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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMUL ACTION COMMITTEE ET AL. Plaintiffs, **v.** TRACIE STEVENS, ET AL. Defendants.	Case No. 2:13-cv-01920-KJM-KJN **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** Date: March 11, 2016 Time: 10:00 am Place: Courtroom No. 3 Judge: Honorable Kimberly J. Mueller

INTRODUCTION

Plaintiffs, by this motion, are seeking partial summary judgment on their First Claim for Relief in their Second Amended Supplemental Complaint (SASC). (Electronic Court File (ECF) No. 51). Specifically, Plaintiffs request a determination that none of the four properties on which a proposed Indian casino is being constructed in Jamul, California, is a "reservation" as that term is defined and used in the Indian Gaming Regulatory Act (IGRA). 25 U.S.C. §§ 2701-2721.

In support of this motion, Plaintiffs are submitting a Request for Judicial Notice (RJN) of the pertinent title documents with respect to each of the four properties. Plaintiffs' counsel is also submitting a declaration with copies of seven documents from the Jamul Indian Village (JIV)

website that depict the casino project and confirm that the casino, the casino parking lot, and several related structures are being constructed on the four properties. See Declaration of Kenneth R. Williams dated February 12, 2016, Exhibits 1through 7 (KRW Dec). Finally, as required Local Rule 260(a), Plaintiffs are submitting a Statement of Undisputed Facts (SUF) in support of their motion for partial summary judgment.

As outlined below, there is no genuine issue as to any material fact regarding the current title status of the title of these four parcels. And based on this undisputable title information, there is no material dispute that none of the four parcels is a "reservation" eligible for Indian gaming as defined in IGRA. Furthermore there is no genuine dispute that the Jamul casino, casino parking lot, and related structures are being built on these four parcels which are not, separately or combined, a "reservation" eligible for Indian gaming under IGRA. Consequently, Plaintiffs are entitled to partial summary judgment on this key issue as a matter of law. (Fed. R. Civ. P. 56.)

STATEMENT OF THE CASE

Plaintiffs filed their SASC in this case on August 26, 2014. (ECF No. 51) The SASC included six claims for relief. This motion for partial summary adjudication is based on the Plaintiffs' First Claim for Relief that seeks a injunctive and declaratory relief that the Jamul properties where the Indian casino is being constructed is not a "reservation" eligible for Indian gaming under IGRA. (ECF No. 51 at 1-18.)

Plaintiffs named the National Indian Gaming Commission (NIGC), the Bureau of Indian Affairs (BIA) and several of their employees as Defendants in the SASC. Plaintiffs also named five JIV council members in their personal capacities and the three private corporations responsible for building the Jamul casino. And it should be noted that the JIV, with permission from the Court, has previously voluntarily participated in this case as though it was a defendant. (ECF No. 51 at 3-5.)

The title documents submitted with this motion reveal the current title status and legal title owner with respect to each of the four parcels. And, as is discussed in detail below, none of the title documents for the four properties indicate that it is a "reservation" for any purpose much less IGRA purposes. (See RJN Exhs. A-G).) Furthermore: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." Cal. Evid. Code § 662 (West 2015).

There is no "clear and convincing proof" in the administrative record provided by the Defendants that, despite the clear record title, any of these properties is a "reservation" for IGRA purposes. Consequently, Plaintiffs are entitled to a partial summary judgment that none of the four properties on which the Jamul Indian casino is being constructed is a reservation eligible for Indian gaming under IGRA.

STATEMENT OF FACTS

On April 10, 2013, the NIGC published a Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Approval of a Gaming Management Contract (SEIS Notice) between the JIV and San Diego Gaming Ventures (SDGV). (RJN Exh. H.) In the SEIS Notice the NIGC asserts that: "The Gaming Management Contract, if approved, will allow SDGV to manage the approved 203,000 square foot tribal gaming facility to be located on the Tribe's Reservation, which qualifies as 'Indian lands' pursuant to 25 U.S.C. 2703." (Id.; emphasis added.) The NIGC did not reference or provide any documents to support this assertion.

