No. 15-16021

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

JAMUL ACTION COMMITTEE, JAMUL COMMUNITY CHURCH, DARLA KASMEDO, PAUL SCRIPPS, GLEN REVELL, and WILLIAM HENDRIX

Plaintiffs-Appellants

v.

TRACIE STEVENS, Former Chair of the NIGC; JONODEV CHAUDHURI, Chairman of the NIGC; DAWN HOULE, Chief of Staff for the NIGC; SALLY JEWELL, Secretary of the Interior; KEVIN WASHBURN, Assistant Secretary - Indian Affairs; PAULA HART, Director of the OIG; AMY DUTSCHKE, Regional Director BIA;JOHN RYZDIK, Chief, Environmental Division, BIA; U.S. DEPT. OF INTERIOR; NATIONAL INDIAN GAMING COMMISSION; RAYMOUND HUNTER; CHARLENE CHAMBERLAIN; ROBERT MESA; RICHARD TELLOW; JULIA LOTTA;PENN NATIONAL, INC.; SAN DIEGO GAMING VENTURES, LLC.; and C.W, DRIVER INC.

Defendants-Appellees

On Appeal from the United States District Court
For the Eastern District of California
Case No. 2:13-cv-01920 KJM-KLN
Honorable Kimberly J. Mueller, District Judge

APPELLANTS' OPENING BRIEF ON PRELIMINARY INJUNCTION APPEAL

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INTRODUCTION

Appellants, the Jamul Action Committee, the Jamul Community Church and four residents of rural Jamul (collectively referred to as "JAC") are appealing the district court's May 15, 2015 interlocutory order (Order) denying their motion for a writ of mandate and a preliminary injunction, against the Bureau of Indian Affairs (BIA), National Indian Gaming Commission (NIGC) and other Defendants, to compel them to comply with the National Environmental Policy Act (NEPA) before allowing the continued construction of the Jamul Indian Village (JIV)/Penn National illegal gaming casino in Jamul, San Diego.

The district court made at least two serious, reversible errors regarding NEPA in its Order. First, the district court concluded that the BIA need not comply with NEPA because it has no authority over the subject property. This conclusion is factually incorrect. The United States owns the property and the BIA is the Lead Agency with respect to the proposed fee-to-trust transfer for the casino.

Second, the district court held that the NIGC need not comply with NEPA until after the casino is constructed and they approve the gaming management contract. This is erroneous as a matter of law. It is contrary to the NEPA mandate that an EIS be completed at the earliest possible stage in the decision-making process. The district court's decision should be reversed and vacated.

JURISDICTIONAL STATEMENT

This is an appeal from the district court's May 15, 2015 Order denying JAC's motion for a writ of mandate and preliminary injunction. (Excerpt of the Record (ER) 2-20.) This Court has jurisdiction to review the Order, as an immediately appealable interlocutory order, under 28 U.S.C. § 1292(a)(1). On May 19, 2015, JAC timely filed a notice of preliminary injunction appeal as required by Federal Rule of Appellate Procedure, Rule 4(a)(1)(A). (ER 1).

The district court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331, 5 U.S.C. §§ 701-706 , 28 U.S.C. §§ 2201-2202, 25 U.S.C. § 2714, and 18 U.S.C. § 1166. This action arises under federal law, including the Indian Reorganization Act (IRA), 25 U.S.C. §§ 465 *et seq.* Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2700 *et seq.* and 18 U.S.C. § 1166, and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*

The Plaintiffs have standing to pursue the claims asserted in this case and appeal. *Bond v. United States* 131 S.Ct. 2355 (2011) and *Match-E-Be-Nash-She-Wish Band v. Patchak* 132 S.Ct. 2199 (2012). The United States waived sovereign immunity from suit under 5 U.S.C. §§701-706, 28 U.S.C. §2201(a) and 25 U.S.C. § 2714. The other Defendants do not have immunity from suit. *See Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014).

ISSUES PRESENTED FOR REVIEW

A. NEPA requires federal agencies to complete an EIS at the earliest possible stage in the decision making process. ***Issue:*** Did the district court abuse its discretion, and apply the wrong legal standard, when it held that the BIA and NIGC need not circulate the noticed SEIS, if at all, until after the JIV casino is constructed and other related matters are approved by the BIA and NIGC?

B. The U.S. owns the property and the BIA and NIGC are responsible for making Indian lands decisions and reviewing JIV's fee-to-trust proposal. The BIA is the Lead Agency for the SEIS. ***Issue:*** Did the district court abuse its discretion, and misstate the facts, when it held that the BIA did not have to comply with NEPA because it did not own or control the property?

C. The NIGC approved the JIV Gaming Ordinance (GO) on July 1, 2013 without first complying with NEPA. NIGC approval of the GO is a major federal action. ***Issue:*** Did the district court abuse its discretion when it held that the NIGC did not have to comply with NEPA before approving the GO.

D. Defendants claim to have complied with the environmental review provisions of their Compact with the State. But the Compact prohibits casino construction after 2005 unless it is amended to provide for stricter review. ***Issue:*** Did the district court abuse its discretion by failing to consider and enforce the Compact's prohibition of casino construction?

STATEMENT OF THE CASE

This case involves a group of half-blood Indians who live in the Jamul area. This half-blood Indian group is known as the Jamul Indian Village (JIV). Until 1978, they occupied and resided on a portion of a 7 acre privately owned parcel that is also the Jamul Indian cemetery.

