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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, *et al.*,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior, *et al.*,

Defendants.

CASE NO. 2:12-CV-03021-TLN-AC

PLAINTIFF UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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

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INTRODUCTION

This case challenges interrelated actions that Defendants[1] have taken in connection with a proposed gaming facility and hotel fee-to-trust acquisition project ("Proposed Action") on a 40-acre portion of a more than 80-acre parcel of undeveloped land in Yuba County, California (the "Yuba Site" or "Site"). Formerly owned by Yuba County Entertainment, LLC, the would-be managers of the 300,000+ square-foot proposed casino and resort, the land was taken into trust for the Enterprise Rancheria of Maidu Indians of California ("Enterprise"). Before approving the Proposed Action, Defendants had to comply with the National Environmental Policy Act ("NEPA") and the Indian Gaming Regulatory Act ("IGRA"). NEPA required Defendants to take a "hard look" at the effects of Enterprise's proposal, including historical effects, and evaluate it fairly. IGRA, like other laws that substantiate the federal government's fiduciary duty to Indian tribes, required Defendants to consult with nearby tribes ahead of affirming that Enterprise's gaming proposal will not harm them or the surrounding community.

Defendants did not do their jobs. The United Auburn Indian Community ("UAIC") is the tribe closest to the Yuba Site in all senses, and development of the Site will irreparably alter a landscape closely tied to the UAIC's history and culture. Operation of a resort and casino on the Site also will harm the UAIC's nearby resort and casino, threaten social services provided by the UAIC, and pose environmental concerns. Defendants did not listen when the UAIC tried to bring its concerns to their attention. As explained in greater detail below, the Court should grant the UAIC's Motion for Summary Judgment and order the Site's removal from trust.

FACTUAL BACKGROUND

I. THE UAIC AND ENTERPRISE.

The UAIC is a federally recognized Indian tribe. Its members are descendants of the Nisenan Indians, and its historical territory comprises land in and around Yuba County, California. UAIC Statement of Facts ("SOF") ¶ 1. The Yuba Site is part of the UAIC's congressionally rec-

[1] "Defendants" are the Secretary of the Interior, the Assistant Secretary-Indian Affairs, the Bureau of Indian Affairs ("BIA"), and the Department of the Interior ("DOI").

ognized "service area" and is closer to the UAIC's reservation than to Enterprise's. *Id.* ¶ 3. Several ethnographic Nisenan villages are located near the Site, as are sacred sites with human remains. *Id.* ¶ 2. The nearby Sutter Buttes also have spiritual and cultural value to UAIC members. *Id.* The UAIC operates the Thunder Valley Casino in Lincoln, California, about 20 miles from the Yuba Site. *Id.* ¶ 40. The UAIC built the casino inside its service area (rather than in a more commercially favorable location) and away from areas where a major development would adversely impact cultural or aesthetic resources. *Id.* The UAIC relies on casino proceeds to support governmental operations and tribal member services. *Id.*

Enterprise is a Konkow group (not Nisenan), and its reservation is a 40-acre parcel in Butte County. *Id.* ¶ 4. Historically, the Nisenan and Konkow rarely interacted, had distinct languages and cultures, and migrated to the Central Valley separately. *Id.* ¶ 5. Enterprise members also include non-lineal "adopted" Indians. *Id.* ¶ 7. Although they lack full tribal privileges—they cannot hold tribal office, for example—the non-lineal members are the sole basis for Enterprise's alleged historic connection to the Yuba Site. *Id.*

II. ENTERPRISE'S FEE-TO-TRUST APPLICATION AND GAMING REQUEST.

In August 2002, Enterprise submitted a Fee-to-Trust Application asking the Secretary of the Interior to take the Yuba Site into trust for the tribe. At the time, Yuba County Entertainment, a casino management company, owned the site. Enterprise proposed to develop a 170-room resort hotel and 1,700-machine casino on the Site—317,886 square feet in total. Yuba County Entertainment would develop and manage the resort and casino. *See* SOF ¶ 8.

To generate local support for the fee-to-trust conversion, Enterprise entered into a Memorandum of Understanding with Yuba County in December 2002, in which Enterprise agreed to make annual payments, starting at $800,000 and increasing to $5 million. SOF ¶ 10. Enterprise entered into a similar Memorandum of Understanding with the City of Marysville in August 2005, for $4.8 million over 15 years. *Id.* ¶ 11.

In April 2006, Enterprise submitted a formal request for an exemption from IGRA's prohibition on Indian gaming on lands acquired into trust after 1988, 25 U.S.C. § 2719(b)(1)(A).

