George Forman (Cal. Bar No. 047822)
Kimberly A. Cluff (Cal. Bar No. 196139)
Jay B. Shapiro (Cal. Bar No. 224100)
Jeffrey R. Keohane (Cal. Bar No. 190201)
FORMAN & ASSOCIATES
4340 Redwood Highway, Suite E352
San Rafael, CA 94903
Telephone: 415/491-2310
Facsimile: 415/491-2313
E-Mail: george@gformanlaw.com
jeff@gformanlaw.com

Attorneys for Plaintiff Cachil Dehe Band of Wintun Indians of the Colusa Indian Community

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 CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY'S COMBINED RESPONSE IN SUPPORT OF COLUSA'S MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO FEDERAL DEFENDANTS' AND INTERVENOR'S MOTIONS FOR SUMMARY JUDGMENT

Date: Thursday, October 9, 2014
Time: 2:00 p.m.
Courtroom: 2, 15th Floor
Hon. Troy L. Nunley

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. INTRODUCTION

Rather than focus on whether the Department of the Interior erred in granting Enterprise Rancheria's application to leapfrog over nearby tribes to obtain a more advantageous location for its proposed casino than its existing gaming-eligible trust lands, Federal Defendants and Intervenor-Defendant Enterprise Rancheria attack Colusa's ability to bring its claims in the first place. Ironically, the supposed procedural defects relied upon by both Federal Defendants and Enterprise are due to the BIA's own failure to consult with Colusa as required by the Indian Gaming Regulatory Act ("IGRA") and by its fiduciary duty to its beneficiary under the federal-tribal trust relationship. Moreover, in an attempt to undermine Colusa's legitimate socioeconomic concerns under NEPA, the Federal Defendants and Enterprise repeat again and again the refrain that NEPA does not address economic harms.

II. ARGUMENT

A. FEDERAL DEFENDANTS FAILED TO COMPLY WITH THE INDIAN REORGANIZATION ACT

1. The Indian Reorganization Act and its Implementing Regulations Require Heightened Scrutiny of the Need for the Yuba Parcel

Federal Defendants aver that *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 801 (8th Cir. 2005) (*South Dakota IV*), stands for the proposition that the regulations do "not require a justification for why a particular parcel was chosen over [sic] against other possibilities" and that the Department only needs to "conclude generally that IRA purposes were served." Fed. Def. MPA at 6:13-16. That is incorrect. In *South Dakota IV*, the State of South Dakota challenged the decision of the Department to accept land already owned by the Lower Brule Sioux Tribe in fee status into trust for that tribe. The Eighth Circuit reviewed an extensive administrative record of that tribe's need for the specific parcel of land under 25 C.F.R. 151.10(b). In the sentence before the one quoted by Federal Defendants, the court explained that the reason for its rejection of the state's argument:

> We agree with the district court that it would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically *why trust status is more beneficial than fee status* in the particular circumstance. It was sufficient for the Department's analysis to express the Tribe's needs and conclude generally that IRA purposes were served. Its conclusion that the Tribe needed the land to be taken into trust was therefore reasonable.

Id. (internal citation omitted, emphasis added). In that case, the BIA Regional Director supplied an analysis of the tribe's need for the particular parcel in question, which was supported by the Office of Trust Responsibility, and incorporated into the Assistant Secretary's decision to take the land into trust for the tribe. *Id.* at 800-801; *see also*, *South Dakota v. U.S. Dep't of Interior*, 314 F. Supp. 2d 935, 942-43 (D.S.D. 2004) (*South Dakota III*). The Eighth Circuit found that South Dakota's argument was whether the Department's regulations required that it find that the tribe needed the land in trust. 423 F.3d at 801. Indeed, the tribe in that case already owned the land in question, and the state argued that it could develop the land adequately in fee status. *Id.*

In contrast to the Lower Brule Sioux Tribe in *South Dakota IV*, Enterprise did not yet own the Yuba County parcel; rather, its beneficial ownership of the Yuba County parcel was to be contingent upon the United States accepting title to the land from the tribe's investor, Gerald Forsythe. In exchange for Forsythe deeding the land to the United States, the Tribe paid Forsythe a greatly inflated price. It was thus incumbent upon the Department to consider whether the Tribe needed the Yuba County parcel in particular, not just whether it could use it.