In 1978, the Daley family, the fee title owners of the property, granted 4.66 acres of that land to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." (ER 234-236.)Thus, this land was conveyed to the United States for the benefit of individual half-blood Jamul Indians.

In 1981 the Jamul Indians created the JIV half-blood Indian organization. (ER 215-220 and 222-232.). They adopted a constitution "to establish a formal organization, to promote our common welfare." (ER 222.) Members had to be "1/2 or more degree of California Indian Blood." (ER 222-223.)

In 1988, Congress passed the Indian Gaming Regulatory Act (IGRA; 25 U.S.C. §§ 2701 et. seq.). The JIV does not qualify for gaming under IGRA. They are a half-blood Indian organization, not a recognized tribe. And the 1978 donated land is not "Indian land" eligible for gaming under IGRA.

In 1993 the Department of Interior confirmed that, although the JIV could organize as a half-blood Indian community, it was not a historical or recognized tribe. (ER 215-220.) Instead, a half–blood Indian village is a "dependent Indian community" under the direct supervision of the federal government. S*ee Alaska v. Native Village of Venetie,* 522 U.S. 520, 527-531 (1988).

In 1999 California and JIV entered into a Compact based on the JIV's misrepresentations that the JIV was recognized tribe, when it never was recognized. (ER 80-90.) Section 10.8.3(b) provides that "any time after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment" to Section 10.8.3 on the grounds that it was inadequate to protect the environment from the adverse impacts of the casino project. (ER 87.) Section 10.8.3(c) provides that if, "as of January 1, 2005" there is no amendment to Section 10.8, then the JIV shall immediately cease construction and all other activities on projects that may cause adverse off-reservation impacts. (ER 87.)

In 2002 the JIV applied to have land taken into trust for their benefit for the construction of a casino. (ER 139-140.)In 2003, the BIA and NIGC announced an EIS for a proposed "Fee to Trust Transfer and Casino Project in San Diego County, California." (ER 142-143) The EIS was to study "traffic, threatened and endangered species, wildlife habitat and conservation areas wastewater disposal, air quality, and socio-economic impacts" of the casino proposal (ER 143.)

The BIA was designated as the Lead Agency. (ER 142). The BIA is, first, required to determine whether an applicant was a federally recognized tribe entitled to the benefits of the 1934 Indian Reorganization Act (IRA; 25 U.S.C. §§ 465 et seq.) If the tribe qualifies, the BIA is also responsible for reviewing and, if appropriate, approving the fee-to-trust transfer for the casino. (25 C.F.R. Part 151.)

The NIGC was designated as a Cooperating Agency with the primary obligation to determine whether a recognized tribe has any lands that qualify for gambling under IGRA, and whether the additional lands proposed to be taken into trust for a casino are "Indian lands" eligible for gaming under IGRA. (ER 142) The NIGC is also responsible for making an Indian lands decision when requested. 25 C.F.R. §559.1. The NIGC is also responsible for approving the tribal gaming ordinance before the casino can be operated. And the NIGC has an obligation to review any proposed management contract. 25 U.S.C. §§ 2710 & 2711.

On March 1, 2003, the Governor requested negotiations with 61 tribes to amend Section 10.8 of their 1999 Compacts to improve the environmental review provisions. (ER 91-93.) Thirteen tribes amended their Compact, many before initiating casino construction. (See ER 35-46) The JIV did not. Although the fee-to-trust transfer was not pursued by the JIV, it has not been withdrawn and has never been approved by the BIA. (ER 106.)

The JIV fee-to-trust casino project stalled in 2009 after the Supreme Court's decision in *Carcieri v. Salazar,* 555 U.S. 379 (2009). The Supreme Court held that the Secretary of Interior's authority to take lands into trust is limited to "recognized tribes . . . under federal jurisdiction" in 1934. Under *Carcieri,* the BIA lacks the authority to take land into trust for a half-blood Indian group created in 1981 that did not exist in 1934. (ER 160-182.)

In 2013, the NIGC and BIA announced that they intended to prepare a SEIS supplementing the 2003 EIS for a "reconfigured" casino facility and for a related gaming management contract and ordinance. (ER 145-147.) The public notice also included an announcement that the NIGC had determined that the subject land is a "Reservation" and "Indian lands" eligible for gaming under IGRA. (ER 145.) See 25 C.F.R. 599.1. The casino was to be managed by Defendant San Diego Gaming Ventures a subsidiary of Defendant Penn National Gaming. (ER 145.)

The significant difference between the 2003 and 2013 proposals is that the fee-to-trust aspect of the project was completely ignored by the BIA and NIGC in 2013. Instead of the fee-to-trust process, the BIA and NIGC simply proclaimed that the land acquired by private donation in 1978 was a "Reservation which qualifies as 'Indian Lands' pursuant to 25 U.S.C. 2703," when it doesn't. (ER 145.) This is an attempt by the BIA and NIGC to make an end-run of the Supreme Court's *Carcieri* decision and to short-circuit public participation in the fee-to-trust

process by unilaterally declaring that the property was a "reservation" eligible for gaming under the IGRA. Neither the BIA nor the NIGC has the authority to proclaim that the 1978 donated fee land is a "reservation."[1]

The claim that the 1978 donated land was a "reservation," and "Indian land" eligible for gaming under IGRA, was announced by the NIGC and BIA on April 10, 2013, without any prior public input or the required NEPA review. The "reservation" claim was not mentioned in either the 2002 or the 2003 EIS notices published in the Federal Register. (ER 139-143.) Instead, as summarized above, the focus in 2003 was a proposed transfer of a fee interest of additional land that was never approved by the BIA.