SOF ¶ 13. Before deciding such a request, regulations require the BIA Regional Director to consult with "[o]fficials of . . . nearby Indian tribes." 25 C.F.R. § 292.13; 25 C.F.R. § 292.2. The UAIC, however, was not consulted. *See* SOF ¶¶ 14–15. The UAIC nevertheless learned of the BIA's request for comments and submitted a comment letter just days before the deadline. *Id.* ¶¶ 15–16. The BIA granted the UAIC an extension to submit further comments, which the UAIC did on May 11, 2009. *Id.* ¶ 16. The UAIC requested a copy of ethnographic data submitted with Enterprise's application, which had not been made available for public review, and submitted further comments on November 3, 2010. *Id.*

III. THE ENVIRONMENTAL ASSESSMENT AND IMPACT STATEMENTS.

In support of its request to the BIA, Enterprise retained Analytical Environmental Services ("AES") to prepare an Environmental Assessment ("EA") for the Proposed Action. SOF ¶ 17. AES prepared the EA, and the BIA "adopted" it in July 2004, requesting comments. *Id.* ¶ 19.

Based on public comments, Defendants determined that an Environmental Impact Statement ("EIS") was necessary to address significant environmental impacts. *Id.* ¶ 23. In May 2005, the DOI announced that the BIA, with Enterprise as a "cooperating agency," 40 C.F.R. §§ 1501.6, 1508.5, would prepare the EIS. SOF ¶ 24. AES was again contracted to prepare the EIS. *Id.* ¶ 23. The Draft EIS was issued for public review and comment in March 2008. *Id.* ¶ 30. The BIA issued the Final EIS on August 6, 2010. *Id.* ¶ 32. In addition to the comments noted above, the UAIC submitted comments on the Final EIS on September 6, 2010. *Id.* ¶ 37.

The Final EIS identified taking the Yuba Site into trust and constructing a hotel and gaming facility there as the "Preferred Alternative." *Id.* ¶ 33. The EA, the Draft EIS, and the Final EIS each dismissed other options and ignored the public's concerns, including the UAIC's, in favor of Enterprise's self-serving and unsupported statements. The result was *fait accompli*.

IV. THE PROPOSAL IS APPROVED OVER OPPOSITION.

The UAIC and many organizations, individuals, entities, and public officials opposed Enterprise's proposal. *See* SOF ¶¶ 16, 42, 49–53. Defendants nonetheless found "strong local sup-

port" for the proposal only by giving "substantial weight" to the opinions of Marysville and Yuba County—the two entities Enterprise promised to pay tens of millions of dollars once casino operation commences on the Yuba Site. *Id.* ¶¶ 10–11, 54.

In September 2011, the DOI, through the BIA, issued a Record of Decision ("ROD") pursuant to IGRA Section 20(b)(1)(A) and its implementing regulations, 25 C.F.R. Part 292 ("Part 292 ROD"), finding that a gaming establishment on the Yuba Site would "be in the best interest of [Enterprise] and its members" and "would not be detrimental to the surrounding community." SOF ¶ 55. On November 21, 2012, the BIA issued a second ROD pursuant to the Indian Reorganization Act ("IRA") and 25 C.F.R. Part 151 ("Part 151 ROD"), which approved the taking of the Yuba Site into trust, as distinct from the question of gaming. *Id.* In a Notice published in the Federal Register on December 3, 2012, the Secretary announced the decision to take the Yuba Site into trust. *Id.* The Notice erroneously ordered the conversion of an 80+-acre parcel, not the 40-acre portion that was the subject of Enterprise's application. *Id.* ¶ 56. The DOI published a Notice in the Federal Register on January 2, 2013, purportedly changing the land description published in the original Notice of Intent to reflect a 40-acre parcel. *Id.* The Government took the 40-acre parcel into trust on behalf of Enterprise on May 16, 2013. *Id.*

ARGUMENT

I. 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 Kohala Ohana Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002).

II. DEFENDANTS VIOLATED NEPA.

NEPA is designed "to ensure informed decision making to the end that the agency will not act on incomplete information." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d

1157, 1166 (9th Cir. 2003) (citation and internal quotation marks omitted). Defendants' decision-making here was far from informed, however. They narrowed the purpose and need of the Proposed Action to dismiss viable alternatives on Enterprise's say-so. They violated NEPA's conflict-of-interest provisions by giving undue weight to Enterprise's consultant. And they ignored the Proposed Action's impacts on the UAIC—the tribe with the greatest connection to the Yuba Site, and the tribe to which Defendants owe "moral obligations of the highest responsibility and trust." *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942).