The SEIS Notice states that: "The enterprise to be managed includes a gaming facility, a multi-level parking structure, surface parking lot, fire-fighting facilities, waste water treatment plant/disposal facilities, water delivery system, and improved on-site traffic circulation." "The total estimated gaming floor area for the gaming facility is 70,000 square feet." (Id.) The description of the "gaming enterprise" in the SEIS Notice is similar to the definition in the JIV

Compact: "Gaming Facility or Facility means any building in which Class III gaming activities or gaming operations occur . . . and all rooms, buildings, and areas, including parking lots and walkways, a principal purpose of which is to serve the activities of the Gaming Operation." (RJN Exh. I.) Thus, the SEIS Notice and Compact definitions both include the casino parking lot.

Although the 2013 SEIS was never circulated, it was supposed to supplement an EIS prepared in 2003 for an earlier casino proposal by the JIV and a different developer. (RJN Exh. H.) The 2003 EIS, that was never finalized or approved, included a fee-to-trust proposal to take adjacent land into trust for some of the casino related facilities listed above. (KRW Dec. Exhs. 5 & 6.) But, in 2013, the JIV supposedly "revised their project to eliminate the fee-to-trust component and to reconfigure all uses onto the existing Reservation, except for an access road" on the adjacent property. (RJN Exh. H; emphasis added.) This "access road" is depicted on the JIV website as the grand driveway and entrance to the "Hollywood Casino." (KRW Dec. Exh. 7; see also Exhs. 5 and 6 depicting the adjacent property and access road as part of the earlier project.) Thus, despite the attempted reconfiguration of the casino to avoid the fee-to-trust process, Defendants retained an important portion of the 2003 fee-to-trust proposal for the adjacent property as the main entrance to the 2013 casino project.

The SEIS Notice itself does not specifically describe or depict what the NIGC claims to be the JIV's Reservation. But it does reference environmental documents posted on the JIV website which do include some helpful pictures and depictions of the proposed Jamul casino, parking lot and related structures. (KRW Dec. Exhs. 1-7.) And these aerial photos and depictions confirm that the casino and related structures are being constructed on the four properties addressed in this motion. In summary, the casino is being constructed on four different properties all of which must qualify, but none of which do qualify, as a "reservation" eligible for Indian gaming under IGRA.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The moving party "bears the initial responsibility of informing the district court of the basis for its motion." *Celotex v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually exists. *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 586 (1986).

The non-moving party "may not rest upon the mere allegations or denials of his pleadings," but must instead establish specific, "significantly probative" facts showing a genuine issue or dispute of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-249 (1986). The opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matshshita*, 475 U.S. at 587 (citations omitted). In that event, summary judgment should be entered in favor of the moving party. *Celotex Corp.*, *supra.* 477 U.S. at 322.

LEGAL FRAMEWORK

When it enacted IGRA, Congress created the NIGC and vested it with certain powers of regulatory oversight over gaming activities on "Indian lands." 25 U.S.C. §§ 2701 et seq. IGRA defines "Indian lands" as:

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4).

Here the NIGC claimed for the first time in 2013, without any documentary support, that the property where the Jamul Indian casino is being constructed is a "Reservation, which qualifies as 'Indian lands' pursuant to 25 U.S.C. 2703" eligible for gaming under IGRA. (RJN Exh. H.)

When it was enacted, IGRA did not include a definition of "reservation." And, given the many varied definitions of "reservation" in other – non-IGRA contexts – it was not clear which definition, if any, should or could be used for IGRA purposes. See *Sault Ste. Marie Tribe of Chippewa Indians v. United States,* 576 F.Supp.2d 838 (USDC W.D.Mich. 2008) (Although the definition of reservation under IGRA is ambiguous, the Secretary of Interior's change of position and new narrow interpretation of "reservation" was not entitled to deference.)

