & Casino Project, San Diego County, CA, 67 Fed. Reg. 15,582 (Apr. 2, 2002). Pursuant to NEPA, the BIA then published a Notice of Intent to Prepare an Environmental Impact Statement for the proposed fee-to-trust transfer in April 2002. *Id.* That Notice announced that the "Jamul Indian Village propose[d] that . . . a casino be constructed on existing trust land [but] that parking and other facilities supporting the casino be constructed on the 101 acre trust acquisition." *Id.* The April 2002 Notice also stated that the proposed gaming facility would be managed by Lakes Kean Argowitz Resorts-California. *Id.* On January 10, 2003, the BIA published a Notice of Availability for a Draft Environmental Impact Statement ("DEIS"). DEIS for the Jamul Indian Village 101 Acre Fee-to-Trust Casino Project, San Diego County, CA, 68 Fed. Reg. 1475 (Jan. 10, 2003). Plaintiff Jamul Action Committee's members provided

comments on the DEIS. The United States Environmental Protection Agency ("EPA") published notice of its receipt of the Final Environmental Impact Statement ("FEIS"), Environmental Impact Statements & Regulations, Availability of EPA Comments, 68 Fed. Reg. 54,900 (Sept. 19, 2003) and subsequently, notice of the availability of the FEIS on November 14, 2003. 68 Fed. Reg. 64,621 (Nov. 14, 2003).

Between late 2003 and early 2006, the Tribe revised the planned casino development to eliminate the fee-to trust component and reconfigured the uses associated with the casino, with the exception of one access road, onto the existing Reservation. *See* Notice of Intent to Prepare a Supplemental EIS for the Approval of the Gaming Management Contract, 78 Fed. Reg. 21,398, 21,399 (Apr. 10, 2013). Subsequently, the Tribe also revised its proposal for a gaming management contract, and in late December 2012, it forwarded a tribal resolution as required pursuant to IGRA, and declared its intention to negotiate a management contract with a different entity, San Diego Gaming Ventures LLC. On April 5, 2013, the Tribe submitted a new proposed management contract to the NIGC and requested that the NIGC undertake the NEPA review process for approval of the contract. In accordance with the Tribe's request, on April 10, 2013, the NIGC published a "Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Approval of a Gaming Management Contract" in the Federal Register. 78 Fed. Reg. 21,398. The April 2013 NOI explained that reconfiguration of uses . . . together with the passage of time since the Final EIS was circulated" in 2003 had "resulted in the need for NIGC to develop and issue a SEIS." *Id.* The NOI provides that the analysis in the SEIS will "include land resources, water resources, air quality, biological resources, cultural and paleontological resources, socioeconomics, transportation, land use, agriculture, public services, noise, hazardous materials and visual resources." *Id.* at 21, 399. This analysis, including public comments, will inform the NIGC's decision concerning approval or disapproval of the gaming management

contract, and the SEIS will be issued prior to that decision. *See* Declaration of John Rydzik in Support of Federal Defendants Opposition ¶ 12. ("Rydzik Decl."), attached hereto as Exhibit 1.

On January 10, 2014, following the California Department of Transportation's approval of a Transportation Management Plan for construction of the proposed casino, the Tribe and Penn National issued a press release announcing "the launch of construction activities" at the proposed casino site. *See* January 10, 2014 press release attached hereto as Exhibit 2, available at http://jamulindianvillage.com/ (last visited Jan. 16, 2015).[4] The press release indicates that the NIGC's process for approval of the gaming management contract was ongoing and that Penn National and the Tribe were making "substantial progress" with respect thereto. *Id.* In a subsequent press release issued on December 17, 2014, the Tribe and Penn National announced the completion of the excavation phase of construction and that construction of the foundation and the enclosed below grade parking structure for the casino have begun. ECF No. 60-2, Pls.' Mem., Ex. E at 17-18. As these press releases indicate, the Tribe has been conducting these excavation and construction activities on its own land in cooperation with Penn National and San Diego Gaming Ventures. There is no federal involvement in the construction and no federal funds are being spent. The SEIS that is being prepared has nothing to with construction of the casino; rather as the NOI expressly states, it is for "the Approval of the Gaming Management Contract," 78 Fed. Reg. 21, 398, and the management of gaming operations by a non-tribal entity.