In 2013, however, the NIGC and BIA acknowledged in the public notice that the re-configuration of the casino on the newly claimed reservation, and the passage of time, required them to circulate a SEIS. The SEIS would update the 2003 EIS to include an analysis of "land resources, water resources, air quality, biological resources, cultural and paleontological resources, socio-economics transportation, land use, agriculture, public services, noise, hazardous materials, and visual resources" impacted by the new casino project. (ER 147.)

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[1] Nor could they create a new Indian reservation in California. In 1864, Congress passed the Four Reservations Act which limited the number of reservations in California to no more than four. (13 Stat. 39 (1864).) See *Mattz v. Arnett* (1973) 412 U.S. 481, 489-491. The JIV parcel was not one of the four reservations.

The SEIS notice invited "written comments on the scope and implementation" of the casino project. JAC provided detailed comments. (ER 169-182.) San Diego County also responded by reserving the right to submit formal comments "during the SEIS public review period." (ER 149-150.) The BIA also assured the County that a public "comment period [on the SEIS] will happen sometime in the future." (Id.)[2] The BIA and NIGC made similar assurances to the community, including a promise of a public hearing. That did not happen. There has been no hearing. Nor has the SEIS been prepared or circulated for comment.

The signed gaming management contract and proposed site-specific gaming ordinance were submitted to the NIGC on April 3, 2013. (ER 52-79). The gaming ordinance was attached to the management contract. (ER 58.) A week later the NIGC announce that the 1978 donated land was a "reservation" eligible for gaming under IGRA. (ER 158-159') The site-specific gaming ordinance was approved on July 1, 2013. (ER 72.) The maximum time period for the NIGC to review the gaming management contract expired on January 5, 2014. (See 25 U.S.C. §2711.) Shortly thereafter, construction site preparation was initiated. [3]

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[2] The district court declined to take judicial notice of the letter written by San Diego County. (ER 7-8 n 5) JAC respectfully requests that this Court take judicial notice of that letter as part of the administrative record for the SEIS

[3] The site excavation activity did not require federal approvals. But it did require approvals from the California Department of Transportation. JAC initiated

On December 17, 2014, JIV and Penn National Gaming issued a press-release announcing that the site excavation process was complete and that construction of the casino itself would soon begin. (ER 152-153.) The press-release did not mention the SEIS much less indicate if it would be circulated.

Two weeks after the JIV/Penn National press release, on January 2, 2015, Plaintiffs filed a motion for writ of mandate and preliminary injunction to compel the BIA and NIGC to prepare and circulate the SEIS, as noticed, and to enjoin Defendants from constructing the casino until the NEPA process was complete.

The BIA and NIGC filed an opposition to Plaintiffs' motion on January 16, 2015. They concede that their NEPA obligations began in April 2013. (ER 106.)

The private Defendants and Defendant Hunter also filed an opposition to Plaintiffs' motion on January 16, 2015. They asserted that "the public interest in environmental review has already been satisfied as to the impacts of the casino project through the Compact-mandated environmental review." (ER 109.) They also asserted that "the environmental review of the casino's impact . . . is governed by the Tribe's Compact. See Compact § 10.8. The Tribe has fully complied with its Compact obligations . . ." (ER 110.).

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litigation against CalTrans with respect to those approvals. (ER 94-99.) Litigation was initiated before site excavation began and is still ongoing. The district court's implication (ER 18) that JAC unduly delayed its motion is incorrect. JAC brought its motion two weeks after the casino construction was announced.(ER 152-153.)

JIV council Defendants, Tellow, Lotta, Mesa and Chamberlain did not file an opposition to Plaintiffs motion for a writ of mandate and a preliminary injunction.

Plaintiffs filed a reply on January 23, 2015. In response to the Defendants claim that they complied with the environmental provisions of their 1999 Compact, Plaintiffs provided a copy of the Compact. (ER 80-90.) Section 10.8.3(b)&(c) of the Compact prohibits casino construction after January 1, 2005 unless it is amended to provide for stricter environmental review.

The district court took Plaintiffs' motion under submission for over four months. On May 15, 2015, the Court issued its Order denying JAC's motion. (ER 0002-0020.) Plaintiffs-Appellants filed this appeal on May 19, 2015, (ER 0001.)

SUMMARY OF ARGUMENT

Appellants are asking this Court to reverse the district court's Order and to protect their procedural rights under NEPA to provide meaningful comments on the potential environment impacts of the JIV/Penn National casino before it is constructed in their rural, quiet community. In April 2013 the BIA and NIGC publically announced that they were going to prepare an SEIS on the JIV fee-to-trust casino project, the Indian lands decision and the related gaming ordinance and gaming management contract approvals. They have a ministerial duty to complete

that process at the earliest possible stage in the decision-making process. The BIA and NIGC have abrogated their mandatory duty to the detriment of the public.

