No. 15-16021

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JAMUL ACTION COMMITTEE, et al.
Plaintiffs-Appellants,

v.

JONODEV CHAUDHURI, Chairman of the National Indian Gaming Commission, et al.
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA (HON. KIMBERLY J. MUELLER)

ANSWERING BRIEF FOR THE FEDERAL APPELLEES

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INTRODUCTION

Jamul Action Committee, several of its members, and Jamul Community Church (collectively "JAC") appeal from the denial of a preliminary injunction. JAC sought an order (1) halting casino construction by the Jamul Indian Village (the "Tribe") on its reservation, and (2) requiring the National Indian Gaming Commission ("NIGC") to publish a Supplemental Environmental Impact Statement ("SEIS") under the National Environmental Policy Act ("NEPA") before the Tribe's casino construction project is allowed to proceed.

The district court denied the motion because the relief JAC seeks would not remedy the injury alleged. Appellants conflate the Tribe's non-federal construction of a casino facility on its reservation with its request for federal approval of a gaming management contract. NEPA requires a review of the potential environmental impacts of proposals for "major federal action," and no such action is at issue here: The Tribe's construction project is a wholly non-federal undertaking that is not subject to NEPA's requirements, and NIGC has merely announced its intention to prepare an

EIS as a part of the process of acting on the Tribe's request for approval of a gaming management contract for a casino on its reservation.[1] NIGC's notice did not announce any final action. Nor will the decision on the Tribe's request for approval of its management contract involve the creation of new trust land or the establishment of a reservation for the Tribe.

The district court additionally held that JAC had established none of the requisite elements to warrant injunctive relief. The court found that JAC has shown neither that the gaming management contract will be approved without NEPA compliance nor that any federal agency has any duty to complete NEPA reviews of a private construction project on the Tribe's reservation. It concluded that JAC has neither shown that it is likely

[1] In connection with the decision on the Tribe's request, NIGC published notice of its intent to supplement the environmental impact statement ("EIS") prepared for the Tribe's earlier-proposed casino development plan. 78 Fed. Reg. 21,398 (Apr. 10, 2013). NIGC has determined that it will treat its decision on the request for approval of the Tribe's management contract as a "major federal action." In the earlier proposal, which was studied in detail in an EIS published in 2003, the Tribe sought to acquire trust lands for use in connection with its casino. The Tribe has since revised its plan such that it no longer involves any trust-land acquisition.

to succeed on the merits of its claims nor raised serious questions going to the merits. The district court also concluded that JAC has not shown that it will suffer imminent, irreparable harm from the denial of injunctive relief. JAC alleges a purely procedural injury under NEPA – an alleged denial of the opportunity to submit comments on the SEIS before the Tribe builds its facility – although the federal courts lack jurisdiction to remedy procedural injury unconnected to a concrete injury to a protected interest. And in any event, NEPA does not apply to the Tribe's casino construction project.

JAC's motion in the district court also sought a "writ of mandate" requiring NIGC to publish the SEIS now, before the agency completes its review of the Tribe's request for approval of its gaming management contract. The district court denied the motion to compel publication of the SEIS because the agency's action on the contract is not yet final, and there is no evidence that NIGC will approve the contract without complying with NEPA.

JURISDICTIONAL STATEMENT

In its complaint, JAC asserted jurisdiction pursuant to 28 U.S.C. § 1331 and sought relief under the Administrative Procedure Act, 5 U.S.C §§ 701-706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202. On May 15, 2015, the district court entered an order denying injunctive relief. Appellants filed their notice of appeal on May 19, 2015. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF THE ISSUES

The Tribe intends to open a casino on its reservation. After it entered into a compact with the State of California as required by the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721 for "Class III" casino gambling, the Tribe contracted with a third party to manage a casino operation on the Tribe's reservation lands. It submitted the management contract to NIGC for approval and began construction work on the casino facility. The issues are:

1. Whether the district court correctly concluded that it lacked jurisdiction to grant a preliminary injunction to stop the Tribe's wholly

non-federal casino construction project on the basis of NIGC's alleged failure to comply with NEPA.

2. Whether the district court correctly denied JAC's motion to compel NIGC to publish a supplemental environmental impact statement where NIGC has announced its intent to publish the document but has not yet completed its analysis of the Tribe's request for approval of its proposed management contract.

3. Whether the district court correctly concluded that JAC had not established the elements required to support injunctive relief.

4. Whether JAC's motion amounts to an impermissible collateral attack on the Tribe's status as a federally recognized Indian tribe and the trust status of its reservation, where JAC seeks to enjoin construction and operation of the casino on the ground that the Secretary has not validly recognized the Tribe as a sovereign entity and its lands as an Indian reservation.

STATEMENT OF FACTS

I. Statutory and Regulatory Background

A. The Indian Reorganization Act

The Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461 *et seq.*, was enacted in 1934 as part of the federal government's return to a policy supporting "principles of tribal self-determination and self-governance." *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992) (citations omitted). In the IRA, Congress authorized the Secretary of the Interior "to acquire . . . any interest in lands . . . for the purpose of providing land for Indians" and to hold such lands "in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.* § 465; see also *Big Lagoon Rancheria v. State of California,* --- F.3d ----,, 2015 WL 3499884 at *2 (9th Cir. 2015) *(en banc*). The IRA also authorized the Secretary of the Interior to establish new Indian reservations on lands acquired under this provision. 25 U.S.C. § 467. In addition, the IRA allowed certain Indians living on the same reservation to organize as a tribe. *Id.* § 476. Section 19 of the Act defines the term "tribe" to refer to "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation."

Id. § 479. It defines "Indian" to include, *inter alia*, "persons of one-half or more Indian blood." *Id.*

In 1994, Congress enacted amendments to the IRA that prohibit federal departments and agencies from distinguishing among federally recognized tribes with respect to their sovereign powers. See 25 U.S.C. § 476(f)-(g).[2] Also in 1994, Congress enacted the Federally Recognized Indian Tribe List Act, Pub. L. No. 103-454, 108 Stat. 4791 (1994) (codified at 25 U.S.C. §§ 479a to 479a-1) ("List Act"). Through the List Act, Congress affirmed the authority of the Secretary to "permanently establish[] a government-to-government relationship between the United States and the

[2] The 1994 amendments to 25 U.S.C. § 476 added two subsections, one prohibiting agencies from "promulgat[ing] any regulation or mak[ing] any decision or determination … with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes" (25 U.S.C. § 476(g)); and one stating that existing regulations or administrative decisions or determinations that "classif[y], enhance[], or diminish[] the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no force or effect" (*id.* § 476(f)).

recognized tribe[s].” See H.R. Rep. No. 103-781, at 2 (1994). The List Act requires the Secretary to maintain an updated list of recognized tribes, and reserved to Congress the exclusive authority to de-list or terminate a tribe. Pub. L. No. 103-454, § 103(4).

