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' REPLY BRIEF ON PRELIMINARY INJUNCTION APPEAL

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INTRODUCTION

Defendants' answering briefs reinforce the need for this Court to reverse and vacate the district court's May 15, 2015 Order denying Plaintiffs' motion for a writ of mandate to compel compliance with NEPA and to enjoin the continued casino construction in the meantime. Defendants now agree that an updated Supplemental Environmental Impact Statement (SEIS) must be prepared and circulated for at least one casino related federal approval. And the parties agree that the SEIS shall include an analysis of: "land resources, water resources, air quality, biological resources, cultural and paleontological resources, socioeconomics, transportation, land use, agriculture, public services, noise, hazardous materials and visual resources." (Excerpt of the Record (ER) 0009.) The district court held that these factors are "relevant to the construction of the casino." (ER 0017.)

The disagreement here is not about whether to prepare an SEIS or what it should study, but when the SEIS should be circulated for public comment. Specifically, the issue is whether the BIA and NIGC, after announcing in April 2013 that they will prepare the SEIS, can continue to ignore their mandatory duty under NEPA to circulate the SEIS at the earliest possible stage in the decision-making process. The district court's decision that they can delay the SEIS until the last possible moment in the process - after the casino is fully constructed and opened - is erroneous as a matter of law. It should be reversed and vacated.

The district court's decision that the SEIS need not be circulated until after the casino is constructed is "exactly backwards." *Nat. Park Cons. Assoc. v. Babbitt,* 241 F.3d 722, 732-733 (9th Cir. 2001). The SEIS must be circulated and "the 'hard look' must be taken before, not after, the environmentally threatening actions have been put into place." *(Id; emphasis added.)* "NEPA ensures that the agency will not act on incomplete information, only to regret its decision after it is too late to correct." *Marsh v. Oregon NRDC,* 490 U.S. 360, 370-374 (1989) (*citing Robertson v. Methow Valley Citizens Council,* 490 U.S. 332 (1989).)

Casino construction is ongoing but not near completion. The projected opening is not until late next year. There is still time to study the impacts of the casino and consider mitigation in the SEIS before proceeding further. Early circulation of the SEIS is required by NEPA and it has been "unlawfully withheld" and "unreasonably delayed" by the BIA and NIGC. 5 U.S.C. §706. *Marsh v. Oregon NRDC,* 490 U.S. at 370-374 and *Norton v. Southern Utah Wilderness Alliance,* 542 U.S. 55, 62-64 (2004). The BIA and NIGC should be mandated to complete the SEIS process and the other Defendants should be enjoined from constructing the casino at least until that process is complete.[1]

[1] Also, as is outlined below, casino construction should be enjoined until the environmental review provisions (Section 10.8.3) of the JIV Compact are amended and the Defendants comply with those updated and amended provisions.

ARGUMENT

A. Plaintiffs' lawsuit is a direct challenge to the NIGC's and BIA's four interrelated approvals for the JIV casino; it is not a collateral attack.

Defendants claim that Plaintiffs' lawsuit is a collateral attack on the JIV's recognition and reservation. (DE 26 at 48-49; DE at 49-50.) They are wrong. This case is a direct challenge to the NIGC's Indian lands determination (ILD) that the land is a "reservation" eligible for gaming under IGRA. And it is a challenge to the NIGC's approvals of the related gaming ordinance (GO) and gaming management contract (GMC). Finally, it is a challenge to the BIA's decision to allow the casino to be constructed on the subject property before it is taken into trust. (ER 0183-0213.) Plaintiffs also allege that the BIA and NIGC failed to comply with NEPA with respect to any of these approvals. (ER 00207-0211.)

The Defendants' reliance on this Court's recent decision in *Big Lagoon Rancheria v. State of California,* (9th Cir. Nos. 10-17803 and 10-17878; June 4, 2014) is misplaced. In that case the BIA took 11 acres into trust for Big Lagoon in 1994. In 2009, Big Lagoon sued California to negotiate a gaming Compact. California defended by arguing that the BIA lacked the authority to take land into trust for Big Lagoon in 1994 because it was not a federally recognized tribe in 1934 when the Indian Reorganization Act (IRA) was enacted. 25 U.S.C. §465.

This Court held that California's defense to Big Lagoon's lawsuit was an improper collateral attack on the BIA's 1994 decision to take the land into trust.

But the Court also confirmed that if there had been a timely and direct APA challenge by California the outcome would have been different. If the tribe was not federally recognized in 1934, "the BIA lacks authority to take land into trust on its behalf." *Id at* 12; *Carcieri v. Salazar,* 555 U.S. 379, 385 (2009).