The district court erroneously concluded that the BIA need not comply with NEPA because it did not control the property . And the district court erroneously held that the NIGC did not need to prepare the required SEIS, prior to making the Indian lands decision or approving the gaming ordinance. The district court also implicitly found that, since the NIGC had not yet approved the management contract, it had not yet failed to prepare the NEPA required SEIS. The district court's conclusion that the SEIS need not be circulated until later, if at all, is "exactly backward." The district court also disregarded Section 10.8.3 prohibiting casino construction after 2005 unless it is amended. The Order should be reversed and vacated. The BIA and NIGC should be compelled to comply with NEPA and the Compact and casino construction should be enjoined in the meantime.

STANDARD OF REVIEW

A. **Denial of Writ of Mandamus – Standard of Review.**

A district court's denial of a writ of mandamus is reviewed for an abuse of discretion. A district court abuses its discretion when its decision is based on clearly erroneous factual findings or an incorrect legal standard. *Independence Mining Co. v. Babbitt,* 105 F.3d 502, 505 (9th Cir. 1997). Whether each element of

the mandamus test is satisfied is a question of law that is reviewed de novo. *Oregon Natural Resources Council v. Harrell,* 52 F.3d 1499, 1508 (9th Cir. 1995). "For mandamus relief, three elements must be satisfied: (1) the plaintiff's claim is clear and certain; (2) the [defendant official's] duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available." *Johnson v. Reilly,* 349 F.3d 1149, 1154 (9th Cir. 2003).

A decision that an agency has complied with NEPA is reviewed de novo. *Carmel-By-The-Sea v. United States Dept. Transp.,* 123 F.3d 1142, 1150 (9th Cir. 1997). The Court must insure that the agency has taken a "hard look" at the environmental consequences in advance of each proposed federal action. *Center for Biological Diversity v. U,S. Dept. of Interior,* 623 F.3d 633, 636 (9th Cir. 2010).

B. Denial of Preliminary Injunction – Standard of Review.

This Court reviews a district court's denial of a preliminary injunction for abuse of discretion. *Alliance for Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131 (9th Cir. 2011). Abuse of discretion occurs if the decision is based "on an erroneous legal standard or a clearly erroneous finding of fact." *Id.* Conclusions of law are reviewed de novo and findings of fact are reviewed for "clear error." *Id.* Mixed questions of law and fact are reviewed de novo. *Diamond v. City of Taft,* 213 F.3d 1051, 1055 (9th Cir. 2000). "A district court would necessarily abuse its discretion

if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Institute of Cetacean Research v. Sea Shepard,* 725 F. 3d 940, 944 (9th Cir. 2013).

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council,* 555 U.S. 7, 20 (2008). This Court applies a "sliding scale" approach. *Alliance for Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131-1135 (9th Cir. 2011). "That is, 'serious questions going to the merits' and a balance of hardships that tip sharply toward the plaintiff can support the issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and the injunction is in the public interest." *Id.* at 1135.

ARGUMENT

A. **The Federal Legal Framework.**

Three important federal statutes should have worked in tandem when the BIA and NIGC reviewed the JIV fee-to-trust casino proposal when they made the April 10, 2013 Indian lands decision: the Indian Reorganization Act (IRA), Indian Gaming Regulatory Act (IGRA) and National Environmental Policy Act (NEPA).

1. The Indian Reorganization Act of 1934.

The IRA of 1934 authorized the Secretary of Interior to acquire land and hold it in trust "for the purpose of providing land for Indians" and such land "shall be taken in the name of the United States in trust for the individual Indian for which the land is acquired . . ." Ch. 576 § 5, 48 Stat. 984, 25 U.S.C. § 465. The IRA defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." "and shall further include all other persons of one-half or more Indian." 25 U.S.C. § 479.

The Supreme Court, in its 2009 *Carcieri* decision, first held that Section 479 was not ambiguous and there was no need to defer to the Secretary of Interior's interpretation, and that Section 479 clearly provides that a tribe must be recognized and under federal jurisdiction in 1934, before land can be taken into trust for such a tribe. *Carcieri v. Salazar,* 555 U.S. 379 (2009).

The Secretary of Interior (SOI) has the primary responsibility for reviewing and deciding a tribe's fee-to-trust application under the IRA. The SOI adopted detailed regulations that the BIA must follow when processing a fee-to-trust application. (25 C.F.R. Part 151.) And the regulations provide an opportunity for public participation in the process as "interested parties." 25 C.F.R. § 151.12.) This is the process that was initiated by the BIA in 2003 and was the focus of the

initial EIS. The district court's statement that the JIV "abandoned" its fee-to-trust application is not correct. (ER 11.) The JIV's application is still pending and has not been withdrawn. (ER 106.). The JIV is a half-blood Indian organization created in 1981; it was not a federally recognized or under federal jurisdiction in 1934. Congress has never proclaimed the 1978 donated land to be a reservation.

2. The Indian Gaming Regulatory Act.

Congress passed the IGRA in 1988 (25 U.S.C. §§ 2701 et. seq.). Congress enacted IGRA to, among other things. "provide a statutory basis for the operation of gaming by Indian tribes" 25 U.S.C. § 2702(1).

IGRA divides gaming into three classes. 25 U.S.C. § 2703(6)-(8).Class III gaming involves "high-stakes games usually associated with Nevada-style gambling," including slot machines and banked card games. *In Re Indian Gaming Related Cases*, 331 F.3d 1094, 1104-1105 (9th Cir. 2003). A new Las Vegas style Class III gaming casino can have major adverse environmental impacts - especially when constructed in a rural area. *Match-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012)**.**

Class III gaming can be conducted on "Indian lands" only if it complies with a valid compact by a federally recognized tribe and the State. 25 U.S.C. § 2710(d)(1)(C). A Tribal-State Compact approved by the Secretary of Interior

under IGRA is enforceable as federal law. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); see also *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997). As discussed below, the mandate of Section 10.8.3 of the JIV-California Compact regarding environmental review should be enforced here.

