No. 15-16021

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

JAMUL ACTION COMMITTEE, JAMUL COMMUNITY CHURCH, DARLA KASMEDO, PAUL SCRIPPS, GLEN REVELL, and WILLIAM HENDRIX

Plaintiffs-Appellants

v.

TRACIE STEVENS, Former Chair of the NIGC; JONODEV CHAUDHURI, Chairman of the NIGC; DAWN HOULE, Chief of Staff for the NIGC; SALLY JEWELL, Secretary of the Interior; KEVIN WASHBURN, Assistant Secretary - Indian Affairs; PAULA HART, Director of the OIG; AMY DUTSCHKE, Regional Director BIA;JOHN RYZDIK, Chief, Environmental Division, BIA; U.S. DEPT. OF INTERIOR; NATIONAL INDIAN GAMING COMMISSION; RAYMOUND HUNTER; CHARLENE CHAMBERLAIN; ROBERT MESA; RICHARD TELLOW; JULIA LOTTA;PENN NATIONAL, INC.; SAN DIEGO GAMING VENTURES, LLC.; and C.W, DRIVER INC.

Defendants-Appellees

On Appeal from the United States District Court
For the Eastern District of California
Case No. 2:13-cv-01920 KJM-KLN
Honorable Kimberly J. Mueller, District Judge

REPLY TO FEDERAL APPELLEES' OPPOSITION TO URGENT MOTION TO COMPEL COMPLIANCE WITH NEPA AND FOR AN INJUNCTION PENDING APPEAL (CIRCUIT RULE 27-3(b).)

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INTRODUCTION

The Bureau of Indian Affairs' (BIA) and the National Indian Gaming Commission's (NIGC) response to Appellant's urgent motion reinforces the need for immediate injunctive relief pending this appeal. The BIA and NIGC want to disavow any federal involvement in, or review authority over, the JIV casino project. By taking this position, the BIA and NIGC hope to abdicate their responsibility to complete the required Supplemental Environmental Impact Statement (SEIS) until after the JIV casino is constructed.

The BIA and NIGC would have this Court believe that the federal involvement in the JIV casino project is minimal and limited to their never-ending review of a proposed gaming management contract (GMC) between the JIV and Penn National. They claim that casino construction is a "wholly non-federal undertaking" – unrelated to the GMC. Nothing could be further from the truth.

The federal role in approving and regulating the proposed JIV casino project is pervasive and comprehensive. The U.S. owns the property on which the casino is being constructed. The BIA is required to review JIV's fee-to-trust application for the casino before it is built. The NIGC is required to determine if the subject property is "Indian land" eligible for gaming before the casino is constructed. The NIGC is also required to approve a gaming ordinance before the casino is allowed. The NIGC is must also to review the GMC before gaming is allowed in the casino.

It is clear, from their response that the BIA and NIGC have no intention of complying with NEPA or completing the SEIS before the casino is completely constructed. And, with the help of the BIA, the JIV is proceeding with casino construction at a rapid pace while the NIGC is delaying the SEIS until after they finally approved the GMC. Immediate relief is needed from this Court to insure that there is an opportunity for meaningful environmental review in the SEIS while mitigation options remain open and while this Court decides this appeal.

As outlined in their Urgent Motion, Appellants are likely to succeed on the merits. The BIA and NIGC have a ministerial duty under NEPA to complete and circulate the SEIS as early as possible in the decision-making process. Also, in the absence of immediate injunctive relief, Appellants will lose their right to provide meaningful comment and the opportunity for effective mitigation will disappear. The balance of equities tips in Appellants' favor. They relied on the BIA's and NIGC's published notice that an SEIS would be circulated before the casino was constructed. The BIA and NIGC have a ministerial duty under NEPA to comply with their public representations. And it is in the public interest to protect the public rights under NEPA. This appeal involves 'serious questions going to the merits' and a balance of hardships that tip sharply toward the Appellants. *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-1135 (9th Cir. 2011). Urgent injunctive relief from this Court is needed to protect the Appellants and the public.

ARGUMENT

A. There are four "major federal actions" by the BIA and/or NIGC that are necessary for the JIV/Penn National casino project and that require the completion of the SEIS process before casino construction continues.

Like all federal agencies, the BIA and NIGC are required to comply with NEPA on all major federal actions that they propose which could adversely affect the environment. "'Major Federal action' includes actions with effects that may be major and which are potentially subject to federal control and responsibility." 40 C.F.R. §1508.18. The touchstone of 'major federal action' for NEPA purposes is a federal agency's authority to influence non-federal activity." *Save Barton Creek Assn v. Federal Highway Administration,* 950 F.2d 1129, 1135 (5th Cir. 1992). The overall federal involvement in a project can turn a private action into a federal action, NAACP *v. Medical Center Inc.* 584 F.2d.619, 629 (3d. Cir. 1978.)

Federal control of the JIV/Penn National casino project and its progress is comprehensive. There are at least four major federal actions necessary for the JIV casino project and that require NEPA review, including: (1) determining that the land is "Indian land" eligible for gaming; (2) approving the fee-to-trust transfer for the casino; (3) approving a gaming ordinance; and (4) approving a gaming management contract. Each action required the completion and circulation of the SEIS before decisions were made and casino construction initiated. But that did not happen. Instead the BIA and NIGC are trying to avoid their NEPA mandates.