Plaintiffs' lawsuit is not a collateral attack. It is a direct challenge to BIA's authority to take lands into trust for the JIV which did not exist before 1981 and was not a federally recognized tribe in 1934. Based on *Carcieri,* as a matter of fact and law, the property could not be taken into trust for the JIV under the IRA of 1934. It is also a direct challenge to the NIGC's approval of the ILD, GO, and GMC for land that is not eligible for Indian gaming under the Indian Gaming and Regulatory Act (IGRA). 25 U.S.C. §§ 2700 et seq.

Plaintiffs' Second Amended Supplemental Complaint (SASC) includes six causes of action (ER 0183-0213.): (1) a challenge to NIGC's approval of the ILD, GO, and GMC under IGRA; (2) a challenge to the BIA's conclusion that JIV was a recognized tribe in 1934 eligible for a fee-to-trust transfer under the IRA; (3) a constitutional challenge to the federal attempt exempt the land from State law; (4) a public nuisance claim; (5) a NEPA claim; and (6) a Compact violation claim.

Plaintiffs named the BIA and NIGC as Defendants. (ER 0185-0186.) Plaintiffs also named several BIA and NIGC employees in their official and personal capacities for facilitating the construction of an illegal casino on federally

owned land.[2] (Id.) Plaintiffs also named five JIV council members in their personal capacities for facilitating the construction of the illegal casino.[3] (ER 0186-0187.) Finally, Plaintiffs named the three private corporations responsible for building the casino as Defendants.[4] (ER 0187.) (JIV's involvement in the case was also noted.)[5]

All Defendants were served with the SASC and summons prior to the end of 2014. And they all had until mid-February 2015 to file a response to the SASC. But none of the Defendants responded to the SASC. Nor have they denied the factual allegations in the SASC. Thus, those uncontested factual allegations are now deemed admitted. Fed.R.Civ.P. § 8(b)(6).[6]

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[2] Plaintiffs continue to list Tracie Stevens as the lead defendant in the caption for this case because she remains a Defendant in her personal capacity.

[3] These Defendants are being sued in their individual capacities. *Michigan v. Bay Mills Indian Community,* 134 S.Ct 2024, 2035 (2014). Defendants, Chamberlain, Mesa, Tellow, and Lotta, did not file an answering brief in this appeal.

[4] This group calls themselves the "Tribally-Related Defendants." (DE 30.) That is a misnomer. These Defendants are private corporations who the district court determined are not entitled to tribal immunity. (ER 0015.)

[5] "The JIV has voluntarily participated in this case as though it was a party." (ER 0187.) The district court allowed JIV's participation and did not hold that JIV was an indispensable party. See *Kootenani Tribe v. Veneman,* 313 F.3d 1094, 1108 (9th Cir. 2002) (federal government is the only proper defendant in a NEPA case) and *Manygoats v. Kleppe,* 558 F.2d 556, 559 (10th Cir. 1977) (tribe not indispensable in NEPA action involving Indian lands).

[6] Some Defendants claim they "were not timely served with summons and complaint" and, therefore, need not respond. (DE No. 30 at 25 n5.) Even if true, and it is not, those Defendants cannot ignore a summons and unilaterally declare

"Defendants' failure to deny allegations of a complaint constitutes a judicial admission of the matters alleged. Fed.R.Civ.P. 8[(g)(6)]. No additional evidence is required to prove the matters so admitted." *Keel v. Dovey* 459 F.Supp.2d 946, 959 n3 (CD Cal. 2006) *citing Lockwood v. Wolf Corp.,* 629 F.2d 603, 611 (9th Cir. 1980.) "By failing to submit an answer or other pleading denying the factual allegations of Plaintiffs' complaint, Defendant admitted those allegations, thus placing no further burden upon Plaintiff to prove its case factually. Defendant certainly would have been entitled to file an answer . . . but chose not to." *Burlington Northern Railroad Company v. Huddleston,* 94 F.3d 1413, 141 (10th Cir. 1996.) It is appropriate for the court to decide the case as a matter of law on admitted factual allegations and the record presented to the district court. *Id.*[7]

B. Defendants have a mandatory and ministerial duty to comply with NEPA and to circulate the SEIS before casino construction continues.

NEPA requires that an EIS be prepared for "proposals" for "major federal actions significantly affect the quality of the human environment." 42 U.S.C.

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that they are not parties. Instead, if they objected to service, they should have brought a timely motion to dismiss based on "insufficient process" or "insufficient service of process." Fed.R.Civ.P. 12 (b)(4) & (5). They did not.

[7] Defendants did not provide separate excerpts of the record. Nor did Federal Defendants provide an administrative record to support any of their four approvals. Instead they reference documents not in evidence in this case. Review "should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

§4332(2)(C). A "proposal" exists when an agency "has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal." 40 C.F.R. §1508.23. The EIS is intended to be an "action-forcing" device to insure that environmental factors are considered in that decision-making process. *Robertson v. Methow Valley Citizens Council,* 490 U.S. at 349.