Congress, in IGRA, specifically identified which NIGC actions constitute reviewable "final agency action" under the APA. 25 U.S.C. § 2714. These NIGC final agency actions include: making Indian lands decisions (25 U.S.C. §2703(4); 25 C.F.R. §599.1), decisions gaming ordinances (§ 2710) and gaming management contracts (§ 2711). (The NIGC posts its Indian lands opinions at: www.nigc.gov/Reading_Room/Indian_Land_Opinions.aspx)

3. The National Environmental Policy Act

The decisions made by the BIA under the IRA and the NIGC under the IGRA are subject to NEPA review. 42 U.S.C. §§ 4321 *et seq.* NEPA declares a broad national commitment to protecting environmental quality. 42 U.S.C. § 4331. To insure that this commitment is infused into the federal decision making process, NEPA includes important "action forcing" procedures such as the preparation of an EIS by every federal agency contemplating a major action, before the action is taken. An EIS "ensures that the agency, in reaching its decision will have available, and will carefully consider, detailed information concerning significant

environmental impacts; it also guarantees that the relevant information will be available to the larger audience that may also play a role in both the decision making process and the implementation of that decision." An EIS gives the public assurance that the agency "has indeed considered environmental consequences in its decision making process" and has taken a "hard look" at the environmental consequences of its proposed action. *Robertson v. Methow Valley Citizens Council et al.* 490 U.S. 332, 348-350 (1989).

Agencies and officials of the federal government have the primary obligation and duty to comply with NEPA's EIS procedures. *Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1108 (9th Cir. 2002). In this case, the BIA and NIGC have, on at least three occasions, acknowledged that an EIS is required for the JIV fee-to-trust casino proposal and the related Indian lands determination, gaming ordinance and management contract. (ER 138-147.) They now have a ministerial duty to carry through on that commitment consistent with the mandates of the Council on Environmental Quality's (CEQ) regulations.

The CEQ regulations require a federal agency to commence preparation of an EIS as close as possible to the time that the agency is presented with a proposal so it can be completed in time for the analysis and final statement to be included in any recommendation or report on the proposal, before the proposed action is taken. 40 CFR § 1502.5. The EIS "shall be prepared early enough so that it can serve

practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." 40 CFR § 1502.5.

Federal agencies are required to "make diligent efforts to involve the public in preparing and implementing their NEPA procedures" including public hearing and meetings and a reasonable opportunity for public comment. 40 CFR § 1506.6. Furthermore, until the EIS is finalized, no action concerning the proposal shall be taken by the federal agency, or by the non-federal applicant which would "have an adverse environmental impact; or limit the choice of reasonable alternatives." 40 CFR § 1506.1(a) & (b). If necessary, the federal agency is required to notify the non-federal applicant that the agency "will take appropriate action to insure that the objectives and procedures of NEPA are achieved." 40 CFR § 1506.1(b).

B. Plaintiffs-Appellants are entitled to a writ of mandate directing the BIA and NIGC to comply with NEPA and prepare and circulate the SEIS before construction continues on the JIV/Penn National casino project.

The Administrative Procedure Act (APA) provides that a federal court has jurisdiction to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). *North County Community Alliance, Inc. v. Salazar et al.,* 573 F.3d 738, 744 (9th Cir. 2009). The BIA's and NIGC's obligations to comply with NEPA and prepare and circulate the SEIS at the earliest possible stage

in their decision-making processes are clear, mandatory and ministerial. They should be compelled to prepare and circulate the SEIS and allow for public input.

Plaintiffs' NEPA claim in this case is clear, certain and unambiguous. The BIA and NIGC informed that public that they will prepare an SEIS for the JIV/Penn National casino project and identified the impacts that will be studied in the draft SEIS. (ER 145-147.) The BIA and NIGC now have a ministerial duty to circulate the SEIS in a timely fashion to ensure that the adverse impacts of the casino are studied, and potentially mitigated, before the casino is constructed.

Furthermore, JAC has no other adequate remedy. Without a writ of mandate and injunction from this Court, the BIA and NIGC will continue to delay the NEPA process while the casino is constructed at a rapid pace. Comments from the public will become irrelevant and viable alternatives and potential mitigation will be precluded. This would be directly contrary to the purpose and mandates of NEPA.

C. Plaintiffs are entitled to a preliminary injunction against the Defendants enjoining them from constructing the JIV/Penn National casino until there is full compliance with NEPA

First, JAC is likely to succeed on the merits of their NEPA claim that the draft SEIS should be finalized and circulated before the continued construction of the casino proceeds further limiting the choice of reasonable alternatives and mitigation measures. 40 CFR § 1506.1(a) & (b). An EIS "shall be prepared early

enough so that it can serve practically as an important contribution to the decision making process and **will not be used to rationalize or justify decisions already made.**" (40 CFR § 1502.5; emphasis added.) Here, the SEIS should be completed before casino construction continues lest it be used later to justify an already constructed casino project. The Defendants should be enjoined from continuing to construct, the Jamul casino at least until the SEIS is circulated and approved.