[4] A copy of this press release was previously introduced by Plaintiffs' attorney during the May 23, 2014 hearing on Defendants' Motions to Dismiss. *See* Hr'g on Defs.' Mot. to Dismiss 23, May 23, 2014, ECF No. 40 ("May 23 Tr.")11, 14.

III. STATUTORY AND REGULATORY BACKGROUND

1. The Indian Gaming Regulatory Act ("IGRA")

IGRA was enacted in 1988. The purposes of the statute were, inter alia,

> (1) 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; [and]
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players.

25 U.S.C. §§ 2702(1),(2). By enacting IGRA, Congress established "independent Federal regulatory authority for gaming on Indian lands[,] [f]ederal standards for gaming on Indian lands," and the NIGC within the Department of the Interior. *Id.* §§ 2702(3); 2704. IGRA applies to federally recognized tribes, *id.* § 2703(5), and governs gaming on "Indian lands" within their jurisdiction. *Id.* § 2710(b)(1) (Class II); § 2710(d)(3) (Class III). IGRA authorizes the NIGC's chair to review and approve tribal ordinances or resolutions and management contracts for Class II and Class III gaming.[5] *Id.* § 2705. Pursuant to IGRA and the NIGC's implementing regulations, a federally recognized tribe may enter into a contract with an outside contractor for the management of Class II or Class III gaming operations only if the contract is first approved by the chair of the NIGC. 25 U.S.C. § 2710(d) (9), 2711(a)(1); 25 C.F.R. § 533.1.

The NIGC's review of a management contract begins once the parties submit a signed contract for review. 25 C.F.R. §533.3(a) (1); Declaration of Christinia Thomas in Support of

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[5] The tribes and the NIGC share regulatory duties over Class II gaming, 25 U.S.C. § 2710(b), which includes bingo and certain "non-banking" card games. *See id.* § 2703(7). Regulatory and enforcement oversight for Class III gaming activities, which involve more traditional "casino" games such as slot machines, roulette, and poker, is assigned to the NIGC. 25 U.S.C. §§ 2705(a), 2710(d).

Federal Defendants' Opposition ¶ 10, ("Thomas Decl."), attached hereto as Exhibit 3. The review is tailored to meet IGRA's goals of ensuring that tribes are the primary beneficiaries of the gaming activity and protecting tribes from organized crime or other corrupting influences. Thomas Decl. ¶¶ 6, 8 (citing 25 U.S.C. § 2702). Accordingly, substantive review of a proposed contract focuses on the financial terms of the agreement and the background of the proposed management contractor, and it also includes environmental review under NEPA. *See id.* ¶¶ 5, 10.

a. Contract Terms

To be approved by the NIGC, a management contract must contain certain specified terms and provisions concerning the gaming operations. It must expressly "[p]rovide that all gaming covered by the contract will be conducted in accordance with . . . IGRA . . . and governing tribal ordinance(s)," 25 C.F.R. § 531.1(a). It also must specify the responsibilities of the Tribe and the operator for the identifiable functions of the gaming operations, including, but not limited to:

> [m]aintaining and improving the gaming facility; . . . [p]roviding operating capital; . . .[e]stablishing operating days and hours; . . . [m]aintaining the gaming operation's books and records; . . . [p]reparing the operation's financial statements and reports . . . ; [h]iring and supervising security personnel; [p]roviding fire protection services; . . .[s]etting advertising budget and placing advertising; . . . [p]aying bills and expenses; . . . [e]stablishing and administering employment practices; [and] obtaining and maintaining insurance coverage; . . . .