Once an agency has decided to prepare an EIS, as the BIA and NIGC have done here, they have a mandatory, non-discretionary obligation complete and circulate the EIS as early as possible in the decision-making process. *Andrus v. Sierra Club,* 442 U.S. 347, 351 (1979); *California v. Block,* 690 F.2d 753, 761 (9th Cir. 1982.) "The rationale behind this rule is that inflexibility may occur if delay in preparing the EIS is allowed: 'After major investment of both time and money, it is likely that more environmental harm will be tolerated.'" *Confederated Tribes v. FERC,* 746 F.2d 466, 471-472 (9th Cir. 1984) (citation omitted).

Also BIA and NIGC decisions involving Indian land are not exempt from NEPA. "NEPA is concerned with national environmental interests. Tribal interests may not coincide with national interests. [N]othing in NEPA . . . excepts Indian lands from national environmental policy." *Manygoats v. Kleppe,* 558 F.2d 556, 559 (10th Cir. 1977.) Furthermore, the BIA and NIGC have represented to the public that they will comply with NEPA and circulate the SEIS. They are now precluded from claiming that they have no duty to comply with NEPA. *Salmon*

River Concerned Citizens v. Robertson, 32 F.3d 1346, 1357-1358 (9th Cir. 1994). The BIA and NIGC are not allowed shirk their NEPA obligations, or sacrifice national environmental interests protected by NEPA, for alleged tribal interests.

Here BIA and NIGC control of the JIV casino project is comprehensive. There are four federal approvals necessary for the casino project, including: (1) the ILD; (2) the GO; (3) the GMC; and (4) construction of the casino on non-trust land. Each federal action required the completion and circulation of the SEIS before decisions were made. But that did not happen. Instead the BIA and NIGC are trying to avoid their NEPA mandates by claiming that the only casino related federal approval is for the GMC. And, although the GMC has been "deemed" approved, and it and the other prior approvals are being implemented, the BIA and NIGC claim that the SEIS can be delayed until after GMC is signed by the NIGC.

The NIGC and BIA also argue that only the GMC was included in the notices announcing the SEIS. (ER 0139-0147.) That is not correct. All four proposed "major federal actions" for the JIV casino were in the notices. And even if they were not, that would not limit the BIA's and NIGC's NEPA obligations. A major federal proposal "may exist in fact as well as by agency declaration that one

exists." 40 C.F.R. §1508.23. The four BIA and NIGC proposals were noticed and existed in fact and include:[8]

1. NIGC's ILD that the land is a "reservation" eligible for gaming.

The statement in the 2013 notice that triggered this lawsuit was the unsubstantiated announcement by the BIA and NIGC that the JIV casino is "to be located on the Tribe's Reservation, which qualifies as 'Indian Lands' pursuant to 25 U.S.C. 2703." (ER 0145.) This is the first time that the NIGC called the subject property a "reservation" eligible for gaming under IGRA. This ILD that the property is a "reservation" was made by the NIGC and BIA with no prior environmental review, public input or supporting administrative record. The ILD was a necessary pre-requisite to the construction of the casino for three reasons.

First, IGRA allows Indian gaming only on "Indian lands." 25 U.S.C. §2710. And "Indian lands" are limited to "reservations" or "land held in trust over which the Indian tribe exercises governmental power." 25 U.S.C. §2703(4). Casinos constructed on non-Indian lands are public nuisances which should be enjoined as a matter of law. (See ER 0206-0207.) Cal. Penal Code §§11225 & 11226; *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024, 2035 (2014).

[8] Defendants also claim that there was a JIV environmental evaluation (EE) for the casino project. (DE No. 30 at 59.) Even if the EE exists, it is not part of the record in this case. Also, an EE is not a substitute for the SEIS required by NEPA. *Idaho Sporting Congress, Inc. v. Alexander,* 222 F.3d 562, 567 (9th Cir. 2000).

Second, before approving the GO, the NIGC had to make an ILD with respect to the proposed gaming site. 25 U.S.C. § 2710; *North County Community Alliance, Inc. v. Salazar,* 573 F.3d 738, 746, 749 (9th Cir. 2009) ("The NIGC states . . . that when a site-specific ordinance is presented for approval it has an obligation to make an Indian lands determination for the specifically identified site or sites.")

And, third before approving the GMC, the NIGC had to make an ILD of the proposed gaming site to insure that the management activity will occur on Indian lands eligible for gaming under IGRA. *Id*. 25 U.S.C. § 2711. See also *Citizens Against Casino Gambling v. Kempthorne,* 471 F. Supp. 2d 295 (W.D.N.Y. 2007.)

