No. 15-16021

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

JAMUL ACTION COMMITTEE, *et al.*,

Plaintiffs-Appellants,
v.
JONODEV CHAUDHURI,
Chairman of the National Indian Gaming Commission, *et al.*,

Defendants-Appellees

On Appeal from the United States District Court
for the Eastern District of California
Hon. Kimberly J. Mueller, No. 2:13-cv-01920 KJM

TRIBALLY-RELATED DEFENDANTS' ANSWERING BRIEF

FRANK LAWRENCE, CA Bar No. 147531
LAW OFFICE OF FRANK LAWRENCE
578 Sutton Way No. 246
Grass Valley, CA 95945
(530) 478-0703

Counsel for Tribally-Related Defendants-Appellees

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I. INTRODUCTION

Defendants Raymond Hunter, Chairman of the Jamul Indian Village ("Tribe" or "JIV"), the Tribe's development partners Penn National Gaming, Inc. ("Penn") and San Diego Gaming Ventures LLC, and the Tribe's general contractor C.W. Driver, Inc. (collectively "Tribally-Related Defendants") hereby oppose plaintiffs' preliminary injunction appeal.

For twenty years plaintiffs have played a leading role in a coordinated, well-funded war against the Tribe. These modern-day Indian fighters have one goal: stop the Tribe at all costs from exercising its federal right to develop a governmental gaming enterprise on its Reservation. Plaintiffs' strategy is to delay the Tribe's project in the hopes of exhausting its financing. Since 1995, plaintiffs and those with whom they are in privity – the proposed *amici* here, *see* Dkt. Entry 13-1 -- have brought dozens of frivolous and uniformly unsuccessful legal challenges in numerous jurisdictions.[1] These efforts consistently attack the same

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[1]*See, e.g., Rosales v. Dutschke*, No. 2:15-cv-01145 (E.D. CA); *Jamulians Against the Casino v. California Department of Fish and Wildlife*, No. 34-2014-80001894 (Sac. Sup. Ct.), *appeal pending*, 3rd Dist. Ct. App. No. C078024; *San Diego v. California Department of Transportation*, 37-2014-85080 (San Diego Sup. Ct.), *appeal pending*, 3rd Dist. Ct. App. No. C077769; *Jamulians Against the Casino v. California Department of Transportation*, No. 34-2014-8001752 (Sac. Sup. Ct.), *appeal pending*, 3rd Dist. Ct. App. No. C077806; *Jamulians Against the Casino v. National Indian Gaming Commission*, No. 2:13-cv-01920 KJM (E.D. CA) (this

(continued...)

two fundamental issues: (1) the Tribe's very existence as a tribe (including its sovereignty and sovereign immunity); and (2) the Tribe's beneficial ownership of its Reservation. For without its status as a Tribe with "Indian lands" the Tribe

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[1](...continued)
case); *Rosales v. Off Duty Officers*, No. 37-2009-00092322-CU-PO-CTL (San Diego Sup. Ct), *dism'd*, 4th Dist. Ct. App. No. D064058 (7/30/2013); *Jamulians Against the Casino v. Iwasaki/California Department of Transportation*, No. 34-2010-8000428 (Sac. Sup. Ct.), 3rd Dist. Ct. App. No. C067138 (3/29/2012); *Rosales v. California*, No. GIC878709 (San Diego Sup. Ct.); *Rosales v. U.S.,* No. 07-624, 2007 WL 4233060 (S.D. CA 2007), *app. dism'd for failure to prosecute*, No. 08-55027 (9th Cir. Aug. 12, 2009); *Rosales v. U.S.*, 477 F. Supp. 2d 119 (D.D.C.), *aff'd* 275 Fed. Appx. 1 (D.C. Cir. March 27, 2008); *Rosales v. U.S.*, No. 01-951 (S.D. CA), *aff'd* 73 Fed. Apx. 913 (9th Cir. 2003), *cert. den*. 541 U.S. 936 (3/22/2004); *Rosales v. U.S.*, No. 98-860, 89 Fed. Cl. 565 (Fed. Ct. Cl. 2009), *aff'd*, No. 2010-5028, *cert. den.* 131 U.S. 2882 (2011); *Rosales v. Townsend*, No. 97-769 (S.D. CA Nov. 19, 1998); *Rosales v. Pacific Regional Director, BIA*, 39 IBIA 12, 2003 WL 23170149 (IBIA March 4, 2003), *aff'd* 477 F. Supp. 2d 119 (D.D.C. 2007), *aff'd* 278 Fed. Appx. 1 (D.C. Cir. March 27, 2008); *San Diego County v. BIA Pacific Regional Director*, 37 IBIA 233, 2002 WL 32345812 (IBIA April 23, 2002); *Rosales v. Kean Argovitz Resorts, Inc*., No. 00-1910 (S.D. CA), *aff'd* 35 Fed. Appx. 562 (9th Cir. 5/21/2002), *cert. den.*, 537 U.S. 975 (2002); *Rosales v. BIA*, 34 IBIA 125, 1999 WL 980184 (IBIA Sept. 29, 1999), *aff'd* 477 F. Supp. 2d 119 (D.D.C. 2007), *aff'd* 278 Fed. Appx. 1 (D.C. Cir. March 27, 2008); *Rosales v. BIA*, 34 IBIA 50, 1999 WL 980163 (IBIA July 29, 1999); *Rosales v. BIA,* 32 IBIA 158, 1998 WL 233748 (IBIA April 22, 1998); *Jamul Indian Village v. Hunter*, No. 00699070 (San Diego Sup. Ct.); *Jamul Indian Village v. BIA*, 29 IBIA 90, 1996 WL 164971 (IBIA Feb. 21, 1996); *Jamul Indian Village v. Hunter*, No. 95-131-R (S.D. CA 1995).

could not develop a government gaming project.[2] *See* 25 U.S.C. §§ 2703(4), 2710. This case is one of the recent episodes in this story.

Plaintiff Jamulians Against the Casino ("JAC") hopelessly confuse the pending National Indian Gaming Commission ("NIGC") review and approval of a management contract between the Tribe and SDGV with the Tribe's casino construction. Plaintiffs have conflated environmental review of a proposed management agreement to manage the casino once it becomes operational with environmental review of the Tribe's construction of a casino project. The environmental review of the construction project was completed years ago

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[2] Six years ago, the U.S. Federal Court of Claims decided two cases that "represent[ed] but the most [recent] iterations of plaintiffs' persistent attempts – in the face of repeated dismissals and unfavorable judgments over the course of 15 years – to ... wrest from the [Jamul Indian] Village the beneficial ownership of ... tribal land." *Rosales v. U.S.*, 89 Fed. Cl. 565, 571 (2009) ("*Rosales X*"). The court noted that these plaintiffs "have litigated or sought to litigate these same and related issues in no fewer than fourteen legal actions [now approaching 40, including appeals] brought before tribal tribunals, administrative boards, and federal courts in California and the District of Columbia, all without success." *Id*. The court noted that "[d]espite vainly prosecuting myriad legal claims in every conceivable forum and fruitlessly propounding inventive and novel legal theories, plaintiffs have continually stared down the face of defeat, personifying Mason Cooley's aphorism, 'if at first you don't succeed, try again, and then try something else.'" *Id.* (*quoting Franklin Sav. Corp*. v. U.S., 56 Fed. Cl. 720, 721 (Fed. Ct. Cl. 2003)). The court warned plaintiffs that their "current attempt to defy their fate – an attempt this court strongly admonishes plaintiffs to make their last – miscarries again." *Id*. Plaintiffs and their privies have now filed at least a dozen new lawsuits and appeals since *Rosales X's* admonition, including this case, in further meritless attempts to kill the Tribe's hopes for self-sufficiency.

pursuant to the Tribe's Compact with California, which included JAC's opportunity to review and comment on the draft environmental review. The Tribe fully met its Compact obligations, as confirmed by the Governor's Office. *See* J. Applesmith letter to Chairman Raymond Hunter (Aug. 27, 2013), Appellants Excerpts of Record ("AER") 114-16. The key point to understand at the outset is that a management contract is *not a prerequisite,* and indeed is *irrelevant*, to the Tribe's right to build a casino.

JAC blatantly misrepresents the district court's Order denying its preliminary injunction motion. JAC claims that the district court made "two serious, reversible errors ...." Appellant's Opening Brief at 1 ("JAC Br."), Dkt. Entry. 9-2. First, JAC says, the district court held that the "BIA need not comply with NEPA because it has no authority over the subject property." *Id.* This is simply false. Far from holding that the "BIA need not comply with NEPA", the district court actually "finds that the NIGC will undertake a major federal action for purposes of NEPA if it approves the Tribe's proposed gaming management contract." Order at p. 9-10 of 19, AER at 10-11. The district court found that "the evidence before the court supports the ... conclusion" that the NIGC will comply

with NEPA, "solicit and address public comments" and "mitigate the environmental impacts of the management contract." Order at p. 17 of 19.[3]

JAC then compounds its confusion and distortion by devoting substantial portions of its argument to a non-existent "fee-to-trust" application that the Tribe abandoned many years ago. *See, e.g.*, JAC Br. at 1 ("the BIA is the Lead Agency with respect to the proposed fee-to-trust transfer for the casino"), 3, 6, 7, 14, 15, 16, 18, 26, 27.

There is no proposed fee-to-trust transfer for the casino. The district court explained that in 2002 the BIA had announced an intent to prepare an environmental review of a proposed fee-to-trust transfer of 101 acres for a casino project. *See* Order at pp. 6-7 of 19. "Between 2003 and 2006, the Tribe revised its plan", however, and "[r]ather than build the casino's support facilities on new trust land, the Tribe decided to use existing reservation land ...." Order at 7 of 19. The district court's finding is well supported b the record. *See* Declaration of John

[3]JAC's allegation of error confuses the BIA with the National Indian Gaming Commission. The alleged major federal action at the heart of JAC's case is the pending review and approval of the Tribe's management contract with SDGV. The BIA does not review or approve management contracts. That responsibility rests with the Chairman of the NIGC. *See* 25 U.S.C. § 2711. While the NIGC currently contracts with the BIA to provide environmental review services to the NIGC, *see* Thomas Dec. ¶ 11, AER at p. 102, the federal action triggering NEPA review is the NIGC's review of the Tribe's management contract.