Id. § 531.1(b). Additionally, the contract, inter alia, must:

> [p]rovide for the establishment and maintenance of satisfactory accounting systems and procedures . . .; [r]equire the management contractor to provide the tribal governing body . . . with verifiable financial reports or all information necessary to prepare such reports . . .[,] and "to provide immediate access to the gaming operation, including its books and records, by appropriate tribal officials . . . ; [p]rovide for a minimum guaranteed monthly payment to the tribe. . . .; . . . [d]etail the method of compensating and reimbursing the management contractor . . .; [p]rovide the grounds and mechanisms for amending or terminating the contract . . .; [and] [c]ontain . . . mechanism[s] [for] dispute[] [resolution] . . . .

Id. §§ 531.1(c)-(f); (i)-(k). Importantly, with certain limited exceptions, the terms of the gaming management contract cannot exceed five years. *Id.* §531.1(h). All of these contract terms, which are required for NIGC approval, concern the casino's operations; they do not relate to or affect the construction of the facility where the gaming will be conducted.[6]

b. Background Investigations

The NIGC's review of a proposed gaming management contract also focuses on background investigations of the management contractor and its agents, 25 C.F.R. §533.6, including

> "[e]ach person with management responsibility for a management contract; . . . [e]ach person who is a director of a corporation that is a party to a management contract; . . . [t]he ten (10) persons who have the greatest direct or indirect financial interest in a management contract; . . . [a]ny entity with a financial interest in a management contract . . .; and . . . [a]ny other person with a direct or indirect financial interest in a management contract otherwise designated by the Commission.

Id. § 537.1. The management contractor is required to provide extensive information to the Commission to facilitate the background investigations, *id.* §§ 537.1(b), (c); 537.2, and must pay for the cost of the investigations. *Id.* § 537.3. The background investigations are intended to further the NIGC's statutory mandate under IGRA "to shield [Indian gaming] from organized crime and other corrupting influence[,]" 25 U.S.C. § 2702(2), and they are thus concerned with to the suitability of the individuals who will be involved in managing, or who stand to profit from, the gaming operations.

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[6] The regulations mention construction only in that they require that the management contract must provide for "a minimum guaranteed monthly payment to the tribe . . . that has preference over the retirement of development and construction costs" and must "[p]rovide an agreed upon maximum dollar amount for the recoupment of development and construction costs." 25 C.F.R. §§ 531.1 (f), (g). These provisions does not allow the NIGC to review or approve the construction, however, but only establishes the terms of payment or repayment of construction costs.

2. The National Environmental Policy Act ("NEPA")

The purpose of NEPA is to focus the attention of federal agencies and the public on a proposed federal action so that the environmental consequences of the action can be studied before a decision is made. *See* 42 U.S.C. § 4321; 40 C.F.R. § 1501.1; *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). NEPA is a procedural statute that "does not mandate particular results, but simply prescribes the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA requires a federal agency proposing a "major Federal action[ ] significantly affecting the quality of the human environment" to prepare an environmental impact statement ("EIS") analyzing the potential impacts of the proposed action and possible alternatives. 42 U.S.C. § 4332(2)(C).

NEPA does not apply to every action undertaken by a federal agency; rather, "NEPA is triggered only by a '"major federal action."' *Ctr. for Biological Diversity v. Salazar*, No. CV-09-8207-PCT-DGC, 2010 WL 2493988, at *6 (D. Ariz. June 17, 2010). *See also Hale v. Norton*, 476 F.3d 694, 700 (9th Cir. 2007); *Sierra Club v. Penfold*, 857 F.2d 1307, 1313 (9th Cir. 1988); *Metro Edison v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983) (quoting 42 U.S.C. § 4332(C)). Regulations promulgated by the Council on Environmental Quality ("CEQ"), 40 C.F.R. §§ 1500–1508, provide guidance in the application of NEPA. *Robertson*, 490 U.S. at 351-52 (1989). Under the CEQ's regulations, "[m]ajor Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. §1508.18.