Moreover, the conclusory discussion of Enterprise's "need" for land centers on the unexamined claim that Enterprise's pre-existing gaming-eligible land in Butte County is useless for economic development, ARN 30214, despite the fact that Enterprise's EIS discloses that a casino on the reservation would generate nearly $20 Million per year. ARN 0002742. It is apparently unusable for the exercise of unspecified government functions because the tribal government *chose* to locate its headquarters in an office park it purchased in Oroville (Butte County), not Yuba County. ARN 30214. Finally, the 151 ROD finds, without analysis, that Enterprise No. 1 is insufficient to house the membership. *Id.* More damning, the Assistant Secretary entirely failed to discuss the 63-acre parcel in Butte County that Enterprise purchased with HUD funds for housing and economic development purposes. ARN 0030214.

Insofar as the Federal Defendants assert that the Department was not required to explain why it chose one parcel over another, Fed. Def. MPA at 16, they fail to note the requirements of both 25 C.F.R. Part 151 and NEPA. By itself, 25 C.F.R. 151.10(b) does not require analysis of where the land is located because Section 151.10 only addresses on-reservation acquisitions. In this matter,

however, Section 151.10 is incorporated by reference in Section 151.11, which applies to off-reservation acquisitions such as the Yuba County parcel. Section 151.11(b) provides:

> The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised [state and local governments] pursuant to paragraph (d) of this section.

The 151 ROD failed to consider or even discuss the greater scrutiny of the benefits and greater weight to the concerns required, however. In fact, the ROD only addressed the physical location of the Yuba County parcel, which is not the purpose of Section 151.11(b). ARN 30218. Implicit in the requirement that the Department give greater scrutiny to Enterprise's justification for acquiring a parcel over an hour from its existing gaming-eligible reservation in Butte County is the requirement to ask whether a parcel closer to the reservation would provide those benefits. Further, pursuant to NEPA, the Department was required to analyze the impacts of different locations. Had the Department complied with NEPA, it would have addressed more locations than just those preferred by the tribe and its investor. Those alternatives would have been included in the ROD, which is required to address each alternative, identifying the environmentally preferred alternative as well as the proponent's preferred alternative.

Federal Defendants assert that the Department fulfilled its duty to give greater scrutiny to the "justification of anticipated benefits" pursuant to Section 151.11(b) because it "thoroughly considered the anticipated benefits." Fed. Def. MPA at 17:6. Defendants do not explain how simply ignoring the differing standards for on and off-reservation acquisitions complied with the regulation. If thorough consideration of the anticipated benefits is the standard for off-reservation acquisitions, Federal Defendants seem to imply that only partial consideration of the benefits would suffice for an on-reservation acquisition. Since both NEPA and Part 151 require a thorough examination of the impacts, including benefits, of a proposed project, requirement of *greater* scrutiny necessarily must impose a greater burden of proof by a tribe that the off-reservation acquisition would benefit it without harming the local community, including other nearby tribes.

/ / /

2. The Federal Defendants Were Required to Verify That the Beneficiaries of the Proposed Yuba Casino Were Entitled to Benefit from It

Federal Defendants correctly note that tribal membership is generally an internal tribal affair. Fed. Def. MPA at 17 fn. 13. When one of the facts relied upon by the Department is the benefit to a large number of indigent Indians, it most certainly is (or at least should be) germane to the Department's decision whether the tribe in question has inflated its membership numbers with individual Indians who will not be eligible to share in the benefits of the proposed casino. Enterprise's constitution, adopted after its application to have the Yuba County parcel taken into trust, provides that non-lineal descendants of persons listed on the July 20,1915 U.S. Indian Service Census of Indians on and near Enterprise, Butte County, may apply for tribal membership and receive federal but not tribal benefits. Art. III, § 1(B)(2), ARN0001569. Indeed, by throwing open its membership to any Indian from the Feather River Drainage Area, it has nearly doubled in size in one decade. Tribal application (2002) ARN0000518 ("over 500"); Record of Decision (2012) ARN0030214 (823 members); Enterprise's Answer to Colusa Complaint (2013), ECF 72 at 4:3 ("approximately 898"); *see also*, 1935 voter roll, ARN0000102 (25 voters).

