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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe, et al. Plaintiffs, v. SALLY JEWELL, Secretary of the Interior, et al., Defendants.	CASE NO. 2:12-CV-03021-TLN-AC **PLAINTIFF COLUSA INDIAN COMMUNITY'S MOTION FOR RECONSIDERATION**

Plaintiff Cachil Dehe Band of Wintun Indians of the Colusa Indian Community ("Colusa") hereby respectfully moves the Court for reconsideration of its decision of September 24, 2015 pursuant to Fed. R. Civ. P. 59(e) or 60(b) on the ground that the Court omitted consideration of several claims included in Colusa's Memorandum of Points and Authorities in support of its Motion for Summary Judgment ("MPA").

1. THE DEPARTMENT OF THE INTERIOR'S FAILURE TO EXAMINE A VIABLE ALTERNATIVE RENDERS THE FINAL ENVIRONMENTAL IMPACT STATEMENT INADEQUATE

The Court wrote "given that Plaintiffs did not provide any additional alternatives, the Court cannot presume that an adequate alternative exists elsewhere." Slip Op. at 9:6-7. NEPA does not require DOI to consider alternatives that are "remote and speculative" or that "are not significantly

distinguishable from alternatives actually considered, or which have substantially similar consequences." *Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1180-81 (9th Cir. 1990) (citations omitted). "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (citation omitted).

Plaintiff Colusa, however, pointed out that in 2006 Enterprise actually purchased a larger parcel of land in Oroville, not far from its existing and former reservations, two years before the Draft EIS was published in 2008. ECF 102-1 at 9:18-20 ("the EIS completely ignored a logical alternative based on Enterprise's purchase of 63 acres of land adjacent to the City of Oroville in Butte County in 2006, while the Draft EIS was still under development.") Enterprise purchased that land, and has deliberately refrained from seeking to have it taken into trust until after the Yuba County parcel, giving the impression that it only owned its original pre-IGRA 40-acre reservation on which gaming was permitted, instead of over 100 acres on which gaming could be both legally and physically possible. ARN 0022969-970.

In *NRDC v. U.S. Forest Serv.*, the court found that the U.S. Forest Service failed to examine viable alternatives because it did not address the demands reflected in an economic study. 421 F.3d 797, 814 (9th Cir. 2005). In a similar manner, the FEIS examined Enterprise's existing pre-IGRA (thus already gaming eligible) reservation, the land it was offered in Yuba County in exchange for sharing hundreds of millions of dollars with YCE, but *entirely failed* to address the largest parcel of Butte County land *already actually owned by Enterprise near its existing trust lands and that would not require payment of hundreds of millions of dollars to YCE*.

In *Citizens for a Better Henderson v. Hodel*, the court found that the Secretary did not need to look into an alternative route for transmission lines he had failed to address because the district court had taking extensive, uncontradicted testimony on the unreasonableness of the route. 768 F.2d 1051, 1057 (9th Cir. 1985); *Dubois v. USDA*, 102 F.3d 1273, 1288 (1st Cir. 1996) (unexamined alternative "is not so facially implausible that it can be dismissed out of hand," rendering EIS inadequate). Here, the 63-acre alternative remains entirely unexamined by either DOI or the Court.

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2. THE DEPARTMENT OF THE INTERIOR'S FAILURE TO EXAMINE THE SOCIOECONOMIC IMPACTS ON COLUSA AND OTHER INDIAN COMMUNITIES RENDERS THE FINAL ENVIRONMENTAL IMPACT STATEMENT INADEQUATE

By relying on stale data, inadequate scientific analysis and frankly-admitted pure speculation, the EIS failed to adequately analyze the socioeconomic and environmental justice impacts on Colusa as required by NEPA. The ROD, by relying on the same stale data, inadequate economic analysis and outright speculation, failed to analyze the economic detriment to Colusa as required by IGRA. The Court addressed the claim that the data was stale (Slip Op. at 13:13-14), but did not address the argument that the data and analysis were fundamentally flawed.[1]

Addressing the socioeconomic impact on UAIC, DOI and the Court argue that "competition alone is not enough of a detrimental impact to sustain this NEPA challenge." Slip Op. at 13:7-8. That observation does not address Colusa's argument, however. Colusa did not argue that it should be free of competition, but that DOI should not facilitate the destruction of the primary source of its governmental revenues without relying upon the "high quality information" and "accurate scientific analysis" required by NEPA. 40 C.F.R. § 1500.1(b).

Like a house built on a weak foundation, an analysis based on pure conjecture is itself nothing more than pure conjecture. The authors of the report upon which the EIS bases its socioeconomic findings admit that they "cannot estimate the actual impact on each tribe." ARN 0024811; MPA iso MSJ at 10. They admittedly guess at both the Colusa casino's market and revenues, and therefore admittedly guess at the impacts on it, using as their standard whether Colusa's casino would be put out of business. *Id*. At no point did they even guess at the impacts on Plaintiff's government and community.