The NIGC's published ILD that the land is a "reservation" eligible for gaming is a "final agency action" for APA purposes and a "major federal action" that required compliance with NEPA. The completion and circulation of the SEIS was required before the ILD was approved by the NIGC and before the GO and GMC were approved and before a casino could be constructed on the supposed "reservation." But that did not happen.

2. NIGC's approval of the site-specific gaming ordinance.

The GO was submitted to the NIGC, as Exhibit B to the GMC, on April 3, 2013. (ER 0058; GMC Exhibits And Schedules.) Thus, the GO is a key part of the GMC and the casino proposal included in the 2013 notice to be studied in the SEIS. But, without the benefit of the SEIS, the GO was approved by NIGC on July

1, 2013. (ER 0072-0079.)[9] NIGC approval of the GO was a prerequisite to casino construction and gaming on the Indian lands. 25 U.S.C. §2710(d)(1)(A); *Tamiami Partners v. Miccosukee Tribe,* 63 F.3d 1030, 1034 (11th Cir. 1995).

The NIGC's approval of the GO is a "final agency action" for APA purposes. 25 U.S.C. §2714. And it is a "major federal action" for NEPA purposes. *Citizens Against Casino Gambling v. Kempthorne,*471 F.Supp. 2d 295 (W.D.N.Y. 2007) and *North County Community Alliance v. Salazar,* 573 F.3d 738, 749 (9th Cir. 2009). The SEIS should have been completed and circulated before the decision was made by the NIGC to approve the GO.[10]

3. BIA's review of JIV's proposed fee-to-trust casino transfer.

The 2013 notice announced the preparation of a SEIS to update the BIA's 2003 proposed EIS for a "Fee to Trust Transfer and Casino Project in San Diego County, California." – which was never finalized by the BIA. (ER 0139 and 0142.) Specifically, the BIA found that the re-configuration of the casino, together with the passage of time, required an updated SEIS on the fee-to-trust transfer to include an analysis of "land resources, water resources, air quality, biological resources,

[9] Defendant Stevens, as then NIGC Chairwoman, was required to publish her order of approval in the Federal Register but failed to do so. 25 U.S.C §2710(d)(2)(B).

[10] Defendants claim that Plaintiffs raised the GO issue for the first time in its reply. That is not correct. Plaintiffs challenged all of the proposed approvals in the SEIS notice. (See 0136-0182.) Also, in support their NEPA claim, Plaintiffs alleged: "Defendants' approval and implementation of the ILD, the gaming ordinance and management and development contracts violate (NEPA)." (ER 0208.)

cultural and paleontological resources, socio-economics transportation, land use, agriculture, public services, noise, hazardous materials, and visual resources" impacted by the reconfigured casino project. (ER 00147.) This updated analysis still has not been completed.

Although not mentioned in the 2013 notice, the fee-to-trust casino application referenced in the 2003 notice is still pending. There is nothing in the record to support the district court's claim that it has been withdrawn. In fact, it is essential to the reconfigured casino project because, as noticed in 2003 and 2013, some of the casino facilities are to be built on the proposed trust property.

The 2013 notice claims that the casino will be constructed on the newly announced "reservation" but "other uses such as wastewater treatment/disposal facilities, firefighting facilities, and structured parking [for the casino] were designed to be located on adjacent land north of the Reservation" which has not yet been taken into trust. (ER 0146.) Furthermore, according to the GMC, this "Adjacent Property" is to be managed by the private Defendants as part of the casino project. (ER 0059, 0069-0070.) And, when announcing the commencement of construction, Defendants states that the casino includes "state-of-the-art water reclamation treatment" facilities located on the adjacent properties. (ER 0152.)

These adjacent properties and casino facilities are also part of the pending fee-to-trust application first announced in the 2003 notice which states: "The

Jamul Indian Village proposes that 101 acres of land be taken into trust and that a casino, parking, hotel and other facilities supporting the casino be constructed on the existing Jamul Indian Village site and the 101-acre trust acquisition." (ER 0143.) Thus, a portion of the casino project is being constructed on land that is not part of the claimed "reservation." The 2013 notice relied on, and did not withdraw, the 2003 notice of the proposed fee-to-trust transfer. Casino construction should be enjoined until the BIA fee-to-trust process is complete and the BIA complies with NEPA as required by that process. 25 C.F.R Part 151

4. NIGC's approval of the gaming management contract.

Defendants and the district court agree that the SEIS must be prepared to study the GMC between JIV and Penn National for a gaming facility on the newly announced "reservation" and "Adjacent Properties." (ER 0010-011.) Thus the NIGC has already decided that the approval of the GMC is a "major federal action" which requires a SEIS under NEPA. Now that they exercised their discretion, the BIA and NIGC have a non-discretionary duty to circulate the SEIS at the earliest possible stage in the decision-making process. *National Parks Conservation Association v, Babbitt,* 241 F.3d 722, 733 (9th Cir. 2001).

