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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe, et al. Plaintiffs, v. SALLY JEWELL, Secretary of the Interior, et al., Defendants	CASE NO. 2:12-CV-03021-TLN-AC **PLAINTIFF COLUSA INDIAN COMMUNITY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

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I. INTRODUCTION

At first glance, this case may seem like a somewhat technical inquiry into the Department of the Interior's exercise of discretion to accept an off-Reservation parcel of land into trust for gaming. In fact, it involves much more: specifically, whether DOI violated IGRA, NEPA, its trust responsibility to Colusa, and other federal statutes and its own regulations when, based on an EIS prepared by a consultant that had a clear but undisclosed financial interest in the application being approved, and after refusing to consult with the Colusa Indian Community after arbitrarily changing its definition of "nearby Tribe" part way through the fee-to-trust process, DOI allowed the Enterprise Rancheria to move from its pre-IGRA gaming-eligible trust land in Butte County to a parcel of land in Yuba County owned by Enterprise's investor, to build and operate a large casino and hotel. By allowing Enterprise to leapfrog over Colusa to establish a casino specifically located to cannibalize Colusa's own gaming market, DOI has assured a huge reduction in Colusa's own casino and governmental revenues, the layoff of hundreds of Colusa's employees, the elimination of most of Colusa's government programs and services, and the possible loss of fee lands that now secure Colusa's debts. In addition, an Enterprise casino in Yuba County will deprive Colusa County and other non-tribal government agencies of most of the revenues they now receive in the form of grants from the Colusa Tribe's contributions to the Indian Gaming Special Distribution Fund ("SDF").

In deciding to permit development of an off-reservation casino in Yuba County by the Enterprise Rancheria ("Enterprise") over 50 miles by road from its existing 40-acre pre-IGRA Indian lands in Butte County, Defendants the Department of the Interior ("DOI"), its Bureau of Indian Affairs ("BIA"), and their respective officials failed to take the "hard look" at the impacts on local communities, including nearby Indian tribes, and the human environment as required by federal statutes, DOI's own regulations and guidance, and common sense.

Plaintiff Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa"), is a small, rural Indian tribe whose government is dependent upon the income from its modest casino and hotel business. Meister Decl. Exh. 1 at 2. Through the income from its casino, the Tribe has provided health care, education, housing, environmental and other social services to its members, in many cases for the first time since the federal, state, and local governments have long neglected their

Indian citizens.

The Yuba County site is located in the heart of the area from which Colusa draws its customers and employees and interposed between Colusa and the Sacramento Metropolitan Area, from which it also draws many of its customers. Although its Reservation is a significant distance from local freeways and metropolitan areas, Colusa did not seek to move outside of its home county and territory to take advantage of a more lucrative location, much less leapfrog over other Indian tribes in order to cannibalize their main sources of tribal revenue and livelihoods.

A. THE ENTERPRISE APPLICATION

In 1998, the voters of Yuba County approved Measure R, approving a racetrack and entertainment development zone southeast of Yuba City and Marysville. ARN 0022909.[1] The auto racing magnate Gerald Forsythe of Illinois, the owner of Forsythe Racing, purchased the land set aside by the voters for a racetrack and entertainment venue. ARN 0022910. Although the SleepTrain Amphitheater was constructed in the zoned area, no racetrack has been built. In mid-2001, Forsythe established Yuba County Entertainment LLC ("YCE"), a Delaware limited liability company, the sole member of which is his racing corporation, and commissioned a study by the Innovation Group to determine how lucrative it would be to build a casino on the site instead of the voter-approved racetrack. ARN 0000389. That study found that a Marysville casino would be extremely lucrative by "cannibalizing" the casino business of several nearby tribes. *Id.* at 0000428. The crux of the 2001 study, that cannibalization of other Indian tribal governments' casinos would provide more than half of the gaming revenues at a Yuba County casino, remained unchanged through the last economic report, which was prepared by Gaming Market Advisors ("GMA") for YCE and AES in June 2006. ARN 0023911, 24811-812 (finding that $76.8 Million out of $132 Million in expected gaming revenues would come from cannibalizing the income of other tribal casinos); ARN 0024684 (AES "in conjunction with [YCE] is assisting the Enterprise Rancheria with their Land in Trust Process ... AES engaged Gaming Market Advisors").

[1] The Department of the Interior submitted its final Administrative Record to the Court on compact disk on May 23, 2014, and repaginated the documents in the format EN AR NEW 0000001. Most documents bear two Bates-style page numbers, but we have used the new pagination for our citations in this Memorandum, but have shortened the citations to the format, "ARN 0000001".

The initial application by Enterprise to take the YCE land into trust was made in August 2002, but did not discuss any exception to the general prohibition against gaming on lands acquired in trust after October 17, 1988 (ARN 0000753), which may have been because YCE and Enterprise were seeking to have the land declared eligible for gaming by Congress. ARN 0002403. Initially, the casino partners directed Analytical Environmental Services ("AES") to prepare an Environmental Assessment ("EA"). ARN_0001036. Despite the fact that the EA purportedly found no significant environmental impacts, *e.g.*, ARN 0001551, the decision was made to produce an Environmental Impact Statement ("EIS") in support of the casino partners' application. ARN 0002401; 0002340 (YCE opposing an EIS and offering to indemnify the United States for litigation costs).

