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 NON-FEDERAL DEFENDANTS-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

On June 6, 2015, Plaintiffs-Appellants, Jamul Action Committee, the Jamul Community Church, and four residents of Jamul (collectively referred to as "JAC") filed an Urgent Motion to Compel Compliance with NEPA and for Injunction Pending Appeal. (Docket Entry (DE) No. 7.) Immediate relief is needed from this Court to compel the Federal Appellees, the BIA and NIGC, to comply with the National Environmental Policy Act (NEPA) and to enjoin continued accelerated construction of the illegal JIV casino by the other Defendants in the meantime.

On June 19, 2015, the Defendant, Raymond Hunter, and corporate Defendants, San Diego Gaming Ventures, C.W. Driver and Penn National (collectively referred to as "Penn National")[1], filed an opposition to JAC's motion. (DE No. 12.) This reply is in response to Penn National's opposition.

The recurring theme in Penn National's opposition is that the gaming management contract (GMC) is not a pre-requisite for the casino and that, until it is approved, there is no final agency action requiring NEPA review. The Federal Appellees make the same argument. This contention is wrong for two reasons.

[1] This group calls themselves the "Tribally-Related Defendants." But that label is a misnomer. Three of these Defendants are private corporations which the district court has held are not entitled to tribal immunity. The only tribal related Defendant in this group is Hunter who is the chairman of the JIV. But Mr. Hunter is being sued in his individual capacity for violating federal law by constructing an illegal casino on non-Indian land or allowing the construction of the illegal casino by Penn National. Mr. Hunter's illegal activities are not protected by any claim of immunity. *Michigan v. Bay Mills Indian Community*, 134 S.Ct 2024, 2035 (2014).

First, the federal approval of the GMC is not the only federal action needed for the JIV/Penn National casino. The Federal Appellees approved the Indian lands determination (ILD) that the land is a "reservation" eligible for gaming on April 10, 2013. And the NIGC approved the JIV gaming ordinance (GO) on July 1, 2013. And the BIA is still considering JIV's fee-to-trust transfer for the casino. All of these approvals are major federal actions subject to NEPA compliance.

Second, even if the GMC was the only federal approval involved (and it is not), NEPA requires that the SEIS be completed before any federal decision on the GMC – not after. Likewise, JIV's fee-to-trust application for the casino is still under consideration by the BIA. The SEIS should be completed and circulated before the BIA makes a decision on that application – not after. Penn National's contention that only the GMC is under federal agency consideration is wrong.

Penn National also raises several irrelevant procedural issues which will be addressed briefly.[2] But their real purpose is to distract the Court from the fact that, separate from the NEPA issues, the Compact prohibits the continued construction of the casino until Section 10.8.3 is amended. That fact alone requires that casino construction be enjoined until the Compact is amended.

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[2] Penn National accuses Plaintiffs of being "modern day Indian fighters" who are conducting a "coordinated, well-funded, war against the Tribe." (PN Opp. at 1.) This pejorative language is disgraceful and unprofessional. It is an attempt to defame the Plaintiffs before the Court. Plaintiffs respectfully request that Penn National's outrageous accusation be stricken and disregarded by the Court.

ARGUMENT

A. There are four major federal agency actions, prerequisites to casino construction, which require NEPA compliance; the SEIS should be completed and circulated before they are approved or implemented.

Penn National claims that the only agency action under consideration is the NIGC's approval of the GMC. This is incorrect. The JIV casino proposal requires four major federal agency approvals. Two of these federal approvals - the ILD that the land is a "reservation" eligible for gaming and the site-specific gaming ordinance – have been completed. The other two – the JIV's fee-to-trust casino application and the GMC – are supposedly still pending before the BIA and NIGC.

1. NIGC's 2013 ILD that the land is a "reservation" eligible for gaming.

The most important statement in the April 10, 2013 Federal Register notice is the announcement by the BIA and NIGC that the JIV 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 called the 1978 donated land a "reservation" eligible for gaming under IGRA. This Indian Lands Determination (ILD) was made by the NIGC with no prior environmental review or public input.

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 and 25 C.F.R. §§ 522.2(i) and 559.1. See also 25 U.S.C. §2703(4). Casinos constructed on non-Indian lands in California are public nuisances per se

which can be enjoined as a matter of law. Cal. Penal Code §§11225 and 11226; *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024, 2035 (2014).