Also the 270 day maximum statutory window for the NIGC to reject the GMC expired on January 4, 2014. 25 U.S.C. §2711(d). And, Defendants have been implementing the GMC ever since. Thus, the GMC was "deemed approved"

by statute over 18 months ago. The NIGC's claim that the GMC is still pending and has not been approved is a fiction designed to indefinitely delay their obligation to circulate the SEIS until they formally sign the GMC. This ploy to avoid complying with NEPA should be rejected.

C. Construction of the JIV casino should be enjoined pending compliance with NEPA and circulation of the SEIS by the BIA and NIGC.

1. Plaintiffs are likely to succeed on the merits.

This Circuit employs a sliding scale approach where an injunction should issue when there are "serious questions going to the merits" and when the balance of hardships fall sharply in Plaintiffs' favor, provided there is a likelihood of irreparable injury and the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1135 (9th Cir. 2011). "Serious questions" are those that are "substantial, difficult and doubtful, requiring a more thorough investigation." *Northwest Environmental Defense Center v. US Army Corps of Eng'rs,* 817 F.Supp. 2d 1290, 1302 (D. OR. 2011) (*citing Rep. of Philippines v. Marcos,* 862 F.2d 1355, 1362 (9th Cir. 1988)). There are serious questions going to the merits of this case that are intertwined with Plaintiffs' request for injunctive relief. And Plaintiffs are likely to succeed on the merits of those serious questions.

a. Defendants are required to circulate the SEIS before approving the ILD, GO, GMC and allowing casino construction to continue.

The district court's decision that the BIA and NIGC could circulate the SEIS

after the GMC is signed is clearly erroneous. An EIS should precede, not follow, a federal action. *Save the Yaak Com. 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 from 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 can 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 would allow the BIA and NIGC to wait and circulate the SEIS after the GMC is signed and the casino is completely constructed. 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 0010-0011.) Incredibly, the district court also concludes that until the NIGC signs the GMC and the casino is opened "any adverse environmental impacts [the JIV's casino] operations remains speculative." (ER 0012 at lines 13-14.) This after-the-fact approach is directly contrary to the mandates of NEPA which requires an analysis of such potential impacts of the project in advance. The

district court's conclusion that the harm is speculative is "beside the point." *Inst. of Cetacean Rsrh. v. Sea Shepard Cons. Soc.,* 725 F.3d 940, 946 (9th Cir. 2013).

The district court also erroneously concluded that an injunction to enforce NEPA 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 0017.) This conclusion is factually legally incorrect. The BIA initially announced the preparation of the EIS and SEIS and has complete control over the JIV fee-to-trust application under IRA (ER 0139-0143). And the property itself is owned by, and under the control of, 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" and neither the BIA, nor the NIGC, nor "any federal agency" has review authority over the casino construction project. (ER 0017.) The district court's finding is simply wrong and, given plenary role that the BIA and NIGC have over Indian gaming proposals, completely "implausible." *Id.* at 945. It is a major factual mistake that undermines the district court's entire analysis of the BIA's NEPA obligation to study the casino project in a SEIS before allowing it to be constructed on U.S. owned property.

b. Defendants do not have a "reservation" eligible for gaming.

Plaintiffs are likely to succeed in their challenge to the NIGC's ILD that the property donated to the United States in 1978 is not a reservation. Other than its unilateral declaration in 2013 that the land is a "reservation," neither the NIGC nor the BIA have put any evidence in the record that the land donated to the United States in 1978 for individual half-blood Jamul Indians is a reservation. There is no such evidence in existence because the 1978 donated land is not reservation. [11]

Furthermore, a recent decision by the Court confirms that, as a matter of law, the parcel donated to the United States in 1978 could not be a reservation. *David Laughing Horse Robinson v. Jewell,*(9th Cir. No. 12-17151; June 22, 2015.). That case involved an Indian group who identified themselves as a Tribe that "resided in and around Kern County, California since time immemorial." The "Tribe" also claimed that it owned a reservation that was created in 1853.

This Court disagreed and held that the property claimed by the Indian group, was not a reservation and that any potential reservation rights they may have had in

[11] The 2002 and 2003 notices do not mention a "reservation." (ER 0138-0144.) And Federal Defendants now seem to acknowledge that the 2013 notice was the first time the property was called a "reservation." (DE No. 26 at 17 & 56 n7.) They also reference 25 U.S.C. §467. But Section 467 did not authorize the BIA or NIGC to proclaim a "reservation" in the 2013 notice. Also, such a proclamation would be prohibited by the 1864 Four Reservations Act. (Act of Apr. 8, 1864, ch. 40, 48, 13 Stat. 39.) *Mattz v. Arnett,* 412 U.S. 481, 489 (1973).)