Soon afterward, the then-Assistant Secretary for Indian Affairs, Carl Artman, announced a policy that Defendants would not approve any off-reservation casino applications more than a commutable distance from a tribe's existing reservation. ARN 0011771. Since Enterprise's reservation is over 50 miles by road from the YCE parcel, the Commutability Policy put the application into suspension for the remainder of the Bush Administration.

In September 2008, DOI issued regulations shrinking the distance within which it would consult with "nearby" Indian tribes and local governments. 73 Fed. Reg 29354. While the published regulations explained the purpose of shrinking the radius for non-Indian governments, no explanation was given for excluding Indian tribes farther than 25 miles from a proposed off-reservation casino from consultation. *Id.* at 29357.

In June 2010, then-Secretary Salazar instructed Assistant Secretary Echo Hawk to review the Department's policies for approval on off-reservation casinos. ARN 0028181. One year later, on June 13, 2011, Echo Hawk repealed the commutability policy established by Artman. ARN 0028770. With lightning speed for a federal department, Defendants circulated a draft ROD approving the Enterprise two-part determination application under Part 292. ARN 0028780.

In order to gain the support of elected officials for their off-reservation casino, the casino partners negotiated MOUs with Yuba County and the City of Marysville. ARN 0000922; ARN 002755. The Yuba County MOU provides for direct payments to the County beginning at $800,000 and rising to $5,000,000 per year, to be adjusted for inflation. ARN 0000924. In exchange, the

casino's backers received a letter supporting their casino plans from the Board of Supervisors. ARN 0000909. Marysville was the only other local government, to support putting the land into trust status for an off-reservation casino, perhaps because it would receive approximately $5 Million pursuant to its MOU with Enterprise. ARN 0002757. As of 2011, Yuba County and Marysville accounted for all six of the local governmental letters in support of the Enterprise off-reservation casino. ARN 0030248. In 2005, however, BIA acknowledged internally that "considerable opposition from the local community exists." ARN 0002403. In late 2005, an advisory measure placed on the ballot by the Yuba County Board of Supervisors asked whether a casino should be built on the YCE parcel. It was defeated by a vote of 52% against, with opposition highest in the nearby community of Olivehurst. ARN 0022911; ARN 0028777. Notwithstanding this democratic expression of opposition, Defendants characterized the fact that Yuba County and Marysville "continued to engage in a relationship with the Tribe" as evidence "strong local support" for the off-reservation casino project. ARN 0029817; ARN 29989 (demand by House Conferees that DOI support its claim of "strong local support"). In 2009, the Board of Supervisors, after noting the 2005 vote against the casino and the fact that "[l]egitimate concerns exist regarding the social and economic impacts as a result of a gaming facility being located in Yuba County," noted that Yuba County would "honor the agreement [with Enteprise] and the provisions contained therein." ARN 0022911-912.

Notice of Availability of the draft EIS was published in March 2008. ARN 0015274. When Colusa learned from other sources not directly from Defendants that Defendants were considering granting Enterprise's fee-to-trust ("FTT") application, Colusa attempted to engage Defendants in consultation as required by law and Defendants' own policies to no avail. Mitchum Letter to Morris (2009) ARN 0026979. Colusa's experience was not unique among tribes or local governments. Colusa brought the environmental shortcomings and economic dangers to the attention of its "trustee," the BIA in oral and written comments. Notice of Availability of the final EIS was published in August 2010. ARN 0028249.

B. DECISIONS UNDER REVIEW

On September 1, 2011, Defendants issued a Record of Decision ("292 ROD") pursuant to 25

USC § 2719 and 25 CFR Part 292, finding that the proposed casino would be in the best interest of Enterprise and "would not be detrimental to the surrounding community." ARN 0029815. On August 30, 2012, the Governor of California concurred in the 2011 Part 292 determination that would benefit Enterprise without being "detrimental to the surrounding community" after negotiating a compact that provides for significant funds that would be paid directly to the State. ARN 0029207. On November 21, 2012, Defendants issued a second Record of Decision ("151 ROD") pursuant to 25 USC § 465 and 25 CFR Part 151, finding that Enterprise had need of the land. ARN 0030166.

Defendants published notice of their decision to take title to a parcel in trust for Enterprise in the Federal Register on December 3, 2012. 77 Fed. Reg. 71612 (2012). Because the December notice contained a legal description of land totaling more than 80 acres, while the RODs only described the parcel as 40 acres, Defendants published a Federal Register notice on January 2, 2013 changing the metes and bounds of the parcel to describe a 40-acre parcel. 78 Fed. Reg. 114 (2013).