Rydzik, Chief, Division of Environmental, Cultural Resources, and Safety, Pacific Region, BIA ("Rydzik Dec.") at ¶ 3, AER p. 105 ("In 2000, the Tribe proposed that a casino be construction on its existing trust land, and request BIA to approve a 101-acre trust acquisition, on which parking and other facilities supporting the casino would be build"); *id*. at ¶ 6 ("The Tribe subsequently determined not to pursue the trust application"). *See also* 78 Fed. Reg. 21398-01 (April 10, 2013).[4]

Incredibly, JAC itself conceded this point in its brief in support of its motion for a preliminary injunction below: "the fee-to-trust aspect of the project included in the 2003 proposal ***has been dropped***." Dist. Ct. ECF No. 60-1 ("ECF") at p. 4 of 10, lines 3-4 (emphasis added). For JAC to have so clearly acknowledged this fact below, and now on appeal to repeatedly tell this Court the exact opposite, exemplifies JAC's complete disregard of the facts in its myopic effort to derail the Tribe's project.

"Second," JAC asserts that the district court erred by holding "that the NIGC need not comply with NEPA until after the casino is constructed and they approve

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[4]Had JAC made this argument below, the Tribally-Related Defendants would have had a fair opportunity to put into the record a letter from the Pacific Regional Office of the BIA to then-Tribal Chairman Kenneth Meza, dated January 12, 2009, acknowledging "receipt of your letter dated December 18, 2008 requesting that the Bureau of Indian Affairs withdraw ... the ... fee-to-trust application ... [for] [t]he 101.00 acre acquisition request ...."

the gaming management contract." JAC Br. at 1. Again, that is absurd. As noted above, the district court held that the NIGC's approval of a management contract is the major federal action triggering NEPA. *See* Order at 9-10 & 17 of 19. The Court noted that "the federal defendants appear to agree." *Id.* at 10. The Court pointed to the declaration of Christinia Thomas, Acting Chief of Staff for the NIGC, which states that "since the NIGC was created it has been the agency's practice that when a management contract is submitted for approval a review under [NEPA] is initiated." Thomas Dec. ¶ 10, AER at p. 101. Acting Chief Thomas further declared that "[a]fter the Management Contract was submitted, the NIGC requested that the BIA provide environmental services in connection with the preparation of a Supplemental Environmental Impact Study (SEIS)." *Id.* at ¶ 13, AER at p. 102.

Subscribing to the adage "[i]f you tell a lie big enough and keep repeating it, people will eventually come to believe it," https://www.jewishvirtuallibrary.org/jsource/Holocaust/goebbelslie.html, JAC continues its collateral attacks denying the Tribe's very existence. Plaintiffs claim that the Tribe is "not a recognized tribe", JAC Br. at 4, and that it "never was recognized." *Id.* at 5. They deny that the Tribe's government officials "have immunity from suit." *Id.* at 28. *See also* JAC's Urgent Motion, Dkt Entry: 7-1, at

5 of 26 (denying that the Tribe has any "inherent sovereign immunity or governmental authority").

JAC continues to make these legally frivolous, morally offensive assertions in the face of numerous courts -- including this Court -- and the federal government repeatedly affirming the Tribe's federal recognition and sovereignty. *See, e.g., Rosales v. U.S.*, 89 Fed. Cl. 565, 572 (Fed. Ct. Cl. 2009) ("*Rosales X*") ("The [Jamul Indian] Village is a tribal governmental entity of the Kumeyaay Indians, which Congress recognized pursuant to section 16 of the Indian Reorganization Act ('IRA') of 1934, 25 U.S.C. § 476"); *Rosales v. United States*, 73 F. App'x 913, 914-15 (9th Cir. 2003) ("*Rosales VII*") (holding that the Tribe possesses sovereign immunity).

Moreover, the U.S. Department of Interior has consistently listed the Tribe on its statutorily-mandated annual list of federally recognized tribes beginning in 1982. *See, e.g.,* 80 Fed. Reg. 1942-2 (Jan. 14, 2015) (listing JIV as a federally recognized tribe); 47 Fed. Reg. 53130-03 (Nov. 24, 1982) (same). Inclusion on the Federal Register list establishes federal recognition. *See, e.g., United States v. Zepeda*, 738 F.3d 201, 212 (9th Cir. 2013), *aff'd on rehearing en banc*, 2015 WL 4080164 (9th Cir. July 7, 2015); *LaPier v. McCormick*, 986 F.2d 303, 305 (9th Cir. 1993) ("The BIA list appears to be the best source to identify federally

acknowledged Indian tribes"). The district court in this case has also held at least three times over the past year that the Tribe is a tribe. *See, e.g., Jamul Action Comm. v. Chaudhuri,* No. 2:13-CV-01920, 2015 WL 2358590, at *1 (E.D. Cal. May 15, 2015); *id.* 2015 WL 1802813, at *1 (Apr. 17, 2015); *id.* 2014 WL 3853148, at *4 (Aug. 5, 2014).

Similarly, JAC continues to collaterally attack the status of the Tribe's federal Indian lands. JAC claims that the Tribe's Reservation "is not 'Indian land' eligible for gaming under IGRA." JAC Br. at 4. They claim that the United States lacks "the authority to proclaim that the 1978 donated fee land is a 'reservation.'" JAC Br. at 8. *See also* Plaintiffs' Urgent Motion at 16 of 26 (charging that the federal defendants "proclaimed a 'reservation' without NEPA compliance"). Plaintiffs' "Second Amended" Complaint – actually the fifth complaint plaintiffs have filed in this case ("Fifth Complaint") – seeks a declaratory judgment "that neither the Parcel, nor the JIV Defendants' claimed beneficial interest in the Parcel is trust land under JIV's government control or Indian lands eligible for tribal gaming under the IRA [Indian Reorganization Act, 25 U.S.C. § 461 *et seq.*] , IGRA [Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21] and their implementing regulations." AER at 212.

Years ago the Court of Federal Claims held that claims attacking the status of the Tribe's Indian lands accrued in 1982 when the second of two contiguous parcels that comprise the Tribe's Reservation was taken into federal trust for the Tribe: "the court fixes the time of this accrual-triggering event at nearly three decades ago." *Rosales X*, 89 Fed. Cl. at 579. The statute of limits on claims attacking the status of the Tribe's Indian lands thus expired six years later, in 1988. *See id.* at 577. There, like here, "[p]laintiffs' claims all arise out of defendant's recognition of the Village as the beneficial owner of Parcels 04 and 05 ...." *Id.* at 578. The court noted that "any ongoing grading, excavation, or other construction activity conducted by the Village, on Parcels 04 and 05, flows from the Village's exercise of beneficial ownership of these parcels." *Id.*

Moreover, this Court has already held that the Reservation's status cannot be adjudicated in the Tribe's absence: "The Village has claimed jurisdiction over the parcel of land at issue in this action since at least 1981. This interest would be impaired if Appellants were declared to be the beneficial owners of the land." *Rosales v. United States*, 73 F. App'x 913, 914 (9th Cir. 2003) ("*Rosales VII*"). (dismissing an attack on the status of the Tribe's Reservation under Fed. R. Civ. P. 19). Indeed, JAC's own exhibits demonstrate that the United States took the first

of the two parcels that comprise the Tribe's Reservation into trust in 1978. *See* AER at 234.

Turning to the factors governing a motion for a preliminary injunction, plaintiffs fail entirely to demonstrate any likelihood of success on the merits for at least seven independent reasons. First, plaintiffs' motion depended on their claim that NEPA review of the Tribe's proposed management contract must happen before to the Tribe embarks on building its casino. That is not the law. Plaintiffs fail to grasp that the NIGC's environmental review, conducted as part of its review of the management contract, is irrelevant to the Tribe's right to continue constructing its casino. Put another way, casino construction does not require an approved management contract under IGRA.

Second, plaintiffs cannot succeed on the merits because there has been no final agency action yet. The only pending matter for which NEPA review is required is the NIGC's review of the proposed management contract. Thus their claims are not ripe for judicial review under the Administrative Procedures Act ("APA"). *See* 5 U.S.C. § 704.

Third, the Tribe remains a required party under Rule 19. The Fifth Complaint continues JAC's collaterals attacks on the Tribe's fundamental interests, reasserting the same frivolous claims that the Tribe is not a tribe, that it lacks

sovereign immunity, and that its Reservation is not a reservation. Yet it does not – because it cannot – join the Tribe as a party.

Fourth, defendants are legally incapable of affording plaintiffs the remedy they seek. As the district court noted, this lack of redressability deprives JAC of standing under Article III of the U.S. Constitution.

Fifth, this Court's *en banc* decision a few weeks ago in *Big Lagoon v. California*, 2015 WL 3499884 (9th Cir. June 4, 2015), further forecloses plaintiffs' attempt to collaterally attack the Tribe's existence and the status of its Reservation.

Sixth, JAC's arguments regarding the Tribe's Compact with California are fatally flawed, as a simple reading of the Compact's plain language discloses. Moreover, JAC cannot enforce the Compact's terms because it lacks standing, a private right of action and an immunity waiver as to the Tribe and the State of California.

Seventh, JAC's argument regarding federal approval of the Tribe's Gaming Ordinance was raised for the first time in their reply brief below. The district court correctly held that this Court's decision in *North County Community Alliance Inc. v. Salazar*, 573 F. 3d 738 (9th Cir. 2009) forecloses JAC's assertion that approval of a tribal gaming ordinance requires NEPA review. Moreover, the statute of

limitations on a challenge to federal approval of the Tribe's Gaming Ordinance expired many years ago.

Plaintiffs' arguments regarding the other injunction factors are similarly unavailing. Their claim of irreparable harm is based on the same flawed understanding already noted, namely, that the SEIS at issue here is somehow a legal prerequisite to the Tribe's right to continue casino construction. It is not. Plaintiffs *have already had* the environmental review of the casino's impacts they claim to seek here, pursuant to the Compact. *See* Compact § 10.8, AER 87-88. Indeed, as noted above, two years ago the California Governor's Office affirmed the Tribe's compliance with the Compact's environmental review process. *See* AER 114-16. Plaintiffs' decision to wait nearly a year after the Tribe began building its casino to ask the district court for injunctive relief – now more than 18 months – also undermines their claim of imminent irreparable injury.