B. The Indian Gaming Regulatory Act

Congress enacted IGRA to regulate gaming on Indian lands and to promote tribal economic development. See *id.* § 2702(1)-(2). IGRA created a “‘cooperative federalis[t]’” framework” (see *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1096 (9th Cir. 2003) (quoting *Artichoke Joe's v. Norton*, 216 F. Supp. 2d 1084, 1092 (E.D. Cal. 2002)) that “balance[d] the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme.” *Big Lagoon*, 2015 WL 3499884, at *1. IGRA established three “classes” of gaming and delineated the regulatory responsibilities of tribes, states, and the federal government for each “class” of gaming.

Class I gaming includes “social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a

part of, or in connection with, tribal ceremonies or celebrations." 25 U.S.C. § 2703(6). Indian tribes have exclusive jurisdiction to regulate this class of gaming. *Id.* § 2710(a)(1); *Big Lagoon,* at *1 (citing *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1096–97 (9th Cir. 2003)). "Class II gaming includes bingo . . . and certain card games . . . but excludes any banked card games, electronic games of chance, and slot machines." *Ibid*. Class III gaming includes "all forms of gaming that are not Class I gaming or Class II gaming." 25 U.S.C. § 2703(8). Class III gaming often involves "the types of high-stakes games usually associated with Nevada-style gambling." *In re Indian Gaming Related Cases*, 331 F.3d at 1097.

With respect to both Class II and Class III gaming, IGRA provides that a tribe "may engage in, or license and regulate [such] gaming on Indian lands within such tribe's jurisdiction, if . . . the governing body of the Indian tribe adopts an ordinance or resolution which is approved by" the NIGC's chairman. 25 U.S.C. § 2710(b)(1)(B), (d)(1)(a)(iii). Before a tribe may engage in gaming under IGRA, it must also comply with NIGC's facility license notification regulations found at 25 CFR Part 559.

Before Class III gaming may commence on Indian lands, IGRA ordinarily requires that a tribal-state "compact" be in effect. *Id.* § 2710(d)(3)(B), (d)(8). Class III gaming is subject to state regulation to the extent specified in such compacts between tribes and states that allow such gaming to occur. In this case, the Tribe contemplates operating a gaming establishment that will include both Class II and Class III gaming, and has elected not to manage the operation itself. In these circumstances, IGRA provides that tribes "may enter into a management contract for the operation of a Class III gaming activity," provided that the management contract is "submitted to, and approved by, the [NIGC's] chairman ." *Id.* § 2710(d)(9).

C. The National Environmental Policy Act

NEPA, 42 U.S.C. §§ 4321-4370h, requires federal agencies "to the fullest extent possible" to prepare an EIS for "every * * * major Federal actio[n] significantly affecting the quality of the human environment." *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 372 (2008) (quoting 42 U.S.C. § 4332(2)(C)). An EIS is a detailed analysis and study

conducted to determine whether, or the extent to which, a proposed project will affect the environment. In enacting NEPA , Congress was concerned with the potential impacts of major federal actions significantly affecting the physical environment. See *Metro Edison v. People Against Nuclear Energy*, 460 U.S. 766, 772-73 (1983). Regulations promulgated by the Council on Environmental Quality ("CEQ"), 40 C.F.R. §§ 1500–1508, provide guidance in the application of NEPA. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52 (1989).

By its terms, NEPA applies only to proposals for "major Federal action." *Sierra Club v. Penfold*, 857 F.2d 1307, 1313-14 (9th Cir. 1988) (citing 42 U.S.C. § 4332(c)); see also 40 C.F.R. § 1508.18 (elaborating what constitutes "action" subject to NEPA). Where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant action, NEPA does not require the agency to consider that effect. *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004). Under the CEQ regulations, an agency is required to prepare a supplemental environmental impact statement ("SEIS") if there are "substantial changes

in the proposed action that are relevant to environmental concerns; or . . . [t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1).

D. The Administrative Procedure Act

The Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, allows persons "suffering legal wrong because of any agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute" to seek judicial review. *Id.* § 702. Under the APA, a reviewing court may set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 701(2)(a); see, *e.g., Earth Island Inst. v. Carlton,* 626 F.3d 462, 468 (9th Cir. 2010). The APA also authorizes district courts to order agencies to take action "unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). That provision "empowers a court only to compel an agency to perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act." *Norton v. S. Utah Wilderness Alliance*, 542

U.S. 55, 64 (2004) (emphasis in original; internal quotation marks omitted). The courts are not free to "impose upon the agency [their] own notion of which procedures are 'best' or most likely to further some vague, undefined public good." *Churchill County v. Norton*, 276 F.3d 1060, 1072 (9th Cir. 2001).

II. Factual Background

The Jamul Indian Village is a federally recognized Indian tribe. See 47 Fed. Reg. 53,130, 53,132 (Nov. 24, 1982); 80 Fed. Reg. 1942, 1948 (Jan. 14, 2015). The Tribe first enacted a gaming ordinance in 1993, and in 1999 it amended its ordinance to allow Class III, casino-style gaming on its reservation in Jamul, California, in San Diego County, approximately 20 miles east of San Diego. NIGC published notice of its approval of the Tribe's amended gaming ordinance in the Federal Register on January 29, 1999. 64 Fed. Reg. 4722, 4723 (Jan. 29, 1999). In 2000, the Tribe entered into a compact with the State of California to conduct Class III gaming. The Secretary of the Interior approved the compact and published notice of the approval in the Federal Register. See 65 Fed. Reg. 31,189-01 (May 11, 2000).

In 2003, the Tribe requested that the Secretary of the Interior acquire a 101-acre parcel of land in trust for the Tribe under IRA section 5, 25 U.S.C. § 465. It also sought approval of a gaming management contract with a private operator (Lakes Kean Argovitz Resorts-California, LLC) for a casino that would be located on its existing trust lands, with support facilities occupying the newly-acquired parcel. See Doc 63-1 ¶ 3. On April 2, 2002, BIA published a Federal Register notice of its intent to prepare an EIS for the proposed fee-to-trust transfer and casino project. 67 Fed. Reg. 15,582. Following public comment, the Final EIS was made available to the public on November 14, 2003. See Doc. 63-1 ¶ 5. The Tribe decided not to pursue its application for acquisition of the additional trust lands in trust, however, and the Secretary accordingly never had occasion to approve the project. See *id.* ¶ 6.