A. A narrow purpose and need led Defendants to reject viable alternatives.

Under NEPA, an agency must state the purpose and need of the proposal it is evaluating. 40 C.F.R. § 1502.13. Then, the agency must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14. If the agency defines the purpose and need too narrowly or overemphasizes private interests, no alternative but the one the project applicant prefers will be taken seriously. NEPA forbids that. *See Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1070–72 (9th Cir. 2009); *see also Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 Fed. App'x 440, 443 (9th Cir. 2007); *Envtl. Law & Policy Ctr. v. U.S. Nuclear Regulatory Comm'n*, 470 F.3d 676, 683 (7th Cir. 2006).

Here, approval of Enterprise's proposal was preordained because Defendants did what NEPA forbids. They defined the purpose and need of Enterprise's proposal narrowly, focusing on Enterprise's private interests—restoring trust land to Enterprise, permitting Enterprise to conduct Class III gaming, and increasing Enterprise's economic development potential. SOF ¶ 32. Then, Defendants considered five purported alternatives for fulfilling that purpose and need: Enterprise's proposal for a hotel and Class III gaming facility on the Yuba Site (Alternative A); two alternatives for smaller developments on the Yuba Site (Alternatives B and C); one for a smaller development on the Butte Site (Alternative D); and one that proposed taking "no action" (Alternative E). *Id.* ¶ 33. Transferring the Yuba Site into trust for Enterprise was the only alternative that fulfills *all* of those purposes.

In light of the narrow purpose and need—particularly the need to restore trust land to En-

terprise—the five alternatives steered Defendants to approve development of the Yuba Site. The only listed alternative for development elsewhere, Alternative D, was on land already part of Enterprise's reservation. And because Alternative D proposed a development of "drastically reduced scale" that "would result in minimal to no profits," *see id.* ¶¶ 33–34, it was not "'economically feasible.'" *See Biodiversity Conservation Alliance v. Bureau of Land Mgmt.*, No. 09-cv-08, 2010 WL 3209444, at *25 (D. Wyo. June 10, 2010) (quoting and affirming decision of Interior Board of Land Appeals). Those shortcomings doomed Alternative D from the start, so Alternative D was not a true alternative for NEPA. *See id.*; *see also 'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1100 (9th Cir. 2006) (finding an EIS inadequate because it failed to support the conclusion that a proposed project's location was "the only reasonable alternative").

The two remaining development alternatives to Enterprise's proposal (B and C) also steered Defendants to approve development of the Yuba Site. While their details are different, Alternatives B and C—a smaller casino without a hotel versus a hotel and water park—are highly similar. Both proposed lower-revenue developments of the Yuba Site. The proposals, therefore, "were not varied enough to allow for a real, informed choice." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1039 (9th Cir. 2008). And in conjunction with the no-action Alternative E, Alternatives B and C did not sufficiently expand the range of true alternatives. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999) (rejecting an EIS that listed a "no action alternative along with two virtually identical alternatives").

All this should come as no surprise: Enterprise handpicked the alternatives Defendants considered. SOF ¶ 35. Early on, Enterprise rejected three other sites primarily because it could not secure investors for development there, and because it already had a contract with the entity that owned the Yuba Site (and that would manage the casino built there). *See id.* ¶¶ 8, 35; *see also* Final EIS at EN_AR_NEW_0023339–40, EN_AR_NEW_0023369, EN_AR_NEW_0023378, EN_AR_NEW_0023385–87 (Ex. 9 to SOF).[2] Since nothing in the

[2] Enterprise cited lack of infrastructure and the presence of biologically sensitive resources as reasons for refusing to consider the other sites, *see* SOF ¶ 35, but nothing in the record indi-

Record indicates that Defendants "independently evaluate[d]" those three sites (or others), 40 C.F.R. § 1506.5, those "unexamined alternatives[]" render the EIS inadequate. *Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1057 (9th Cir. 1985). In short, Defendants impermissibly took Enterprise on its say-so. *See S. Utah Wilderness Alliance v. Norton*, 237 F. Supp. 2d 48, 52–54 & n.3 (D.D.C. 2002).