The NIGC's review of gaming management contracts includes environmental review pursuant to NEPA. It is the NIGC's practice to initiate NEPA review when a signed gaming management contract is submitted. Thomas Decl. ¶ 10. The subject of analysis

in the NEPA review is the potential environmental impacts if the proposed gaming management contract is approved and the casino becomes operational. *See id.*

IV. ARGUMENT

Plaintiffs now seek a "writ of mandate" pursuant to section 706(1) of the APA, or the Mandamus Act, 28 U.S.C. § 1361, compelling the Federal Defendants to take action they claim the agencies have '"unlawfully withheld or unreasonably delayed[,]"' Pls.' Mem. 5 (quoting 5 U.S.C. § 701; citing *Johnson v. Reilly*, 349 F.3d. 1149, 1154 (9th Cir. 2003) (setting forth standards for relief under Mandamus Act)). The Supreme Court has made it abundantly clear, however, that in order for a court to compel agency action unlawfully withheld under 5 U.S.C. § 706(1), two jurisdictional prerequisites must be satisfied. The plaintiff must (1) identify a failure to take a discrete "agency action" that (2) the agency is legally required to take. *See SUWA*, 542 U.S. at 62-64. Similarly, to be entitled to mandamus relief under the Mandamus Act, a plaintiff must show, inter alia, that his claim is "clear and certain[,]" and that the defendant's duty is "ministerial and so plainly prescribed as to be free from doubt[.]" *Johnson*, 349 F. 3d at 1154. Plaintiffs do not satisfy either of these standards for obtaining mandamus relief.

Plaintiffs also request that Defendants be "enjoined from constructing, or continuing to construct, the . . . casino at least until the NEPA process is complete and until the SEIS is finalized . . . ." Pls.' Mem. 10. An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). A plaintiff seeking a preliminary injunction must establish that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Nat'l Res. Def. Council v. Winter*, 555 U.S. 7, 20 (2008). An injunction should issue only where a plaintiff makes a "'clear showing'" and presents "substantial proof" that one is warranted.

Mazurek v. Armstrong, 520 U.S. 968, 972 (1997) (*per curiam*) (quoting 11A Charles Alan Wright, Arthur R. Miller, Federal Practice and Procedure § 2948 (2d ed. 1995). Here, Plaintiffs also do not satisfy the standards for obtaining injunctive relief.

A. Plaintiffs Cannot Obtain Mandamus Relief.

With respect to the first prerequisite for obtaining mandamus relief pursuant to the APA, in *SUWA*, the Supreme Court construed the phrase "failure to act" as limited to a failure to take an "agency action," as that term is defined in 5 U.S.C. § 551(13). *SUWA*, 542 U.S. at 62. In examining 5 U.S.C. § 551(13), the Supreme Court observed that the APA begins its definition of the term agency action "with a list of five categories of decisions made or outcomes implemented by an agency– 'agency rule, order, license, sanction [or] relief.'" All of those categories involve circumscribed, discrete agency actions . . . ." *Id.* (citations omitted) (emphasis added). As to the second prerequisite, the Supreme Court found that the agency action sought to be compelled must be one that the agency is legally required to take. *SUWA*, 542 U.S. at 63. In this regard, the Court in SUWA explained that "[t]he mandamus remedy was normally limited to enforcement of 'a specific unequivocal command,' [or] the ordering of a 'precise, definite act . . . about which [an official] had no discretion whatever."' *Id.* (citations omitted). *See also Blancett v. U.S. Bureau of Land Mgmt.*, No. Civ. A. 04-2152 (JBD), 2006 WL 696050 at *6, n.5 (D.D.C. Mar. 20, 2006) ("[T]he framework set forth in *SUWA* expressly applies to all claims of agency inaction."). Based on this unequivocal Supreme Court precedent, Plaintiffs here must demonstrate that the agencies have a mandatory, non-discretionary duty to prepare environmental analysis for construction activities by the Tribe and private parties on the Tribe's land, and that they failed to carry out that duty. Plaintiffs cannot meet this burden.