Between late 2003 and early 2006, the Tribe redesigned its proposed casino project to eliminate the need for the additional parcel of land, by reconfiguring the project such that the facilities that would have been located on the 101-acre parcel would be located instead on the Tribe's

existing reservation lands. See 78 Fed. Reg. 21,398, 21,399 (Apr. 10, 2013). Site preparation for the casino began early in 2014, and construction is now underway.

The Tribe also revised its proposal for a gaming management contract, and in late December 2012, it forwarded a resolution declaring the Tribe's intention to negotiate a management contract with a different entity. In April 2013, the Tribe entered into a contract with San Diego Gaming Ventures LLC ("SDGV") to manage its casino operation. The Tribe submitted the contract for approval by the NIGC chairman, as required by IGRA. On April 10, 2013, NIGC published a Federal Register notice of its intent to prepare an SEIS for the management contract with SDGV. 78 Fed. Reg. 21,398. The notice explained that "[t]he environmental effects of a gaming facility on the Tribe's Reservation ha[ve] been extensively studied . . . since 2000." *Id.* NIGC concluded, however, that "reconfiguration of uses to place all features on the Reservation, together with the passage of time since the Final EIS was circulated, has resulted in the need for the NIGC to develop and issue an SEIS to address these changes." *Id.* at 21,399.

As the Tribe explained in a tribal Environmental Impact Statement/Report published for public comment in 2006 (see 78 Fed. Reg. 21,398 (Apr. 10, 2013), its casino proposal no longer includes a request that the Secretary acquire any new trust lands for the Tribe. Accordingly, NIGC, which is assigned responsibility for gaming-contract approval, is the "lead agency" for the current proposal. *Id.* The Bureau of Indian Affairs (BIA), the agency that developed the EIS for the earlier project, is serving as the environmental staff for NIGC. *Id.* NIGC's approval of the gaming management contract is the final step necessary before a party other than the Tribe may manage the proposed casino.

III. District Court Proceedings

On September 15, 2013, JAC filed a complaint challenging NIGC's publication of a notice of intent to prepare a supplemental EIS in connection with the Tribe's request for approval of its proposed management contract. JAC alleged that the notice contains a final "Indian lands" determination pursuant to IGRA. (Doc. 7, ¶1). JAC challenged the purported determination under the APA on grounds, *inter alia*, that it

violates the IRA as interpreted by the Supreme Court in *Carcieri v. Salazar*, 555 U.S. 379 (2009), that the Tribe's trust lands are not eligible for Indian gaming under IGRA, and that NIGC and the Secretary failed to comply with NEPA (i*d*.).

JAC named as defendants representatives of NIGC and the Department of the Interior ("federal defendants") and the Tribe's chairman. It sought an order declaring, inter alia, that the Secretary lacks authority to hold the Tribe's lands in trust; setting aside NIGC's purported decisions – allegedly embodied in the Notice of Intent – to take the land into trust and that the land is "Indian lands;" and enjoining "approval and implementation of the Tribe's gaming management contract." (Doc. 7 at 42.) On August 5, 2014, the district court dismissed JAC's first amended complaint without prejudice. Holding that the Tribe is a required party to the complaint (Doc. 50 at 25), the district court dismissed the claims on the ground, *inter alia*, that the Tribe cannot be joined as a defendant because it is entitled to sovereign immunity. The district court granted leave to amend within 21 days, and on August 26, 2014, JAC filed a second

amended complaint (ER 183), in which it named the federal defendants in their personal as well as official capacities, and named additional tribal officials (collectively, “tribal defendants”) and the Tribe’s gaming management company and construction contractors (collectively, “private defendants”) as defendants. Its second amended complaint seeks, *inter alia*, a declaration that the Tribe is not a federally recognized Indian tribe and that its lands are not Indian trust lands eligible for gaming under IGRA (ER 212).

On January 2, 2015, JAC filed a Motion for a Writ of Mandate and for a Preliminary Injunction (Doc. 60), seeking to compel publication of the SEIS and to enjoin all activities related to the Tribe’s casino project until NIGC has completed its SEIS regarding the request for approval of the management contract. JAC sought injunctive relief on the ground that “the Plaintiffs and public will suffer irreparable harm if the casino is constructed without being studied in an SEIS,” and that “Plaintiffs and the public have an irreplaceable due process right to provide meaningful comment, and

receive the BIA's and NIGC's responses to those comments, before the casino is constructed" (*id.*).

The district court held (ER 14) that it lacked subject-matter jurisdiction to enjoin the alleged the federal and tribal defendants. It concluded that JAC's claim is not redressable by an order enjoining the federal or tribal defendants from completing construction of the casino, because the federal defendants have no authority over the casino construction project, and the Tribe, which controls the project, is immune from suit. The district court therefore concluded that JAC could not establish standing to seek injunctive relief against either the federal or the tribal defendants (ER 14). With respect to the Tribe's contractors, the district court held that JAC had established standing but had failed to establish any of the showings required for injunctive relief (ER 15,17-19).

With respect to JAC's request for a "writ of mandate," the district court held that "the court is aware of no statute or regulation, and the parties have cited none, that would require NIGC or BIA to review or approve a management contract before the subject casino is constructed or

operated, or to approve construction at all" (ER 11). Noting that NIGC's review of the gaming contract has not been completed, it concluded that the mandatory order JAC seeks should not be issued because JAC has not shown that NIGC will approve the contract without conducting review under NEPA (ER 12).

The district court denied the motion on May 15, 2015. This appeal followed. On June 30, 2015, this Court denied JAC's request for an injunction pending appeal.

SUMMARY OF ARGUMENT

The standard for granting a preliminary injunction is exacting, and review of district-court orders denying such relief is both limited and deferential. Because the district court correctly assessed the merits of JAC's claims and did not abuse its discretion in weighing the equities, this Court should affirm the district court's order.

The district court correctly concluded that JAC lacks standing to prosecute its claim for injunctive relief against the federal and tribal defendants. The federal defendants have no authority over the Tribe's

entirely non-federal construction of its casino. The tribal defendants similarly lack authority to direct the Tribe's action in their personal capacities. And the Tribe and the tribal defendants in their representative capacities are immune from suit. There is accordingly no power in the federal courts to enjoin the Tribe's construction of its casino.

To the extent that JAC has standing to seek injunctive relief, the district court correctly concluded that JAC cannot establish any of the elements necessary to support a preliminary injunction. On the merits, JAC's claims fail because NEPA applies to "major federal actions." But NEPA review of the Tribe's construction of a casino on its reservation is not required, because the casino project is neither federally regulated nor federally funded. Moreover, review of the status of the Tribe's lands as an Indian reservation is impermissible.