In addition to probing whether Enterprise padded its membership numbers with those who will not benefit from the proposed casino, it was incumbent upon the Department to inquire as to whether Congress had terminated the federal recognition of the Indian status of the tribal members descending from the distributees of Enterprise No. 2. In 1915, the United States purchased Enterprise No. 1 for the family of Emma Walters and Enterprise No. 2 for the family of Nancy Martin. *Edwards v. Pacific Regional Dir.*, 45 IBIA 42 (2004). In 1964, consistent with the practice of the time, Congress with the support of the residents of Enterprise No. 2 and the Department, sold Enterprise No. 2 to the State of California. H.Rep. 88-1569. Pursuant to the sale of Enterprise No. 2, Congress found that "[w]hen the land has been sold and the proceeds distributed, the Bureau of Indian Affairs will have terminated its supervisory responsibilities over Enterprise Rancheria No. 2 *and its inhabitants*." H.Rep. 88-1569 at 78 (emphasis added). As the Department of the Interior noted at the time, the legislation authorizing the sale of Enterprise No. 2 was consistent with the act of August 18, 1958, also known as the California Rancheria Act, which approved the termination of

the special federal-Indian relationship with over 40 Indian rancherias and their residents, most of which have not been restored to federal recognition, which would require an act of Congress. *Id.* The California Rancheria Act, to which the Department favorably compared the sale of Enterprise No. 2, provided that after distribution of tribal assets, the recipients and their dependents "shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them" P.L. 85-671 Section 10(b), 72 Stat. 69 (1958); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1574-75 (Fed. Cir. 1988). The distributees of Enterprise No. 2 were the descendants of the Nancy Martin family for whom the land was originally purchased by the United States. H.Rep. 88-1569 at 78. That family is also the basis for much or all of the lineal descendant membership of Enterprise, which is the only class of membership entitled to share in the profits of the proposed casino or other tribal benefits. Art. III, § 1(A). As of 2004, 95 members were descendants of the residents of Enterprise No. 2 and 252 members were descendants of the residents of Enterprise No. 1, although membership was not restricted to descendants of the Rancheria residents. *Edwards*, 45 IBIA at 49. Although the IBIA found in *Edwards* that there had never been two tribal entities, it did not address the membership status of the descendants of the distributees of Enterprise No. 2. *Id.*

It is axiomatic that restoration to federal recognition after termination by Congress requires an act of Congress itself. 25 C.F.R. 292.10(a) (unless a federal court has adjudged the termination to have been unlawful, *e.g.*, *Hopland Band*, 855 F.2d at 1575). Consistent with that approach, Enterprise originally sought Congressional restoration, which would have qualified it for the "restored lands" exception to IGRA's ban on gaming establishments on land acquired in trust after 1988. *Id.*; Briefing Paper (2005) ARN0002404. Indeed, if the descendants of the distributees of Enterprise No. 2 today were to apply for federal acknowledgment, they would be prevented by the Department's own regulations from receiving it. 25 C.F.R. 83.7(g) ("Neither the petitioner nor its members [may be] the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship").

Finally, who benefits from the casino is a matter of federal, state, and tribal law. Under

IGRA, Enterprise must have a federally approved Revenue Allocation Plan ("RAP") regulating the distribution of net revenues from any gaming enterprise. 25 C.F.R. 290.12. Among the requirements for the RAP are that per capita payments to members "does not discriminate or otherwise violate the Indian Civil Rights Act." 25 C.F.R. 290.14(b)(2). The same office that approved acquisition of the Yuba County parcel for the proposed Enterprise casino will have to approve Enterprise's RAP; to be consistent with Enterprise's Constitution, the RAP would have to be inconsistent with the Department's assumption about the number of tribal members who will benefit for the proposed casino.

B. COLUSA IS WITHIN THE ZONE OF INTERESTS PROTECTED BY NEPA

The proposed Yuba casino is "an act within NEPA's embrace." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 415 F.3d 1078, 1103 (9th Cir. 2005) (quoting *Port of Astoria v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979)). As conceded by the Department and Enterprise's own EIS, the proposed Yuba County casino would have adverse environmental effects that would only be reduced to less-than-significant if and only if Enterprise carries out the recommended mitigation. *E.g.*, FEIS Executive Summary, ARN0023223-23330; 2011 ROD ARN0029772-792. Colusa certainly does contend that being leapfrogged by the Yuba county casino would be bad indeed, likely lethal for its business, which in and of itself is germane to the argument that DOI has violated its duties to Colusa under the IRA and IGRA and their implementing regulations. *E.g.*, 25 U.S.C. 2719 (requiring a finding of no detriment to surrounding tribes); 25 C.F.R. 292.19 - .21. However, operation of an Enterprise casino in Yuba County, which falls within NEPA's embrace, also would cause significant adverse environmental impacts on Colusa by depriving tribal members of essential government services, causing local and reservation unemployment, and reversing the gains the Tribe and its neighbors have made in ameliorating their environments. *E.g.*, ECF 1 at 11, 14 & 15-16; ECF 106 at 6 (discussing near total elimination of governmental services). In a shocking oversight by its trustee, both RODs dismiss impacts on Colusa without discussing them, demonstrating that Federal Defendants did not take a hard look at the impacts on its trust beneficiaries who reside closer to the proposed Enterprise casino than Enterprise is, but were hardly looking at all. ARN0029817-18; ARN0030184.