B. The Final EIS was prepared in violation of conflict-of-interest provisions.

A third-party contractor that prepares an EIS must be selected to avoid any conflict of interest, and the agency must independently evaluate the EIS upon completion. *See* 40 C.F.R. § 1506.5(c); 43 C.F.R. § 46.105. Without adequate supervision, the biases of private parties with "an interest in seeing the project accepted and completed in a specific manner as proposed" can frustrate the fair and impartial analysis NEPA requires. *Natural Res. Def. Council, Inc. v. Callaway*, 524 F.2d 79, 87 (2d Cir. 1975). Here, the project proponent (Enterprise) was designated a cooperating agency, *see* SOF ¶ 24, and it selected and controlled the third-party consultant that prepared the Final EIS (AES). The potential for Enterprise and AES to manipulate the process was high, yet Defendants did not independently investigate the patent and pervasive conflicts of interest. Because those conflicts compromised the objectivity of the NEPA analysis and had a material impact on the Final EIS, it must be vacated.

Enterprise's history with AES began well before the EIS. In 2002, AES entered into a Consulting Services Agreement with Enterprise. Even though Defendants were not parties to the Agreement, it provided Enterprise would pay AES $65,000 to prepare the EA. *Id.* ¶¶ 17–18. The BIA later adopted the EA that AES prepared with little substantive change, claiming it had been prepared "for" Defendants. *Id.* ¶¶ 19–20, 35. In truth, AES had prepared it "for" Enterprise.

When a project applicant like Enterprise funds an EIS, it must "solicit proposals from consulting firms," then pass them along "to the BIA, which chooses the consulting firm and in-

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cates whether these deficiencies could be mitigated or eliminated, and each of the alternatives actually considered presented similar concerns.

forms the project applicant of its choice." *See* U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, INDIAN AFFAIRS NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) GUIDEBOOK, 59 IAM 3-H, at 39–40, § 8.7.3 (Aug. 2012), *available at* http://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf ("BIA NEPA Handbook"). Enterprise funded the preparation of the EIS, but it did not solicit competing proposals. Instead, Enterprise chose AES to continue the work it began on the EA.

AES's prior work and its dealings with Enterprise were not properly disclosed. When a third-party consultant prepares an EIS, the consultant must execute, under oath, a disclosure statement specifying that it has "no financial or other interest in the outcome of the project." 40 C.F.R. § 1506.5(c); *see* BIA NEPA Handbook at App'x 11 (under-oath requirement); *see also Sierra Club v. Marsh*, 714 F. Supp. 539, 552–53 (D. Me. 1989) (discussing conflict of interest disclosure statements). Along the same lines, the Draft EIS should "clearly state the scope and extent of the firm's prior involvement to expose any potential conflicts of interest that may exist." BIA NEPA Handbook at App'x 17, Page 12. Here, AES did not execute its disclosure statement under oath, and neither the Draft EIS nor the Final EIS disclosed AES's prior work. (For that matter, the Draft EIS and Final EIS also did not indicate that Enterprise funded their preparation and the preparation of the EA before them. *See* SOF ¶¶ 30, 32).

The BIA's ultimate responsibility for preparing an objective and fair EIS is nondelegable. *See* 43 C.F.R. § 46.105; *see also* Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263, 34,266 (July 28, 1983). The BIA thus was bound to investigate the extent of the relationship between AES and Enterprise, its potential conflicts of interest, as well as the failures to disclose them. But the BIA did not. Instead, it credited an assertion that AES had "no financial interest in the results of the environmental analysis or the BIA's decision regarding the approvals for the project." SOF ¶¶ 26–27. There is no evidence that the BIA even questioned that assertion. Defendants have admitted, for example, that they never received or reviewed the Consulting Services Agreement between AES and Enterprise in evaluating Enterprise's application. *See id.*

¶¶ 25–28.[3] The assertion is not even reliable on its face, as it was not made under oath, as required. *See id.* ¶ 27. AES's self-serving self-assessment is insufficient to reassure that no conflict existed.[4] *See Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991).

A reviewing court must vacate an EIS when an agency's failure to superintend the preparation of an EIS and investigate potential conflicts of interest compromises the objectivity and integrity of the NEPA process. *See id.* Here, the process cannot be relied upon because AES's judgment was compromised by Enterprise. Enterprise was allowed to review AES's work and could initiate changes to its scope. *See* SOF ¶ 25. AES met with Enterprise's counsel monthly to discuss strategy for "pushing" the EIS through. *Id.* ¶ 27. And before the public release of the Draft EIS, Enterprise privately submitted comments to increase the document's "persuasiveness," which the BIA accepted. *Id.* ¶ 31. By all appearances, the EIS seems to have been steered by Enterprise toward its preferred outcome—development of the Yuba Site.[5] *See Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983) (finding excessive control of EIS preparation by a financially interested entity).