In any event, enjoining the purported final federal actions on which JAC bases its claims would not remedy the injury JAC alleges. And even if effective relief could be based on those purported "major federal actions," the district court correctly rejected JAC's claims. The challenged "actions"

are not "major federal action" subject to NEPA review. And with regard to NIGC's purported "Indian lands" determination, JAC additionally waived its claim. The district court also correctly denied JAC's motion for a writ of mandate. The APA does not authorize courts to compel discretionary agency actions, and preparation of a supplemental EIS, even when one is required, is a matter for agency discretion.

Additionally, JAC has failed to demonstrate irreparable harm from the denial of injunctive relief. The district court's order may be affirmed on this ground alone. The procedural harm JAC alleged in its motion was insufficient even to support standing, let alone a preliminary injunction. Moreover, the equities favor denial of injunctive relief. Not only will the Tribe suffer economic harm from an injunction, contrary to the purposes of IGRA, but the balance Congress struck in delineating state, federal, and tribal regulatory authority under IGRA would be upset if the Tribe's private construction project were disrupted on the ground that a federal agency has not yet completed its NEPA review of a different, federal action.

Accordingly, the district court properly denied JAC's motion for preliminary injunction and writ of mandate, and this court should affirm its ruling.

ARGUMENT

To obtain the "extraordinary remedy" of a preliminary injunction, JAC must clearly establish four elements: (1) that JAC is "likely to succeed on the merits," (2) that JAC is "likely to suffer irreparable harm in the absence of [injunctive] relief,"(3) that "the balance of equities tips in [JAC's] favor," and (4) that "an injunction is in the public interest." *Winter v. NRDC*, 129 S. Ct. 365, 374, 376 (2008) (describing factors in the context of preliminary injunction); *Humane Soc. v. Gutierrez*, 523 F.3d 990, 991 (9th Cir. 2008). The final two factors "merge" where, as here, the government is the party opposing the injunction. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)).

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010). An injunction should issue only where a plaintiff

makes a "'clear showing'" and presents "substantial proof" that such relief is warranted. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam) (quoting 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948 (2d ed. 1995)).

I. Standard of Review

A. Review of the order denying injunctive relief

This Court reviews the district court's denial of a preliminary injunction for abuse of discretion. *Earth Island Inst. v. Carlton*, 626 F.3d 462, 468 (9th Cir. 2010). In this case, the district court concluded (ER 15, 19) that to the extent JAC could establish standing – against the private defendants – it failed to establish the elements necessary for injunctive relief. Review of that determination is "limited and deferential." *Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 979 (9th Cir. 2011) (citations omitted).

The district court's order denying injunctive relief must be upheld unless the court (1) erred in considering the merits of JAC's claims, (2) abused its discretion when assessing the likelihood of imminent irreparable harm to JAC, *and* (3) abused its discretion when weighing the relevant

equities. This Court must affirm unless the district court's application of the correct legal standard to the facts of this case was "illogical," "implausible," or "without support in inferences that may be drawn from the facts in the record." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (*en banc*) (internal quotation marks and citation omitted).

The district court's factual findings are reviewed for clear error, and its conclusions of law are considered *de novo*. *Lands Council v. McNair*, 537 F.3d 981, 986–87 (9th Cir.) (*en banc*), abrogated on other grounds by *Winter*, 555 U.S. 7 (2008).

B. Review of JAC's claims on the merits

JAC's NEPA claims are reviewed under the APA's deferential standard of review. *Department of Transp. v. Public Citizen,* 541 U.S. 752, 763 (2004) ("An agency's decision not to prepare an EIS can be set aside only upon a showing that it was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.") (citing *Lands Council,* 537 F.3d at 987 (citing 5 U.S.C. § 706(2)(A))). APA review is narrow and does not permit a court to substitute its own judgment for that of the expert agency. *Ibid*.

II. JAC IS NOT LIKELY TO SUCCEED ON THE MERITS.

The district court correctly concluded that it lacked jurisdiction to issue the order JAC seeks against the federal and tribal defendants. JAC's motion amounts to a collateral attack on the Tribe's sovereignty and the trust status of its reservation, and therefore must be denied. Moreover, JAC's claims rest on the incorrect assertions that NIGC's notice of intent to conduct further environmental review constitutes final agency action, and that NEPA requires NIGC to publish its SEIS before the Tribe constructs its casino. JAC has identified no final agency action from which it can claim injury, and it therefore cannot prevail on the merits of its claims, even if it could establish standing to seek injunctive relief, which it cannot. JAC therefore is not likely to succeed on the merits of its claims.

A. JAC lacks standing to seek an injunction of the Tribe's construction project.

To establish Article III standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010). *Lujan v. Defenders of Wildlife*, 504 U.S.

555, 564-65 n.2 (1992) (citing *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing." *Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009). Only a "person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy." *Ibid*. (quoting *Lujan*, 504 U.S. at 572 n.7 (emphasis in original)). This Court's analysis of Article III standing is "'not fundamentally changed' by the fact that a petitioner asserts a 'procedural,' rather than a 'substantive' injury." *Nuclear Info & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 949 (9th Cir. 2006) (quoting *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004)).

The district court in this case concluded that JAC lacks standing to seek injunctive relief against the federal or tribal defendants because issuance of the order JAC seeks could not redress the alleged injury to JAC's interest in participating in a NEPA process before the Tribe builds its casino. See ER 14-15. The court correctly recognized that the federal

defendants would have no power to comply with an order enjoining construction of the casino, that the Tribe and the tribal defendants in their representative capacities are immune from suit, and that the tribal defendants have no power as individuals to stop the Tribe from constructing its casino.[3]

JAC mistakenly cites (Br. 28) *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), as authority for the proposition that it has standing to seek an injunction halting the Tribe's construction project. JAC identifies no ruling in *Patchak* that provides

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[3] Even assuming JAC could establish Article III standing, JAC nonetheless must demonstrate that its claim for injunctive relief falls within the zone of interests protected by NEPA. *Lexmark Int'l v. Static Control*, 134 S. Ct. 1377, 1385 (2014) ("whether a plaintiff comes within the zone of interests requires the Court to determine, using traditional statutory interpretation tools, whether a legislatively conferred cause of action encompasses a particular plaintiff's claim"). In its motion for preliminary injunction and writ of mandate, JAC asserts injury to its procedural "right to provide meaningful comment on the SEIS" (Br. 11). NEPA is intended to protect the environment from unintended impacts of federal agency action. See, *e.g.*, *Department of Transp. v. Public Citizen,* 541 U.S. 752, 770 (2004). Absent injury to a concrete interest protected by NEPA, JAC's claim is not within NEPA's zone of interests, and injunctive relief must be denied.

support for JAC's standing here, however. Indeed, *Patchak* did not concern any issue relating to NEPA review of a tribe's construction project on its trust land. To the contrary, *Patchak* concerned whether the Secretary's decision to take land into trust for a recognized tribe was subject to challenge under the APA. In this case, the Secretary has not been asked to take land into trust for the challenged casino project,[4] and JAC does not seek to enjoin the acquisition of trust lands. Instead, JAC seeks to enjoin the Tribe's construction of a casino facility on the Tribe's existing trust land.