Plaintiffs fail to demonstrate that any equities favor injunctive relief. They will have their opportunity to comment on the SEIS as part of the NIGC's review of the management contract when it is circulated. They already commented on the environmental review of the Tribe's casino project, under the Compact process. On the other hand, the Tribe has been obstructed, delayed and attacked at every turn in its efforts to obtain the benefits of tribal government gaming as Congress

intended in IGRA. *See* fn. 1 *supra.* The Tribe's Compact has been in effect for 15 years and it has yet to open the doors to its casino. *See* 65 Fed. Reg. 31189 (May 16, 2000). The Tribe has made a significant investment in its casino project, and the further delay plaintiffs seek would deprive the Tribe of sorely needed revenue to fund basic tribal governmental programs, including health, education, youth and senior assistance, and housing, among many others. *See* 25 U.S.C. § 2710(b)(2)(B); Declaration of Brent Hughes ("Hughes Dec.") at ¶¶ 4-5 and Exs. A-E thereto, AER 118-130; Declaration of Michael Carroll ("Carroll Dec.") at ¶¶ 3-5, AER 132-135. The equities are entirely against the requested injunction.

Finally, the public interest here weighs heavily against an injunction. Congress established the preemptive public interest calculus favoring tribal government gaming when it enacted IGRA in 1988. As noted, the public interest in environmental review has already been satisfied as to the casino's impacts through the Compact-mandated environmental review. The public interest in environmental review of the management contract pending before the NIGC will be satisfied by the NEPA process outlined in the agency's Notice of Intent ("NOI"). Thus the public interest, like all of the other injunction elements, weighs against granting an injunction here.

For all of these reasons, the Tribally-Related Defendants respectfully request that the Court affirm the district court's order denying plaintiffs' motion for a preliminary injunction.[5]

II. STATEMENT OF ISSUES

1. Whether the district court correctly determined that the NIGC's approval of the proposed gaming management contract between the Tribe and SDGV is not a legal prerequisite to the Tribe's right to construct its casino project on its Reservation?
2. Whether the district court correctly determined that the injunction JAC sought would not redress JAC's claimed harm?
3. Whether the district court correctly rejected JAC's arguments raised for the first time on reply?

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[5]The Tribe has not consented to the district court's jurisdiction and is not a party here. *See* Dist. Ct. Order at 2:5-6, AER 3. The other tribally-related defendants named in the Second Amended Complaint were not timely served with summons and complaint. *See* Dist. Ct. ECF 62 at pp. 16-17 of 25. The time for JAC to do so has expired and JAC has not demonstrated good cause for its failure to timely serve. *See Wei v. State of Hawaii*, 763 F.2d 370, 371 (9th Cir. 1985) Those named defendants thus are not parties to the case. JAC's argument that their failure to join in the Tribally-Related Defendants' opposition to JAC's preliminary injunction motion below has any legal consequences is simply wrong.

4. Whether, if JAC was permitted to raise a new issue on reply, the district court correctly determined that the NIGC's approval of a non-site-specific Tribal Gaming Ordinance does not require NEPA review?

5. Whether the district court abused its discretion in denying the requested injunction as against the Penn, SDGV and Driver because JAC failed to satisfy the test for issuance of a preliminary injunction?

Relevant provisions of pertinent laws are set forth verbatim and with appropriate citation in an addendum introduced by a table of contents and bound with this brief. *See* 9th Circ. Rule 28-2.

III. BACKGROUND

A. Factual Background

The Jamul Indian Village ("Tribe") is a federally recognized Indian tribal government. *See* 80 Fed. Reg. 1942, 1948 (Jan. 14, 2015) (federally recognized tribes list). It has been formally recognized as a Tribe by the United States since at least 1982. *See* 47 Fed. Reg. 53,130, 53,132 (Nov. 24, 1982) (same).

The Tribe is "descended from a group of Diegueno Indians who were living in the vicinity of Jamul [San Diego County] on or before the date of the enactment

of the Mission Indian Relief Act of January 12, 1891 (26 Stat. 712). They were among the California Indians for whom the Congress intended to make provisions in that Act." U.S. Department of Interior, Commissioner of Indian Affairs Memorandum to BIA Area Director, Sacramento Area at ¶ 1 (Dec. 19, 1974), RJN Ex. 2, ECF 22-3. The Tribe is "one of the Indian communities for which Congress expressed the intention that a reservation should be established." *Id*. at ¶ 2. "Reservation land was, in fact, set aside for several communities, including Jamul ... and those communities thereby received full Federal recognition ...." *Id.* at ¶ 3.

In 1978, the U.S. accepted into trust status a 4.66 acre parcel of land ("Parcel 04") on which the Jamul Indians resided. *See* "First Amended" Complaint ("Third Complaint") ¶ 46, Ex. D, ECF 1 & 15 (exhibits to Third Complaint incorporate by reference the exhibits to the original complaint, ECF 1); *Rosales X*, 89 Fed Cl. at 574. That deed conveyed the land "to [t]he United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the [Secretary] may designate." *Id.* In 1980, the Jamul Indians petitioned the U.S. to organize as a community of half-blood Indians, under the Indian Reorganization Act, 25 U.S.C. § 476. *See* Third Complaint Exs. G, I; *see also id.* p. 2 fn 1; *Rosales v. Sacramento Area Dir.*, 32 IBIA 158, 159-60 (1998) ("*Rosales I*"). In response, the BIA identified a list of Jamul Indians eligible to vote on the proposed tribal

Constitution, and held an election under section 16 of the IRA. *See Rosales v. U.S.*, 477 F. Supp. 2d 119, 122 (D. D.C. 2007) ("*Rosales VII*"). On May 9, 1981, the eligible voters unanimously adopted the Constitution. *Id.*; *Rosales I* at 159-60. The U.S. Department of the Interior approved the Constitution on July 7, 1981. *See* Third Complaint Ex. G; *Rosales I*, 32 IBIA at 160. The secretarial election and Interior's approval of the adopted Constitution established the Tribe as a federally recognized Tribe. *Rosales VII* at 122; *Rosales I* at 159-60.

On May 25, 1982, the U.S. took "Parcel 05" into trust, consisting of 1.372 acres, for the Tribe's benefit. Thus today, the Tribe's Reservation includes 6.03 acres of contiguous land held by the U.S. in trust for the Tribe, consisting of Parcels 04 and 05. *See Rosales X*, 89 Fed. Cl. at 574.

In 1999, the Tribe's Gaming Ordinance was approved by the NIGC, as IGRA requires. *See* 25 U.S.C. § 2710; 64 Fed. Reg. 4722, 4723 (Jan. 29, 1999). Later in 1999, the Tribe negotiated a gaming Compact with California, pursuant to IGRA, federal approval of which was published at 65 Fed. Reg. 31189 (May 16, 2000). California entered into and ratified the Tribe's Compact as a matter of State law. *See* Cal. Gov't Code § 12012.25(22). California's Gambling Control Commission publishes the Tribe's Compact on its official governmental web site. *See* http://www.cgcc.ca.gov/documents/compacts/original_compacts/Jamul_

Compact.pdf. The National Indian Gaming Commission also publishes the Tribes Compact. *See* http://www.nigc.gov/Portals/0/NIGC%20Uploads/readingroom/compacts/Jamul%20Indian% 20Village/jamulindiancomp5.5.00.pdf.

In 2000, the Tribe proposed a casino project to be built on its Reservation and asked the BIA to take an adjacent 101-acre parcel into trust for the Tribe to house parking and other facilities in support of the proposed casino project. *See* Rydzik Dec. ¶ 3, AER 105. The Tribe also submitted a proposed gaming management contract with Lakes Ken Argovitz Resorts-California, LLC. *See id.* (*citing* 67 Fed. Reg. 15582 (April 2, 2002). In 2002, the BIA published a Notice of Intent to prepare an EIS for that 101-acre trust acquisition. *Id.* ¶ 4 (*citing* 67 Fed. Reg. 15582 (April 2, 2002)). In 2003 the BIA published a draft EIS, *see id.* ¶ 5 (*citing* 68 Fed. Reg. 1475 (Jan. 10, 2003)), followed by a final EIS. *See id.* (*citing* 68 Fed. Reg. 64621 (Nov. 14, 2003). The Tribe subsequently withdrew the fee-to-trust application. *See id.* ¶ 6; JAC's Brief in support of motion for preliminary injunction ECF 60-1, at p. 3 of 10, lines 24-25 and p. 4 of 10, lines 3-4; 78 Fed. Reg. 21,398 (April 10, 2013).

Between 2003 and 2006, the Tribe revised its project to eliminate the fee-to-trust component and to reconfigure all uses onto the existing Reservation. *See* 78 Fed. Reg. 21398-01 (April 10, 2013). "The project modifications were

evaluated by the Tribe in a Tribal Environmental Impact Statement/Report (December 2006). Additional changes to the project resulted in the release of a Draft Tribal Environmental Evaluation (Tribal EE) in March 2012 and a Final Tribal EE in January 2013." *Id.* The Tribal EE was conducted as required by, and pursuant to the authority of, Compact section 10.8.1. *See* AER at 87-88.

In August, 2013, the California Governor's Office confirmed the Tribe's compliance with the Compact's environmental review terms, including its obligations "to inform the public of the Project; identify potential adverse off-Reservation environmental impacts; submitting environmental impact reports to the appropriate state and local government agencies; consulting with the board of supervisors; and affording the affected members of the public an opportunity to comment." AER 115.

Also in 2013, the Tribe submitted a proposed management agreement with defendant SDGV – this time without any fee-to-trust transfer request -- which triggered the NEPA review process for federal approval of the contract. *See* Rydzik Dec. ¶ 7, AER 106. On April 10, 2013, the NIGC published a NOI to prepare an SEIS. *See id.* at ¶ 10 (*citing* 78 Fed. Reg. 21398 (April 10, 2013)). The NOI included directions for submitting public comments. *See id.* at ¶ 12. Once the draft SEIS is completed and reviewed, a new NOI will be published in the

Federal Register inviting comments on the document. *See id.* "A 45-day public comment period, as well as a public meeting, will provide opportunities to the public to review and comment on the draft SEIS." *Id.* Following the comment period a final SEIS will be prepared. *See id.* "The Chairman of the NIGC has not approved or disapproved the Management Contract." Thomas Dec. ¶ 19, AER 102.

B. Procedural Background

JAC filed this action on September 15, 2013. *See* ECF 1. On September 23, 2013, JAC filed a second complaint. *See* ECF 7. In February, the federal defendants moved to dismiss. *See* ECF 12. Before that motion could be heard, JAC filed a third complaint in February 2014, which included allegations that the Tribe had begun construction of its casino project. *See* "First Amended Complaint" ("Third Complaint") at ¶¶ 7, 8, 88, ECF 15. The federal defendants and Tribal Chairman Raymond Hunter moved to dismiss, *see* ECF 20-21, 23, and the Tribe moved for leave to file an *amicus* brief in support. *See* ECF 22. After briefing and argument, *see* ECF 20-24, but before the district court ruled on the motions, JAC filed a Motion to Amend the complaint yet again, and attached a proposed fourth complaint. *See* ECF 42.