The NIGC and BIA claim that only one proposed major federal action – the proposed approval of the GMC – that was included in the April 10, 2013 Federal Register notice announcing the SEIS. (DCD No. 60-3 at 5-6; Attachment 1.)[1] That is not correct. All four of the proposed "major federal actions" needed for the JIV casino were covered by the Federal Register notice. But even if they weren't, it would not limit the NEPA obligations of the BIA and NIGC. A federal proposal "may exist in fact as well as by agency declaration that one exists." 40 C.F.R. §1508.23. The following four major federal actions were noticed and exist in fact.

1. NIGC's determination that the property is a "reservation."

The most important statement in the April 10, 2013 Federal Register notice is the announcement by the BIA and NIGC that the JIV/Penn National casino is "to be located on the Tribe's Reservation, which qualifies as 'Indian Lands' pursuant to 25 U.S.C. 2703." This is the first time that the NIGC determined that the 1978 donated land is a "reservation" and therefore is "Indian land" eligible for gaming under IGRA. This Indian lands determination (ILD) was made by the NIGC with no prior environmental review or public input. Furthermore, there is nothing in the historical or current record, or the record in this lawsuit, to support this claim that private land donated to the United States in 1978 for the benefit of individual half-blood Jamul Indians is, or ever was, an Indian reservation.

[1] For the convenience of the Court, attached to this reply are pertinent portions of the Excerpts of the Record that has already been filed in this appeal.

"Indian lands" are limited to "reservations" or "land held in trust over which the Indian tribe exercises governmental power." 25 U.S.C. §2703(4). An ILD is a necessary pre-requisite to the construction of the casino because IGRA allows Indian tribes to conduct gaming activities only on "Indian lands." 25 U.S.C. §2710. The ILD is also required for the NIGC's review of a gaming ordinance and GMC.

Before approving a site specific gaming ordinance, the NIGC must make an ILD with respect to the proposed gaming site. 25 U.S.C. §2710 and 25 C.F.R. §§ 522.2 and 559.1; *North County Community Alliance, Inc. v. Salazar,* 573 F.3d 738, 746, 749 (9th Cir. 2009) ("The NIGC states . . . that when a site-specific ordinance is presented for approval it has an obligation to make an Indian lands determination for the specifically identified site or sites.") .And, before approving a gaming management contract, the NIGC must make an Indian lands determination of the proposed gaming site which is the subject of the management contract in order to insure that the management activity will occur on Indian lands upon which the tribe may game under IGRA. *Id*. 25 U.S.C. §§ 2711. See *Citizens Against Casino Gambling in Erie County v. Kempthorne,* 471 F.Supp. 2d 295 (W.D.N.Y. 2007.)

The NIGC's April 10, 2013 Indian lands determination that the land is a "reservation" eligible for gaming under IGRA was a "major federal action" that required compliance with NEPA and completion of the SEIS before a casino could be constructed on the supposed "reservation." But that did not happen.

2. BIA's pending proposal to take the land into trust for a casino.

The 2013 Federal Register notice announced the preparation of an SEIS to update the BIA's and NIGC's 2002 and 2003 Federal Register notices for an EIS for a proposed "Fee to Trust Transfer and Casino Project in San Diego County, California" and related GMC. (DCD No. 60-2 at 3- 8; Att. 2.) The 2003 EIS was to study "traffic, threatened and endangered species, wildlife habitat and conservation areas wastewater disposal, air quality, and socio-economic impacts" of the fee-to-trust casino proposal (DCD No. 60-2 at 8; Att. 2.)

In 2013, the NIGC and BIA decided that the re-configuration of the casino, together with the passage of time, required them to update the environmental baseline and mitigation analysis of the 2003 EIS to include an analysis of "land resources, water resources, air quality, biological resources, cultural and paleontological resources, socio-economics transportation, land use, agriculture, public services, noise, hazardous materials, and visual resources" impacted by the reconfigured casino project. (DCD No. 60-2 at 12; Att. 2.) This updated impact analysis still has not been included, or circulated for comment in the SEIS.

3. NIGC's approval of the JIV gaming ordinance for the "reservation."

The JIV gaming ordinance was submitted to the NIGC, as Exhibit B to the management contract on April 3, 2013. (DCD No. 67-2 at 7; Att. 3.) Therefore it is part of the gaming management contract and is part of the casino proposal to be

studied in the SEIS announced by the April 10, 2013 public notice. Although the SEIS has not been completed or circulated, the JIV gaming ordinance was approved by the NIGC on July 1, 2013 with no prior environmental review or public comment. (DCD No. 67-4 at 2-8, 11; Att. 4.)

4. NIGC's approval of the JIV-Penn National management contract.

The BIA and NIGC concede that they must prepare an SEIS to study the environmental impacts caused by "the proposed Gaming Management Contract" between JIV and Penn National for a gaming facility on the newly proclaimed "reservation." Thus, they decided that this proposal was a "major federal action" which required the preparation of a SEIS. But the BIA and NIGC also claim that they need not complete the SEIS until after the management contract is approved. This contention is "exactly backwards." *National Parks Conservation Association v, Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001). The SEIS should have been circulated at the earliest possible stage, not the last possible moment, in the process.