C. Defendants failed to take a "hard look."

Proposed actions can have "ecological . . . aesthetic, historic, cultural, economic, social,

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[3] The BIA did not consider other documents that should have been part of the Record. As the BIA admits, *see* SOF ¶ 29, records of contractual work are required to be part of the Administrative Record. *See* BIA NEPA Handbook at 44, § 10.2; *see also Burka v. U.S. Dep't of Health & Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (finding that contractor's records are agency records). Defendants never asked for any of AES's internal records before September 2012, when prompted by a suit brought under the Freedom of Information Act. SOF ¶ 28.

[4] The conflicts of interest continued even after the issuance of the Final EIS, into the IGRA determination. In 2009, the BIA suggested that AES should assist in preparing the recommendation and ROD for the Enterprise proposal. SOF ¶ 27. Chad Broussard was the AES Project Manager who prepared the EA, Draft EIS, and Final EIS. Sometime in 2011 or 2012, he joined the BIA, where he continued to work on Enterprise's application. *Id.* ¶ 38. Because Mr. Broussard was not walled off from Enterprise's application, the BIA cannot even contend that its (limited) review of the application was insulated from AES's relationship with Enterprise.

[5] In commenting on a passage in draft EA, the DOI found the analysis "neither objective nor scientific," and indicated that "[t]he passage has been used to promote by inference the proposed [Yuba Site] alternative." SOF ¶ 36. AES included nearly the same subjective, unscientific analysis in the Final EIS. *Id.*

or health" consequences. 40 C.F.R. § 1508.8. NEPA forces agencies to take a "hard look" at those consequences. *See Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir. 2002); *see also* U.S. COUNCIL ON ENVIRONMENTAL QUALITY, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 9 (Dec. 10, 1997), *available at* http://ceq.hss.doe.gov/nepa/regs/ej/justice.pdf ("Environmental Justice") ("Agencies should recognize the interrelated cultural, social, occupational, historical, or economic factors that may amplify the natural and physical environmental effects of the proposed agency action"), *cited by* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 10.08, at 824 (2012). That is, an agency must "consider[] all foreseeable direct and indirect impacts" of the proposed action and "discuss[] adverse impacts" without "improperly minimiz[ing] negative side effects." *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006) (citations and internal quotation marks omitted). The "hard look" analysis cannot be "an exercise in form over substance" or "a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). As explained below, Defendants avoided taking a hard look at significant consequences of Enterprise's proposal.

1. Impacts on the UAIC's socioeconomic interests.

Enterprise's planned casino will not be the only one in the area. The UAIC operates the Thunder Valley Casino 20 miles away. The UAIC asked Defendants to consider the impacts Enterprise's planned casino will have on the UAIC, which depends on revenues from Thunder Valley. Defendants downplayed the harm. Without support, the Final EIS asserted that Enterprise's planned casino will not have "a disproportionate and adverse effect" on other tribes, "although a nominal impact would occur[] and a less than significant impact would result." SOF ¶ 43. Similarly, the DOI asserted that "[m]ere competition" will not injure the UAIC. *Id.*

Defendants based their assertions on a study prepared for AES. That was arbitrary and capricious. Besides having been prepared for a conflicted third-party consultant, the AES study is internally inconsistent on this very issue. Its factual findings disprove the conclusions on which Defendants relied—namely, that Thunder Valley's reduced revenues would be "arguably

negligible," and that the UAIC would suffer only a "nominal impact." *Id.* ¶ 44. For, as a factual matter, the study projected that Thunder Valley's revenues would "experience the greatest levels of decline" and would, along with one other casino, "absorb[] nearly 2/3 of the drop in revenue" among all competitors. *Id.* That drop in revenue—$30.6 million—is no drop in the bucket.

Completed in 2006, the AES study also was outdated and unreliable when Defendants relied on it. The nationwide recession began in 2007, and nothing in the Record indicates that Defendants revisited the potential impacts of Enterprise's casino in the recession's wake. In fact, because of the recession, Thunder Valley had to implement layoffs and a hiring freeze and scale back a planned expansion in 2009. *Id.* ¶ 41. So, even if a $30.6 million revenue loss could have been deemed "nominal" in 2006, the Record contains no evidence supporting that conclusion today, let alone when the Final EIS was completed in 2009. Reliance on facially "stale data" without further explanation "does not constitute a 'hard look' under NEPA." *N. Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067, 1085–87 (9th Cir. 2011).