The district court dismissed the Third Complaint in August 2014, because the Tribe had not been joined as a required party, among other reasons. *See* Order Aug. 5, 2014, at 27, ECF 50. The JAC amended its complaint yet again, filing its fifth complaint int his case on August 26, 2014. *See* "Second Amended" Complaint ("Fifth Complaint"), ECF 51.

On January 2, 2015, JAC moved for a preliminary injunction. *See* ECF 60. The district court denied the motion on May 15, 2015. *See* ECF 93.

On May 19, 2015, JAC noticed this preliminary injunction appeal. *See* ECF 94. JAC moved the district court for an injunction ending appeal, *see* ECF 97, which the district court denied on June 1, 2015. *See* ECF 101.

On June 6, 2015, JAC filed in this Court an "urgent" motion for an injunction pending appeal. *See* Dkt Entry 7. On June 30, 2015, this Court denied JAC's motion. *See* Dkt Entry 22.

On June 23, 2015, proposed *amici* Mr. Rosales and Ms. Toggery, represented by attorney Patrick Webb, file a motion seeking leave of this Court to file an *amicus curiae* brief. *See* Dkt. Entry 13-1. The Tribally-Related Defendants opposed, *see* Dkt. Entry 23-1, and JAC filed a response supporting the *amici's* motion and confirming the obvious privity between JAC and Rosales/Toggery/Webb. *See* Dkt. Entry 24. On July 7, 2015, this Court issued an

Order referring the *amici's* motion to the merits panel for adjudication. *See* Dkt. Entry 25.

IV. DISCUSSION

A. Standard of Review

JAC must overcome the presumption that the district court's decision is correct. *See Parke v. Raley*, 506 U.S. 20, 29 (1992); *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). Moreover, JAC's claimed error must implicate substantial rights, and this Court must disregard any district court "errors or defects which do not affect the substantial rights of the parties." 28 U.S.C. § 2111; *Obrey v. Johnson*, 400 F.3d 691, 699 (9th Cir. 2005). This Court may affirm on any ground with support in the record, whether or not the district court decision relied on those grounds. *See, e.g., Wood v. City of San Diego*, 678 F.3d 1075, 1086 (9th Cir. 2012); *Northwest Environmental Defense Ctr. v. Brown*, 617 F.3d 1176, 1192 (9th Cir. 2010).

This Court reviews the trial court's denial of a preliminary injunction for abuse of discretion. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 709 F.3d 1281, 1286 (9th Cir. 2013); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027 (9th Cir. 2012). "A preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of

persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). *See Monstanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010);*Winter v. Natural Res. Def. Council, Inc*., 555 U.S. 7, 22 (2008). The district court only abuses its discretion if its decision is based on clearly erroneous findings of fact or an erroneous legal standard. *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012); *Alliance for Wild Rockies v. Cottrel*, 632 F.3d 1127, 1131 (9th Cir. 2011); *Johnson v. Couturier*, 572 F3d 1067, 1078-1079 (9th Cir. 2009).

The scope of this Court's review is "very narrow. We review whether the court employed the appropriate legal standards governing the issuance of a preliminary injunction and whether the district court correctly apprehended the law with respect to the underlying issues in the case." *Rucker v. Davis*, 237 F.3d 1113, 1118 (9th Cir. 2001), *rev'd sub nom. on other grounds, Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125 (2002) (*citing California Prolife Council v. Scully*, 164 F.3d 1189, 1190 (9th Cir. 1999); *Gregorio T. v. Wilson*, 59 F.3d 1002, 1004 (9th Cir. 1995)). *See also Wildwest Inst. v. Bull,* 472 F.3d 587, 589-90 (9th Cir. 2006) ("Our review of the denial of a preliminary injunction 'is limited and deferential'") (*quoting Southwest Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003)).

This Court "typically will not reach the merits of a case when reviewing a preliminary injunction." *Rucker*, 237 F.3d at 1118. Nor will it "second guess whether the [district] court correctly applied the law to the facts of the case, which may be largely undeveloped at the early stages of litigation." *Id.* "As long as the district court got the law right, 'it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.'" *Gregorio T.*, 59 F.3d at 1004 (*quoting Sports Form, Inc. v. United Press Int'l*, 686 F.2d 750, 752 (9th Cir. 1982)).

This Court reviews district court factual determinations underlying a preliminary injunction for clear error, which may be reversed only if "illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 660 F.3d 384, 395 (9th Cir. 2011), *rev'd on other grounds* __ U.S. __ , 133 S.Ct. 2096 (2013).

The merits of JAC's NEPA claims are reviewed under the APA's arbitrary and capricious standard. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (*citing Bennett v. Spear*, 520 U.S. 154, 174 (1997); *Oregon Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1109 (9th Cir. 2010); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990)). "Section 706(2) of the APA provides that an agency

action must be upheld on review unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (*quoting* 5 U.S.C. § 706(2)(A)).

A district court's decision is only based on an erroneous legal standard if the court either failed to employ the appropriate legal standards governing the issuance of a preliminary injunction or misapprehended the law with respect to the underlying issues in the litigation. *See Walczak v. EPL Prolong, Inc.*, 198 F3d 725, 730 (9th Cir. 1999). The proper legal standard for preliminary injunctions requires the movant to demonstrate: (1) a likelihood of success on merits; (2) a likelihood of irreparable injury in the absence of preliminary relief; (3) that the balance of equities tips sharply in its favor; and (4) that an injunction is in the public interest. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008); *Farris v. Seabrook*, 677 F.3d 858, 864 (9th Cir. 2012). This Court sometimes applies an alternative formulation of the *Winter* test, under which "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d

1127, 1135 (9th Cir. 2011) (internal quotations omitted); *see Farris v. Seabrook*, 677 F.3d 858, 864-865 (9th Cir. 2012).

The district court's purely legal conclusions are reviewed *de novo*. *See Doe v. Harris*, 772 F.3d 563, 570 (9th Cir. 2014).

B. Plaintiffs Fail to Demonstrate Any Likelihood of Success on the Merits

1. NIGC Approval of the Tribe's Management Contract -- and its Accompanying NEPA Review -- Is Not a Prerequisite to the Tribe's Right to Construct its Casino

JAC's appeal rests on its contention the NIGC must complete its NEPA review before the Tribe builds its casino project. *See, e.g.,* JAC Br. at 1 (JAC seeks to compel defendants to "comply with ... (NEPA) before allowing the continued construction of the [Tribe's] ... casino"); *see also* JAC Urgent Motion at pp. 7 & 20 of 26. Plaintiffs could not be more wrong. The NEPA review is being conducted as part of the NIGC's review of a proposed management agreement between the Tribe and SDGV, not construction of the Tribe's casino. *See* Order, ECF 50, at 22:25-28; 78 Fed. Reg. 21398-01.

The district court correctly found that IGRA "does not empower the NIGC to regulate, monitor, or inspect Class III gaming; tribal state compacts govern Class III gaming activities." Order at 4:2-6 (*citing Colorado River Indian Tribes v. Nat'l*

Indian Gaming Comm'n, 466 F.3d 134, 137-40 (D.C. Cir. 2006) (affirming the district court's determination that no statutory basis empowers the NIGC to regulate Class III gaming operations).

The district court found that

> no statute or regulation, and the parties have cited none, that would require the NIGC or BIA to review or approve a management contract before the subject casino is constructed or operated, or to approve construction at all. To the contrary, the IGRA implies the Tribe may construct and operate a casino on its own land without a management contract.

Id. at 10:3-7 (*citing* 25 U.S.C. § 2710(d)(9) ("An Indian tribe ***may*** enter into a management contract ....) (emphasis added)"). The district court concluded that "JAC has not shown the NIGC has authority to 'approve' the casino's construction, and the NIGC undertakes no major federal action by standing aside as construction progresses on the Tribe's land." *Id.* at 10:10-12. The district court's finding on this issue is supported by the record. *See* Thomas Dec. ¶ 21, AER at p. 102 ("IGRA does not authorize the chairman of the NIGC to approve or disapprove construction of an Indian gaming facility"). JAC offers no authority to the contrary.

The key point is this: the approval of the management contract is not a prerequisite to the Tribe's right to build a casino.

Plaintiffs' incessant claim that the NEPA review that is a part of the NIGC's review of the proposed management contract somehow is a prerequisite to the Tribe's right to construct its casino is simply wrong. The district court's Order dismissing the Third Complaint found that "plaintiffs' allegations regarding construction are problematic considering plaintiffs bring this action under the APA, and the alleged Indian Lands Determination is contained in an NOI that specifically addresses approval of a gaming management contract, not a construction contract." *See* Order, Dist. Ct. ECF 50, at 22:25-28; *see* 78 Fed. Reg. 21398-01. *See also* Thomas Dec. ¶ 21, AER at p. 102.

Per plaintiffs' *modus operandi*, their Fifth Complaint simply ignores the district court's Order. Plaintiffs' claims remain firmly rooted in the NOI for the pending review of the management contract. *See* Fifth Complaint at ¶ 2, AER at p. 184 ("This lawsuit was triggered by the ... Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Approval of a Gaming Management Contract ..."); *see id.* at ¶¶ 16, 63, 65, 66, 78, 135 (all referencing the NOI). IGRA permits, but does not require, gaming management contracts: "Subject to the approval of the Chairman, an Indian tribe may enter into a management contract ...." 25 U.S.C. § 2711(a)(1).[6]

[6] The NIGC "Chairman ***may*** approve any management contract entered into (continued...)

Thus the entire basis for plaintiffs' motion for a preliminary injunction below and their appeal here rests on the false premise that approval of a management contract is a precondition to the Tribe's right to construct a casino. It is not. The Tribe can, and did, begin constructing its casino – a year and a half ago – without an approved gaming management contract. Indeed, the Tribe has every right to not only build but also operate its own casino under IGRA. *See generally* IGRA, 25 U.S.C. §§ 2701-21 (no requirement for a management contract); Compact (same).

Plaintiffs fail to demonstrate that the district court erred in concluding that NIGC approval of the Tribe's management contract is not a prerequisite to the Tribe's right to construct a casino on its Reservation. In other words, they fail to show that the federal defendants have a statutory obligation to complete their NEPA review of the management contract prior to the Tribe's construction of its casino project.