Under IGRA and the NIGC's implementing regulations, the Tribe is required to submit a gaming management contract to the NIGC for review before a casino on the Tribe's land that will be managed by an outside contract can commence gaming operations. *See* Thomas Decl. ¶ 22. Accordingly, contrary to Plaintiffs' assumptions, it is the approval or disapproval of the gaming management contract - not construction of the casino - that is a "major federal action" that triggers NEPA review. As explained above, construction of the casino is an entirely private undertaking that was initiated and is being conducted by the Tribe on its own land in cooperation with Penn National and San Diego Gaming Ventures. Pursuant to IGRA and the NIGC's regulations, federal approval of a management contract is required before the casino can be *operated* by an outside manager, but neither the statue nor the regulations have anything whatsoever to do with casino construction. *See* Thomas Decl. ¶ 21 (confirming that IGRA does not authorize approval or disapproval of construction of casinos). Plaintiffs do not allege otherwise, nor have they identified any other federal law or regulations that require federal authorization of casino construction or that would trigger an obligation for NEPA review prior to construction of a gaming facility.

Plaintiffs thus have not demonstrated nor, pursuant to the Mandamus Act, have they stated a "clear and certain" claim that Federal Defendants have any mandatory, non-discretionary duty that is "so plainly prescribed as to be free from doubt" to take the action that they seek to compel. Plaintiffs therefore cannot obtain the mandamus relief they seek.

B. Plaintiffs Have Not Satisfied the Requisites for Preliminary Injunctive Relief.

Plaintiffs also seek to have Defendants including, but not limited to, the Federal Defendants, enjoined from constructing or continuing to construct the casino prior to completion of the SEIS and NEPA review. *See* Pls.' Mem., 10. As an initial matter, as explained above, Federal Defendants are not in any way involved in the construction of the casino, and therefore, they

cannot be enjoined from any construction or continuing construction activity. Plaintiffs' motion for preliminary injunction should be denied for this reason alone, but in any event, Plaintiffs' also fail to satisfy any of the requirements for obtaining injunctive relief. Likelihood of Success on the Merits.

1. Likelihood of Success on the Merits

Plaintiffs have not shown that they are likely to succeed on the merits of their NEPA claim. As explained above, "the obligation to review a project pursuant to NEPA arises only when there is 'major federal action.'" *Sierra Club v. U.S. Army Corps of Eng'rs*, 990 F. Supp. 2d 9, 33 (D.D.C. 2013) (quoting 42 U.S.C. §4332(2)(C)). Here, there is no federal involvement whatsoever in the construction of the casino on the Tribe's land, let alone a "major federal action" that would trigger NEPA review.

The *only* federal action related to the proposed casino is the NIGC's pending decision whether to approve or disapprove the gaming management contract. Under federal law, NEPA review of the environmental impacts of the gaming operations is only required before the NIGC issues that decision. That NEPA review is ongoing and will be completed before the gaming management contract is either approved or disapproved; thus, NEPA's requirements will be satisfied before the only major federal action implicated here takes place. In the interim, the Tribe and Penn National can proceed with construction of the facility on the sovereign Tribe's land without any requirement for authorization by the federal agencies. The Tribe, and Penn National, to the extent that it may be contributing to the construction costs of the casino, bear the risk that the gaming management contract may be disapproved and that the proposed casino managed by Penn National might not become operational, but this does not mean that the casino cannot be constructed in advance of the NIGC's decision. If the facility is completed and the gaming management contract is subsequently disapproved, the Tribe could seek another

management partner, or it could elect to use the completed facility for other purposes, including commercial enterprises other than gaming. Alternatively, as Federal Defendants previously explained during the hearing on Defendant's Motion to Dismiss, *see* May 23 Tr. 23, if it has the financial capability, the Tribe could manage the gaming operations on its own without a third party manager. *See also* Thomas Decl. ¶ 23.

In sum, there is no basis for Plaintiffs' contention that the Federal Defendants have any obligation to undertake NEPA review concerning the construction of the casino, or that the ongoing NEPA review for the NIGC's decision to approve or disapprove the management contract must be completed in connection with construction of the facility. For this reason, Plaintiffs have not shown, and cannot demonstrate, that they are likely to succeed on the merits of their NEPA claim.