Indeed, *Patchak* underscores the district court's conclusion that JAC lacks standing to seek injunctive relief against the federal defendants. JAC asserts (Br. 26-27) that the district court should have exercised its discretion

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[4] JAC's briefing makes repeated references to the Tribe's request that the Secretary take 101 acres of land into trust for its earlier-proposed casino project (Br. 5,6,8,11,14,15,16,18,26). Regardless whether that request is technically "pending" (see Br. 16), the Tribe is not currently pursuing its request for acquisition of that land and that request is unrelated to the current casino proposal. The Secretary has not taken land into trust for the Tribe in connection with the currently proposed casino project, and any decision on the Tribe's current request for approval of its gaming contract therefore will not raise the question concerning challenges to the Secretary's acquisition of trust land that was at issue in *Patchak.*

to enjoin the construction project because the Department of the Interior owns, and the Bureau of Indian Affairs ("BIA") manages, the land on which the Tribe is building its casino. To grant JAC's motion, this Court would have to accept as true JAC's incorrect assertion (Br. 4, 7, 8, 16) that the site of the casino is not an Indian reservation, contrary to the record here and to this and other courts' conclusions. But as this Court recently explained, the Supreme Court in *Patchak* held that a challenge to the trust status of land held by the United States for an Indian tribe must be presented as a "garden variety APA claim" challenging the Secretary's exercise of authority to acquire the land in trust. *Big Lagoon Rancheria v. California*, 2015 WL 3499884, *5 (9th Cir. 2015) (*en banc)*, citing *Patchak,* 132 S. Ct. 2199, 2208 (2012)).

JAC's motion, although couched as a NEPA challenge, raises the questions whether the Tribe's land was properly taken into trust, and whether the Tribe is entitled to special benefits under federal law. It therefore amounts to an impermissible collateral attack on the trust status of the tribe's reservation lands. See *Big Lagoon*, 2015 WL 349884, at *5. As

the district court correctly concluded (ER 15), the Tribe's construction project is not within the control of the federal defendants; and the Tribe, which controls the project, is immune from suit. Accordingly, the district court was correct in concluding that JAC's injury is not remediable through an order requiring the federal defendants to stop the construction of the casino.

JAC additionally contends (Br. 28) that the district court erred in denying injunctive relief because the Tribe's compact with California purportedly prohibited construction of the casino after 2005. JAC raised this issue for the first time in its reply brief in the district court, which correctly concluded (ER 12) that the claim was forfeited by JAC's failure to raise it in its motion. Moreover, even if JAC had properly asserted its challenge based on the compact, it has offered no basis for its standing to seek enforcement of the compact, citing only general authority to the effect that federal courts have constitutional jurisdiction to enforce interstate

compacts (see Br. 17).[5] Although this Court has held that IGRA envisions federal-court enforcement of contractual obligations assumed by States pursuant to a compact, see *Cabazon Band v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997), JAC has not shown, and we are aware of no authority holding, that IGRA provides a cause of action for nonparties to a tribal-state compact to sue in federal court to enforce the compact's terms. Accordingly, even if JAC had properly raised the issue of compliance with the compact – and it did not – the district court could not have granted relief on its claim, over which the district court lacked subject-matter jurisdiction. And in any event, the claim lacks merit. Environmental review of the Tribe's casino construction project is governed by § 10.8 of the Tribe's compact with the State, and the governor has affirmed the Tribe's full compliance with the requirements of that provision (Doc. 62-3 at pp. 13-15).

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[5] JAC incorrectly cites *Cuyler v. Adams*, 449 U.S. 433, 440 (1981), for the proposition that "a Tribal-State Compact approved by the Secretary of Interior under IGRA is enforceable as federal law." No provision of IGRA, which was enacted in 1988, is addressed in *Cuyler*.

B. The district court correctly concluded that no statute requires NEPA compliance for the Tribe's non-federal construction project.

JAC incorrectly contends (Br. 22-24) that the district court applied the "wrong legal standard" in concluding that the SEIS at issue in this case need not be published before the Tribe constructs a casino on its reservation. JAC relies only on authority (Br. 22-23) to the effect that *federal* decision makers must comply with NEPA before they take final action. JAC's argument thus is premised on the incorrect assumption that the casino construction project is federal agency action, ignoring the district court's contrary conclusion that "no statute or regulation * * * require[s] the NIGC or BIA to review or approve a management contract before the subject casino is constructed or operated, or to approve construction at all" (ER 11). The district court's legal conclusion is correct: The Tribe's construction project is neither funded nor regulated by any federal agency, and JAC's contention accordingly must be rejected.

1. JAC lacks a cause of action to enjoin non-federal action by the Tribe.

JAC asserts that it is likely to prevail on the merits, but its own argument makes clear that it cannot prevail. IGRA does not require federal approval of construction or operation of gaming facilities by tribes on their reservations. 25 U.S.C. § 2710(b)(1)(B), (d); see also Doc. 63-3. As discussed at pp. 9-10 above, IGRA requires federal approval only of the gaming ordinance and any third-party management contract for the Tribe's contemplated casino operation. JAC nonetheless seeks to halt the Tribe's construction project – which NIGC has no authority to prevent – pending NIGC's compliance with NEPA. Thus, as the district court correctly observed (ER 11), JAC's request for injunctive relief conflates two actions, one federal and one private. The APA authorizes judicial review of final agency action, but has no relevance to the Tribe's decision to build a casino on its trust property. JAC cites authority (Br. 22-23) only for the proposition that an EIS should precede *federal* action. But the action JAC seeks to enjoin pending NIGC's compliance with NEPA is the Tribe's *non-federal* decision

to construct the facility. JAC accordingly has identified no cause of action for the relief it seeks.

Similarly, NEPA applies only to proposals for "major federal action." The Tribe accordingly is not required to await NIGC's NEPA review of the management contract for its casino operations or to conduct its own review pursuant to NEPA before completing construction of the gaming facility. Nor does NEPA require NIGC to analyze the impacts of the Tribe's construction project, which involves no federal funding or oversight, and therefore is not "major federal action." See, *e.g.*, *Department of Transp. v. Public Citizen*, 541 U.S. 752, 770 (2004) (NEPA does not require consideration of effects that are not "caused" by agency action where the agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant action). NEPA requires a ''reasonably close causal relationship'' akin to proximate cause in tort law. *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983). No such relationship exists between NIGC and the Tribe's construction project. JAC's assertion that the district court applied an incorrect legal standard

therefore is plainly wrong. NEPA does not apply to the Tribe's non-federal construction project, and federal law provides no ground on which to enjoin construction pending NIGC's completion of its NEPA analysis of the proposal to approve the management contract.