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[6](...continued)
pursuant to this section ...." *Id.* § 2711(b). *See also Turn Key Gaming v. Oglala Sioux Tribe*, 164 F.3d 1092, 1094 (8th Cir. 1999) ("[T]he Act permits tribes to enter into management contracts..."). Also, at the hearing on defendants' motion to dismiss the Third Complaint, the district court further established that federal approval of the management contract is not a precondition to the Tribe's right to build and operate the casino. *See* Reporter's Transcript ("R.T."), p. 23, lines 8-17 (May 23, 2014), Dist. Ct. ECF 62-3; *id.* at 25:2-12.

2. There Has Been No Final Agency Action

Plaintiffs depend on the APA for jurisdiction and an immunity waiver by the United States in this case. *See* Fifth Complaint ¶ 18-19, AER 188. APA jurisdiction generally requires final agency action. *See* 5 U.S.C. § 704. There are two requirements for agency action to be final. "First, the action must mark the consummation of the agency's decision making process – it must not be of a merely ... interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Fairbanks N. Star Borough v. U.S. Army Corps of Engineers*, 543 F.3d 586, 591 (9th Cir. 2008) (internal quotations omitted). The NOI, upon which JAC's lawsuit rests, is merely an initial step along the way to the NIGC's decision to approve or disapprove the pending gaming management contract.[7] *See* 25 U.S.C. § 2714 (NIGC approvals of management contracts are "final agency decisions" for purposes of APA review).

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[7]The plaintiffs' claim that the NIGC has already approved the management contract is demonstrably false. *See* Dist. Ct. ECF 51 at ¶ 4. The NIGC publishes a listing of federally approved management contracts. Jamul's is conspicuously absent. *See* nigc.gov/http://www.nigc.gov/Reading_Room/Management_Contracts/Approved_Management_Contracts.aspx. *See* Order at p. 8, lines 17-22, AER 9.

At some point, the NIGC will make a decision to either approve or reject the pending management contract. That decision will be final agency action that is reviewable under the APA. *See* 25 U.S.C. § 2714. At that point, plaintiffs will need to either file a new lawsuit or seek leave of the district court to file a sixth complaint. *See* n. 6 *supra*. Either way, plaintiffs cannot succeed on the merits of the currently operative Fifth Complaint.

3. The Tribe Remains a Required Party Under Rule 19

Plaintiffs also fail to demonstrate a likelihood of success on the merits because the Tribe remains a required party under Rule 19 that cannot be joined because of its sovereign immunity.

The district court previously held that the "Tribe is a necessary party to this action because it has an interest in how the NOI is interpreted with regard to the land at issue .... [and] has a legal interest in [its] Reservation," and noted the Tribe's "efforts to protect its interest through similar litigation involving opposition to development of the parcel into a gaming facility." Order, Dist. Ct. ECF 50, at 25:2-6. "Because the Tribe is a sovereign entity" that is "immune from nonconsensual actions in ... federal court," the district court held that "the Tribe is a required party under Rule 19," *id*. at 23:18-19, and granted the federal

defendants' motion to dismiss "for failure to join a required party." *Id*. at 27:22-23.

As noted above, JAC nevertheless continues its meritless collateral attack on the Tribe's very existence. *See* JAC Br. at 4 & 5 (the Tribe "is not a ... recognized tribe"). Plaintiffs' Fifth Complaint completely ignores the district court's holding that the Tribe is a required party under Rule 19. The Tribe is "not named as a defendant," Fifth Complaint at ¶ 14, even though the Fifth Complaint attacks the construction of the Tribe's casino project which it admits is conducted "under the color of JIV governmental authority ...." *Id.* at ¶ 13. JAC's Fifth Complaint seeks a judicial declaration that the Tribe's Reservation is not "trust land under JIV's government control ...." Fifth Complaint Prayer for Relief at ¶ B. In direct conflict with the district court's Order, the Fifth Complaint claims that the Tribe "is not a federally recognized Indian tribe." *Id.* at ¶ 44.

Indeed, this Court has also previously held that the Tribe is a required party under Rule 19, in a case brought by plaintiffs' counsel Patrick Webb[8] and on behalf

[8] Mr. Webb – counsel for the proposed *amici* here, *see* Dkt. Entry 22, as well as numerous cases cited in fn. 1*supra* – appeared as counsel of record on the original complaint in this case, along with Mr. Williams. *See* ECF 1. Mr. Webb's newfound claim of clerical error notwithstanding, under the district court's Local Rules, that is how an attorney becomes counsel of record. *See* E.D. L.R. 182(a)(2). To be removed as counsel of record, an attorney must substitute out, *see* E.D. L.R. 182(d), which Mr. Webb has never done. Thus Mr. Webb remains

(continued...)

the proposed *amici*,[9] making the same attacks on the status of the Tribe's sovereignty and its federal Indian lands. *See, e.g., Rosales VII*, 73 Fed. App'x. 913 (9th Cir. Aug. 11, 2003).

Plaintiffs and their proposed-*amici* privies have made, and lost, the same arguments in other cases as well. *See, e.g., Rosales X*, 89 Fed. Cl. at 586; *Rosales v. United States* ("*Rosales IX*"), Case No. 3:07-CV-624, *9-10, pp. 10-11 of 18 (S.D. Cal. 2007) (RJN in support of Tribe's motion for leave to file amicus brief in this case, Ex. 10, ECF 22-5).

The Court of Federal Claims explained to plaintiffs' counsel six years ago that:

> Over the course of the labyrinthine history of these disputes, other courts have determined that plaintiffs cannot maintain any claims that assert, explicitly or implicitly, beneficial ownership of tribal land ... without joining the Village, a 'necessary and indispensable' party. The doctrine of issue preclusion bars plaintiffs from challenging that determination.

Rosales X, 89 Fed. Cl. at 580-81 (citations omitted).

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[8](...continued)
counsel of record for plaintiffs in this case, as well as counsel for the proposed *amici* here.

[9] JAC's response supporting the Rosales/Toggery/Webb motion for leave to file an *amicus* brief states in part that "Appellants' request for injunctive relief is ***intended to protect theirs and the public's right (including Mr. Rosales and Ms. Toggery's right***) to provide meaningful input on, and propose mitigation for, the adverse impacts of the proposed casino proposal early in the decision making process." Dkt. Entry 24 (emphasis added).

As this Court has previously held, an absent tribe has "an interest in preserving [its] own sovereign immunity, with its concomitant right not to have its legal duties judicially determined without consent." *Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) (internal quotations omitted). Here, as in *Shermoen,* the Tribe is a required party under Rule 19, precluding any likelihood of plaintiffs' succeeding on the merits. This Court should not allow JAC to engage in yet another collateral attack on the Tribe's existence and the status of is Reservation.

4. The Defendants Cannot Provide Any Relief

Plaintiffs also cannot succeed on the merits because they fail to demonstrate the redressability element of standing. Where, as here, "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else," the "redressability" element of standing "'depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict ....'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (*quoting ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989), and *citing Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)).

Under these circumstances, plaintiffs' burden is to demonstrate that the absent party's "unfettered choices" will "permit redressability of injury." *Id.* (*citing Warth v. Seldin*, 422 U.S. 490, 505 (1975)). Thus, when the plaintiff is not the object of the challenged government action or inaction it challenges – as is the case here -- "standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Id.* (*quoting Allen v. Wright*, 468 U.S. 737, 758 (1984); *Simon*, 426 U.S. at 44-45; *Warth*, 422 U.S. at 505).

Here, neither the Tribally-Related Defendants nor the federal defendants have the capacity to afford plaintiffs the relief they seek. The Tribal leader defendants are sued only in their individual, personal capacities. *See* Fifth Complaint at ¶ 13, AER 186. To date, only one tribal leader, Raymond Hunter, has been timely served. *See* ECF 62 at pp. 16-17 of 25. In his individual capacity, Raymond Hunter has no authority to order the cessation of construction on the Tribe's casino project. Even if the other tribal leaders named in plaintiffs' Fifth Complaint had been timely served, *see* fn. 4 *supra*, in their individual capacities they also lack the capacity to take any official action on behalf of the Tribe.

As the district court previously held:

> "To the extent plaintiffs bring this action against defendant Hunter in his individual capacity, the allegations in the first amended complaint suggest he is entitled to tribal sovereign immunity because initiating construction of the

> Tribe's casino presumably falls under the chairman's duties in his representative capacity rather than his individual capacity."

Id. at 19:23-26. The district court recognized that only when acting in his official capacity as Tribal Chairman could defendant Hunter participate in official tribal governmental actions related to construction of the casino. *See id.*

The Tribally-Related Defendants, in their individual capacities, are not capable of authorizing or prohibiting development of the Tribe's casino on its Reservation. IGRA requires and provides for official tribal governmental action, not action by individuals, to develop, own and operate a casino. *See, e.g.,* 25 U.S.C. §§ 2702, 2703(5), 2710(d); *see also* Compact §§ 1, 3, 4.1-2. The right to develop and own a tribal casino belongs only to federally-recognized tribal governments.

Congress' primary purpose in enacting IGRA was "to provide a statutory basis for the operation of gaming by Indian ***Tribes*** as a means of promoting tribal economic development, self-sufficiency, and strong tribal government." 25 U.S.C. § 2702(1) (emphasis added). Congress found that "Indian ***tribes*** have the exclusive right to regulate gaming activity on Indian lands ...." *Id.* § 2701(5) (emphasis added). IGRA provides that only tribal governments may conduct gaming on Indian lands. *See id.* at § 2710(b)(1), (d)(1)-(2). Individual tribal officials in their individual capacities lack the ability to start or stop the process of the Tribe

developing and operating a government gaming enterprise. The same is true as to the other Tribally-Related Defendants.[10] Here, "[i]t is difficult to view the suit against the officials as anything other than a suit against the Band.... [I]t is the official action of the Band" that authorized construction its gaming enterprise and only official action of the Tribe can halt it. *Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991).

Likewise, the federal defendants lack the capacity to halt the Tribe's casino construction project. As explained above, the only federal action pending related to the Tribe's casino project is the NIGC's review of the proposed management contract between the Tribe and SDGV. The management contract is not a prerequisite to the Tribe's right to construct its casino. *See* discussion *supra* at § IV(B)(1) of this brief.

Because the defendants lack the capacity to provide plaintiffs with the relief they see, the district court correctly determined that plaintiffs lack the redressability element of Article III's standing requirement. *See Lujan*, 504 U.S. at 562.

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[10] Moreover, tribal officials named in their individual capacities retain their sovereign immunity. "[T]he fact that a tribal officer is sued in his individual capacity does not, without more, establish that he lacks the protection of tribal sovereign immunity." *Murgia v. Reed*, 338 F. App'x 614, 616 (9th Cir. 2009).