Colusa filed its Complaint in this action on December 14, 2012. Dkt. 1. Under Defendants' long-established prior practice, filing of Colusa's lawsuit within 30 days after publication of the notice of intent to take the land into trust would have caused the immediate suspension of that decision, 61 Fed. Reg. 18082 (1996), but instead, Defendants changed that policy for this case on the pretext that under the Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012) ("Patchak"), there no longer was a need to delay action because the land could be taken out of trust if the plaintiff ultimately prevailed. Defendants' Opp. to Plaintiff's Motion for TRO, Dkt. 24 at 6.

Colusa's action was ordered consolidated with two other actions, one filed by the United Auburn Indian Community and one filed by Citizens for a Better Way. All three plaintiffs moved for provisional relief, but before ordering the case transferred, Judge Mendez denied injunctive relief *without addressing the merits*, on the grounds that plaintiffs had failed to show irreparable injury because under *Patchak*, the land could be taken out of trust if plaintiffs prevail, and Defendants, including Enterprise, committed to providing notice (later extended from 30 to 60 days) before commencing activity on the Yuba site.

On May 16, 2013, Defendants took title to the new 40-acre parcel into trust for Enterprise.

United Auburn Indian Community Statement of Facts ¶ 49. Despite Defendants' hasty insistence on taking the land into trust for Enterprise, Defendants took over one year to assemble an adequate Administrative Record, which they provided to the Court on May 23, 2014. Dkt.96.

C. LEGAL BACKGROUND

The Indian Gaming Regulatory Act ("IGRA"), generally prohibits gaming on lands acquired by the Department of the Interior ("DOI") in trust for the benefit of an Indian tribe after October 17, 1988 unless one of a small number of enumerated exceptions applies. 25 U.S.C.A. § 2719. Because the United States already held lands in trust for Enterprise on October 17, 1988 (thus qualifying those lands as "Indian lands" under 25 U.S.C. § 2703(7), IGRA would permit Enterprise to conduct gaming on later-acquired lands only if,

> the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination[.]

25 U.S.C.A. § 2719(b)(1)(A). This process is known as a "Two-Part" or "Secretarial" Determination. 25 CFR Part 292, § 292.13, *et seq.*

Because the Yuba Casino Site is nearly 54 road miles from Enterprise's Reservation and never was part of the original Enterprise Rancheria, 25 U.S.C. §2719(b)(1)(A) required that Defendants' decision to accept the Yuba Casino Site into federal trust for Enterprise be preceded by a Secretarial Determination and the concurrence of the Governor of California based upon the consultation process described in that subsection and in 25 C.F.R. Part 292, § 292.13 *et seq.*[2]

II. ARGUMENT

Rather than giving the proposed off-reservation casino by Enterprise and YCE the requisite "hard look," it appears that Defendants hardly looked at it either in the EIS or the two RODs that followed it. Although the EIS disclosed the existence of significant adverse effects on the human

[2] Pursuant to 25 CFR 151.11, the YCE parcel is an "off-reservation" acquisition because it is not within or adjacent to Enterprise's existing reservation. The Administrative Record is replete with references to the YCE parcel as off-reservation. Neither of the RODs proclaim the Yuba Parcel as a reservation pursuant to 25 U.S.C. § 467, the sole authority for deeming trust land to be an Indian reservation.

environment, Defendants did not ensure that they were properly analyzed. In particular, Defendants failed to seriously evaluate the socioeconomic effects on the environment of other tribes and their members whose casino businesses would be cannibalized by the Enterprise YCE casino. The sole consideration being a cheerleading market evaluation completed in 2006, well before the "great recession" began, and based on vague assumptions about the affected tribal casinos. The RODs carried over that lackadaisical approach, simply reiterating the claims about the lack of adverse effects in the Enterprise application. The fact that the RODs did not reflect the skepticism required by a federal agency toward the claims of an applicant for its approval is no wonder. Both the EIS and the RODs signed by the Assistant Secretary Indian Affairs were drafted by AES, which had been retained by YCE long before it entered into a three-party agreement with BIA that would supposedly guard against bias, and which continued to work on the application after it supposedly terminated the three-party agreement. *E.g.*, ARN 0027031.

III. STANDARD OF REVIEW

Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Under the APA, a court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or taken "without observance of procedure required by law." 5 U.S.C. § 706(2). Those rules of review apply to NEPA as well. See *Ka Makani 'O Kohla Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002).

A. DEFENDANTS' REVIEW OF THE ENVIRONMENTAL IMPACTS OF THE PROPOSED TRUST LAND ACQUISITION UNDER NEPA WAS ARBITRARY AND CAPRICIOUS

1. The EIS Failed to Address an Adequate Range of Alternatives.

The alternatives analysis is the "heart" of an FEIS. 40 CFR 1502.14; *Ctr. for Biological Diversity v. DOI*, 623 F.3d 633, 642 (9th Cir. 2010). NEPA requires study of "enough alternatives 'to permit a reasoned choice.'" *Pacific Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1100 (9th Cir. 2012). Because the alternatives are based on the Purpose and Need statement, it must not be drafted too narrowly. *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070-72 (9th Cir. 2010). The Council on Environmental Quality's ("CEQ's") regulations require that an FEIS

"shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. "[T]he statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an FEIS." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir. 2004).