2. As a federally recognized tribe with jurisdiction over its reservation lands, Jamul Indian Village is immune from suit, and a collateral attack on its sovereignty and the status of its lands is impermissible.

Although Jamul Indian Village has been included on the list of federally recognized tribes annually since 1982, JAC asserts that this Court has jurisdiction to enjoin the Tribe's construction of the casino facility on the ground that BIA owns and manages the casino site, and that "JIV is not a historical or recognized tribe" (Br. 5). JAC contends that the Tribe is a "half-blood Indian organization" and that such an organization is "not a federal recognized tribe" (Br. 4). As authority for these incorrect assertions, JAC cites generally *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), and *Nisqually Indian Tribe v. Gregoire*, 623 F.3d 923, 927 (9th Cir. 2010). But neither *Venetie* nor *Gregoire* contains a holding relevant to the federally recognized status of the Tribe or the trust status of its lands. Indeed, JAC's

assertions not only are incorrect, they constitute collateral attacks on the Tribe's federally recognized status and the trust status of its lands. This Court, sitting *en banc,* held in *Big Lagoon Rancheria v. California*, 2015 WL 3499884 (9th Cir. 2015), that such collateral attacks are impermissible.

In *Big Lagoon*, the State of California relied on *Carcieri v. Salazar*, 555 U.S. 379 (2009), to contend that the State was not required to negotiate an IGRA compact with a federally recognized tribe, on the ground that BIA had exceeded its authority in taking land into trust for the Tribe. The *en banc* court held that the proper vehicle for challenging the acquisition of land in trust for Indians is a "garden-variety APA claim," *Big Lagoon,* 2015 WL 3499884, at *4. It held that the State's challenge to the trust status of the land in the context of an IGRA enforcement action was instead a "belated collateral attack." *Ibid.* JAC's challenges to the federally recognized status of the Tribe and the reservation status of its lands here are materially indistinguishable from the challenge in *Big Lagoon*. This Court accordingly may not assert jurisdiction on the ground that the tribe lacks sovereignty or that the land is not Indian trust land. Nor may JAC challenge the agency

actions recognizing Jamul Indian Village as a Tribe and holding lands in trust for its benefit. Any such challenge is time-barred, because the Tribe has been included on every list of federally recognized tribes since 1982, and the Secretary accepted the lands at issue in trust in 1978. *Big Lagoon*, 2015 WL 3499884, at *5 ("28 U.S.C. § 2401(a) creates a general six-year statute of limitations for actions brought against the United States").[6]

C. The district court correctly concluded that enjoining the federal agency actions JAC challenges will not remedy JAC's alleged injury.

The district court concluded that it could not order relief that would remedy JAC's alleged injury. The Tribe's casino construction project is not subject to NEPA. And because NIGC has not approved the management contract, it cannot have violated NEPA with respect to its decision. JAC

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[6] Moreover, JAC's attack on the status of the Tribe's reservation would not provide a basis for injunctive relief even if it were permissible. JAC contends that under *Alaska v. Native Village of Venetie,* 522 U.S. 520, 527-31 (1998), that the Jamul reservation is a "dependent Indian community." Even if JAC were correct – and it is not – IGRA defines "Indian lands" to include such communities, where lands over which a tribe exercises jurisdiction are held by tribes or individual Indians subject to restrictions on alienation by the United States.

now contends that the district court was "wrong as a matter of law" (Br. 24) in concluding that the construction project can proceed, because NIGC *has* completed two *other* federal actions without completing a NEPA analysis. JAC contends (Br. 3) that NIGC has approved an amendment to the Tribe's gaming ordinance without first complying with NEPA, and that NIGC's notice of intent to prepare an SEIS for the decision on approval of the Tribe's casino management contract contains a "final" "Indian lands" decision. As shown below (pp. 41-44), the district court correctly rejected JAC's claims regarding both of these purported NEPA violations.

Moreover, as the district court correctly concluded (ER 17), JAC has not shown that any federal agency has a duty to complete a NEPA analysis of the Tribe's construction project before it proceeds. Accordingly, even if approval of the amended gaming ordinance and the purported "Indian lands" decision constituted "major federal actions," enjoining them would not remedy JAC's alleged injury to its ability to comment on the SEIS that NIGC intends to publish regarding approval of the management contract before the Tribe's construction project is completed.

Regardless whether NIGC was required to conduct a NEPA analysis before approving the amendments to the Tribe's gaming ordinance (and it was not) or whether NIGC has issued a final "Indian lands" determination (and it has not), enjoining these actions would not affect the Tribe's construction project. Because, as the district court correctly concluded (ER 17), "no federal agency has any duty to complete NEPA reviews of a private construction project on the Tribe's reservation," that project would be unaffected by any injunction directed at the federal defendants.

The district court also correctly concluded (*id.*) that any challenge based on JAC's claim that the casino will be built on land that is not the Tribe's land must be dismissed. And, as discussed below, the district court has no authority to require NIGC to publish its SEIS absent a final decision on the management contract. The district court correctly concluded (ER 13-14) that no order it could issue would remedy the injury JAC alleges. Its denial of preliminary-injunctive relief must be affirmed.

D. The district court correctly rejected JAC's NEPA claim.

Even if enjoining NIGC's actions with respect to the ordinance and the purported "Indian lands" decision would redress the injury alleged in JAC's motion (and it would not), the district court correctly rejected JAC's claims based on these actions. The district court concluded (ER 13) that the NIGC chairman's approval of the gaming ordinance did not trigger NEPA's requirements, and that JAC waived any claim based on a purported "Indian lands" decision by failing to address it in the motion.

1. Approval of the amended ordinance was not "major federal action."

JAC contends (Br. 24) that the district court erred in denying injunctive relief, because NIGC did not conduct a NEPA analysis before approving the Tribe's amended gaming ordinance in 2013. But NEPA applies only to "major federal actions" potentially affecting the human environment. The district court therefore rejected JAC's challenge on the ground that approval of a gaming ordinance is not a "major federal action" subject to NEPA's requirements. The district court found that a conclusion that the ordinance approval was "major federal action" would be

irreconcilable with this Court's decision in *North County Community Alliance v. Salazar*, 573 F.3d 738, 740 (9th Cir. 2009). In *North County,* this Court addressed a challenge to various federal actions, including approval of a gaming ordinance, and alleged failure to prepare an EIS under NEPA for a tribe's casino construction project. This Court rejected that NEPA challenge on the ground that "there has been no major federal action in this case." As in *North County,* the district court here correctly concluded (ER 13) that ordinance approval is not "major federal action," and therefore does not trigger NEPA's requirements.

