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EL DORADO COUNTY

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

EL DORADO COUNTY, a Political Subdivision of the State of California,

Plaintiff

v.

GALE A. NORTON, in her Capacity as Secretary of the Interior, PHILIP N. HOGAN, in his Capacity as Chairman of the National Indian Gaming Commission, NATIONAL INDIAN GAMING COMMISSION, AURENE MARTIN, in her Capacity as Assistant Secretary of the Interior for Indian Affairs, and BUREAU OF INDIAN AFFAIRS,

Defendants.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Intervenor.

CASE NO. CIV.S-02-1818 GEB DAD

FIRST AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This case arises from efforts by Intervenor Defendants Shingle Springs Band of Indians ("Band")[1] and its financial backers to construct a $100 million Nevada-style gaming resort in the heart of residential El Dorado County. The Band proposed this hotel and casino project ("Casino Project") on a 160-acre property commonly known as the Shingle Springs Rancheria ("Rancheria").

2. The necessary components of this Casino Project are twofold: (i) approval by the National Indian Gaming Commission ("NIGC") of a Development and Management Contract for a gambling casino facility ("Development Component"), and (ii) approval by U.S. Department of Interior, Bureau of Indian Affairs ("BIA") of a highway interchange that would directly connect the Rancheria and U.S. Highway 50 ("Interchange Component"). Plaintiff County of El Dorado ("County") brings its claims under the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. ("NEPA"), its implementing regulations, 40 C.F.R. Parts 1500-1508, and the Administrative Procedure Act, 5 U.S.C. §§ 551 et seq. ("APA").

3. The County challenges the Casino Project as it has been divided into its component parts by the BIA and NIGC. Plaintiff's original complaint challenges NIGC's 2001 Draft and Final Environmental Assessments ("NIGC Draft EA" and "NIGC Final EA," respectively), NIGC's January 2002 Finding of No Significant Impact ("NIGC FONSI"), and NIGC's underlying approval of the Development Component. The supplemental portion of Plaintiff's complaint challenges the BIA's subsequent EAs ("BIA Draft EA" and "BIA Final EA," respectively), FONSIs ("BIA FONSI") and underlying approval of the Interchange Component. The amended portion of the complaint challenges both the purported decision of the Secretary of the Interior to recognize the Band as an Indian tribe and its resulting inclusion on administrative and statutory lists of federally-recognized Indian groups as well as the determination that the Rancheria is "Indian lands" within the meaning of the Indian Gaming Regulatory Act ("IGRA"),

[1] Intervenor Defendant refers to itself as the "Shingle Springs Band of Miwok Indians." However, the County is not aware of any basis for such characterization because, as explained below, the Articles of Association creating the organization identify the "Shingle Springs Band of Indians."

25 U.S.C. section 2703(4)(B).

JURISDICTION

4. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as this action arises under laws of the United States. The requested declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201-2202. Judicial review of the agency actions is authorized by 5 U.S.C. §§ 702, 704, and 706.

5. An actual case and controversy has arisen and now exists between the parties within the meaning of 28 U.S.C. § 2201(a). Defendants contend that they have complied with NEPA, its regulations, and APA, while the County contends that they have not. Further, Defendants contend that the Band is authorized to conduct gaming on the Rancheria pursuant to IGRA, while the County contends that it is not. This Court may grant declaratory relief and additional relief pursuant to 28 U.S.C. §§ 2201, 2202, and 5 U.S.C. §§ 705, 706.

6. All challenged agency actions and determinations are final agency actions pursuant to the APA. The Development Component is final based upon the NIGC FONSI dated January 22, 2002, and NIGC's approval. The Interchange Component is final based upon the BIA FONSI dated December 3, 2002, and BIA's approval. The BIA's recognition of the Band as an Indian Tribe is final as applied to the County through NIGC's approval of the Development Component. Lastly, the Rancheria's recognition as Tribal Land is final as applied to the County through NIGC's approval of the Development Component.

7. Venue lies in this judicial district by virtue of 28 U.S.C. § 1391(e) because the events or omissions giving rise to the claim arise, and the County is located, in this district.

PARTIES

8. Plaintiff El Dorado County is a political subdivision of the State of California. California law vests the County with plenary authority over land use and development projects within its jurisdiction. The County is likewise responsible for ensuring that such projects comply with applicable environmental disclosure laws. The County therefore has a vital interest in ensuring that any development within its borders is appropriate in scale and context and environmentally sensitive, and that its environmental impacts are fully disclosed and weighed,

regardless of whether the County holds actual permitting authority over the development.

9. The County also furnishes law enforcement and other social services to its citizens. Given its limited fiscal resources, the County struggles to provide and maintain adequate levels of these services to its citizens. The Casino Project will impose new and additional burdens upon the County's provision of these services, to the detriment of the County's citizens.

10. The County is also responsible for safeguarding the health, safety, and general welfare of its citizens. The health, safety, and general welfare of County citizens depends in large part upon the availability of abundant, clean water supplies, adequate levels of traffic service, healthy air, and adequate social services. The unexamined and unmitigated adverse environmental and socioeconomic effects of the Casino Project will impair these resources, and therefore the health, safety, and general welfare of County citizens, particularly those near to the project site.