In *Simmons* the Seventh Circuit required the Army Corps of Engineers to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project," and to look more broadly at the general purpose of the project rather than the alternatives identified by the applicant to meet its narrow goals, rather than "contriv[ing] a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 & 669 (7th Cir.1997).

As admitted in both the 292 and 151 RODs, Congress in IGRA intended to confine tribal casinos to pre-1988 Indian Lands with only extremely limited exceptions. 25 USC § 2719; ARN 0029813 (292 ROD); ARN 0030173 (151 ROD); *compare* 25 USC § 2701(4) (finding that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government"). Rather than draft a statement of Purpose and Need addressing the BIA's congressionally mandated purposes, or the general needs of the Enterprise Rancheria, the FEIS's statement of Purpose and Need is drafted to require the construction of as large a casino as possible, essentially unchanged in configuration from the one proposed in 2002. ARN 0002823 ("Alternative A is unchanged from the EA"); *e.g.*, *compare* ARN 0023333 & 0023339 (EIS) *with* ARN 0001046 & 0001050 (EA).

Defendants were required to "Rigorously explore and objectively evaluate all reasonable alternatives." 40 CFR 1502.14. The FEIS, however, posits ephemeral alternatives, only one of which was not on the land already owned by Enterprise's investor. Just as the statement of Purpose and Need is tailored to require only one type of development, the identified alternatives stacked the deck in favor of Alternative A, undermining the action-forcing purpose of NEPA.

The statement of Purpose and Need required building a casino. Thus, only a casino alternative could satisfy the statement of Purpose and Need. Alternatives C and E thereby

automatically were disfavored as not meeting the P&N.

Because the P&N requires generating revenue, the larger the casino, the better it would fit the P&N. As a result, Alternatives B and D were discarded because, while they would meet the "need" to build a casino, they were assumed to be smaller and therefore would not meet the need of producing as much revenue as possible. ARN 0023393. The reasoning behind making Alternative D a small casino is obscured by general statements about lower profits of an Oroville casino and the high expense of construction, but those effects are not quantified in either the FEIS or Appendix M. *Id.* Neither do the FEIS or its appendices or the Administrative Record disclose *any* data to demonstrate that other investors were actually approached regarding funding a casino on a site other than the one selected by the actual investor, YCE, notwithstanding the fact that the lack of investors was the boilerplate reason for rejecting all other alternatives in the EA (ARN 0001072), and one of the reasons for not selecting the strawman of Alternative D in the EIS. ARN 0023393.

Because only Alternative A included a large casino on the Yuba site already owned by Enterprise's investor, the FEIS did not seriously propose any other alternative casino locations for consideration. Such alternatives should have included purchase of a possible site on lands in Enterprise's home county of Butte, such as the Highway 99 Alternative rejected without analysis in the EA and EIS and repeated in the RODs. ARN 0001072 & 0023392; ARN 0030174-175. While there was at least a gesture toward considering the Highway 99 Alternative, the EIS completely ignored a logical alternative based on Enterprise's purchase of 63 acres of land adjacent to the City of Oroville in Butte County in 2006, while the Draft EIS was still under development. ARN 0022969. In addition, there is a long history of transferring federal lands, many of which surround the Enterprise Rancheria, into trust for Indian tribes. The FEIS, therefore, completely failed to address a suitable range of alternatives by restricting itself to only two locations. The only alternative in another location, Alternative D, would have been a smaller casino. Being smaller, Alternative D could not address the revenue maximizing purpose of the overly narrow P&N.

As the Ninth Circuit has held, "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (citation omitted). Because the FEIS presented a false

choice of locations, the obvious missing alternative is another site, perhaps through an exchange of land with the federal government near the site of the inundated Enterprise No. 2 parcel.[3]

2. DOI Failed to Take a "Hard Look" at the Environmental Impacts of the Proposed Casino.

Pursuant to NEPA, Defendants were required to take a "hard look" at the impacts of the proposed casino, including "considering all foreseeable direct and indirect impacts" and a "discussion of adverse impacts that does not improperly minimize negative side effects." *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006) (citations and internal quotation marks omitted).

While economic impacts themselves are not considered environmental impacts, the environmental and socioeconomic impacts caused by the economic impacts of the proposed project must be considered. Appendix M, upon which the FEIS relies for its socioeconomic data, was completed in 2006 based upon statistics from 2005 and even earlier. It analyzes what it calls the projected "cannibalization" of other tribal casino businesses by an Enterprise casino. ARN 0024812. Enterprise's contractors analyzed the economics of a casino well before the economic downturn that began in earnest in 2008, and made rosy assumptions about economic activity in 2009.