The NIGC's published ILD that the land is a "reservation" eligible for gaming is a "final agency action" for APA purposes and a "major federal action" that required compliance with NEPA before the casino could be constructed on the supposed "reservation." But that did not happen. So, immediate injunctive relief is needed to complete the SEIS process and to prevent the illegal construction of the casino on land that is not Indian lands eligible for gaming under IGRA.

2. NIGC's 2013 approval of the site-specific gaming ordinance.

The GO was submitted to the NIGC, as Exhibit B to the GMC, on April 3, 2013. (District Court Docket (DCD) No. 67-2 at 7.) Thus, the GO is a key part of the casino proposal to be studied in the SEIS. And, although the SEIS has not been completed or circulated, the GO was approved by the NIGC on July 1, 2013. (DCD No. 67-4 at 2.) The NIGC approval of the GO was a prerequisite to casino construction and gaming activities on the Indian lands. 25 U.S.C. §2710(d)(1)(A). See *Tamiami Partners v. Miccosukee Tribe,* 63 F.3d 1030, 1034 (11th Cir. 1995).

The NIGC's approval of the GO is a final agency action for APA purposes. 25 U.S.C. §2714. And it is a "major federal action" for NEPA purposes. *Citizens Against Casino Gambling v. Kempthorne,*471 F.Supp. 2d 295 (W.D.N.Y. 2007) and *North County Community Alliance v. Salazar,* 573 F.3d 738, 749 (9th Cir. 2009).

3. The BIA's review of JIV's proposed fee-to-trust casino transfer.

The 2013 F.R. notice announced the preparation of a SEIS to update the BIA's 2003 proposed EIS for a "Fee to Trust Transfer and Casino Project in San Diego County, California." (DCD No. 60-2 at 3-8.) Specifically, re-configuration of the casino, together with the passage of time, required an updated SEIS 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 10-12.) This updated analysis still has not been completed or circulated for comment.

The fee-to-trust casino application has not been withdrawn or abandoned by the JIV. It is still pending. And, at least a portion of the illegal casino is being constructed on land that is part of that fee-to-trust application. The casino construction should be enjoined until the fee-to-trust process is complete.

4. NIGC's review of the Penn National gaming management contract.

Penn National concedes that a SEIS must be prepared to study "the proposed Gaming Management Contract" between JIV and Penn National for a gaming facility on the newly proclaimed "reservation." The BIA and NIGC, by their Federal Register announcement, have already decided that their approval of the GMC is a "major federal action" which requires a SEIS. But the BIA and NIGC

also claim that they need not complete the SEIS until after the GMC is approved. This contention is "exactly backwards." *National Parks Conservation Association v, Babbitt*, 241 F.3d 722, 733 (9th Cir. 2001). The SEIS should be circulated at the earliest possible stage, not the last possible moment, in the process.

Also the 270 day maximum statutory window for the NIGC to review the GMC expired on January 4, 2014. 25 U.S.C. §2711(d). Construction site preparation began the next day. And, JIV and Penn National have been implementing the GMC ever since. Although perhaps not formally approved, as a practical matter the GMC has been approved and is being implemented. The NIGC's claim that the GMC has not been approved is a fiction designed to delay their obligation to circulate the SEIS. This ploy should be rejected.

B. The JIV-California Compact is enforceable federal law. Section 10.8.3 requires that the environmental provisions of the Compact be amended before casino construction can continue after January 1, 2005.

IGRA requires that tribal Class III (Las Vegas style) gaming be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State and approved by the Secretary of Interior" 25 U.S.C. §2710(d)(1), (3)(B); *In re Indian Gaming Related Cases*, 331 F.3d 1094, 1097 (9th Cir. 2003)..And "where Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the States' agreement

into federal law under the Compact Clause." *Cuyler v. Adams*, 449 U.S. 433, 440-441 (1981). See *Cabazzon Band v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) and *Gaming Corp. v. Dorsey & Whitney*, 88 F.3d 536, 543-551 (9th Cir. 1996).

Penn National claims that JIV has complied with the 1999 Compact.[3] But they ignore Section 10.8.3(b) and (c) which prohibit casino construction after 2005 "unless and until" the Compact is amended. Section 10.8.3(b) provides: "At any time after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the Section has proven inadequate to protect the off-Reservation environment." (DCD No. 67-5 at 39.) If a request is made, "the Tribe will enter into such negotiations in good faith." On February 28, 2003, the State made such a request to JIV, and other tribal entities, to amend Section 10.8.3 (DCD No. 67-6.)