1853 were extinguished by the Four Reservations Act of 1864. (Act of Apr. 8, 1864, ch. 40, 48, 13 Stat. 39.) *Mattz v. Arnett,* 412 U.S. 481, 489 (1973) and *Shermoen v. United States,* 982 F.2d 1312, 1315 (9th Cir, 1992). The land claimed by the Tribe was not one of the four reservations allowed by the 1864 Act.

For the same reason, the NIGC's 2013 ILD that the subject parcel is a "reservation" is wrong as a matter of law and fact. The parcel was donated to the United States in 1978 for the benefit of individual half-blood Indians. It was not taken into trust for the JIV, a half-blood Indian group that was organized in 1981 (ER 0222-0232.) and did not exist in 1978. The 1978 donated land is not included in the 1864 Four Reservations Act. (ER 0189 and 0198-0200.)[12]

c. JIV was not a federally recognized tribe in 1934 and, therefore, is not entitled to the fee-to-trust transfer benefits of the IRA of 1934.

The IRA of 1934 authorized the Secretary of Interior to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. §465. "Indian" is defined to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. §479. In *Carcieri*, the Supreme Court held that "now" in Section 479 "refers solely to events contemporaneous with the Act's enactment" in 1934. *Carcieri v. Salazar,*

[12] Defendants reference *Rosales* litigation involving competing property claims. (DE No. 30 at 12-28.) The *Rosales* cases are completely irrelevant here. Plaintiffs were not parties to those lawsuits and do not claim an interest in the property.

55 U.S. at 385-389. Thus the Secretary's authority to take land into trust extends only to tribes that were federally recognized in 1934.

The JIV was not a federally recognized tribe in 1934. They did not even come into existence until 1981 when they organized as a half-blood Indian organization. (ER 0222-0232.) And, they chose not to seek federal recognition. (ER 0215-0222.) (See also ER 0190-0191 & 0200-0202.) The JIV is not entitled to a fee-to-trust transfer under the IRA of 1934 as a matter of fact and law.

Defendants claim the JIV "has been formally recognized as Tribe by the United States since at least 1982." (DE 30 at 26.) This contention, even if true, is not helpful to Defendants claim that they are entitled to a fee-to-trust transfer under the IRA of 1934. The Narragansett Tribe involved in the *Carcieri* was formally recognized in 1983. But, because they were not a recognized tribe in 1934, the Supreme Court held that they were not eligible for a fee-to-transfer under the IRA of 1934. *Carcieri v. Salazar,* 555 U.S. at 385-389. Likewise, if the JIV was recognized in 1982, that would not qualify them for the IRA fee-to-trust benefits.[13]

[13] The JIV 1981 decision not to seek federal recognition under Part 83 contradicts their reliance on the 1982 BIA list of Indian entities eligible to receive services. *U.S. v. Zepeda,* (9th Cir. Case No. 10-10131; July 7, 2015). Also the BIA list, first complied in 1978, is not the same as the list required by Congress in 1994 which limits administratively recognized tribes to Part 83 tribes and, unlike the BIA list, does not include half-blood organizations. Tribal List Act, 108 Stat. 4791 (1994).

2. The balance of equities tip in Plaintiffs' favor.

This circuit applies a traditional balance of harms analysis. *Lands Council v. McNair,* 537 F.3d 981, 1004 (9th Cir. 2008). Environmental injuries are often irreparable and "if such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987); *Northwest Env. Def. Ctr. v. US Army Corps of Eng'rs,* 817 F.Supp. 2d 1290, 1302 (D. Or. 2011). Potential environmental harm "outweighs economic concerns in cases where plaintiffs are likely to succeed on the merits." *Lands Council,* 537 F.3d at 1005. See also *Save Our Sonoran, Inc. v. Flowers,* 408 F.3d 1113, 1125 (9th Cir. 2004) (balance of hardships tip in favor of injunction in light of likelihood of environmental harm despite the fact that defendant would suffer financial harm).