11. Thus, the County's governmental authorities and responsibilities to uphold the health, safety and general welfare of the citizens have been and will be directly, adversely, and irreparably injured by defendants' failure to comply with NEPA and IGRA and their implementing regulations, unless the relief requested herein is granted. These are actual, concrete injuries to the County that would be redressed by the relief sought. The County has no other adequate remedy at law.

12. In order to safeguard its responsibilities and interests, and the interests of its citizens, the County has actively participated in all processes and fora associated with the Casino Project and past, similar proposals.

13. Defendant Gale A. Norton is Secretary of the Interior and is sued in her official capacity. In that capacity, Defendant Norton is responsible for the supervision of various federal agencies and Bureaus within the Department of the Interior, including the NIGC and the BIA.

14. Defendant NIGC is a commission of the federal government charged with the implementation of the Indian Gaming Regulatory Act. In that role, NIGC is the lead agency responsible for the Development Component's Final EA and FONSI.

15. Defendant Philip N. Hogan is Chairman of the NIGC and is sued in his official

capacity. Defendant Hogan's predecessor, Monte Deer, approved the Development Component. Pursuant to 25 C.F.R. § 533.1, the Development Component is valid only if approved by the Chairman of the NIGC, evidenced by an NIGC document (here, the NIGC FONSI) dated and signed by the Chairman. No other means of approval is valid.

16. Defendant Aurene Martin is Acting Assistant Secretary of the Interior for Indian Affairs and is sued in her official capacity. In that capacity, Defendant Martin is responsible for implementing regulations concerning the federal acknowledgment of Indian tribes as well as the publication of such federally recognized Indian tribes. Defendant Martin's predecessor, Neal McCaleb, signed the BIA FONSI and approved the Interchange Component.

17. Defendant BIA is an agency of the federal government acting as trustee of the welfare of the federally recognized tribes of Native Americans. In that role, BIA was originally the lead agency for the Development Component's Draft EA. BIA is also the lead agency responsible for the Interchange Component's Draft EA, Final EA, and FONSI.

18. Intervenor Shingle Springs Band of Indians is an unincorporated association under California law that purports to be federally recognized.

BACKGROUND

A. The Band and the Rancheria

19. Through various appropriations statutes in the early 1900s, the U.S. Congress provided funds for the acquisition of land for "homeless California Indians." Those appropriations were intended to benefit groups of individual Indians rather than organized tribes.

20. Pursuant to this Congressional direction, Department of Indian Affairs (predecessor to the current BIA), Special Indian Agent John Terrell in 1916 conducted a census of Indians then living in Sutter and Sacramento Counties ("1916 Census"). The 1916 Census reported 34 individuals, some of whom were of Native American ancestry and some of Hawaiian ancestry. The individuals lived in the towns of Verona and Nicolaus as well as Sacramento.

21. On information and belief, these 34 individuals neither identified themselves nor

conducted their collective affairs as an Indian tribe. On information and belief, these 34 individuals had no knowledge of one another outside of their given family groups and the efforts of Special Agent Terrell.

22. Special Agent Terrell recommended that the Department of Indian Affairs purchase the Rancheria for these "landless" Indians identified in the 1916 Census. The purchase of the 160-acre Rancheria was completed in 1920. Land title is held by "the United States of America, for the use and occupancy of the Sacramento Verona - Band of Homeless Indians." Title to the Rancheria is not held for the use and occupancy of the "Shingle Springs Band of Indians." Moreover, no historic "Sacramento-Verona Band" ever existed as that purported entity was created by Special Agent Terrell for purely administrative convenience.

23. Notwithstanding the federal government's purchase of the Rancheria in 1920, none of the original 34 Indians ever relocated to the Rancheria. Thus, the Rancheria sat vacant for several decades.

24. Further, on information and belief no organizational or governing documents were ever prepared for the Band during the several decades of inactivity at the Rancheria. Thus, in 1951 the Area Director of the BIA stated, "There are no 'Shingle Springs Indians of California' . . . I hesitate to recommend that another trust fund account be established for a non-existent band of California Indians."

25. In 1958, Congress passed the Rancheria Termination Act, establishing as a public policy an "assimilation" period of Indian relations. The Act was amended in 1964 by providing for the sale of any rancheria or reservation located within California that was unoccupied on January 1, 1964. Pursuant to this authority, the BIA attempted to sell the Rancheria as it was then still unoccupied. However, the efforts to sell the Rancheria failed as the BIA could not obtain minimum market-value bids for the property.

26. In 1970, the BIA contacted the descendants of 34 individuals from the 1916 Census ("Descendants") for the purpose of formulating a distribution plan for the Rancheria. The BIA sponsored a meeting that was held in November 1970.

27. On information and belief, prior to BIA's initial contact in 1970 the Descendants

never conducted their collective affairs as an Indian tribe. On information and belief, none of the Descendants ever resided on the Rancheria before 1980.