Also it was not clear initially in IGRA whether the NIGC Chairman or the Secretary of Interior had the authority to determine whether or not a property is a "reservation" for IGRA purposes. The NIGC, as part of its regulatory authority over Indian gaming, has the obligation to determine that a parcel which a tribe claims is a reservation is, in fact, is a reservation eligible for Indian gaming for IGRA purposes. But only the Secretary of Interior has the authority to "proclaim" a new reservation after a property has been taken into trust. 25 U.S.C. § 479 & 25 C.F.R. Part 151. The competing responsibilities and jurisdictions of the NIGC and Department of Interior over Indian reservations seemed to create another ambiguity inherent in IGRA.

The Tenth Circuit attempted to address both of these issues in *Sac and Fox Nation of Missouri v. Norton,* 240 F.3d 1250 (10th Cir. 2001). There the court considered whether a tribal burial ground was a "reservation" for IGRA purposes. The Secretary of Interior had issued a decision that it was a reservation and, therefore, the tribe could conduct gaming on a contiguous parcel. But the Tenth Circuit held that the Secretary of Interior had not been "charged with administering IGRA" and, therefore, the "Secretary lacked the authority to interpret the term 'reservation,' as used in IGRA." *Id.* at 1265. The court rejected the Secretary's broad

interpretation that a "reservation" includes "any parcel of land set aside by the federal government for Indian use." *Id.* at 1266-1267. The Indian cemetery in that case was held not to be a reservation for IGRA purposes.

The Tenth Circuit's decision in *Sac and Fox Nation of Missouri v. Norton* created more confusion than clarity regarding the interpretation of "reservation" for IGRA purposes. For example, the District of Columbia Circuit rejected the Tenth Circuit's narrow interpretation of "reservation" and adopted a broader definition for IGRA purposes suggested by the Secretary of Interior in that case. *Citizens Exposing the Truth About Casinos v. Kempthorne*, 492 F.3d 460, 468 (D.C.Cir. 2007.)

Fortunately, for the purposes of this case, both of these issues, the authority of the Secretary of Interior and the IGRA definition of "reservation," have since been clarified. These issues are no longer ambiguous.

First, in 2001, almost immediately after the *Sac and Fox Nation of Missouri v. Norton Sac and Fox Nation of Missouri v. Norton* decision was issued, Congress "clarified" that the Secretary of Interior had been delegated "the authority to determine whether a specific area of land is a 'reservation' for the purposes" of IGRA. Pub. L. No. 107-63, § 134 (2001). Thus, contrary to her announcement in the SEIS Notice, NIGC Chairwoman Stevens lacked the authority to unilaterally declare, without a supporting determination of the Secretary of Interior, that the property on which Jamul casino is being constructed is a "Reservation, which qualifies as 'Indian Lands' pursuant to 25 U.S.C. 2703" eligible for gaming under IGRA.

Second, in 2008, the Department of Interior clarified any previous ambiguity by issuing regulations specifically defining the term "reservation" for IGRA purposes, as:

> (1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;

(2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of Indians as its homeland;

(3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or

(4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

25 C.F.R. § 292.2

Thus, to qualify as a reservation for IGRA purposes, the Secretary of Interior [not the NIGC Chairwoman] must find that the subject property meets one of these four criteria. None of the four parcels, on which the Jamul Indian casino is currently being constructed, meet any of these four regulatory definitions or classifications of "reservation" for IGRA purposes.

ARGUMENT

A. The 4.66 acre parcel granted in 1978 by the Daleys to the United States for the benefit of Jamul Indians is not a reservation eligible for gaming under IGRA.

On December 27, 1978, Donald L. Daley and Lawrence A. Daley granted 4.66 acres to the United States "in trust for such Jamul Indians of one-half degree or more blood as the Secretary of Interior may designate." (RJN Exh. A; SUF No. 1.) The Acting Area Director of the BIA accepted the conveyance without any qualification. And there is no recorded evidence that this parcel was ever accepted into trust pursuant to 25 CFR Part 151 or it had ever been proclaimed by the Secretary of Interior to be a reservation. 25 U.S.C. § 467.