The Colusa tribe, the County of Colusa, and the City of Colusa all provide such environmental services as trash collection, potable water supply, sewage treatment and regulation of air emissions, all of which will be adversely affected by the reduction or elimination of funding from revenues provided by the Colusa tribal casino. ECF 106 at 6. The proposed Enterprise casino would result in severe curtailment of government services on the Colusa Reservation and surrounding communities and the likely permanent vacancy of all or part of the Colusa casino's facilities, including the shutdown of its environmentally sound electrical co-generation facility and resulting burden on the electrical grid. Thus, Colusa's "pecuniary interest" is linked "to the physical environment" as required by NEPA both as to the Colusa Reservation and surrounding communities and as to the actions and impacts embraced by NEPA on and around the Yuba County parcel. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 940 (9th Cir. 2005). A plaintiff can bring a cause of action under NEPA

> even if his or her interest is primarily economic, as long as he or she also alleges an environmental interest or economic injuries that are 'causally related to an act within NEPA's embrace.'

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric., 415 F.3d 1078, 1103 (9th Cir. 2005) (*quoting Port of Astoria v. Hodel*, 595 F.2d 467, 476 (9th Cir. 1979)).

C. COLUSA DID NOT WAIVE ITS OPPOSITION TO THE EIS AND RODs

The Department has an obligation under IGRA, NEPA, and its own policies to actively consult with Indian tribes. 25 U.S.C. 2719(b)(1)(A); 25 C.F.R. 292.2; BIA Gov't-to-Gov't Consultation Policy (2000), Colusa RJN iso MSJ, ECF 104 at 76. Colusa sought to invoke that consultation process both informally and formally, but its trustee declined to engage in consultation, requiring that Colusa itself perform the agency's work of analyzing the impacts on Colusa. Decl. of Alan P. Meister, PhD ECF 106. That work was completed at great cost to Colusa, but only after the Department's RODs were complete demonstrating that it had ignored a crucial element of analysis.

The question of "meaningful participation" is not whether a plaintiff has fully explicated all the details of its objectives and proposed alternatives, but whether it has "alerted the agency to its

position and claims." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1208 (9th Cir. 2004) (citing *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir.1986)). The Ninth Circuit has long held that "[t]he touchstone for our inquiry is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation." *California v. Block,* 690 F.2d 753, 767 (9th Cir.1982). The comments of plaintiffs need not be so detailed as to do the Department's work for it; the onus remains primarily with the agency. *'Ilio'ulaokalani v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006).

Colusa's comments to the Department identified and made clear that it objected to the direct environmental impacts of the proposed casino, the indirect environmental impacts on Colusa, and that the alternatives analysis was too narrow. Letter to Dale Risling, Pac. Reg'l Dir. (2010), ECF 36-2, at 40-49; Letter to Dale Morris, Pac. Regional Dir. (2009), ARN0027578; *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1290-91 (1st Cir. 1996). The possibility that Enterprise could build a casino on land that it, not its investor, already owned was not a "'remote and speculative' alternative whose effects cannot be readily ascertained." *City of Angoon v. Hodel*, 803 F.2d 1016, 1020 (9th Cir. 1986).

In *City of Angoon*, the proposal for a land exchange was remote and speculative in part because the federal government had already been pursuing that option for a decade. *Id.* at 1022. By contrast, the Department knew not only about Enterprise's existing gaming-eligible trust land base, but also about the 63 acres of land located close to Enterprise's reservation in Butte County that Enterprise already owned in fee, and such a possibility was in any case so obvious as not to require Colusa to bring it to the Department's attention although Colusa did so. *Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1134 (9th Cir. 2011); *'Ilio'ulaokalani*, 464 F.3d at 1092-93. Nonetheless, the Department did not consider any land but the parcel proposed by the applicant, which happened to be the land it was under contract to buy from its investor.