And, if negotiations are requested, and they were, Section 10.8.3(c) of the Compact prohibits casino construction after January 1, 2005 "unless and until an agreement to amend this Section 10.8.3 has been concluded between the Tribe and the State." (DCD No. 67-5.) Without an amendment, the JIV is required to "immediately cease construction" of the casino "unless and until agreement to amend this Section 10.8 has been concluded."(Id.)

[3] Penn National claims that there has been an environmental review of the project per the Compact and that JAC submitted comments. (DE No. 12 at 11-12.) This is not true. And, even if these documents exist, they are not in the record in this case.

Despite a timely request from the State on February 28, 2003, the JIV has not agreed to an amendment of Section 10.8.3 of the Compact. Thus current construction of the casino is a violation of Section 10.8.3 and federal law. Casino construction should cease and be enjoined until Section 10.8.3 is amended.

Penn National claims that the Governor's Office confirmed that JIV has complied with the Compact in a letter dated August 27, 2013. (DCD No.62-3 at 13-16.) But Penn National misquotes that letter to mislead the Court into believing that is says something it does not. Penn National asserts that that the Governor's Office found that "[T]he Tribe has complied with its specific obligations under [Compact]." (DE No. 12 at 20-21.) That is not correct. Penn National left off the qualification of the State employee who wrote the letter before the quote that "It is my understanding that the Tribe has complied . . ." (DCD No. 62-3 at 14.)[4]

Also, more importantly, the letter does not discuss the casino construction prohibition in 10.8. 3 (a) and (b). Instead, at most, it was progress report under Section 10.8.2(a) of the Compact. Furthermore, the letter concludes that if the JIV implements all of its obligations under the Compact it will have complied with the Compact. This self-evident, circular comment does not excuse JIV from amending Section 10.8.3(b) and (c) before continuing construction of the casino.

[44] Also there are a couple of other concerns with this letter. First, it was written at the request of the JIV and in response to a letter from the JIV dated August 23, 2013; the JIV has not provided a copy of its letter. Second, it was an unnecessary letter written by a State employee who left the Governor's Office a few days later.

C. Penn National's reference to two State court lawsuits brought by JAC in 2014 undermines their claim that JAC unnecessarily delayed litigation efforts to stop the construction site preparations in 2014.

Penn National mentions two State court lawsuits that JAC brought in in 2014.[5] In *JAC v. CDFW* (Sac.Sup.Ct. 34-2024-8001894) JAC is challenging an easement provided by CDFW for the JIV casino. In *JAC v. CaTrans* (Sac.Sup.Ct. No.34-2014-8001752) JAC is challenging CalTrans permits provided in 2014 for the casino site preparation without first complying with State environmental laws.

The existence of these lawsuits undermines Penn National's claim that JAC did nothing in 2014 while the construction site was being prepared. In 2014, JAC litigated, and is still litigating, these issues against State agencies in State court.

After the site-preparations were complete, the Penn National announced on December 17, 2014, that, despite the fact that the SEIS had not been prepared or circulated they were going to begin construction of the casino soon. JAC filed its motion for preliminary injunction in this case two weeks later - on January 2, 2015. Appellants' request for injunctive relief was more than timely, especially in light of the earlier assurances by the BIA and NIGC that SEIS would be circulated and there would be opportunity for public comment before the casino was constructed. It is unfortunate that the district court took over four months to decide the motion.

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[5] Penn National also lists a series of lawsuits filed by San Diego County and Walter Rosales – a half-blood Jamul Indian and former Chairman of the JIV. None of the Plaintiffs are, or were, parties to these lawsuits. They are not relevant to this appeal or JAC's urgent motion for immediate relief from this Court.

D. The JIV is not a necessary or indispensable party to the continuation of this appeal. The JIV has been named and been allowed to participate in this case, and defend their position, as a "litigating amicus."

Contrary to Penn National's contentions, the district court did not conclude that the JIV was a necessary party without whom this case could not proceed. Instead, the district court merely noted that the JIV "has not consented to the court's jurisdiction and is not a defendant here." (DCD No. 93 at 2.) The district court allowed JAC's motion to go forward with respect to the other Defendants.

The district court also held that Penn National, San Diego Gaming Ventures and C.W. Driver are not protected by immunity from JAC's request for injunctive relief. (DCD No. 93 at 15.) So Penn National's claim that this Court cannot compel the BIA and NIGC to comply with NEPA and enjoin Penn National from continuing construction of the casino in the meantime is wrong. In fact that is the urgent relief Appellants are requesting.

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

/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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