In addition to being out-of-date, the study relies upon pure, unanchored conjecture rather than data. ARN 0024811 ("Colusa likely focuses its marketing efforts on different markets" from other local tribal casinos (*underlining added*)); *compare* Fernandez Dec. in Support of Plaintiff's Motion for a TRO, Dkt. 8-2 at ¶5. As the report's authors admit,

> [w]ithout knowing specific operating margins, it is not possible to quantify the exact bottom line impact to each tribe. . . . While GMA cannot estimate the actual impact on each tribe, a substantial discount can be given to the estimates of revenues that will be cannibalized from each casino.

ARN 0024811; *compare* Meister Decl. Exh. 1 at 2. Although the EIS was not updated to consider the recession (or higher gas prices), defendants relied upon the downturn to support the proposed casino as a source of jobs in the area, but did not address the effect of the downturn on the potential profits

[3] Under Defendants' rationale, the casino should be built in downtown Marysville, Yuba City or even Sacramento as an even more profitable location.

from the casino and the impacts on nearby tribes in light of the downturn, and provided no actual data. *E.g.,* ARN 0029796.

The fact that the analysis of the environmental impact on Colusa was so minimal as to be useless is demonstrated by the fact that analysis of the impacts based upon actual data, rather than suppositions, was performed by Colusa and the California Governor's office after the decision to take the land into trust for Enterprise, and found that it would be devastating. Dec. Meister. The reports found that the planned Enterprise casino would result in a 77% decrease in the Colusa Casino's gross gaming revenues, a 90% decrease in revenues to the Colusa tribal government and a 50% decrease in SDF grand funds to the local community outside of the reservation. *Id.*

Under NEPA, the BIA must analyze the impact of its activities on the State's ability to meet its goals in the State Implementation Plan under the Clean Air Act to clean up the air in the relevant area. *See*, *e.g.*, 40 CFR 1502.16(c) & 1508.27(b)(10). The EIS merely asserted that the emissions from the Proposed Casino would conform to the state plan, but did not give any figures that would support that assertion. ARN 0023623. Based on Table 4.4-3, (ARN 23621) however, it appears that NOx emissions may exceed EPA's *de minimis* threshold for both ozone and PM2.5 emissions and require offsets or other actions by the BIA to conform to the California State Implementation Plan. 40 CFR 93.158; ARN 0023623.

The FEIS briefly acknowledged that six fish species of concern, of which five are listed under the Endangered Species Act, may exist in the vicinity of the Yuba Casino site. ARN 23459. Acknowledging that the nearby rivers are essential to survival of the listed species, NMFS and FWS have designated critical habitat for all of them. 58 Fed. Reg. 33212 (1993); 59 Fed. Reg. 65256 (1994); 65 Fed. Reg. 7764 (2000); 70 Fed. Reg. 52488 (2005); 74 Fed. Reg. 52300 (2009). All but one of the critical habitat designations preceded publication of the draft EIS, and that one preceded the final EIS. Critical habitat for all five listed species includes the Sacramento River, and several include the nearby Feather, Yuba, and Bear Rivers. The EIS acknowledged that natural and artificial waterways surround both the Enterprise and the wastewater treatment plant property, although it does not explain how they are connected to one another or to the nearby rivers. The FEIS excuses its failure to consider the effect on the six fish species on the ground that they "do not have the potential

to occur within the study area, as the only aquatic habitats within the study area are agricultural irrigation ditches and canals or receive water supply from these ditches or canals." ARN 23459. The danger posed to fish species, particularly the anadromous species, by canals and ditches is significant enough, however, that screening their points of diversion from, and their drains into, rivers is a major component of the federal government's recovery strategy for the listed fish species. *See*, *e.g.*, 70 Fed. Reg. 37160 (2005); 65 Fed. Reg. 42422 (2000); NMFS, Fish Screening Criteria for Anadromous Salmonids (1997) (available at https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID_75315). The EIS does not discuss whether the local canals are screened.

3. DOI Arbitrarily and Capriciously Failed to Exercise Sufficient Independent Oversight Over Preparation of the FEIS.

The CEQ regulations and BIA policy both recognize that project proponents may pay a contractor to prepare an EIS for the agency, but only if the agency chooses the contractor and the contractor certifies that it has no conflict of interest, which must be part of the administrative record. 40 CFR 1506.5; BIA NEPA Guidebook at 39-40 & Appendix 11, RJN Exh.6. AES prepared the draft and final EISes pursuant to a "consulting agreement" with Enterprise and a "third-party agreement" with Enterprise and the BIA. ARN 0002396. In addition to the preparation of an FEIS, the third-party agreement provided that AES would "assist with obtaining permit approvals necessary to construct the project." *Id.* Since permit approvals would not be required unless the application is approved, AES had a clear conflict of interest under NEPA. 40 CFR 1506.5(c). Defendants' failure to ensure that the environmental contractor served the BIA instead of the casino proponents, and their failure to remain skeptical of the project proponents' claims and neutrally evaluate the impacts of the Yuba casino, demonstrate that Defendants failed to exercise sufficient supervision of the contractor, and if for no other reason the Decisions should be vacated and the EIS should be remanded to the BIA. *Utahns for Better Transp. v. DOT*, 319 F.3d 1207, 1210 (10th Cir. 2003) (citing *Davis v. Mineta*, 302 F.3d 1104, 1112-13 (10th Cir 2002)).[4]