But even if approval of a tribal gaming ordinance could trigger NEPA requirements, NIGC's approval of the Tribe's amended ordinance in this case did not trigger those requirements. The Tribe's first gaming ordinance was approved in 1993, and it has had an approved ordinance permitting Class III gaming in place since 1999. See 64 Fed. Reg. 4722-23 (Jan. 29, 1999). The ordinance was amended in 2013 to update certain information in the earlier ordinance as required by an amendment to the NIGC regulations. That amendment was submitted for approval with the

gaming management contract (see ER 71-73) and approved shortly thereafter. JAC has offered no evidence that the amendment of the ordinance could result in impacts on the environment, see, *e.g.*, *Penfold*, 857 F.2d at 1313–14, and accordingly there is no basis for JAC's assertion that approval of the amended ordinance was a "major federal action" for purposes of NEPA. The district court was correct in concluding that JAC therefore is unlikely to succeed on the merits of its NEPA claim.

2. JAC waived its claim that NEPA applies to a purported "Indian lands" decision, and such a claim lacks merit in any event.

Finally, as the district court correctly observed (ER 13), JAC has waived any argument supporting an injunction on the ground that NIGC purportedly issued a final "Indian lands" decision or "reservation proclamation" (see Br. 25-26) without complying with NEPA's requirements. These contentions were not raised in JAC's motion, and the district court correctly declined to consider them because they were raised for the first time in JAC's reply brief (*id.*). See, *e.g.*, *Smith v. Marsh*, 194 F.3d

1045, 1052 (9th Cir. 1999) (holding that arguments "fully articulated" for the first time in a reply brief "are deemed waived").

And in any event, NIGC's Federal Register notice stating that the proposed casino is "to be located on the Tribe's Reservation, which qualifies as Indian lands pursuant to 25 U.S.C. 2703," 78 Fed. Reg. 21,398, does not purport to be a final determination or confirmation by the NIGC Chairman. Instead, it reflects IGRA's Indian-lands definition and the fact that the proposed casino is intended to be located entirely on the Tribe's reservation. Under IGRA, "Indian lands" is defined to include "all lands within the limits of any Indian reservation," as well as "lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703. The Tribe's reservation comprises lands that were accepted in trust in 1978, and have been

recognized since then as a federal Indian reservation,[7] and a small parcel added to the reservation in 1981. See, *e.g.*, 2003 FEIS at 2-39 (citing this Court's unpublished affirmance of the district court decision in *Rosales v. United States*, No. 01-951-IEG (S.D. Cal. 2002)).

As the district court correctly concluded, NIGC has yet to reach a final decision on the Tribe's request for approval of the contract, which will address the "Indian lands" status of the land on which the casino is to be operated. The chairman has not yet issued his final decision. To obtain judicial review under the APA, JAC must challenge a "final" agency action. See 5 U.S.C. § 704; *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882

[7] JAC asserts (Br. 8 n.1) that federal law prohibits the "creation" of more than four reservations in California. JAC is incorrect, and the 1864 statute on which it relies (13 Stat. 39 (Apr. 1, 1864)) is irrelevant here. That statute authorized the President to reserve from the public domain no more than four areas to be held as reservations for Indians in California. Assuming the 1864 statute remains effective, the Jamul Indian Village reservation was not "reserved" in violation of its limitations. Instead, the Tribe's reservation was acquired in trust by the Secretary under the IRA, which authorized the Secretary of the Interior "to acquire . . . any interest in lands . . . for the purpose of providing land for Indians" and hold those lands "in trust for the Indian tribe or individual Indian for which the land is acquired," 25 U.S.C. § 465, and to establish new Indian reservations on lands so acquired, *id*. § 467.

(1990). The district court therefore correctly concluded (ER 13) that it lacked jurisdiction to issue the order JAC seeks.

In any event, JAC has made no attempt to show that a final "Indian lands" decision could have impacts on the human environment that would trigger NEPA's requirements. See *Penfold,* 857 F.2d at 1313–14. Accordingly, even if JAC had not waived the argument, and further assuming that enjoining a final decision on the "Indian lands" question would have the effect of stopping the Tribe's construction project, JAC has failed to show that NEPA applies to the purported "Indian lands" decision. NIGC's supposed "action" in making that decision therefore does not provide a basis for the injunction JAC seeks.

E. The APA does not authorize the courts to direct the exercise of agency discretion.

The district court correctly found that "the federal action at issue is NIGC's approval of the management contract … [and] NIGC has not completed its review" (ER 13; Doc. 93 at 12). The court further correctly found that "JAC has not shown that NIGC will approve the contract without conducting the review required by NEPA" (ER 11). It denied

mandatory injunctive relief (*id.*) on the ground that JAC cannot establish NEPA noncompliance because it cannot show that NIGC will approve the Tribe's gaming management contract without complying with NEPA. JAC contends that the district court erred in failing to order NIGC to publish its SEIS, on the ground that BIA and NIGC have a mandatory, ministerial duty to "prepare and circulate the SEIS at the earliest possible time in their decision making process" (Br. 19-20). JAC is incorrect.

The district court correctly declined to direct NIGC to complete and publish its SEIS. The APA authorizes a reviewing court to set aside agency action that is "not in accordance with law," but it does not authorize the courts to require an agency to take actions that are not otherwise required. Under 5 U.S.C. § 706(1), which allows district courts to order agencies to take action "unlawfully withheld or unreasonably delayed," the Supreme Court has held that a court may only compel an agency to perform "ministerial," nondiscretionary actions, and may do so only "without directing *how* [the agency] shall act." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. at 63-64 (emphasis in original).

APA authority to compel action is appropriate "when agency recalcitrance is in the face of a clear statutory duty or is of such magnitude that it amounts to an abdication of statutory responsibility." *Public Citizen Health Research Group v. Comm'r, Food & Drug Admin*., 740 F.2d 21, 32 (D.C. Cir. 1984). Those circumstances are entirely absent here. While compliance with NEPA is mandatory and the courts may order agencies to comply, this Court has made clear that NEPA "is not a paper exercise," *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 625 F.3d 1092, 1124 (9th Cir. 2010), and agencies are accorded deference in the conduct of their obligations under NEPA as applied to their specific activities. See, *e.g.*, *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1071 (9th Cir. 2002) (deference to agency's determination of the scope of its review) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 413–14 (1976)).

Here, Congress has entrusted NIGC with the authority to approve the Tribe's contract for management of its casino by a third party. Although NIGC has announced its intention to publish an SEIS for comment as a part of the approval process, it has not yet completed that

process and therefore cannot be charged with failure to comply with NEPA. This Court may not "intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Immigration & Naturalization Serv. v. Ventura*, 537 U.S. 12, 16 (2002). It therefore may not compel publication of the results of NIGC's NEPA review. The relief JAC seeks accordingly exceeds the courts' APA jurisdiction.