D. FEDERAL DEFENDANTS' FAILURE TO EXAMINE REASONABLE ALTERNATIVES RENDERS THE EIS INADEQUATE

A fundamental flaw at the heart of the EIS is the adoption by a federal agency of a purpose and need that required that the private, self-interested goals of the applicant and its financial backer

be met. *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1072 (9th Cir. 2010). The Department cannot avoid the requirement that it not adopt an unreasonably narrow purpose and need by adopting private interests and rejecting alternatives that do not meet those interests. *Id.* The Department's relevant policy goal is to promote Indian tribal welfare for tribes as a class, not casinos in particular, and not particular casinos. 25 U.S.C. § 2701. Moreover, as acknowledged by the Department, one of the purposes of IGRA was to avoid gaming establishments on land that was not held in trust for tribes upon passage of IGRA in 1988, except in extremely limited circumstances subject to exacting standards. 25 U.S.C. 2719; ARN0029813 ("the Department will apply heavy scrutiny to tribal applications for off-reservation gaming")

The legitimate purpose of Federal Defendants was to promote the economic development of the Enterprise tribe, not development of a casino on a specific site. The purpose is not "tied to a specific parcel of land," meaning that development outside of the Yuba parcel is a reasonable alternative. *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1098 (9th Cir. 2006) (quoting *Methow Valley Citizens Council v. Regional Forester*, 833 F.2d 810, 815 (9th Cir.1987), rev'd on other grounds, 490 U.S. 332 (1989). It is "troubl[ing] that in this case, the [federal agency] failed to consider an alternative that was more consistent with its basic policy objectives than the alternatives that were the subject of final consideration." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999). An unexamined, reasonable alternative renders the EIS *per se* inadequate. *Id.* at 814. A reasonable alternative needs only to present "reasonable probability" that it would avoid significant adverse impacts. *Dubois v. U.S. Dept of Ag.*, 102 F.3d 1273, 1289 (1st Cir. 1996).

E. DECLARATION AND REPORT OF DR. ALAN P. MEISTER DEMONSTRATES THAT FEDERAL DEFENDANTS COMPLETELY IGNORED A RELEVANT AREA OF SOCIOECONOMIC INQUIRY

As Federal Defendants acknowledge, (Fed. Def. MPA at 40 fn. 28) the Ninth Circuit has held that "[i]naccurate economic information may defeat the purpose of an EIS by 'impairing the agency's consideration of the adverse environmental effects' and by 'skewing the public's evaluation' of the proposed agency action." *Natural Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 811 (9th Cir.

2005) (quoting *Hughes River Watershed Conservancy v. Glickman,* 81 F.3d 437, 446 (4th Cir.1996)). In this case, Colusa contends that the failure to properly analyze the effects on other Indian tribes, not just their casinos, skewed the Department's decision making, because the Department could not have assessed the socioeconomic environmental impacts of the proposed Yuba casino on other tribes, their members, and reservations without also making a legitimate assessment of the likely economic impacts on the casinos upon which they depend. Moreover, the Department could not make the finding required by IGRA of no detriment to other tribes without the same analysis of economic impacts and their consequent social and environmental dislocation on its other trust beneficiaries.

In *Northwest Environmental Advocates*, the Ninth Circuit considered whether an EIS analyzing the impacts of a port was faulty due to a failure to analyze the effect on other ports. *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir. 2006). It found a "multi-port analysis to assess whether any gains from the channel deepening project would come at the expense of other domestic ports," unnecessary because the Army Corps of Engineers had convened an Economic Technical Review panel to examine the need for a multi-port analysis and because such an analysis would likely have resulted in higher projected benefits. *Id.*

In this case, the Department neither applied expert opinion to the question of the negative impacts on other tribal trust beneficiaries, nor did it find that such a review would result in higher benefits. Instead, the Department made no inquiry of its own, and simply relied on a report that acknowledged that its conclusion that cannibalization by the proposed Enterprise casino in Yuba County would not be enough to put other tribal casinos out of business was based on pure speculation. ARN0024811 (guessing at Colusa's market); ECF 106 at 5 (EIS study did not have access to any revenue figures).