Compounding the error, DOI misinterpreted the reports to conclude that the Enterprise casino would not cause detrimental socioeconomic impacts on Indian tribes, communities, or individuals despite the fact that they are included in the definition of the communities covered by the

[1] The Court – inappropriately in Plaintiff's view – struck a declaration by Alan Meister (ECF 158) that demonstrates the devastating impacts that Enterprise's proposed casino on the Yuba site would have on both Plaintiff's own casino and its ability to provide vital services to the Reservation community, but Colusa's socioeconomic argument under NEPA and economic detriment argument under IGRA did not depend wholly upon that declaration.

environmental justice policies of the federal government. E.O. 12898 (1994). Although the economic study vastly underestimated the impacts, it still estimated that the Enterprise casino would "cannibalize" over $4 Million of Colusa's business, and that "[f]or the small casinos, such as Colusa, . . . the impacted gaming revenues likely represent a higher percentage of the casinos' total win as compared to" the larger casinos. ARN 0024812. Nonetheless, the EIS did not address the socioeconomic impacts on the Colusa community.

The failure to even address the impacts is a violation of NEPA. *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 106-07 (1983) ("NEPA requires an EIS to disclose the significant health, socioeconomic and cumulative consequences of the environmental impact of a proposed action" (underlining added)). Moreover, DOI's misinterpretation of the economic analyses upon which the EIS relies to find that there would be no socioeconomic impact on Colusa and other Indian tribes is fatal to the EIS. *NRDC v. U.S. Forest Serv.*, 421 F.3d 797, 812 (9th Cir. 2005)

3. UNDER 25 U.S.C. § 465 AND 25 C.F.R. PART 151, THE DEPARTMENT OF THE INTERIOR'S FAILURE TO ADDRESS ENTERPRISE'S NEED FOR THE YUBA PARCEL IN LIGHT OF ENTERPRISE'S OWNERSHIP OF THE 63-ACRE BUTTE COUNTY PARCEL WAS ARBITRARY AND CAPRICIOUS

The failure to address Enterprise's existing ownership of the 63-acre Butte County parcel extends to the RODs, which do not address the fact that Enterprise already owned a 63-acre Butte County parcel adjacent to Oroville in addition to its existing, gaming-eligible reservation, Enterprise No. 1, and thus does not need the 40 acres in Yuba County in order to build a casino, or to pay hundreds of millions of dollars to YCE. ARN 0030214; ARN 0022969. The Court found that "the Secretary explained in the ROD that this current 40 acres [the existing Enterprise reservation] is not sufficient," but did not address the failure of the Secretary to analyze Enterprise's "need" for YCE's parcel in light of the fact that the tribe already owned a 63-acre parcel that Enterprise never has sought to place into trust. Slip Op. at 25:16.

Although DOI may not be required to justify acquiring one parcel as opposed to another, Slip Op. at 25:9, it must consider the needs of the tribe in light of its current holdings, including both the 63-acre parcel and the 40-acre reservation in Butte County, and the distance from its reservation and

headquarters. 25 C.F.R. §§ 151.10 & 151.11. DOI's complete failure to consider the 63-acre parcel despite it being acquired two years before the Draft EIS, six years before the ROD under 25 C.F.R. Part 151, and eight years before acquisition of the parcel in trust is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

4. UNDER 25 U.S.C. § 2719(B) AND 25 C.F.R. PART 292, THE DEPARTMENT OF THE INTERIOR'S FAILURE TO ADDRESS THE DETRIMENTAL IMPACTS OF ENTERPRISE'S CASINO ON COLUSA WAS ARBITRARY AND CAPRICIOUS

Similarly to its treatment of Colusa's socioeconomic arguments under NEPA, the Court did not address Colusa's argument that DOI incorrectly ignored the detrimental economic impacts on Colusa as required by IGRA. Slip. Op. at 19-20. In dismissing UAIC's detriment argument, the Court again relied upon the Defendants' straw-man argument that what the tribe sought was protection from competition. *Id*. at 20. As noted *infra*, Colusa has not sought to avoid competition, and would not object to Enterprise building a casino on its existing gaming-eligible 40-acre Enterprise No. 1 reservation, or even to DOI's acceptance into trust for gaming purposes the 63-acre Butte County parcel that Enterprise already owned in fee simple. Indeed, when UAIC and other tribes opened their casinos to Colusa's detriment, it did not seek to prevent them from opening.

Colusa has only sought to block DOI's decision to take land into trust for gaming for Enterprise, *which already had gaming eligible land in trust*, because it amounts to conferring an artificial – and completely unfair – competitive advantage on one tribe to the substantial detriment of other tribes to which it also bears a fiduciary responsibility. In its ROD, DOI ignored the fact that even the inadequate data before it conclusively demonstrated that Enterprise's casino necessarily would "cannibalize" the business of other tribes, and would have a greater impact on the smaller casinos, such as Colusa's. ARN 0024812.

By placing the *desire* of Enterprise for a better casino location than it already had, and the willingness of YCE to finance development of Enterprise's casino only on land that YCE already owned, over the needs of the business enterprise that supports Colusa's government and people, DOI gave an invalid preference to Enterprise. DOI "cannot favor one tribe over another." *Redding Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015); 25 U.S.C. § 476(f) (prohibiting federal

agencies from any action that "classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes"). By failing to address detrimental impacts patent in the record before it, DOI's decision under 25 C.F.R. Part 292 is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

CONCLUSION

For the forgoing reasons, the Court should grant Colusa's Motion for Reconsideration of the judgment of September 24, 2015, and grant summary judgment in Plaintiff's favor.

Dated: October 22, 2015

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