In sum, the district court's conclusion (ER 17) that JAC has neither shown a likelihood of success on the merits nor raised serious questions going to the merits should be affirmed.

III. JAC has failed to demonstrate that it will be irreparably harmed absent a preliminary injunction.

JAC has not challenged the district court's conclusion (ER 18; Doc 93 at 17) that JAC failed to demonstrate imminent, irreparable harm from denial of preliminary-injunctive relief. With respect to its claimed injury from the denial of an opportunity to comment on NIGC's SEIS, the district court concluded that the evidence supports "the opposite conclusion," (ER 18) that NIGC will provide JAC a full opportunity to comment. On appeal, NIGC has offered no basis for reversal of that conclusion. On this ground

alone, this Court must affirm the district court's denial of preliminary-injunctive relief, because preliminary-injunctive relief may not be granted unless JAC can demonstrate all the required elements.

And even if this Court were to reach the question, the district court was correct. JAC cannot show that the harm to it absent an injunction is both irreparable and greater than the harm to the public of an injunction.

JAC's motion alleged that JAC will suffer irreparable harm to its "irreplaceable due process right to provide meaningful comment on the SEIS before mitigation options are foreclosed" (see Br. 20). But JAC has provided no authority for the proposition that the opportunity for participation in the NEPA process is a property interest subject to due-process protections, and we are aware of none. And the Supreme Court has held that deprivation of the opportunity to comment on federal agency action, without a concrete interest that is injured by the deprivation, does not establish injury-in-fact, much less irreparable harm. *Summers v. Earth Island Inst.*, 555 U.S. at 496 ("Respondents argue that they … have been denied the ability to file comments on some Forest Service actions .... But

deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.”).

In any event, the district court correctly concluded that JAC has not shown that there is any likelihood of such a deprivation. NIGC has determined that approval of the Tribe’s third-party management contract is subject to NEPA (see Doc. 93 at 6), and it therefore intends to complete a supplemental EIS before issuing a final decision on the Tribe’s contract with San Diego Gaming Ventures, LLC. 78 Fed. Reg. 21,398 (Apr. 10, 2013). And while the Tribe is not obliged to comply with NEPA, and JAC therefore has no legally protected interest in participating in a NEPA process with respect to its construction project, the record indicates that similar opportunities for public involvement have been provided under State and tribal procedural requirements. See 78 Fed. Reg. 21,399 (Apr. 10, 2013). Accordingly, JAC has entirely failed to demonstrate that the district court abused its discretion in concluding that JAC failed to demonstrate that it will be irreparably harmed absent a preliminary injunction.

IV. The equities do not favor an injunction, which is contrary to the public interest.

Finally, the public interest favors denial of an injunction. As this Court explained in *Big Lagoon*, when Congress enacted IGRA, it "balance[d] the competing sovereign interests of the federal government, state governments, and Indian tribes, by giving each a role in the regulatory scheme." 2015 WL 3499884, at *1. Congress did not condition tribal casino construction on federal approval or federal procedural requirements. Because NEPA review generally is not required for private or tribal construction projects, enjoining the Tribe's casino construction project pending completion of federal environmental review would upset the balance Congress struck in IGRA between the competing sovereign interests. Moreover, Congress's purpose in enacting IGRA was to promote tribal economic development. See 25 U.S.C. § 2702(1)-(2). The district court found (Doc. 93 at 18) that an injunction would cause the tribal defendants to incur substantial costs. An order enjoining the Tribe's project therefore is contrary to the public interest in achieving Congress's purpose, in addition to being unsupported by any legal authority.

* * * *

JAC has failed to demonstrate a basis for reversal. The district court correctly concluded that it lacked jurisdiction to enter the order JAC seeks against the federal defendants. And JAC has not shown that it will be irreparably harmed absent a preliminary injunction, that the district court abused its discretion in weighing the equities, or that the court's assessment of the merits was incorrect.

CONCLUSION

For the foregoing reasons, the district court's order denying JAC's motion should be affirmed.

Respectfully submitted,

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JULY 2015
90-6-16-01072

STATEMENT OF RELATED CASES

Counsel is unaware of any related cases pending in this court.

CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Palatino Linotype, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,114 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ *Elizabeth Ann Peterson*
ELIZABETH ANN PETERSON

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2015, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

ELIZABETH ANN PETERSON

STATUTORY AND REGULATORY ADDENDUM

Addendum Contents

Relevant provisions of the Indian Reorganization Act…………………………………………………………......A1

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I. RELEVANT PROVISIONS OF THE INDIAN REORGANIZATION ACT

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

§ 467. New Indian reservations

The Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by this Act, or to add such lands to existing reservations: Provided, That lands added to existing reservations shall be designated for the exclusive use of Indians entitled by enrollment or by tribal membership to residence at such reservations.

§ 476. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

(f) Privileges and immunities of Indian tribes; prohibition on new regulations

Departments or agencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the Act of June 18, 1934 (25 U.S.C. 461 et seq., 48 Stat. 984) as amended, or any other Act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other

federally recognized tribes by virtue of their status as Indian tribes.

(g) Privileges and immunities of Indian tribes; existing regulations

Any regulation or administrative decision or determination of a department or agency of the United States that is in existence or effect on May 31, 1994, and that classifies, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes shall have no forceor effect.

(h) Tribal sovereignty

Notwithstanding any other provision of this Act—

(1) each Indian tribe shall retain inherent sovereign power to adopt governing documents under procedures other than those specified in this section;

* * * * *

II. FEDERALLY RECOGNIZED INDIAN TRIBES LIST ACT

§ 479a. Definitions

For the purposes of this title:

(1) The term ''Secretary'' means the Secretary of the Interior.

(2) The term ''Indian tribe'' means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term ''list'' means the list of recognized tribes published by the Secretary pursuant to section 479a–1 of this title.

§ 479a–1. Publication of list of recognized tribes

(a) Publication of list

The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) Frequency of publication

The list shall be published within 60 days of November 2, 1994, and annually on or before every January 30 thereafter.

III. RELEVANT PROVISIONS OF THE INDIAN GAMING REGULATORY ACT

25 U.S.C. § 2701. Findings
The Congress finds that—
(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

§ 2702. Declaration of policy

The purpose of this chapter is—

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

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

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if—

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman. A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are—

(A) authorized by an ordinance or resolution that—

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and
(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that—

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title. Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and

conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

IV. RELEVANT PROVISIONS OF THE NATIONAL ENVIRONMENTAL POLICY ACT , 42 U.S.C. §§ 4321-4370H

§ 4332.

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on— (i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.