On the other hand, this parcel appears to be the primary parcel that, in the SEIS Notice, the NIGC Chairwoman declared to be the JIV Reservation, which qualifies as Indian lands eligible for gaming under IGRA. (RJN Exh. H.) Most to the gaming facilities, including the casino and underground parking lot and other facilities, are being constructed on this parcel. (KRW Dec. Exh. 3; SUF No. 1.)

Despite the NIGC Chairwoman's assertion that this parcel qualifies as a reservation under IGRA, it does not meet any of the four regulatory criteria to be a reservation. 25 C.F.R. § 292.2. It was not created by treaty, executive order or any other federal statute. Furthermore, the NIGC Chairwoman lacked the authority to proclaim this parcel to be a reservation. That authority rests solely with the Secretary of Interior. 25 U.S.C. § 467.

Plaintiffs are entitled to a summary adjudication that, as a matter of law, this 4.66 acre parcel is not a reservation eligible for gaming under IGRA.

B. The adjacent parcel to be used for the Hollywood Casino access and entrance is owned in fee and is not a reservation eligible for gaming under IGRA.

This triangular shaped parcel north of the Jamul Indian Village has always been part of the casino project and was always going to be used for the casino entrance and driveway. It was first included in the 2003 101 acre fee-to-trust proposal for the earlier casino project. (RJN Exh. H; KRW Dec. Exhs. 5 & 6; SUF No. 2.) But, after the Supreme Court decision in *Carcieri,* this fee-to-trust aspect of the casino project was no longer a viable option for the JIV. Specifically, the JIV was not in existence, much less federally recognized, in 1934 when the Indian Reorganization Act (IRA) was enacted. And, therefore, according to the Supreme Court, the JIV was not entitled to the fee-to-trust benefits of the IRA. *Carcieri v. Salazar* 132 S.Ct. 1058 (2009). Consequently, the 2003 fee-to-trust casino proposal did not proceed further. And the former casino developer, Lakes Kean, eventually conveyed the property to the JIV in 2011 to construct a new roadway or driveway to the 4.66 acre parcel. (RJN Exh. B.)

In February 2012, contrary to the provisions of the 25 C.F.R. Part 151, JIV Chairman Hunter and BIA Regional Director Amy Dutschke entered into an agreement to take the adjacent property into trust to build an elevated driveway into the casino parking lot and a grand entrance for the casino. To achieve this objective, an Easement Deed that was signed by Hunter and Dutschke, was recorded February 23, 2012, conveying the property from the JIV to the United

States "in trust for the benefit of the Jamul Indian Village of California." (RJN Exh. C.) This important Easement Deed should have been, but was not, disclosed in the SEIS Notice issued in April 2013. (RJN Exh. H.) (On the other, it was later revealed that this property was included in the Gaming Management Contract dated April 3, 2013. (ECF No. 67-3.))

On January 16, 2015, John Rydzik, BIA Chief of the Division of Environmental, Cultural Resources, and Safety, filed a declaration in this lawsuit that did not mention this 2012 easement deed between Defendant Hunter and, his boss, Defendant Dutschke. (ECF No. 63-1; SUF No. 4.) Instead, in an attempt to avoid the impact of the *Carcieri*, Mr. Ryzdik declared – under the penalty of perjury – that, after circulating the 2003 EIS "for the trust acquisition and casino project," the JIV "subsequently determined not to pursue the trust application." But Ms. Ryzdik and Ms. Dutschke knew that this statement was not true when the declaration was made. Ms. Dutschke and Mr. Hunter tried to put this parcel in trust a year earlier

On April 21, 2015, three months after Mr. Ryzdik's wrong declaration, Ms. Dutschke and Mr. Hunter tried to "correct" their *Carcieri* avoidance misstep after-the-fact, by signing and recording a Correction Deed which essentially took the adjacent property back out of trust. (RJN Exh. D.) Specifically, they "corrected" the earlier easement deed by removing the words "in trust for the benefit of the Jamul Indian Village of California." The Correction Deed also removed the following phrase: "Grantee shall hold such Easement in trust for the benefit of the Jamul Indian Village." (Id.) Thus the adjacent property, which was illegally transferred in trust in 2012, was awkwardly taken out of trust in 2015. In either event, it is not a "reservation" under IGRA. And the Defendants have made it clear in this Court and before the Ninth Circuit that they are not going pursue a fee-to-trust transfer of the 4 acre adjacent property. (SUF No. 3 & 4.)