2. Irreparable Harm.

In order to obtain the extraordinary relief of a preliminary injunction, a plaintiff must also show that it will suffer irreparable harm in the absence of the injunction. *Winter*, 555 U.S. at 20. *Accord Sampson v. Murray*, 415 U.S. 61, 88 (1974) ('"[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies . . . .") (internal quotation marks and citation omitted). Here, Plaintiffs claim that they have "an irreplaceable due process right to provide meaningful comment and receive the BIA's and NIGC's responses to those comments before the casino is constructed[,]" Pls.' Mem. 9, and that the deprivation of this right constitutes irreparable harm supporting the requested injunction. First, however, for the reasons explained above, Plaintiffs' assertion that NEPA affords them any procedural right to comment on the environmental impacts of the casino prior to construction of the gaming facility is simply incorrect because here, no NEPA analysis is required in the first

instance.[7] Second, although Plaintiffs and the public have a right to comment on the environmental review of the casino's operations before the NIGC decides to approve or disapprove the management contract, Plaintiffs will be afforded that opportunity. Rydzik Decl. ¶ 12. Thus, Plaintiffs will obtain the environmental review and the procedural relief they now seek without the necessity of an injunction halting construction. Therefore they cannot show that, absent the injunction, they will suffer irreparable harm or any harm whatsoever.

Moreover, Plaintiffs' claim of irreparable harm is seriously undermined by their delay in seeking injunctive relief. As the Ninth Circuit has stated [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) (holding that [a] delay in seeking a preliminary injunction is a factor to be considered in weighing the propriety of relief."). *See also 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."); *Gowan Co., LLC v. Aceto Agric. Chems.*, No. CV-09-1124-PHX-JAT, 2009 WL 2028387, at *4 (D. Ariz. July 10, 2009) ("Because *Winter* requires that irreparable harm be imminent, any significant delay in pursuing an injunction is relevant in determining whether injunctive relief is necessary.").

In *Protect Our Communities Foundation v. U.S. Department of Agriculture*, 845 F. Supp. 2d 1102 (S.D. Cal. 2012), *aff'd* 473 F. App'x 790 (9th Cir. 2012), the plaintiffs alleged, inter alia, that the U.S. Forest Service had violated NEPA by approving a transmission line based on

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[7] Moreover, even if Plaintiffs could establish a procedural harm, that alone "does not compel the issuance of a preliminary injunction." *See Fund for Animals v. Lujan*, 962 F.2d 1391, 1400 (9th Cir. 1992).

an inadequate EIS and by failing to prepare an SEIS to account for post-EIS project changes, new information and new circumstances. Plaintiffs sought a preliminary injunction against construction of the transmission line on the day that defendants had indicated construction would begin, but four months after the plaintiffs were informed of the date and more than a year after the Forest Service had approved the project. Given these facts, the district court determined that the plaintiffs' delay weighed against a finding of irreparable harm in the absence of the requested injunction. *Id.* at 1113 (citing *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 79-80 (4th Cir. 1989) (denying preliminary injunction to stop filling of wetlands pursuant to § 404 permit, when plaintiffs delayed six months in filing complaint and sought injunction on the eve of construction, nine months after issuance of the ROD and EIS)). *See also Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 55 F. Supp. 2d 1070, 1090 (C.D. Cal. 1999) (plaintiff's five-month delay in seeking injunctive relief "demonstrates the lack of any irreparable harm").