The Record also contains no evidence that Defendants considered how Thunder Valley's losses would harm the UAIC's governmental operations and tribal member services, which rely on Thunder Valley's proceeds. The UAIC commented that competition from Enterprise would have "a significant negative economic impact" on its operations and services, to the point of cutting back or eliminating tribal governmental programs. SOF ¶ 41. Defendants made no inquiry; in fact, the DOI faulted the UAIC because it "did not provide an economic analysis to support its claim of negative economic impact." *Id.* ¶ 43. That was legal error. "Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of . . . plaintiffs." *City of Davis v. Coleman*, 521 F.2d 661, 671 (9th Cir. 1975). A commenter, therefore, need only "alert[] the agency to its position and claims." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1208 (9th Cir. 2004). After that, it is up to the agency to assess them. *See Del. Riverkeeper Network v. F.E.R.C.*, No. 13-1015, 2014 WL 2535225, at *13 (D.C. Cir. June 6, 2014).

Defendants' attempt to displace their NEPA obligations onto the UAIC is doubly flawed

in light of the fiduciary duties Defendants owe the UAIC concerning tribal health, welfare, and gaming. There is "a general trust relationship between the United States and the Indian people." *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *see United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2318 (2011) (noting that federal statutes define the contours of the trust relationship); *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810–12 (9th Cir. 2006) (same). In IGRA, Congress announced a federal policy to treat tribal gaming as "a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). NEPA and IGRA advance that policy not only by obliging Defendants to determine that a new Indian casino is in the best interest of the tribe requesting it, but also by obliging Defendants to consult with nearby tribes, learn about the impacts of the new casino on their existing casinos, and affirm that the new casino will not cause them harm. *See* 25 U.S.C. § 2719(b)(1)(A); *see also* 40 C.F.R. §§ 1501.7, 1502.16, 1503.1 (NEPA tribal consultation requirements); Environmental Justice at 9 ("Agencies should seek tribal representation in the process in a manner that is consistent with the government-to-government relationship between the United States and tribal governments, the federal government's trust responsibility to federally-recognized tribes, and any treaty rights."). Defendants' demand that the UAIC by itself prove the potential impacts it raised in its comments is incompatible with the statutes and regulations that specifically place the burden of proof (or disproof) on Defendants.

2. Impacts on the UAIC's other interests.

Enterprise's casino will affect a range of the UAIC's environmental, aesthetic, and historic interests. The project likely will harm the water table, increase noise levels, and affect the habitats of threatened species. Increased air pollution, infrastructure, and traffic from the casino likely will affect UAIC members who gather natural resources on and near the Yuba Site for important cultural practices. Enterprise's proposed casino development will create light pollution, irreparably interfering with the UAIC's viewshed (*i.e.*, a natural environment that is visible from a fixed vantage point in a cultural landscape) of the Sutter Buttes, which have cultural and spiritual significance to the UAIC. SOF ¶¶ 2, 39.

Defendants' responses are legally inadequate, for they minimized some negative impacts and ignored others altogether. *See Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1179 (9th Cir. 1982) (finding NEPA violation where "significant questions . . . were . . . ignored or, at best, shunted aside with mere conclusory statements"). In response to the UAIC's aesthetic and environmental concerns, Defendants relied upon Enterprise's conclusory assertion that it "is prepared to mitigate the environmental impacts of its proposed Resort." *See* Part 292 ROD at EN_AR_NEW_0029818 (Ex. 3 to SOF). One cannot reasonably evaluate purely hypothetical mitigation measures. *Cf. Found. for N. Am. Wild Sheep*, 681 F.2d at 1179–81 (rejecting concrete and specific mitigation measures).

Defendants also dismissed the UAIC's historical connections with the Yuba Site as "not an environmental comment related to the environmental analysis in the [Final EIS]." SOF ¶ 48. But NEPA regulations mandate consideration of "historic" impacts. 40 C.F.R. § 1508.8. Defendants again relied upon Enterprise's "commit[ment] to mitigating impacts on cultural resources." Part 292 ROD at EN_AR_NEW_0029810 (Ex. 3 to SOF). But the mitigation measures in the Final EIS have nothing to do with the UAIC's historical interests. The Final EIS provides for mitigation only with respect to "archaeological resources" (such as cultural artifacts), "human remains," or "grave goods" discovered during construction. *See* Final EIS at § 5.2.5, EN_AR_NEW_0023859–60 (Ex. 9 to SOF). It says nothing about mitigating harm to the UAIC's *historical connection* to the Yuba Site. Nor could it. Once Enterprise builds a casino on the Yuba Site, the UAIC's connection to the Site will be forever severed.

III. DEFENDANTS VIOLATED IGRA, 25 C.F.R. PART 151, AND PART 292.

To acquire land in trust for Enterprise, Defendants were required to comply with regulations set forth in 25 C.F.R. Part 151 and 25 C.F.R. Part 292. Defendants failed to do so. They did not adequately consider that Enterprise already has existing land on which gaming can occur, that the Yuba Site is located much closer to the UAIC's historic land base than Enterprise's, and that taking the Yuba Site into trust and constructing a casino complex there would be detrimental to the UAIC's and surrounding community interests.