Defendants claim that the Plaintiffs unduly delayed their motion for writ of mandate and preliminary injunction in the district court. This is not correct. Plaintiffs brought their motion on January 2, 2015 - two weeks after the Defendants announced the commencement of casino construction. (ER 0136-0182). Also, Plaintiffs in 2013 and 2014 initiated litigation that is still ongoing, in State court, challenging State agency approvals of the construction site preparation permits and approvals. (ER 0094-0099.) Furthermore, an earlier motion would not have been successful given the district court's decision (issued after over four

months) that Plaintiffs motion is actually premature because the SEIS is not yet due and the environmental harm is "speculative." (ER 0012.)[14]

3. Plaintiffs will suffer irreparable injury without injunctive relief.

Irreparable injuries are those injuries which cannot be adequately remedied by money damages or other legal remedies and the injuries are "permanent or at least of long duration." *Amco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 545 (1987). In essence, irreparable injuries are those that if they occur without an injunction would render a final judgment useless because of the harm already occurred. *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 932 (1975). Only injuries that are "likely" meet the requirements of a preliminary injunction. *Lands Council v. McNair,* 537 F.3d 981, 987 (9th Cir. 2008).To be "likely" an injury must not be speculative or remote; the potential for harm must be imminent. *Caribbean Marine Servs. Co. v. Baldrige,* 844 F.2d 668, 674 (9th Cir. 1988). Here the potential for harm is not only imminent, the harm is already occurring.

A final SEIS is essential to insure that the BIA and NIGC considered Plaintiffs' concerns. *Robertson v. Methow Valley CC,*490 U.S.at 349. Plaintiffs have an irreplaceable due process right to provide meaningful comment and suggest effective mitigation for the impact of the casino construction project. This is more

[14] The district court also mistakenly states that Plaintiffs violated the Standing Order. (ER 0019-0020.) Plaintiffs corrected this misunderstanding directly with the district court. (CD 97.)

than a mere procedural injury it has substantive impacts. NEPA requires that the public have an opportunity to provide meaningful input on an EIS at the earliest possible stage and while there is still an opportunity for productive changes. *Citizens for Better Forestry v. USDA,* 341 F.3d 961, 970 (9th Cir. 2003). A plaintiff is "surely . . . harmed [when agency action] precluded the kind of public comment and participation NEPA requires in the EIS process." *Id citing West v. Sec'y of Dept. of Transp.* 206 F.3d 920, 930 n. 14 (9th Cir. 2000) (emphasis added). "[T]he harm consists of added risk to the environment that takes place when governmental decision-makers make up their minds without having before them an analysis (with public comment) of the likely effects of their decision on the environment. NEPA's object is to minimize that risk, the risk of uninformed choice. . ." *Citizens for Better Forestry v. USDA supra.* 341 F.3d at 971.[15]

4. The public interest will be served by the issuance of an injunction.

Finally, it is in the public interest to complete the SEIS process before the casino is constructed. *Marsh v. Oregon NRDC,* 490 U.S. at 360. The public interest inquiry addresses impacts on non-parties. *Bernhardt v. LA Cnty.,* 339 F.3d 920, 931 (9th Cir. 2003). A NEPA violation and the resulting environmental harm affects the

[15] Also, contrary to the district court's claim, these harms are not speculative. The construction of the casino is destroying Jamul Indian remains and funerary objects buried on, or spread over, the subject property. (DE 13.) Those adverse impacts are real and immediate. They, and proposed mitigation, should have been studied in a SEIS before casino construction was allowed by the BIA and NIGC. (DE 24.)

public interest. *Save Strawberry Canyon v. DOE,* 613 F.Supp. 2d 1177, 1190 (N.D. Cal. 2009). There is a "well established 'public interest in preserving nature and avoiding irreparable environmental injury.'" *Alliance for the Wild Rockies,* 632 F.3d at 1138-1139. There is also a "public interest in careful consideration of environmental impacts before major federal actions go forward and . . . have held that suspending such projects until that consideration occurs comports with the public interest." *Id. So Fork Band v. U.S. DOI,* 588 F.3d 718,728 (9th Cir. 2009).

The BIA and NIGC have a responsibility to ensure that all adverse environmental impacts of the JIV casino construction project are fully analyzed and adequately mitigated. Requiring the BIA and NIGC to adhere to NEPA "invokes a public interest of the highest order: the interest in having government officials act in accordance with the law." *Seattle Audubon Society v. Evans,* 771 F. Supp. 1081, 1096 (W.D. Wash. 1991) *aff'd* 952 F.2d 297 (9th Cir. 1991).

D. The Compact is enforceable federal law and Section 10.8.3 requires that it be amended before casino construction is allowed to continue.

IGRA requires that tribal gaming be "conducted in conformance with a Tribal-State compact . . . approved by the Secretary of Interior" 25 U.S.C. §2710(d)(1), (3)(B); *In re Indian Gaming,* 331 F.3d 1094, 1097 (9th Cir. 2003). "[W]here Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for

congressional legislation, the consent of Congress transforms the States' agreement into federal law under the Compact Clause." *Cuyler v. Adams,* 449 U.S. 433, 440-441 (1981); *Cabazzon Band v. Wilson,* 124 F.3d 1050, 1056 (9th Cir. 1997) and *Gaming Corp. v. Dorsey & Whitney,* 88 F.3d 536, 543-551 (8th Cir. 1996).