[4] At least one individual, Chad Broussard, apparently has worked on the Enterprise application as both a private contractor and a BIA employee, appearing at least 27 times in the Administrative Record. *See, e.g.*, ARN 0002261 (as AES employee); ARN 0030158 (as BIA employee)

As a further demonstration of the lack of truly independent BIA involvement and oversight in preparing the FEIS, the BIA's Pacific Regional Office provides guidance that it will "generally review environmental documents for thoroughness and accuracy," and require that three bound copies of an EA or FEIS accompany a tribal application, despite the fact that the NEPA review is to be initiated by BIA only *after* it deems the tribal application complete. Pacific Regional Office Land Acquisition Requirements at 3 & 4 (2010), RJN Exh. 7. The lack of BIA oversight over the process is arbitrary and capricious, because it leaves to the applicant tribe and its contractor the analysis that is supposed to drive the agency's decisions by ensuring that "agency decisionmakers have before them and take into proper account all possible approaches to a particular project." *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (quoting *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir.1988)); *Utahns for Better Transp. v. DOT*, 319 F.3d 1207, 1210 (10th Cir. 2003).

B. DEFENDANTS' DECISION TO TAKE OFF-RESERVATION LAND INTO TRUST FOR GAMING PURPOSES IN YUBA COUNTY WAS ARBITRARY AND CAPRICIOUS

1. Defendants Arbitrarily and Capriciously Failed to Consult with Colusa as Required by IGRA and DOI Regulations, and Failed to Find Detriment to Colusa Despite Clear Evidence of Detriment in the Record.

Pursuant to 25 U.S.C. § 2719(b)(A), before taking newly acquired land into trust for gaming purposes, defendants must "consult[] with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes," to evaluate the detriment to the surrounding community of the proposed casino. In 2009, Colusa requested in writing that BIA consult with it concerning the impacts on tribe of the proposed fee to trust acquisition pursuant to 25 CFR Part 292.2; the BIA refused the request, and instead simply invited Colusa to submit comments along with the rest of the public. Keohane Dec. Exh. 2 & 3. Despite the fact that the significant, adverse impacts of the Proposed Casino on Colusa should have been obvious to DOI from 2002, the RODs both ignored Colusa, finding UAIC to be the only "nearby Indian tribe". 2012 ROD at 40; 2011 ROD at 64.

2. Defendants' Limitation of "Nearby Indian Tribe" to Tribes Within a 25-Mile Radius of a Proposed Acquisition Is Arbitrary and Capricious Because it Is Not Based on a Reasoned Analysis and Violates the Intent of IGRA.

During the first decade following passage of IGRA, defendants interpreted "nearby" to include all Indian tribes within 100 miles of a proposed gaming establishment, but in 1997 reduced the distance to 50 miles. 73 Fed. Reg. 29354, 29357 (1997) (discussing DOI's history of consultation with Indian tribes and other governments). In 2000, DOI proposed to codify the 50-mile threshold, and maintained the use of that threshold until May 2008. 65 Fed. Reg. 55471, 55473 (2000); Office of Indian Gaming, Checklist for Gaming Acquisitions at 7 (2007) RJN Exh. 4. In 2008, DOI promulgated regulations implementing 25 USC § 2719 and reduced the consultation threshold for "nearby" tribes to 25 miles, but provided that local governments, including tribes, could rebut the presumption that they were not entitled to consultation as "nearby" governments under 25 § USC 2719(b)(A) by showing that their "governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment." 25 CFR Part 292.2 (definition of "surrounding community"); 73 Fed. Reg 29354, 29357 (2008). Thus, DOI admitted that the meaning of "nearby Indian tribes" must be understood in light of the effects of a proposed acquisition, not mere arbitrary distance. Although DOI established the 25-mile threshold for consulting non-Indian governments after finding that 50 miles included too many non-Indian governments, and 10 miles included too few,[5] 73 Fed. Reg. at 29357, DOI gave no rationale for reducing the area including "nearby tribes" from a circle with a 50-mile radius, encompassing 7,857 square miles to one with a 25-mile radius, encompassing just 1,964 square miles. *Id.*

Given that the purpose of consultation is to determine whether "a gaming establishment on newly acquired lands . . . would not be detrimental to the surrounding community," and defines that community by reference to state, local, and tribal officials, it follows that consultation should address those tribes, cities, and towns affected by the new casino, not just those playing host to the casino. 25 USC § 2719(b)(A). In its 2008 rulemaking, DOI admitted that "the purpose of consulting with nearby Indian tribes is to determine whether a proposed gaming establishment will have detrimental impacts on a nearby Indian tribe that is part of the surrounding community." 73 Fed. Reg. at 29356. As demonstrated by the discussion of "cannibalization" in the FEIS and in Enterprise's original

[5] Colusa County's eastern boundary is within 25 miles of the Yuba casino site, but the record is devoid of any evidence that DOI ever consulted or offered to consult with Colusa County.

application, a 25-mile threshold is far too small to include those tribes that the FEIS admits will be affected by a new casino. FEIS Appendix M, ARN 24689; *see*, ARN 0000394. Because DOI did not supply a reasoned independent judgment in choosing the 25-mile threshold, and ignored evidence that such a threshold was an absurdly small driving distance particularly in the Sacramento Valley, the rule is arbitrary and capricious. *State Farm*, 463 U.S. 29, 43 (1983).