A. Defendants violated 25 C.F.R. Part 151.

Defendants failed to adequately consider Enterprise's "need . . . for additional land" and the "purposes for which the land will be used." 25 C.F.R. §§ 151.10, 151.11. Enterprise already possesses a 40-acre parcel of land in Butte County that is eligible for and "could accommodate" gaming. SOF ¶ 4. That Enterprise *prefers* acquiring new land does not indicate that Enterprise *needs* more land.

Enterprise's request also does not survive the "greater scrutiny" the Secretary must give to requests to convert land that is far from Enterprise's reservation. 25 C.F.R. § 151.11(b). Enterprise's reservation, the center of the tribe's traditional homeland, is located 36 miles from the Yuba Site. *Id.* ¶¶ 4, 9. That is outside the 25-mile radius that BIA uses to determine whether a tribe is a "nearby Indian tribe." 25 C.F.R. § 292.2. Indeed, the Yuba Site is far from Enterprise in every sense: less than 10% of Enterprise members reside in Yuba and Sutter Counties today; no Enterprise members will live at the Yuba Site; and the only Enterprise members allegedly connected with the Site are non-lineal members who have limited tribal privileges and roles. SOF ¶¶ 6–7.

B. Defendants violated 25 C.F.R. Part 292.

Before determining that a proposed casino development "would not be detrimental to the surrounding community," 25 U.S.C. § 2719(b)(1)(A), Defendants must consult with neighboring Indian tribes and consider comments from them. *See* 25 C.F.R. §§ 292.13, 292.19(a), 292.20. Here, Defendants initially failed to consult with the UAIC, and their finding that Enterprise's casino would not be detrimental to the surrounding community, which includes the UAIC, was arbitrary, capricious, and contrary to the weight of the evidence.

1. Defendants failed to adequately consult with the UAIC under IGRA.

IGRA's consultation requirement is distinct from NEPA's. The BIA Regional Director must solicit comments from "[o]fficials of nearby Indian tribes." 25 C.F.R. § 292.19(a). The UAIC is a "nearby Indian tribe," *id.* § 292.2, but the BIA did not include the UAIC on the distribution list when it requested comments from community members. Although the BIA granted

the UAIC an extension to submit comments, SOF ¶ 16, Defendants ultimately gave them little consideration. *See, e.g., id.* ¶¶ 47–48. Defendants also did not consult with the UAIC either when Enterprise amended its application (on the day that the formal comment period on its application closed) or when it supplemented its amended request a month later. *Id.* ¶¶ 13, 15; *see* 25 C.F.R. §§ 292.16–19. These were not minor changes, either, for in them Enterprise added information about its alleged historical connection to the Yuba Site. *See* SOF ¶¶ 13, 16.

2. Defendants' finding of no detriment to the surrounding community was arbitrary and capricious.

a. Defendants failed to adequately consider the Enterprise proposal's detrimental impact on the UAIC.

In addition to the socioeconomic and environmental interests discussed above, including a significant loss in Thunder Valley Casino revenues, upon which the UAIC depends, *supra* at 10–13, Defendants failed to adequately acknowledge the severe and irreparable damage that Enterprise's casino construction will inflict upon the UAIC's cultural and historical interests. *See, e.g.*, SOF ¶¶ 16, 42. As the DOI admitted, the UAIC "submitted evidence that it has a historical connection to the area surrounding the Site." *Id.* ¶ 45. Minimizing the UAIC's interest, Defendants contended that the UAIC's connection with the Site is not "exclusive" and that the UAIC therefore should suffer no "detrimental impact" from Enterprise's construction of a casino. *See* Part 292 ROD at EN_AR_NEW_0029817–18 (Ex. 3 to SOF).

Defendants' reasoning is arbitrary and capricious. Enterprise's proposed activities on the Yuba Site threaten the UAIC's cultural and historic interests *whether or not Enterprise has a connection to the Yuba Site*.[6] Once the Yuba Site is in trust, Enterprise will be "allowed to . . . exercise tribal sovereign powers over Indian lands." SOF ¶ 8. Another tribe's exercise of sovereign authority over the Yuba Site will necessarily eviscerate the UAIC's cultural and historical ties to the Site. Contrary to Defendants' assertion, *see* Part 292 ROD at EN_AR_NEW_0029810

[6] In finding that Enterprise has a historical connection to Yuba County, Defendants relied upon the "most likely descendant" list maintained by the California Native American Heritage Commission ("NAHC"). SOF ¶ 46. The list is unreliable. The NAHC puts tribes on the list "at a tribe's request and does not make a judgment as to a tribe's cultural affiliation to the area." *Id.* The list, in other words, is nothing more than Enterprise's say-so.