5. *Big Lagoon Rancheria v. California* Further Forecloses Plaintiffs' Continuing Collateral Attacks on the Tribe's Status and that of its Reservation

As noted above, plaintiffs' case depends on its arguments that the Tribe is not a tribe and that its Reservation is not a reservation. *See, e.g.,* JAC Br. at 1, 4, 7, 8, 16. As also discussed above, those fundamental issues have been litigated and lost by plaintiffs and their privies the proposed *amici* many times. *See* fn. 1 *supra.* Just a few weeks ago, an *en banc* panel of this Court reaffirmed that the APA's six year statute of limitations applies to federal actions recognizing Indian tribes and taking land into trust for tribes. *See Big Lagoon Rancheria v. California*, 2015 WL 3499884 (9th Cir. June 4, 2015), *as amended on denial of reh'g* (July 8, 2015). As plaintiffs do here, California argued in *Big Lagoon* that the tribe was not federally recognized and that its lands were not "Indian lands" under IGRA. This Court's *en banc* panel rejected the State's arguments because they "amount to collateral attacks on the BIA's 1994 decision to take the eleven-acre parcel into trust and its pre-1979 designation of Big Lagoon Rancheria as an Indian tribe." *Id*. at * 3.

Big Lagoon emphasized that "parties cannot use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions." *Big Lagoon Rancheria,* 2015 WL 3499884, at *4 (internal quotations omitted). The panel explained that "[a]llowing California to attack collaterally the

BIA's APA [action] would constitute just the sort of end-run that we have previously refused to allow, and would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government." *Id.* at *5.

Here, that end-run around federal actions recognizing the Tribe and taking lands into trust for its benefit – all of which were completed by 1982, *see Rosales X, supra* -- is precisely what plaintiffs are attempting. The *Big Lagoon en banc* panel rejected California's "challenge[]" to the "BIA's recognition of Big Lagoon Rancheria as an Indian tribe" and to its Reservation's status, just as plaintiffs seek to do here. *Big Lagoon Rancheria*, 2015 WL 3499884, at *5.

6. The District Court Correctly Rejected Plaintiffs' Untimely Breach of Compact Claim and other Claims Raised for the First Time in its Reply Brief below

JAC's reply brief raised a new argument not made in its opening brief in support of its motion for a preliminary injunction: namely, that the Tribe's casino construction should be halted because the Tribe allegedly breached its compact with California. *See* JAC Reply Br. at 11 (Dist Ct. ECF No 67). The district court correctly rejected this waived argument. *See* Order at 11:23 – 12:1, AER 12-13. *See United States v. Gianelli*, 543 F.3d 1178, 1184 n. 6 (9th Cir. 2008)

("arguments raised for the first time in a reply brief are generally considered waived").

Even if JAC had timely raised it, however, it nevertheless would fail to show a likelihood of success on the merits because JAC lacks standing, a private right of action, and an immunity waiver to seek to enforce the Compact's terms. The Compact is only enforceable by the Tribe and the State. JAC is neither a party to, nor a named third-party beneficiary of, the Compact. It therefore lacks the right and ability to seek to enforce the Compact. There is no express and unequivocal waiver of sovereign immunity in the Compact that allows a private third party, such as JAC, to seek to enforce the Compact's terms.

The Compact expressly addresses the process by which an alleged breach of Compact is to be resolved. *See* Compact § 9.0. "In recognition of the government-to-government relationship of the Tribe and the State," the Compact requires the parties to "make their best efforts to resolve disputes that occur under this Gaming Compact by good faith negotiations whenever possible." *Id.* at § 9.1. The Compact establishes a "threshold requirement that disputes between the Tribe and the State first be subjected to a process of meeting and conferring in good faith ...." *Id.* Following the meet-and-confer process, unresolved disputes may proceed to voluntary arbitration if both parties agree. *See id.* at § 9.1(c). If a Compact

dispute still remains unresolved, then either the State or Tribe may sue in court for "claims of breach or violation of this Compact ...." *Id.* § 9.1(d).

The Compact contains a limited waiver of sovereign immunity of both the Tribe and the State of California. Section 9.4(a) provides that "[i]n the event that a dispute is to be resolved in federal court ..., the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that" certain conditions exist. *Id.* § 9.4(a). Those conditions include that "[n]o person or entity other than the Tribe and the State is a party to the action, unless failure to join a third party would deprive the court of jurisdiction; provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party." *Id.* § 9.4(a)(3) (emphasis added).

Moreover, the Compact provides that "[i]n the event of intervention by any additional party into any such action [seeking to enforce Compact provisions] without the consent of the Tribe and the State, the waivers of either the Tribe or the State provided herein may be revoked, unless joinder is required to preserve the court's jurisdiction; provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party." Compact § 9.4(b) (emphasis added).

Finally, but importantly, Compact section 15.1 provides that "[e]xcept to the extent expressly provided under this [Compact], this [Compact] is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms." *Id.* § 15.1 (emphasis added). The Compact expressly makes "non-compact tribes" third party beneficiaries of the revenue sharing trust fund created thereunder. *See* Compact § 4.3.2(a)(i) ("Federally recognized tribes that are operating fewer than 350 Gaming Devices are 'Non-Compact Tribes.' Non-Compact Tribes shall be deemed third party beneficiaries of this and other compacts identical in all material respects"). Obviously, the Compact does not make JAC third party beneficiaries.

Reading the Compact's dispute resolution provisions as a whole, it is clear that allegations of breach of Compact may be resolved as between the State and the Tribe under Compact section 9, but not by private third-parties such as JAC. *See, e.g., Allen v. Gold Country Casino*, 2005 WL 6112668, No. S-04-322, slip op. at * 1 (E.D. Cal. Feb. 8, 2005), *aff'd in relevant part*, 464 F.3d 1044 (9th Cir. 2006); *Keitt v. WCAB*, 2012 WL 1511707 (2012). Thus even had JAC timely raised its breach of compact argument, it would have had no likelihood of success on the merits of that claim.

Moreover, even if JAC had standing, a private right of action, and an immunity waiver to seek to enforce the Compact, its claim would still fail. JAC argues that compact "Section 10.8.3 ... prohibits the construction of a casino after 2005 unless it is amended." JAC Br. at p. 27. But JAC omits key language. Section 10.8.3 gives the State the right to request renegotiation of section 10.8. *See id.*, AER p. 89. It does not flatly require such renegotiation.

In addition, as noted above, the Governor's Office confirmed the Tribe's compliance with Compact section 10.8 in a letter to Tribal Chairman Raymond Hunter dated August 27, 2013. *See* AER at 115.

Finally, had JAC timely raised this issue below in its opening brief instead of holding it back and raising it for the first time in reply, the Tribally-Related Defendants would have had an opportunity to put into the record a letter from then-Governor Gray Davis to Tribal Chairman Kenneth Meza, dated November 14, 2003, withdrawing the States's prior request to renegotiate Compact section 10.8. *See* AER at 115.

7. The District Court Correctly Rejected JAC's Argument, Made for the First time in its Reply Brief Below, that the NIGC's Approval of the Tribe's Gaming Ordinance is Major Federal Action Requiring NEPA Review

The district court correctly rejected JAC's belated argument regarding federal approval of the Tribe's gaming Ordinance, raised for the first time in their

reply brief below. The district court correctly held that this Court's decision in *North County Community Alliance Inc. v. Salazar*, 573 F. 3d 738 (9th Cir. 2009) forecloses JAC's assertion that approval of a tribal gaming ordinance requires NEPA review.

JAC is confused about what constitutes a "site specific" tribal gaming ordinance. *North County Community Alliance Inc.* held that "[t]here is no explicit requirement in IGRA that, as a precondition to the NIGC's approval, a proposed [tribal gaming] ordinance identify the specific sites on which the proposed gaming is to take place." *Id.* at 744-45. *North County Community Alliance Inc.* distinguished the tribal gaming ordinance at issue there from the one in *Citizens Against Casino Gambling in Erie County v. Kempthorne*, 471 F. Supp.2d 295 (WD NY 2007). In *Citizens*, the Seneca Nation had compacted with the State of New York regarding a significant expansion of that tribe's gaming operations off of its Indian lands. That tribal/state compact was submitted as that tribe's gaming ordinance for federal review and approval under IGRA. The Seneca's ordinance "identified three possible sites for class III gaming. It identified the precise location of two of the three sites." *North County*, 573 F. 3d at 745. The third site was "more generally" identified as "land 'in Erie County, at a location in the City of Buffalo ....'" *Id.* New York agreed in the compact to "assist the Seneca Nation

in acquiring parcels at two sites, including the generally described site in the City of Buffalo, and to assist the Seneca Nation in achieving Indian land status for the parcels." *Id.*

This Court distinguished the ordinance at issue in *North County* from the one in *Citizens* because "no specific gaming sites are identified ...." *Id.* at 746. This Court noted that the NIGC Chair's letter approving the *North County* ordinance stated that "'[i]t is important to note that the gaming ordinance is approved for gaming only on Indian lands as defined in IGRA.'" *Id.* This Court observed that "like the Ordinance itself, the [NIGC Chair's] letter identified no potential gaming site ...." *Id.*

Here, the Tribe's ordinance similarly does not identify a specific potential gaming site. Rather, as JAC's own exhibit demonstrates, the Tribe's ordinance generically authorizes gaming on "the Tribe's Indian Lands." Tribe's Ordinance § 2.2, AER at 78.[11] This Court agreed with the NIGC that "IGRA does not oblige a tribe to specify in an proposed ordinance, as a condition of the NIGC's approval, all (or even any) of the sites at which the tribe might conduct ... gaming." *North*

[11]Tribally-Related Defendants note that JAC inserted two pages of the Tribe's Ordinance, along with the table of contents, into the record with its reply brief below. Thus a complete, true and correct copy of the Ordinance is not in the record here, and the Tribally-Related Defendants were deprived of an opportunity to object or address this matter by JAC's tactics.

County, 573 F. 3d. at 746. This Court found no such "obligation in the statutory text." *Id.* Thus JAC's argument about the Tribe's gaming Ordinance is substantively wrong in addition to being raised for the first time on reply below.

Moreover, even if JAC had timely raised the issue and even if federal approval of the Tribe's Ordinance did trigger NEPA review, the statute of limits on an APA challenge would have expired many years ago. The Tribe's ordinance allowing class III casino gaming on its Reservation was federally approved in 1999. *See* 64 Fed. Reg. 4722, 4723. Thus the statute of limits for an APA challenge to that federal approval expired in 2005. *See* 28 U.S.C. § 2401(a).