Even if the 2008 regulation itself did not violate the APA, defendants' implementation of it with regard to Colusa has been arbitrary and capricious. Enterprise's application materials and the FEIS prepared at its behest frankly acknowledged that it would "cannibalize" other tribal casinos. ARN 0024811; *see,* ARN 0000394. Despite the fact that DOI policy until 2008 was to consult with tribes within 50 miles of the newly acquired lands, during the decade-long process of reviewing the application to have Enterprise's land taken into trust for gaming, defendants entirely failed to consult with even those nearby Indian tribes that Enterprise's initial application in 2002 identified as direct competitors. ARN 0000412. The failure to consult with Colusa was particularly egregious, because Enterprise identified it as the "closest competitor for the proposed Marysville casino." *Id.* AES began preparing the EA for Enterprise in 2002, and completed and published the final version in July 2004. 70 Fed. Reg. 29363 (2005). During that same time, AES also worked with Colusa on the expansion of Colusa's casino, and was thus well aware of Colusa and its casino.

BIA never contacted Colusa despite DOI's rule at the time that all tribes within 50 miles were to be consulted. Dec. Pullen in support of Colusa's Motion for TRO, Dkt. 8-3 at ¶8; 73 Fed. Reg. at 29357; Checklist for Gaming Acquisitions at 7 (2007), RJN Exh. 4. Although the DEIS was completed and defendants published its notice of availability in early 2008, Colusa was only informed of the DEIS and the opportunity to comment a year later and by another tribe, not the BIA.

Colusa immediately requested that BIA consult pursuant to the new regulations, to which BIA responded that the Tribe could submit comments, but did not offer to consult. As BIA has interpreted it, "[c]onsultation does not mean merely the right of tribal officials, as members of the general public, to be consulted, or to provide comments, under the Administrative Procedures Act or other Federal law of general applicability." BIA Government-to-Government Consultation Policy (2000), RJN Exh. 5 at 2. As BIA admits, "[w]ithout early consultation, the Bureau may develop

proposals based on an incomplete and anecdotal understanding of the issues that surround a particular matter. As a result, Bureau proposals often create severe unintended consequences for tribal governments." *Id* at 3.

That is exactly what happened here: Colusa was not consulted about the numerous persistent errors of fact and methodology in the FEIS and supporting documents that have now been adopted by the RODs, "creating severe unintended consequences" for Colusa. *Id.* Because Defendants found that the Proposed Casino would not have a detrimental impact on Colusa as part of the surrounding community, despite the clear evidence in the record that the Enterprise casino will cannibalize the Colusa Casino even using the flawed, baseless analysis in Appendix M, it has "offered an explanation that runs counter to the evidence before the agency," and must be rejected. *State Farm* at 43 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)).

3. Defendants Failed to Adequately Analyze Enterprise's Need for Land Pursuant to 25 CFR Part 151.

Although 25 CFR Part 151.10(b) requires that DOI find that the tribe has a "need" for the land, the AS-IA did not find that the tribe has a "need" for the land so much as a "desire" for it. *E.g.*, ARN 0030214. The FEIS analysis does not find that Enterprise could not generate tribal income at a location other than the Casino Site, just that it would be far less profitable, making a mere $18 Million in revenues. *E.g.*, ARN 0002742. The ROD relies upon the fact that Enterprise 1 purportedly could not accommodate the 823 Enterprise tribal members to demonstrate the need for the Yuba parcel, upon which not a single tribal member will reside, and does not address the 63-acre parcel adjacent to Oroville which had been owned by Enterprise for 7 years. ARN 0030214; ARN 0022969.

Among the purposes of the fee-to-trust acquisition are to replace Enterprise Rancheria No. 2 that the United States sold to the State of California in 1965 pursuant to Pub. L. 88-453 (1963) to accommodate creation of Lake Oroville.[6] According to the tribe, Enterprise No. 2 was used for

[6] Pub. L. 88-453, as approved on August 20, 1964, provided in its entirety:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

housing and the off-reservation casino would replace the land lost and provide for tribal housing. ARN 0022969. Enterprise has described the sale of Enterprise No. 2 as a "taking." *Id.* The legislative history of Pub. L. 88-453, however, describes the sale as voluntary, "[t]he descendants of the Indians for whom the Enterprise Rancheria was established have agreed to the proposed sale of the rancheria and the distribution of the proceeds therefrom among the four named beneficiaries." H. Rep. 88-1569, RJN Exh. 1 at 2; 151 ROD, ARN 0030214. Immediately after using the tribe's need for land for housing as a "need" to take title to the YCE parcel in trust for Enterprise, DOI acknowledges that the land to be acquired will be used solely for gaming, not housing. ARN 0030214.