Second, JAC will suffer irreparable harm if the casino is constructed without being studied in the promised SEIS and without meaningful public comment. An EIS, including the comments and agency responses, is essential to assure the public that the agency has considered environmental concerns in its decision making process. *Robertson v. Methow Valley Citizens Council supra.* 490 U.S. at 349. In fact, the Supreme Court concluded that the right to public comment is the most significant aspect of the EIS process. *Id* JAC has an irreplaceable due process right to provide meaningful comment, and receive the BIA's and NIGC's responses, before the casino is constructed and mitigation options are precluded .

Third, the balance of equities tips decisively in Plaintiff s favor. NEPA requires that environmental factors be given maximum consideration before federal agencies approve a major federal action. It has been over two years since BIA and NIGC announced that they were going to prepare an SEIS. Any potential adverse impacts or additional delay to the casino construction project are a result of the

Defendants' delay of the SEIS. The equities of issuing an injunction while the draft SEIS is finalized and circulated are in favor of the Plaintiffs and the public.

Finally, a preliminary injunction enjoining the construction of the JIV/Penn National casino until the NEPA process is complete is obviously in the public interest. "The public interest inquiry primarily addresses impact on non-parties rather than parties." *Bernhardt v. L.A. Count,* 339F.3d 920, 931 (9th Cir. 2003). NEPA requires that an agency prepare a supplemental EIS if the agency makes substantial changes in the proposed action or if there are new circumstances relevant to the environmental issues. 40 CFR § 1502.9. Here the BIA and NIGC decided to prepare an SEIS for both reasons. Consequently, it is in the public interest for them to complete the SEIS process, and allow for public input, before the casino is constructed. See *Marsh v. Oregon NRDC,* 490 U.S. 360 (1989).

D. The district court applied a clearly erroneous legal standard when it held that the BIA and NIGC could circulate the SEIS and comply with NEPA after JIV/Penn National casino is constructed.

It is a fundamental tenet of NEPA law that the filing of an EIS should precede, not follow, a federal action. It should be prepared and circulated early "so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made." *Save the Yaak Committee v. Block,* 840 F. 2d 714, 718 (9th Cir. 1988). "The purpose of an

EIS is to apprise the decision-makers of the disruptive environmental effects that may flow form their decisions at a time when they retain the maximum range of options." *Pit River Tribe v. U.S. Forest Service,* 469 F. 3d 768, 785 (9th Cir. 2006). "A post hoc examination of data to support a predetermined conclusion is not permissible under NEPA because [t]his would frustrate NEPA's fundamental purpose which is to ensure that federal agencies take a hard look at the environmental consequences of their actions early enough so it ca n serve as an important contribution to the decision making process." *Sierra Clu*b *v. Bosworth,* 510 F.3d 1016, 1026 (9th Cir. 2007).

The district court in this case took the opposite approach. Instead of requiring the circulation of the SEIS for the casino at the earliest possible stage of the decision-making process, the district court would allow the BIA and NIGC to prepare the SEIS at the last possible moment. Specifically, instead of early review, "the [district] court finds that the NIGC will undertake a major federal action for purposes of NEPA if it approves the Tribe' proposed management contract." (ER 10-11.) And even then, according to the district court the BIA and NIGC may not have to circulate the SEIS. (Id.) Incredibly, the district court concludes that until the NIGC approves the contract and JIV begins operating the casino "any adverse environmental impacts [the JIV's casino] operations remains speculative." (ER 12.)

The district court's conclusion that the SEIS need not be circulated, if at all, until after the casino is completed and open for operations is "exactly backwards." *National Parks Conservation Association v, Babbitt,* 241 F.3d *supra* at 733. It is clearly erroneous and an abuse of discretion. It should be rejected.

E. The district court's conclusion that the BIA and NIGC need not comply with NEPA before approving the gaming ordinance and Indian lands decision is wrong as a matter of law.

It is undisputed that JIV gaming ordinance was approved by the NIGC on July 1, 2013. (ER 71-79.) And it is undeniable that the approval of the gaming ordinance was a major federal action and a "final agency action" subject to judicial review. 25 U.S.C. §§ 2710 and 2714. Furthermore, the approval of a site-specific gaming ordinance, as we have here, is subject to NEPA compliance and review. *North County Community Alliance v. Salazar,* 573 F.3d 738 (9th Cir. 2009).

Here, the gaming ordinance was a site specific ordinance. (ER 79.) It was submitted to the NIGC, as Exhibit B to the management contract, in April 2013. (ER 58.) Concurrently, the NIGC issued its erroneous determination that the land is a reservation and Indian lands eligible for gaming under IGRA. (ER 144-147 & 158-159.) The SEIS should have been completed before the Indian lands determination was made and the gaming ordinance was approved.

The district court concluded that the "Ninth Circuit appears to have dismissed this argument summarily in [*North*] *Cnty Cmty. Alliance,Inc. v. Salazar."* (ER 13.) This conclusion is incorrect and is based on a misunderstanding of the factual distinctions between that case and this case. The plaintiffs in the *North County Community Alliance* claimed that the approval of a gaming ordinance required the NIGC to make an Indian lands determination and that NIGC's **"failure to make an Indian lands determination constituted a 'major federal action' . . under NEPA."** *North County Community Alliance v. Salazar*, 573 F.3d at 749.