For the purposes of this motion, it is clear – at least for now – that the adjacent 4-acre parcel is not trust land. Nor does it come close to meeting any of the regulatory criteria listed

above to qualify as a "reservation" under IGRA. 25 C.F.R. § 292.2. Plaintiffs are entitled to a summary adjudication that, as a matter of law, this 4 acre parcel is not a reservation eligible for gaming under IGRA.

C. The Indian graveyard transferred in 1982 by the Catholic Church to the United States in trust for the JIV is not a reservation eligible for gaming under IGRA.

On July 11, 1912, the Coronado Beach Company transferred 2.21 acres to the Roman Catholic Bishop "for an Indian graveyard and approach thereto". (RJN Exh. E.) Seventy years later, on July 27, 1982, of the Roman Catholic Bishop transferred a portion of this property (1.372 acres) to the United States "in trust for the Jamul Indian Village." The Church reserved the remainder of the property and an easement for utility service lines and for "ingress and egress over the existing well-traveled road." (RJN Exh. F.)

This property is still being used for an Indian cemetery and, as such, it should not be considered a reservation for IGRA purposes. See *Sac and Fox Nation of Missouri v. Norton, supra.* Furthermore, it does not meet any of the regulatory criteria to be a reservation under IGRA. 25 C.F.R. § 292.2. Despite this fact, the current access road to the Indian graveyard property is apparently being used as an access road to the casino construction site and will also provide access to the new casino. (KRW Dec. Exhs. 2 & 3; SUF No. 5.) Plaintiffs are entitled to a summary adjudication that, as a matter of law, the Indian graveyard and related access are not a reservation under IGRA.

D. The easement on the Wildlife Conservation Board property, transferred to the JIV and Penn National in 2014, is not a reservation eligible for gaming under IGRA.

October 23, 2014, the Wildlife Conservation Board (WCB) transferred to the JIV an 80 foot easement on wildlife refuge property for an underground "Soil Nail System" to support the JIV casino and related parking lot. (RJN Exh. G; SUF No. 6.) As a part of the arrangement, the casino developers, Penn National and San Diego Gaming Ventures agreed to indemnify the WCB

for any litigation costs that may be generated if this easement is challenged. (Id.)

The soil nails and related casino support structures were necessary, and reasonably foreseeable by any competent structural engineer, because the casino and parking lot were to be built right on the boundary line. In fact, this boundary line wall is called a "soil nail wall" and consists of hundreds of soil nails that penetrate the WCB property up to 36 feet. And an 80 foot easement is apparently needed to maintain and monitor these soil nails. (KRW Dec. Exhs. 3 & 4.) The soil nail wall is critical to the integrity of the entire casino structure. It is part of the casino and gaming facility. (RJN Exh. I; KRW Dec. Exhs. 3 & 4; SUF No. 7.)

The JIV's 80 foot soil nail easement on WCB property does not meet any of the regulatory criteria for a reservation under IGRA. 25 C.F.R. § 292.2. Plaintiffs are entitled to summary adjudication that, as a matter of law, this easement is not a reservation under IGRA.

CONCLUSION

For the forging reasons, Plaintiffs are entitled to summary adjudication on their first claim for relief and a declaration that none of the four properties where the Jamul Indian casino is being constructed is a "reservation" eligible for gaming under IGRA. Plaintiffs respectfully request separate findings with respect to each of the four properties

Dated: February 12, 2016.

Respectfully submitted,

/s/ Kenneth R. Williams
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