JAC failed to argue, much less demonstrate, that the 2013 amended gaming ordinance altered the activity that was authorized in the 1999 ordinance – namely, casino gaming on the Tribe's Reservation. Since no new substantive activity was authorized in the 2013 amendment, even if the Tribe's Ordinance were site-specific – which it is not – federal approval of the 2013 amendment would not trigger NEPA. *See Grand Canyon Trust v. Williams,* 2015 WL 3385456 *2 (D. Az. 2015) (*citing Center for Biological Diversity v. Salazar*, 791 F. Supp.2d 687 (D. Ariz. 2011), *aff'd,* 706 F.3d 1086 (9th Cir. 2013)). In the absence of new major federal action, no supplemental NEPA analysis is required. *See Center for Biological Diversity v. Salazar*, 791 Fed. Supp.2d 687, 6969 (D. Az. 2011) (*citing Sierra Club*

v. Penfold, 857 F.2d 1307, 1312?13 (9th Cir. 1988); *N. County Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 749 (9th Cir. 2009)).

Thus even if NIGC approval of the Tribe's Gaming Ordinance did trigger NEPA review, the statute of limits would have expired in 2005, six years after the 1999 Ordinance was approved. *See* 64 Fed. Reg. 4722 (Jan. 29, 1999). As noted above, parties cannot "use a collateral proceeding to end-run the procedural requirements governing appeals of administrative decisions." *United States v. Backlund*, 689 F.3d 986, 1000 (9th Cir. 2012). "[A]llowing [the defendant] to collaterally attack the administrative proceedings would effectively circumvent the six-year statute of limitations we have held governs review of such actions." *Lowry*, 512 F.3d at 1203. *See Big Lagoon Rancheria*, 2015 WL 3499884, at *4.

C. Plaintiffs Fail to Demonstrate Any Irreparable Harm

Plaintiffs' "irreparable harm" argument is limited to a single paragraph in their opening brief. *See* JAC Br. at p. 21. Their alleged harm is their fear that the casino will be "constructed without being studied in the promised SEIS and without meaningful public comment." *Id.*

Plaintiffs fail to demonstrate irreparable harm because, as noted above, the environmental review of the casino's impacts – as distinct from the management

contract – is governed by the Tribe's Compact, not NEPA. *See* Compact § 10.8. The Tribe has fully complied with its Compact obligations, as confirmed by the Governor's Office:

> [T]he Tribe has complied with its specific obligations under [Compact] Section 10.8.2(a), which describe the period prior to the commencement of a project, to inform the public of the Project; identify potential adverse off-Reservation environmental impacts; submitting environmental impact reports to the appropriate state and local government agencies; consulting with the board of supervisors; ***and affording the affected members of the public an opportunity to comment***.

AER at 115 (emphasis added). Plaintiffs know all of this, as they submitted comments and received responses in that environmental review process.[12]

As also explained above, the SEIS is being conducted as part of the NIGC's review and approval of a management contract, after which plaintiffs will undoubtedly file another APA lawsuit or seek leave to file a sixth complaint in this case. *See* R.T. at 4:11-13. The pending SEIS is not legally relevant to the Tribe's construction of its casino. *See* discussion *supra* at § IV(B)(1) of this brief. Plaintiffs will have an opportunity to review and comment on the draft SEIS when the NIGC circulates it for public comment. *See* Order at 6, 9, AER at 7, 10; Thomas Dec. ¶ 10, AER 101; 78 Fed. Reg. 21398 (April 10, 2013).

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[12] *See http://jamulindianvillage.com/relevant-documents/* (Tribe's website publishing environmental review documents including public comments from and responses to plaintiffs).

The district court found that JAC "has not provided evidence that the BIA and NIGC have not and will not solicit and address public comments or mitigate the environmental impacts of the management contract. The evidence before the court supports the opposite conclusions." Order at 17: 10-13, AER 18. JAC points to no such evidence in its opening brief here, and thus has effectively waived its irreparable harm argument. *See Ind. Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("we will not consider any claims that were not actually argued in appellant's opening brief"); *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1160 (D.C. Cir. 2002) ("a party waives its right to challenge a ruling of the district court if it fails to make that challenge in its opening brief"). Indeed, the NIGC's NOI to prepare a supplemental SEIS for the approval of the Tribe's gaming management contract expressly invited "written comments on the scope and implementation of this proposal ...." 78 Fed. Reg. 21398-01 (April 10, 2013).

Plaintiffs' assertion of imminent irreparable harm is undermined by their decision to wait a full year after the Tribe began construction of its casino project before asking the district court for an injunction – and 18 months after construction began before asking this Court for "urgent" relief. Plaintiffs' "long delay before seeking" injunctive relief shows "a lack of urgency and irreparable harm."

Oakland Tribune, Inc. v. Chronicle Publ'g Co., 762 F.2d 1374, 1377 (9th Cir. 1985). *See Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213-14 (9th Cir. 1984) ("By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action") (internal quotation marks and citation omitted).

Here, plaintiffs' Third Complaint acknowledged that construction had already begun when it was filed in February 2014. *See* Fifth Complaint ¶ 8, ECF 15 ("Given that construction on the casino has been initiated ..."); *id.* ¶ 88 ("construction on the casino has already been initiated").[13]

This does not reflect true imminent irreparable harm. Plaintiffs' significant delay in seeking an injunction weighs heavily in favor of affirmance.

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[13] The district court's Order granting defendants' motions to dismiss the Third Complaint also noted that "construction has already commenced." Order at 4:10-14, ECF 50 (*quoting and citing* Third Complaint at ¶¶ 8, 14, and 88). JAC's counsel conceded at the hearing on those motions to dismiss 15 months ago that construction had already begun: "Since they started construction ....." R.T. at 9: 11-12, ECF 62-3 at 7 of 15. Plaintiff's counsel added that "there has been the initiation of construction of the casino ...." *Id.* at 16:22-24, ECF 62-3 at 8 of 15. As illustrated by the photographs of the project attached as exhibits to the Declaration of C.W. Driver Project Director Brent Hughes, filed six months ago in opposition to plaintiffs' motion for a preliminary injunction below, the project was well underway with significant excavation and construction already completed, reflecting the fact that construction had been ongoing for nearly a year at that time. *See* Ex. A-E to Hughes Dec., AER 121-130.

D. The Balance of Equities Tips Sharply In Favor of Affirmance

Plaintiffs' equities argument consists of this single sentence: "NEPA requires that environmental factors be given maximum consideration before federal agencies approve a major federal action." JAC Br. at 21. As noted above, plaintiffs will have had an opportunity to comment on the SEIS before NIGC approves or disapproves the management contract. *See* Order at 6, 9, AER at 7, 10; Thomas Dec. ¶ 10, AER 101; *see also* 78 Fed. Reg. 21398-01 (the NOI expressly included "[d]irections for Submitting Public Comments").

The district court found that JAC "has not provided evidence that the BIA and NIGC have not and will not solicit and address public comments or mitigate the environmental impacts of the management contract. The evidence before the court supports the opposite conclusions." Order at 17: 10-13, AER 18. JAC points to no such evidence in its opening brief here, and thus has effectively waived its balance of equities argument. *See Ind. Towers of Washington*, 350 F.3d at 929; *World Wide Minerals, Ltd.*, 296 F.3d at 1160.

As also noted above, the plaintiffs have already availed themselves of the opportunity to review and comment on the environmental impacts of the Tribe's casino construction and operation, which review was completed long ago pursuant to Compact section 10.8. *See* Compact § 10.8; AER 87-88; fn. 11 *supra*. The

Tribe's compliance with the Compact's environmental review process has been confirmed by the Governor's Office. *See* AER at 115.

Plaintiffs' Fifth Complaint once again claims that the Tribe is not a tribe and that the Tribe's Reservation is not a reservation, *see* Fifth Complaint ¶¶ 14, 20, 34-35, 44, 46, 75, 77, 87, 93, 97, 119, AER 183-213, despite the district court's contrary holding in this case, *see* Order at 7:13, ECF 50, and despite those issues having been fully and finally determined in prior cases.[14] Plaintiffs also continue to claim that the Tribe does not possess sovereign immunity, *see* Fifth Complaint ¶¶ 19, despite the district court's contrary holding, *see* Order at 7:13-14, 25:14-15, 27:19-20, ECF 50, and despite this Court's prior express holding that the ***"Village enjoys sovereign immunity from suit*** and cannot be forced to join this action without its consent." *Rosales VII*, 73 F. App'x at 914 (emphasis added). For plaintiffs to so blatantly disregard clear, direct orders of both the district court and this Court, and then to claim the equities are in their favor, strains their credibility to the breaking point and beyond. *Cf.* Fed. R. Civ. P. 11.

The Tribe obtained its federal trust lands in 1978 and 1982. *See* ECF 22. Congress confirmed the Tribe's right to engage in gaming for governmental

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[14] *See, e.g., Rosales VII*, 73 Fed. App'x. 913; *Rosales IX*, Case No. 3:07-CV-624, *9-10, pp. 10-11 of 18 (RJN in support of Tribe's motion for leave to file amicus brief in this case, Ex. 10, ECF 22-5); *Rosales X*, 89 Fed. Cl. at 586.

purposes when it enacted IGRA in 1988. *See* 25 U.S.C. §§ 2701-21. It took more than a decade after IGRA's passage for the Tribe to obtain a compact with California. *See* 65 Fed. Reg. 31189 (May 16, 2000). And the Tribe has been working diligently since then for a decade-and-a-half to finance, develop, build and open a casino to seek the benefits Congress intended. These equities weigh heavily against granting the motion.

As the Carroll and Hughes declarations, filed below in opposition to plaintiffs' injunction motion make clear, the injunction plaintiffs seek would cause tremendous damage to the Tribe, with a cost estimated at nearly one million dollars per month for the first month such an injunction existed. *See* Carroll Dec. at ¶¶ 3-5, AER 132-135; Hughes Dec. at ¶ 5, AER 119. Weighed against that is plaintiffs' call for an opportunity to comment on the casino's environmental review, which they have already had, and to comment a draft SEIS for approval of the management contract, which they will get when it is circulated.

The equities here tip sharply in favor of affirmance.

E. The Public Interest Weighs Heavily In Favor of Affirmance

Plaintiffs' "public interest" argument again ignores the fact that the project under review is the management contract not casino construction. Plaintiffs argue

that "it is in the public interest for them to complete the SEIS process, and allow for public input, before the casino is constructed." JAC Br. at 22. But again, as discussed above, the casino construction does not require a management contract or the associated NEPA review. *See* discussion *supra* at § IV(B)(1) of this brief.