(Ex. 3 to SOF), the UAIC raised this very issue in two comment letters, which stated that the Enterprise proposal would "infringe on [the UAIC's] cultural heritage and sovereignty" and that the "proposed relocation of [Enterprise]" to the Yuba Site would be "to the detriment of [UAIC]'s sovereign authority and cultural identity." SOF ¶¶ 16, 42.

Enterprise's commitment to mitigate impact on "cultural resources" will not assuage the UAIC's cultural and historical concerns. Part 292 ROD at EN_AR_NEW_0029810 (Ex. 3 to SOF); SOF ¶¶ 47–48. The mitigation measures mentioned in the Final EIS relate to different cultural concerns—archaeological resources and tangible artifacts found on the site—not the UAIC's cultural and historical interests in and connection to the Yuba Site itself. And Enterprise's Memoranda of Understanding do not address cultural impacts; indeed, they do not even mention the UAIC. *See* SOF ¶ 12. Thus, Defendants did not adequately consider the damage that Enterprise's proposal will cause to the UAIC's cultural and historical practices. Their failure renders their decision arbitrary and capricious.

b. Defendants' finding of community support for Enterprise's proposal was arbitrary and capricious.

The UAIC was hardly alone in opposing Enterprise's proposal: 52.1% of Yuba County voters rejected the proposal in November 2005. SOF ¶ 50. In the Part 292 ROD, Defendants listed the 2005 vote as the *only* "Local Opposition" to Enterprise's proposal. *Id.* ¶ 54. It was not. The City of Wheatland, the Wheatland School District Board of Trustees, the Yuba-Sutter Farm Bureau, and the Yuba County Board of Education passed resolutions opposing off-reservation gaming in Yuba County, including Enterprise's casino proposal. *Id.* ¶ 51. Several local elected officials and U.S. Senator Dianne Feinstein opposed Enterprise's proposal. *Id.* And of the 21 officials and entities listed in the Part 292 ROD as having received the BIA's January 2009 request for comments, only one—the Yuba County Board of Supervisors—responded in support of Enterprise's proposal. *Id.* ¶ 52. Although some of this opposition is noted elsewhere in the ROD, Defendants failed to reconcile it with the local support and thus did not explain their conclusion that "there is strong local support" for Enterprise's proposal. That conclusion (which gives "substantial weight" to Enterprise's dubious Memoranda of Understanding

with Marysville and Yuba County) was arbitrary and capricious. *Id.* ¶¶ 53–54.

IV. DEFENDANTS VIOLATED THE ADMINISTRATIVE PROCEDURE ACT.

In addition to the deficiencies outlined above, throughout the review process, Defendants also failed to accurately identify and describe the parcel of land to be taken into trust. The December 2012 Notice of Intent ordered the conversion of an 80+-acre parcel, not the 40-acre portion that was the subject of Enterprise's application. SOF ¶ 56. The description of the larger parcel appeared multiple times in other key documents in the Record, and a 2008 cartographer's report completed on the Government's behalf specifically stated that 82.64 acres, not 40 acres, would be transferred into trust for Enterprise. *Id.* ¶ 57. The Record contains no evidence of whether and how Defendants took steps to reconcile the differing land descriptions and determine which properly identified the "subject land" to be transferred. Rather, Defendants used the two land descriptions interchangeably and permitted Enterprise to do so in its submissions. The impacts associated with taking a 40-acre parcel of land into trust logically differ from those of an 80+-acre parcel. The arbitrary use of different parcel descriptions undermines the reliability of Defendants' analyses, and the inattention to such a critical detail suggests that approval of Enterprise's proposal was a "decision already made." *Metcalf*, 214 F.3d at 1142.

By failing to comply with NEPA and IGRA, as set forth above, Defendants' actions violated the APA. Their approval of the RODs and the Secretarial Determination to take the land into trust for gaming purposes were arbitrary and capricious, an abuse of discretion, unsupported by the Administrative Record, arbitrarily reliant on documents developed without required guidance, and otherwise not in accordance with law. 5 U.S.C. §§ 702, 704, 706.

CONCLUSION

For the reasons set forth above, the UAIC respectfully requests that the Court grant its Motion for Summary Judgment.

DATED: June 24, 2014

Respectfully submitted,

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