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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 REPLY IN SUPPORT OF THE MOTION FOR RECONSIDERATION**

REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION

Plaintiff Cachil Dehe Band of Wintun Indians ("Colusa") hereby replies in support of its Motion for Reconsideration. ECF 170. The federal defendants, ECF 171, and Enterprise Rancheria, ECF 172, have opposed the Motion for Reconsideration. This Reply addresses only two outstanding issues raised by the Oppositions: (1) whether Colusa's arguments have all been addressed by the Court; and (2) whether its arguments were waived administratively. Notwithstanding Enterprise's unique argument that by not raising an issue in a reply brief a party waives the issue, ECF 172 at 8:6-7, Colusa will let its previous arguments stand on their own unwaived.

Federal defendants and Enterprise argue throughout their Oppositions that all of Colusa's claims were addressed head on by the Court in its Order. As correctly argued by federal defendants, one

cannot raise new claims at the Motion for Reconsideration stage that could have been raised earlier. See ECF 172 at 3:17-18 (quoting *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009)). In its Motion, therefore, Plaintiff sought to highlight the arguments it has already made to the Court that it did not find addressed in its Order of September 24, 2015. ECF 168. Within the argument on each claim Colusa believes the Court did not reach, the Motion identified the section where Colusa expected to find the Court's discussion of the Tribe's claims. *E.g*, ECF 170 at 1:27, 3:8, 4:25 & 5:10.

The argument that Colusa waived its arguments by not participating in the administrative process is incorrect. Although it asked its trustee, BIA, by telephone and in writing for consultation on the cannibalization of its casino by another tribe leapfrogging over it to intercept its customers, BIA put the burden on Colusa to prove it was in danger entirely contrary to published BIA and DOI policies on consultation. ECF 171 at 6:8 (averring without citation that Colusa "declined" BIA's invitation). BIA required proof despite the fact that the studies upon which the EIS was based acknowledged that the Enterprise casino would cannibalize the Colusa casino's business, which would obviously cause Colusa's "governmental functions, infrastructure or services [to] be directly impacted by the proposed gaming establishment." ECF 171 at 6:9-11. The only disagreement was over the degree, since the study's authors admitted that they guessed at their extent.

Unbeknownst to Colusa, the FEIS had already been finalized in May and was signed shortly thereafter. EN AR NEW 0028184. Despite its knowledge of Colusa's concerns, BIA failed to even provide notice to Colusa when the FEIS finally was published, but it did provide notice to other tribes outside of the 25-mile limit for "affected tribes". EN AR NEW 0028244-247. Informed of the FEIS by a fellow tribe, not BIA, its own trustee, Colusa submitted comments. EN AR NEW 0028549-558. In its comment letter, and further oral communications, Colusa pleaded for a serious consideration of the socioeconomic impacts on its people, economic impacts on its livelihood, and full consideration of the 63-acre parcel, among other things. *Id.* The discussion of the socioeconomic and economic impacts on Colusa and the request that the 63-acre parcel be included in the EIS analysis more than sufficed to give the agency "a chance to bring its expertise to bear to resolve the claim" at the administrative level. *Lands Council* v. *McNair*, 629 F.3d 1070, 1076 (9th

Cir. 2010). Federal defendants, however, chose to ignore the matter and let it proceed to litigation.

CONCLUSION

For the forgoing reasons, the Court should grant the Motion for Reconsideration.

Dated: December 2, 2015 FORMAN & ASSOCIATES

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