The public interest here weighs heavily against granting an injunction. Congress has established the pre-emptive public interest with respect to tribal government gaming.[15] The public interest in environmental review of major federal actions has been and will continue to be upheld in this matter. The NIGC has given notice that it intends to supplement the existing EIS related to the review of the management contract. *See* 78 Fed. Reg. 21398-01. Moreover, the Tribe itself has completed a substantial Tribal Environmental Evaluation of the gaming project, as required by the Tribe's Compact.[16]

In sum, the public interests at issue here weigh in favor of affirmance.

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[15] *See* S.Rep. No. 100-446, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083; *Texas v. United States*, 497 F.3d 491, 506-07 (5th Cir. 2007); *United States v. Spokane Tribe of Indians*, 139 F.3d 1297, 1301 (9th Cir. 1998); 25 U.S.C. § 2701(4) ("a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government"); *Id.* at § 2702(1) (IGRA's first "purpose" is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments").

[16] *See* Compact § 10.8; *see also* AER at 115 (Governor's Office letter confirming Tribe's compliance with Compact's environmental obligations).

IV. CONCLUSION

For the foregoing reasons, the Tribally-Related Defendants respectfully request that the Court affirm the district court's Order denying plaintiffs' motion for a preliminary injunction.

Dated: July 14, 2015

Law Office of Frank Lawrence

By /s/
Frank Lawrence

Attorney for Defendants Raymond Hunter, Penn National Gaming Inc., San Diego Gaming Ventures, LLC, and C. W. Driver Inc.

STATEMENT OF RELATED CASES

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

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,075 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: July 14, 2015

By /s/ Frank Lawrence
Attorney for Tribally-Related Defendants

STATUTORY AND REGULATORY ADDENDUM

Addendum Contents

I. RELEVANT PROVISIONS OF THE INDIAN REORGANIZATION ACT

25 U.S.C. § 465. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

25 U.S.C. § 467. New Indian reservations

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

25 U.S.C. § 476. Organization of Indian tribes; constitution and bylaws and amendment thereof; special election

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

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

(h) Tribal sovereignty. Notwithstanding any other provision of this Act --

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

* * *

II. FEDERALLY RECOGNIZED INDIAN TRIBES LIST ACT

25 U.S.C. § 479a

For the purposes of this title:

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

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

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

25 U.S.C. § 479a-1. Publication of list of recognized tribes

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

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

* * *

III. RELEVANT PROVISIONS OF THE INDIAN GAMING REGULATORY ACT

25 U.S.C. § 2701. Findings

The Congress finds that –

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

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

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

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

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

25 U.S.C. § 2702. Declaration of policy

The purpose of this chapter is --

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

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

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

25 U.S.C. § 2710. Tribal gaming ordinances

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

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

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

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

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

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

(B) the governing body of the Indian tribe adopts an ordinance

or resolution which is approved by the Chairman. A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

***

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

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

(A) authorized by an ordinance or resolution that --

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

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

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

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

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

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

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

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

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

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

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

42 U.S.C. 4332.

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

* * *

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

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IV. RELEVANT PROVISIONS OF TRIBAL-STATE GAMING COMPACT

Section 1.0. PURPOSES AND OBJECTIVES.
The terms of this Gaming Compact are designed and intended to:

(a) Evidence the goodwill and cooperation of the Tribe and State in fostering a mutually respectful government-to-government relationship that will serve the mutual interests of the parties.

(b) Develop and implement a means of regulating Class 111 gaming, and only Class I11 gaming, on the Tribe's Indian lands to ensure its fair and honest

operation in accordance with IGRA, and through that regulated Class 111 gaming, enable the Tribe to develop self-sufficiency, promote tribal economic development, and generate jobs and revenues to support the Tribe's government and governmental services and programs.

(c) Promote ethical practices in conjunction with that gaming, through the licensing and control of persons and entities employed in, or providing goods and services to, the Tribe's Gaming Operation and protecting against the presence or participation of persons whose criminal backgrounds, reputations, character, or associations make them unsuitable for participation in gaming, thereby maintaining a high level of integrity in tribal government gaming.

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§ 3.0 CLASS I11 GAMING AUTHORIZED AND PERMITTED.
The Tribe is hereby authorized and permitted to engage in only the Class I11 Gaming Activities expressly referred to in Section 4.0 and shall not engage in Class I11 gaming that is not expressly authorized in that Section.

§ 4.1. Authorized and Permitted Class III gaming. The Tribe is hereby authorized and permitted to operate the following Gaming Activities under the terms and conditions set forth in this Gaming Compact:

(a) The operation of Gaming Devices.

(b) Any banking or percentage card game.

(c) The operation of any devices or games that are authorized under state law to the California State Lottery, provided that the Tribe will not offer such games through use of the Internet unless others in the state are permitted to do so under state and federal law.

(e) Nothing herein shall be construed to preclude negotiation of a separate compact governing the conduct of off-track wagering at the Tribe's Gaming Facility.

§ 4.2. Authorized Gaming Facilities. The Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act. The Tribe may combine and operate in each Gaming Facility any forms and kinds of gaming permitted under law, except to the extent limited under IGRA, this Compact, or the Tribe's Gaming Ordinance.

***

§ 9.0. DISPUTE RESOLUTION PROVISIONS.

§ 9.1. Voluntary Resolution; Reference to Other Means of Resolution. In recognition of the government-to-government relationship of the Tribe and the State, the parties shall make their best efforts to resolve disputes that occur under this Gaming Compact by good faith negotiations whenever possible. Therefore, without prejudice to the right of either party to seek injunctive relief against the other when circumstances are deemed to require immediate relief, the parties hereby establish a threshold requirement that disputes between the Tribe and the State first be subjected to a process of meeting and conferring in good faith in order to foster a spirit of cooperation and efficiency in the administration and monitoring of performance and compliance by each other with the terms, provisions, and conditions of this Gaming Compact, as follows:

(a) Either party shall give the other, as soon as possible after the event giving rise to the concern, a written notice setting forth, with specificity, the issues to be resolved.

(b) The parties shall meet and confer in a good faith attempt to resolve the dispute through negotiation not later than 10 days after receipt of the notice, unless both parties agree in writing to an extension of time.

(c) If the dispute is not resolved to the satisfaction of the parties within 30 calendar days after the first meeting, then either party may seek to have the dispute resolved by an arbitrator in accordance with this section, but neither party shall be required to agree to submit to arbitration.

(d) Disagreements that are not otherwise resolved by arbitration or other mutually acceptable means as provided in Section 9.3 may be resolved in the United States District Court where the Tribe's Gaming Facility is located, or is to be located, and the Ninth Circuit Court of Appeals (or, if those federal courts lack jurisdiction, in any state court of competent jurisdiction and its related courts of appeal). The disputes to be submitted to court action include, but are not limited to, claims of breach or violation of this Compact, or failure to negotiate in good faith as required by the terms of this Compact. In no event may the Tribe be precluded from pursuing any arbitration or judicial remedy against the State on the grounds that the Tribe has failed to exhaust its state administrative remedies. The parties agree that, except in the case of imminent threat to the public health or safety, reasonable efforts will be made to explore alternative dispute resolution avenues prior to resort to judicial process.

§ 9.2. Arbitration Rules. Arbitration shall be conducted in accordance with the policies and procedures of the Commercial Arbitration Rules of the American Arbitration Association, and shall be held on the Tribe's land or, if unreasonably inconvenient under the circumstances, at such other location as the parties may agree. Each side shall bear its own costs, attorneys' fees, and one half the costs and expenses of the American Arbitration Association and the arbitrator, unless the arbitrator rules otherwise. Only one neutral arbitrator may be named, unless the Tribe or the State objects, in which case a panel of three arbitrators (one of whom is selected by each party) will be named. The provisions of Section 1283.05 of the California Code of Civil Procedure shall apply; provided that no discovery authorized by that section may be conducted without leave of the arbitrator. The decision of the arbitrator shall be in writing, give reasons for the decision, and shall be binding. Judgment on the award may be entered in any federal or state court having jurisdiction thereof.

§ 9.3. No Waiver or Preclusion of Other Means of Dispute Resolution. This Section 9.0 may not be construed to waive, limit, or restrict any remedy that is otherwise available to either party, nor may this Section be construed to preclude, limit, or restrict the ability of the parties to pursue, by mutual agreement, any other method of dispute resolution, including, but not limited to, mediation or utilization of a technical advisor to the Tribal and State Gaming Agencies; provided that neither party is under any obligation to agree to such alternative method of dispute resolution.

§ 9.4. Limited Waiver of Sovereign Immunity.

(a) In the event that a dispute is to be resolved in federal court or a state court of competent jurisdiction as provided in this Section 9.0, the State and the Tribe expressly consent to be sued therein and waive any immunity therefrom that they may have provided that:

(1) The dispute is limited solely to issues arising under this Gaming Compact;

(2) Neither side makes any claim for monetary damages (that is, only injunctive, specific performance, including enforcement of a provision of this Compact requiring payment of money to one or another of the parties, or declaratory relief is sought); and

(3) No person or entity other than the Tribe and the State is party to the action, unless failure to join a third party would deprive the court of jurisdiction; provided that nothing herein shall be construed to constitute a waiver

of the sovereign immunity of either the Tribe or the State in respect to any such third party.

(b) In the event of intervention by any additional party into any such action without the consent of the Tribe and the State, the waivers of either the Tribe or the State provided for herein may be revoked, unless joinder is required to preserve the court's jurisdiction; provided that nothing herein shall be construed to constitute a waiver of the sovereign immunity of either the Tribe or the State in respect to any such third party.

(c) The waivers and consents provided for under this Section 9.0 shall extend to civil actions authorized by this Compact, including, but not limited to, actions to compel arbitration, any arbitration proceeding herein, any action to confirm or enforce any judgment or arbitration award as provided herein, and any appellate proceedings emanating from a matter in which an immunity waiver has been granted. Except as stated herein or elsewhere in this Compact, no other waivers or consents to be sued, either express or implied, are granted by either party.

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§ 15.1. Third Party Beneficiaries. Except to the extent expressly provided under this Gaming Compact, this Gaming Compact is not intended to, and shall not be construed to, create any right on the part of a third party to bring an action to enforce any of its terms.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 July 14, 2015.

Participants in the case are all registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Frank Lawrence
Frank Lawrence