In its Amended and Restated Application, Enterprise admitted that the tribe had purchased 63 acres of land in Butte County with funds granted by HUD, and that the tribe had not applied to have it taken into trust. ARN 0022969-970. Enterprise also owns more than 10 other parcels in and around Oroville, near the Enterprise Reservation in Butte County, not near the Casino Site. 62 Fed. Reg. 52348 (1997) (notice of award of $2.3 Million to Enterprise for Indian housing). Economic development is one of the purposes authorized under the HUD grants that funded the purchases by Enterprise. *E.g.,* 24 CFR 1000.10. Defendants simply have ignored the fact that Enterprise now owns more land than it sold to California for creation of Lake Oroville and that the land is dedicated to housing purposes, which is one of the primary justifications for the acquisition of the Casino Site for Enterprise. 2012 ROD, ARN 30214. Defendants' inconsistency in rationales is arbitrary and capricious in light of the requirement that it present a reasoned decision based on the facts before it. *State Farm*, 463 U.S. at 43.

Moreover, the discussion of Enterprise's need for housing purportedly addressed by taking title to a parcel that will not be used for housing does not address the fact that pursuant to Enterprise's own constitution, most of its members would not be eligible for tribal benefits paid for

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> assembled, That the Secretary of the Interior may sell and convey Enterprise Rancheria numbered 2, comprising 40.64 acres of land, more or less, described as lot 3, section 1, township 19 north, range 5 east, Mount Diablo base and meridian, to the State of California for a negotiated price which in the opinion of the Secretary reflects its fair market value, and the proceeds from the sale shall be distributed to Henry B. Martin, Stanley Martin, Ralph G. Martin, and Vera Martin Kiras.

with non-federal funds. Enterprise 2003 Const., ARN 0001569. The income from the off-reservation casino will be non-federal income, and thus Enterprise may deny per capita payments and other benefits of the casino, such as the promised housing, to the large number of tribal members who are literally second-class tribal citizens, an issue steadfastly ignored by Defendants.

Defendants also have not addressed the fact that Public Law 88-453 apparently terminated the federal "supervisory responsibilities over Enterprise Rancheria No. 2 and its inhabitants." RJN Exh. 1 at 2. Although Enterprise is correct that it was not terminated pursuant to the Act of August 18, 1958, which authorized the termination of the federal trust relationship with many California Indian tribes, it appears that it was Congress's intention that Public Law 88-453 be "consistent with" that act with regard to the descendants of Nancy Martin and the residents of Enterprise Rancheria No. 2. *Id.* at 3. Despite the termination of one half of the tribe in 1963 and the enrollment of a second-class citizens in 2003, Defendants have not explained how they ensured that only Indians recognized by the Department would benefit from the off-reservation casino in Yuba County as required by IGRA, 25 USC 2702, and that the benefits would be distributed to the over 800 members described in the decision documents. *E.g.,* ARN 29207.

On December 3, 2012, the AS-IA announced that he had made "a final agency determination to acquire approximately 40 acres of land in trust for gaming purposes" for Enterprise nearly two weeks earlier. 77 Fed. Reg. 71612. Defendants have argued that the misidentification of the Yuba Parcel was of no consequence because the parcel was consistently described as "40 acres." Dkt. 24 at 26. The significance of the misidentification is at least twofold. First, the legal description varies in the Administrative Record and in the descriptions provided to the public and the Governor of California. The EIS never describes precisely where the 40 acres were located within the 80-acre parcel described by the Yuba County Assessor and the legal description provided to the public and the Governor. Depending on where within the 80 acres the 40 acres were taken, it could include or exclude riparian habitat and have other environmental consequences. Second, it contradicts Defendants' policy that they will ensure that the legal descriptions are precise and accurate throughout the process, which would be consistent with the requirements of real property practice outside of the federal government. DOI's own regulations require that it closely examine title to

proposed trust acquisition. 25 CFR Part151.13. DOI guidance, which effectively has the force of law, requires that the Office of Indian Gaming "will review the description to verify that the description accurately describes the subject property, and that it is consistent throughout the application." 2011 Fee-to-Trust Handbook, RJN Exh. 2 at 65 (underlining added); *see*, ARN 0000524. The fact that despite a decade of supposedly searching inquiry and "hard looks," Defendants still did not know exactly what piece of land they were taking title to in the name of the United States amply demonstrates the hands-off approach of Defendants to the application.

IV. CONCLUSION

For the forgoing reasons, the Court should grant Colusa summary judgment in this action and remand the Records of Decision to Defendants for further proceedings consistent with the Court's judgment, declare the transfer of title for the Yuba Parcel invalid, and order the land removed from trust status and title divested from the United States.

Dated: June 24, 2014 FORMAN & ASSOCIATES

By: /s/ Jeffrey R. Keohane
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