In this case, Plaintiffs' long delay in seeking injunctive relief undermines their motion for a preliminary injunction. Plaintiffs would have the Court believe that construction of the casino is only now about to begin, *see* Pls.' Mem. 2, 5, and that this justifies their claim that they will suffer irreparable harm absent the requested injunction. *See id.* at 8, 9. Contrary to Plaintiffs' current contentions however, construction of the casino actually began nearly a year ago, and in fact, in their allegations in the First Amended Complaint and in opposing Defendants' Motions to Dismiss, Plaintiffs themselves repeatedly recognized this construction activity. *See* First Am. Compl., ¶¶ 7, 88 ("construction on the casino project has already been initiated"); *id.* ¶ 14 (asking that construction be halted); *id.* ¶¶ 8, 14 (arguing that Notice of Intent to publish SEIS "triggered the initiation of construction of the casino"); May 23 Tr. 8-9 (arguing that alleged determination that land on which casino is being built constitutes Indian lands triggered legal consequences including the initiation of construction of the casino); *id.* at 11 (introducing Jan.

10, 2014 press release issued by Penn National Gaming, Inc. and the Tribe "at the time they initiated construction"). Likewise in their Second Amended Complaint filed in August 2014, Plaintiffs again stated that construction had been initiated, ¶ 69, and is being "illegally . . . allow[ed] . . . to go forward. *Id.* ¶ 66. Notwithstanding their acknowledged awareness that construction had begun and was already ongoing, Plaintiffs waited to seek a preliminary injunction until nearly eleven months after filing their First Amended Complaint, nearly eight months after the May 23 hearing on Defendants' Motion to Dismiss, and four months after filing their Second Amended Complaint. Plaintiffs' untimely request for injunctive relief should be denied.

3. The Balance of Equities and the Public Interest.

In seeking a preliminary injunction, Plaintiffs "must [also] establish . . . that the balance of equities tips in [their] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20. Where the defendant is the government, the Court may consider these final two factors together. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

With regard to balancing the equities, "courts must balance the competing claims of injury and consider the effect on each party of granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal quotation marks and citations omitted). Here, as discussed above, Plaintiffs have not shown that they will suffer any harm in the absence of an injunction. There is no need for an injunction as Plaintiffs will be afforded the relief they seek, which is completion of the NEPA process, including the right to comment on the environmental review. Rydzik Decl. ¶ 12. On the other hand, third parties - the tribal defendants, Penn National, and San Diego Gaming Ventures - may suffer significant financial harm if construction is brought to a sudden halt and cannot proceed until the SEIS for the only federal action involved here,

approval or disapproval of the gaming management contract, is completed. [8] The tribal defendants and Penn National are best suited to address any harm they may suffer, but the lengthy delays in construction that could result from an such injunction would likely result in significant added costs of construction.

Finally, "in exercising their sound discretion, courts of equity should pay particular regard for the public consequences." *Winter*, 55 U.S. at 24 (internal quotations and citations omitted). In enacting 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), and that regulated gaming operations on Indian lands are in the public interest. *See id.* § 2702(3). In addition, the United States has a strong interest in the orderly administration of the NIGC's process for review and approval or disapproval of gaming management contracts, and that interest would be harmed if the Court were to enjoin construction of the casino and require Federal Defendants to undertake and complete NEPA review of an entirely private enterprise that involves no federal action before any further construction can proceed. *See Sierra Club*, 990 F. Supp. 2d at 26 (deeming federal agencies' argument that the public has an interest in regulatory efficiency particularly compelling). The NIGC and the BIA have invested considerable time and financial resources in the NEPA review that is required for the gaming management contract, Thomas Decl. ¶ 20; Rydzik Decl. ¶ 9, and they have and will continue to provide opportunities for public participation and comment as part of that process. In these circumstances, the public interest is not served by enjoining construction activity that is being undertaken entirely by private parties and that does not involve federal action, yet nevertheless

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[8] In balancing the equities, the Court may consider harm to third parties. *See, e.g., Oregon Natural Desert Ass'n v. U.S. Forest Serv.*, No. Civ. 03–381–HA, 2004 WL 1592606 (D. Or. July 15, 2004) (declining to issue injunction due to harm to third parties notwithstanding showing of likelihood of success on merits).

requiring the NIGC to undertake NEPA analysis of the private construction. Consideration of the public interest thus also favors denying Plaintiffs' motion for injunctive relief.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Writ of Mandate and for a Preliminary Injunction should be denied.

Respectfully submitted this 16th day of January, 2015,

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