Also, it should be noted that the NIGC had a 270 day maximum statutory window to review the GMC which expired on January 4, 2014 when it was, for all practical purposes, deemed approved. In fact, construction site preparation by JIV and Penn National began the next day. NIGC's claim that the GMC has not been formally approved is a fiction designed to further delay their obligation to comply with NEPA and circulate the SEIS. It was approved de facto on January 4, 2014.

B. Appellants' lawsuit is not a collateral attack; it is a direct challenge to the NIGC's Indian lands determination and the BIA's approval of the fee-to-trust transfer for the JIV/Penn National casino.

The BIA and NIGC claim that JAC's lawsuit is a collateral attack on the JIV's recognition and reservation. This is a mischaracterization of JAC's lawsuit which includes six causes of action: (1) a challenge to NIGC's determination that the land is a "reservation"; (2) a challenge to the BIA's claim that JIV was a recognized tribe in 1934 eligible for a fee-to-trust transfer; (3) a constitutional challenge to the attempt to exempt the land from State law; (4) public nuisance and nuisance per se; (5) the NEPA claim; and (6) violation of the Compact.

This case is not a collateral attack. Instead it is a direct APA challenge to the NIGC's 2013 Indian lands determination that the land is a "reservation" eligible for gaming under IGRA. And, it is a direct APA challenge to the BIA's determination the JIV was a recognized tribe in 1934 eligible for the fee-to-trust benefits of the 1934 Indian Reorganization Act. This conclusion is contrary to, and precluded by, the Supreme Court's decision in *Carcieri v. Salazar,* 555 U.S. 379 (2009).

The BIA's and NIGC's reliance on this Court's recent decision in *Big Lagoon Rancheria v. State of California*, Ninth Circuit Nos. 10-17803 and 10-17878 (9th Cir. June 4, 2014) is misplaced. There the BIA took 11 acres into trust for Big Lagoon in 1994. That case was a lawsuit initiated by Big Lagoon in 2009 against the State of California for allegedly failing to negotiate for a Compact in

good faith as required by IGRA. California defended the lawsuit by arguing in part that the BIA lacked the authority to take the 11 acres into trust for Big Lagoon in 1994 because, based on the Supreme Court's *Carcieri* decision, Big Lagoon was not a federally recognized tribe in 1934.

This Court held (en banc) in the *Big Lagoon* case that California's defense to the lawsuit was too late and amounted to an improper collateral attack on the BIA's 1994 decision to take the land into trust. But this Court confirmed that if there had been a timely and direct APA challenge by California the outcome would have been different. If the tribe was not a federally recognized tribe in 1934, "the BIA lacks authority to take land into trust on its behalf." *Id.*

JAC's lawsuit is not a collateral attack. It is a direct APA challenge to BIA's authority to take lands into trust for the JIV which did not exist as an entity before 1981 and was not a federally recognized tribe in 1934. Based on *Carcieri*, as a matter of fact and law, the property could not be taken into trust for the JIV.

Also an even more recent decision by the Court confirms that, as a matter of law, the 4.66 acre parcel donated to the United States in 1978 is not a reservation. *David Laughing Horse Robinson v. Jewell*, Ninth Circuit No. 12-17151 (9th Cir. June 22, 2015.). That case involved a group who identified themselves as a Tribe that "resided in and around Kern County, California since time immemorial." The "Tribe" also claimed that it owned a reservation that was created in 1853.

This Court disagreed and held that the property claimed by the Indian group, was not a reservation and any reservation rights they may have had in 1853 were extinguished by the Four Reservations Act of 1864. (Act of Apr. 8, 1864, ch. 40, 48, 13 Stat. 39.) *Mattz v. Arnett*, 412 U.S. 481, 489 (1973) and *Shermoen v. United States*, 982 F.2d 1312, 1315 (9th Cir, 1992). The land claimed by the Tribe was not one of the four reservations allowed by the 1864 Act.

For the same reason, the NIGC's 2013 Indian lands determination that the 4.66 acres parcel is a "reservation" is arbitrary and capricious, and wrong as a matter of law. The parcel was donated to the U.S. in 1978 for the benefit of half-blood Jamul Indians. The 1978 donated land is not a reservation and it was not in existence or included in the Act of 1864 – enacted 114 years earlier.

CONCLUSION

For the reasons outlined above, and in their motion for urgent relief, Plaintiffs-Appellants respectfully request that this Court immediately issue an injunction pending this appeal and the BIA's and NIGC's full compliance with NEPA.

Dated: June 28, 2015

Respectfully submitted,

/s/ Kenneth R. Williams
KENNETH R. WILLIAMS
Attorney for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the forgoing reply in support of Appellants' motion for urgent relief 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 June 29, 2015.

I certify that Counsel for all the parties in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 29, 2015.

Respectfully submitted,

/s/ Kenneth R. Williams
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