The following factual allegations in SASC were not denied, and are therefore admitted, by Defendants (ER 0211-0212):

- The 1999 JIV Compact was approved by the Secretary in 2000. (ER 80-90.)
- A Compact, once approved, becomes federal law and is enforceable as such.
- The Compact prohibits the construction of a gaming facility on Indian lands by the JIV after January 1, 2005 "unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State."
- Despite a timely request from the State, the JIV has not agreed to amend Section 10.8.3 of the Compact. (ER 91-93.)
- Construction on the casino should cease until Section 10.8 is amended.

Section 10.8.3(b) provides: "At any time after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the Section has proven inadequate to protect the off-Reservation environment." (ER 0088-0089.) If a request is made, "the Tribe will enter into such negotiations in good faith." On February 28, 2003, the State made such a request to JIV, and other tribal entities, to

amend Section 10.8.3 of the 1999 Compact. (ER 0092-0093.)

Because negotiations were requested by the State, Section 10.8.3(c) of the Compact prohibited casino construction after January 1, 2005 "unless and until an agreement to amend this Section 10.8.3 has been concluded between the Tribe and the State." (ER 0089.) Without such an amendment, the JIV is required to "**immediately cease construction**" of the casino "unless and until agreement to amend this Section 10.8 has been concluded."(Id.)

Despite a timely request from the State in 2003, the JIV has not agreed to an amendment of Section 10.8.3 of the Compact. Thus current construction of the casino is a violation of Section 10.8.3 (b) & (c) and federal law. Casino construction should immediately cease and be enjoined at least until Section 10.8.3 is amended and the Defendants' environmental reviews are brought into compliance with the amended Section 10.8.3.[16]

Defendants claim that Plaintiffs waived this argument because it was supposedly raised for the first time in its reply brief. This contention is wrong for two reasons. First, as outlined above, Plaintiffs first raised this issue on August 26, 2014, in the SASC – which has not been denied by Defendants. (ER 0211-0212.)

Second, Defendants ignore the fact that this argument was raised in the

[16] Many tribes amended Section 10.8.3 of their 1999 Compact before constructing a casino. (See ER 0035-0046.)

direct response to assertions made by Defendants in the district court that their environmental review of the casino project was in full compliance with Section 10.8 of the Compact. (ER 0108-01110.) Defendants make the same assertions in their answering briefs. (DE 26 at 41; DE 30 at 59.) Plaintiffs have the right to respond and demonstrate that Defendants' actions are not in compliance with Section 10.8.3 and, instead, are in violation of the Compact and federal law.

Defendants also mischaracterize Plaintiffs' argument as a breach of contract or compact claim. (DE 26 at 41; DE 30 at 51-54.) Plaintiffs are not arguing that the JIV breached the Compact as a matter of contract law. Instead, as stated above, once a Compact is approved by the Secretary, it is no longer just a contract; it is enforceable as federal law. *Cuyler v. Adams, supra.* 449 U.S. at 440-441; *Cabazzon Band v. Wilson, supra.* 124 F.3d at 1056 (9th Cir. 1997). And its enforcement is not limited to the parties to the Compact. Like all federal laws, it applies with equal force to all parties regardless of their connection to the Compact. *Gaming Corp. v. Dorsey & Whitney, supra.* 88 F.3d at 543-551, (Compact is a "creation of federal law" and IGRA which preempts the field and governs related non-compact agreements between third parties.)

Defendants also claim that the Governor's Office confirmed that JIV has complied with the Compact in a letter dated August 27, 2013. (ER 0114-0116.) But Defendants misquote that letter to mislead the Court into believing that is says

something it does not. (DE 30 at 59.) Private Defendants assert that that the Governor's Office found that "[T]he Tribe has complied with its specific obligations under [Compact] . . ." (Id.) Defendants left off the important qualification of the State employee who wrote the letter before the quote that "It is my understanding that the Tribe has complied . . ." (ER 0115.)

Also, more importantly, the letter does not discuss the casino construction prohibition in 10.8. 3 (b) and (c). Instead, at most, it was progress report under Section 10.8.2(a) of the Compact. The letter concludes that if the JIV implements its obligations under Section 10.8.2 it will have complied with Section 10.8.2. This self-evident, circular comment does not mention Section 10.8.3(b) and (c) or excuse JIV from amending the Compact before constructing a casino after 2005.

CONCLUSION

Plaintiffs request that the district court's May 15, 2015 order be reversed and vacated. Plaintiffs also ask that Defendants be required to comply with NEPA and circulate the SEIS and that casino construction be enjoined in the meantime.

Dated: July 28, 2015

Respectfully submitted,

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Dated: July 28, 2015.

Respectfully submitted,

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