Generally, review of the Department's EIS and decision "is limited to the administrative record and may only be expanded beyond the record to explain agency decisions," not to determine the correctness of the agency's decision. *Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir. 2006). However, the Court should not "straightjacket" itself with the administrative record. *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980)

("The court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters"). The Court may consider extra-record material to "ascertain[] whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision." *Id.*

The common formulation of the arbitrary and capricious standard holds that an agency's decision must not have

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *McFarland v. Kempthorne*, 545 F.3d 1106, 1110 (9th Cir. 2008). In order to demonstrate that Federal Defendants "failed to consider an important aspect of the problem," and that their decision was "so implausible that it could not be ascribed to a difference in view or the product of agency expertise," Colusa should be allowed to provide extra-record evidence of that fact. "[D]eference accorded an agency's scientific or technical expertise is not unlimited," it "is not owed when the agency has completely failed to address some factor consideration of which was essential to [making an] informed decision." *National Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798-99 (9th Cir. 2005) (quoting *Brower v. Evans,* 257 F.3d 1058, 1067 (9th Cir. 2001) (internal quotation marks omitted, insertion in original). The Meister Declaration and the report it summarizes are "necessary to determine 'whether the agency has considered all relevant factors and has explained its decision,' and 'to explain ... complex subject matter.'" *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (quoting *Inland Empire,* 88 F.3d at 703-04)); *Lands Council,* 395 F.3d at 1030. NEPA and particularly IGRA require that the Department consider and analyze the harm to Colusa and other tribes of its decisions. The RODs, however, relied solely upon the purported economic impact study included in the EIS, which conceded that it rested upon arbitrary guesses about the likely extent of the impacts on other tribal government casinos, and gave no consideration whatsoever to the devastating impacts on the tribal governments dependent upon revenues from those casinos. ARN0024799 ("decline in tribal revenue ... [not]

anything more than minimal"); *compare* ECF 106 at 6.

The Department has a fiduciary responsibility to promote the well-being of all of its beneficiaries, including Colusa and other nearby tribes, not just to promote the profit of Enterprise and its financial backer at the expense of its other beneficiaries. The conflict between the Appendix M analysis in the EIS and Dr. Meister's analysis of the impacts on Colusa is not a mere difference of opinion in which a federal agency is entitled to rely upon its own experts not that the Department is entitled to deference on economic matters, and in any event, the Department had no experts of its own but the utter failure of the Department to consider a core matter within its responsibility, that is, the welfare of its other tribal beneficiaries.

The EIS's purported analysis of the impacts on other casinos targeted for cannibalization is unscientific in the extreme, based as it is on factually unfounded assumptions rather than evidence. *E.g.*, ARN0024811. Worse still, the analysis of the likely impacts on the Indian tribes, their governments, and their tribal members is *nonexistent*. By relying upon what is essentially a market analysis promoting the Enterprise Casino, the Department entirely failed to consider an important aspect of the problem committed to its care by Congress. *Motor Vehicle Mfrs.,* 463 U.S. at 43; *National Wildlife Fed'n*, 422 F.3d at 798-99.

Federal Defendants' duties to every Indian tribe and its members must be judged by "the most exacting fiduciary standards." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942). "The federal government owes a fiduciary obligation to *all Indian tribes as a class*." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 788 (9th Cir. 2006) (quoting *Inter Tribal Council of Ariz., Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir.1995)) (emphasis added). That duty includes at least compliance with all applicable statutes as it affects the tribes and their members.

Although the Department bears the primary responsibility to develop the facts on its own initiative, in this case it did not. *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006). The sensitivity of the information about the impacts on the Colusa casino made it impracticable to submit public comments on the matter because doing so would have affected Colusa'S ability to obtain financing and compete in the market. The Supreme Court opined that while "[t]he Department is surely right in saying that confidentiality in communications with tribes is

conducive to a proper discharge of its trust obligation," that confidentiality does not apply at least where tribes are in competition with other stakeholders. *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 & 16 (2001). Because of the sensitivity of the information contained within Dr. Meister's report, Colusa submitted his declaration and summary of his report with its MPA, but not the report itself. ECF 106.

III. CONCLUSION

For the forgoing reasons, the Court should grant Colusa summary judgment in this action and remand the Records of Decision to Federal 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: August 25, 2014

FORMAN & ASSOCIATES

By: /s/ Jeffrey R. Keohane
Jeffrey R. Keohane
Attorneys for Plaintiff