The factual situation here is entirely different. Here, JAC argues that the NIGC's Indian land determination announced in the April 2013 notice and its related approval of a site specific gaming ordinance are both "major federal actions" requiring prior NEPA review and the completion of the SEIS. In fact, in the *North County Community Alliance* case, the NIGC conceded that "when a site-specific ordinance is presented for approval it [NIGC] has an obligation to make an Indian lands determination for the specifically identified site or sites." *North County Community Alliance v. Salazar*, 573 F.3d at 746. That is exactly what happened here. JIV submitted a site-specific gaming ordinance for their illegally claimed "reservation" to the NIGC on April 3, 2013 and less than a week later NIGC made the Indian lands determination that the newly proclaimed

"reservation" was Indian lands eligible for gaming without any attempt to comply with NEPA. (ER 58-59.)

This Court also noted that the legal situation changed in 2008 when the NIGC adopted new regulations that require a tribe to submit Indian lands information when submitting a propose gaming ordinance for approval. *North County Community Alliance v. Salazar*, 573 F.3d at 747-748; 25 C.F.R. §522.2(i) and §559. Unlike the *North County Community Alliance* case, this case is subject to the new regulations.

F. The district court's conclusion that the BIA does not own or control the subject property, and therefore need not comply with NEPA, is incorrect as a matter of fact and law; it is clearly erroneous.

The BIA is the Lead Agency for NEPA purposes with respect to the 2003 EIS and the 2013 SEIS. The US owns and the BIA manages the subject property. And the federal action studied in the 2003 EIS, to be updated in the 2013 SEIS, is the proposed fee-to-trust transfer of the land in trust for the JIV for a casino. The SEIS should have been completed before casino construction began.

The district court does not discuss the BIA's responsibility under IRA in the fee-to-trust process or the BIA's NEPA obligations with respect to the construction of new casino. Instead, the district court concludes that an injunction against the BIA would not be enforceable because the BIA has no control over the property

and would not have the power to stop construction. (ER 17.) This conclusion is factually incorrect. The BIA has control over the fee-to-trust application under IRA and the property itself is owned by the U.S. not the JIV. (ER 234-236.)

The district court incorrectly characterizes the casino construction project as a "private construction project on the Tribe's reservation." (ER 17.) The district court concludes that NEPA does not apply because neither the BIA nor the NIGC nor "any federal agency" has review authority over the casino construction project. (ER 17.) The district court's finding is simply wrong and is a major mistake of fact that undermines its entire analysis of the BIA's NEPA obligation to study the casino construction project in the SEIS. Indeed, the reconfiguration of the casino is the reason why the BIA and NIGC notified the public that a substantial SEIS, updating the casino caused impacts, would be prepared. (ER 147.) The district court's conclusion is wrong as a matter of law and fact. It should be reversed.

G. The district court ignored Section 10.8.3 of the 1999 Compact which prohibits the continued construction of the JIV casino after 2005 and until the Compact environmental review provisions are amended.

Defendants claimed that they complied with environmental provisions of their 1999 Compact. (ER 109-110.) But they ignored Section 10.8.3 which prohibits the construction of a casino after 2005 unless it is amended. Without such an amendment, the JIV is required to "immediately cease construction" of the

casino. (ER 89.).The district court should have enjoined continued casino construction of the casino as a violation of the Compact and federal law.

The district court states that, because Section 10.8.3 was raised in the reply, it need not be considered by the Court. (ER 12.) This conclusion is incorrect. The Defendants put their environmental compliance with the 1999 Compact in issue in their opposition. It was appropriate for Plaintiffs to respond in the reply.[4]

H. The district court's ambiguous remarks regarding Plaintiffs standing and Defendants' immunity are incorrect; Plaintiffs have standing to pursue, and the Defendants do not have immunity from, this lawsuit.

In the opening paragraph on page 13 of the Order, the district court states that the Plaintiffs do not have standing. (ER 14.) But in the last sentence of that paragraph the district court states that Plaintiffs do have standing at this early stage of the litigation. Despite this confusion, any questions about Plaintiffs' standing in this case were resolved by the 2012 Supreme Court decision in *Match-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012)**.**

The district court also seems to conclude that it lacked jurisdiction to grant injunctive relief against the BIA, NIGC and JIV council member Defendants because they have immunity from suit. (ER 15.) This is not correct.

[4] Furthermore the enforcement of Section 10.8.3 is pled as a separate cause of action in JAC's Second Amended and Supplemental Complaint. (ER 211-212.)

First, the BIA and NIGC waived their immunity under the Administrative Procedures Act (5 U.S.C. §§ 701 et. seq.). "As a general rule, the federal government is the only proper defendant in action to compel compliance with NEPA." Federal agencies have the obligation and ministerial duty to comply with NEPA. *Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1108 (9th Cir. 2002).

Second, with respect to the JIV council Defendants, the Supreme Court has held that a tribe's sovereign immunity does not preclude a suit against tribal officials or employees seeking injunctive relief under the *Ex Parte Young* doctrine. *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024 (2014).

Also, the district court ignored the fact that JIV Defendants Tellow, Lotta, Mesa and Chamberlain did not oppose JAC's motion for writ of mandate and preliminary injunction. They are not making an immunity claim and have waived the right to do so with respect to JAC'S motion and this appeal.

Finally, the district court correctly held that the private Defendants did not have immunity from suit. These corporations are responsible for constructing the casino and, thus, an injunction against them is the appropriate and best remedy. This is especially true since they have indicated that, if the casino construction is enjoined, they will be indemnified or reimbursed, by the JIV. (ER 131-135.)

/ / /

CONCLUSION

For the reasons outlined above, Plaintiffs-Appellants respectfully request that the district court's Order be reversed and vacated and that construction of the JIV/Penn National casino should be enjoined until: (1) the SEIS has been publically circulated and, if appropriate, finalized and approved by the BIA and NIGC for their respective projects, and (2) Section 10.8.3 of the JIV's Compact has been amended as mandated by the Compact and federal law and that Defendants comply with the amended version of Section 10.8.3 of the Compact.

Dated: June 16, 2015

Respectfully submitted,

/s/ Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Plaintiffs-Appellants

STATEMENT OF RELATED CASES

To the best of our knowledge, there are no known related cases pending in this Court as defined in Circuit Rule 28-2.6.

Dated: June 16, 2015.

Respectfully submitted,

/s/ Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 16, 2015.

I certify that Counsel for all the parties in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 16, 2015.

Respectfully submitted,

/s/ Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Plaintiffs-Appellants

ADDENDUM

Indian Reorganization Act

25 U.S.C. § 465

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.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 479

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The

words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.
The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

25 C.F.R. §151.3 Land acquisition policy.

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

(2) When the tribe already owns an interest in the land; or

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or

(2) When the land is already in trust or restricted status.

Indian Gaming Regulatory Act

25 U.S.C. §2703(4) - Definitions

(4) The term **"Indian lands"** means -

(A) all lands within the limits of any Indian reservation; and

(B) any 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. § 2710 – Tribal gaming ordinances

(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), 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).

(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 12(e)(1)(D) [25 USCS § 2711(e)(1)(D)].

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.

25 U.S.C. § 2711 – Management Contracts

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 11(b)(1) [25 USCS § 2710(b)(1)], but, before approving such contract, the Chairman shall require and obtain the following information:

(A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this Act, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval. The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least--

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues.

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee

requested by the Indian tribe.

(d) Period for approval; extension. By no later than the date that is 180 days after the date on which a management contract is submitted to the Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval. The Chairman shall not approve any contract if the Chairman determines that--

(1) any person listed pursuant to subsection (a)(1)(A) of this section--

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this Act or has refused to respond to questions propounded pursuant to subsection (a)(2); or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this Act; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding. The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land. No management contract for the operation and management of a gaming activity regulated by this Act shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority. The authority of the Secretary under section 2103 of the Revised Statutes (25 U.S.C. 81), relating to management contracts regulated pursuant to this Act, is hereby transferred to the Commission.

(i) Investigation fee. The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

25 U.S.C. § 2714 – Judicial Review

Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of title 5.

§ 522.2 Submission requirements.

A tribe shall submit to the Chairman all of the following information with a request for approval of a class II or class III ordinance or resolution:

(i) A tribe shall provide Indian lands or environmental and public health and safety documentation that the Chairman may in his or her discretion request as needed.

25 C.F.R. § 559.1 - Purpose

(a) The purpose of this part is to ensure that each place, facility, or location where class II or III gaming will occur is located on Indian lands eligible for gaming and obtain an attestation certifying that the construction and maintenance of the gaming facility, and the operation of that gaming, is conducted in a manner that adequately protects the environment and the public health and safety, pursuant to the Indian Gaming Regulatory Act.
(b) Each gaming place, facility, or location conducting class II or III gaming pursuant to the Indian Gaming Regulatory Act or on which a tribe intends to conduct class II or III gaming pursuant to the Indian Gaming Regulatory Act is subject to the requirements of this part.

National Environmental Policy Act

42 U.S.C. 4321

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.

42 U.S.C. 4331

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

40 CFR § 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision as provided in§ 1505.2 (except as provided in paragraph (c) of this section), no action concerning the proposal shall be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to insure that the objectives and procedures of NEPA are achieved.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

(d) This section does not preclude development by applicants of plans or designs or performance of other work necessary to support an application for Federal, State or local permits or assistance. Nothing in this section shall preclude Rural Electrification Administration approval of minimal expenditures not affecting the environment (e.g. long lead time equipment and purchase options) made by non-governmental entities seeking loan guarantees from the Administration.

40 CFR §1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures.

(b) Provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.

(1) In all cases the agency shall mail notice to those who have requested it on an individual action.

(2) In the case of an action with effects of national concern notice shall include publication in the *Federal Register* and notice by mail to national organizations reasonably expected to be interested in the matter and may include listing in the 102 Monitor, An agency engaged in rulemaking may provide notice by mail to national organizations who have requested that notice regularly be provided. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern the notice may include:

(i) Notice to State and area wide clearinghouses pursuant to OMB Circular A-95 (Revised).

(ii) Notice to Indian tribes when effects may occur on reservations.

(iii) Following the affected State's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(c) Hold or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency. Criteria shall include whether there is:

(1) Substantial environmental controversy concerning the proposed action or substantial interest in holding the hearing.

(2) A request for a hearing by another agency with jurisdiction over the action supported by reasons why a hearing will be helpful. If a draft environmental impact statement is to be considered at a public hearing, the agency should make the statement available to the public at least 15 days in advance (unless the purpose of the hearing is to provide information for the draft environmental impact statement).

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Materials to be made

available to the public shall be provided to the public without charge to the extent practicable, or at a fee which is not more than the actual costs of reproducing copies required to be sent to other Federal agencies, including the Council.

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the *Federal Register* each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under§1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day

period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see§1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.