28. Discussions concerning the fate of the Rancheria occurred over the next few years. In 1974, the Descendants refused the distribution plan that was proposed by the BIA. Instead, the Descendants chose rather to retain the Rancheria as a group. On June 19, 1976, sixteen of the Descendants voted to establish the Articles of Association and By-Laws for the "Shingle Springs Band" under California Corporations Code, § 21000 et seq. The Articles of Association did not purport to constitute a tribal Constitution pursuant to the Indian Reorganization Act of June 18, 1934, 73 P.L. 383 ("IRA").

29. The Articles of Association indicated no connection to the Miwok Indians. Nor do the Articles of Association address the fact that several of the original members of the Band were native Hawaiians and not of Indian heritage.

30. In December, the Commissioner of Indian affairs conditionally approved the Articles of Association subject to the Band correcting several deficiencies noted by the Commissioner.

31. In September 1978, the BIA published in the *Federal Register* regulations intended to establish a procedure for acknowledging that certain Indian tribes exist as tribes ("Acknowledgment Regulations"). The current version of the Acknowledgment Regulations is found in 25 C.F.R. Part 83. As of the effective date of the Acknowledgement Regulations, October 2, 1978, the Band had not been formally acknowledged by the federal government, nor had any member of the Band set up permanent residence at the Rancheria.

32. Pursuant to the same rulemaking that created the Acknowledgment Regulations, the BIA published in 1979 an administrative list identifying "Indian Tribal Entities That have a Government-to-Government Relationship With the United States" ("Administrative List"). Although the Rancheria property was included on the Administrative List, the Band itself was not.

33. Later the next year, in 1980, the first member of the Band moved onto the Rancheria. This relocation occurred sixty years after the Rancheria was first purchased and set

aside for use by the so-called Sacramento-Verona Band.

34. In 1981, the BIA updated the Administrative List and included, for the first time, the "Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California." On information and belief, the only basis for the Band's appearance on the Administrative List was the Commissioner's conditional approval of the Band's Articles of Association in 1976.

35. In 1994, the Congress passed the List Act, which provided, for the first time, statutory authority for the BIA to publish a list of federally recognized Indian groups. The first list by BIA in compliance with the List Act was published on February 16, 1995 ("Statutory List"). The Band was identified on the Statutory List. On information and belief, the only basis for the Band's appearance on the Statutory List was its prior appearance on the Administrative List.

36. In the mid-1990s, the Band began attempting to develop and operate a 17,000 square-foot gambling casino on the Rancheria. The County opposed this venture because it posed unacceptable environmental and public health and safety risks from unsafe road access, inadequate water supply and wastewater disposal, substandard construction, and fire hazards. The NIGC investigated the matter and concurred that the proposal had not properly addressed numerous, serious environmental and public health and safety problems. After the Band opened the casino anyway, claiming to have remedied the problems, the NIGC ordered the casino's closure and found that the Band had violated the law and the NIGC's regulations by operating the casino without correcting a significant number of the problems the NIGC had identified. Subsequently, in litigation initiated by the Band itself, this Court found that the Band's right of access to the Rancheria did not authorize commercial traffic, except by permission and under limited circumstances. These administrative and judicial rulings ended the first casino venture.

37. The Band then secured new financial backing and floated a proposal for a casino and hotel about a mile from the Rancheria, on properties adjoining U.S. Highway 50's south border. Under this proposal, the United States, through the BIA, was to take the land in trust for benefit of the Tribe. The Tribe and its new backers then abandoned this proposal, however, in

favor of the current Casino Project.

B. The Casino Project

38. Although the southern end of the Rancheria is visible from U.S. Highway 50, it does not adjoin the highway and there is no direct ingress or egress to the Rancheria from the highway. The only road access to the Rancheria today is a series of one-lane roads through the Grassy Run neighborhood. In separate litigation, this Court determined that the Grassy Run roads are private roads, and that easements granting access to the Rancheria over these roads allow only residential traffic. Commercial traffic, such as deliveries, can use the roads only by prior consent, and under limited circumstances.

39. Grassy Run is a low-density residential neighborhood, developed with single-family homes on five-acre parcels. It adjoins the Rancheria on the north and east. The North Buckeye Rancheros subdivision adjoins the Rancheria on the west and south. Like Grassy Run, North Buckeye Rancheros is a low-density residential neighborhood, developed with single-family homes on five- and ten-acre parcels.

40. Residents of North Buckeye Rancheros obtain their drinking water from individual wells on their properties. Grassy Run residents have access to public water supplies. The Rancheria is also served by public water, but only for residential purposes. No public sewer service is available in the area. Residents use individual septic systems for wastewater disposal.

41. Against this backdrop, the Band, BIA and NIGC propose to construct the Casino Project, a $100 million Nevada-style gaming casino and resort. The Casino Project would occupy 44 acres of the 160-acre Rancheria. It would include a 238,500 square-foot casino featuring 2,000 slot machines and more than 50 gaming tables; a 250-room, 140,000 square-foot hotel; a parking structure and parking lots for 3,000 vehicles; a wastewater treatment plant featuring a 1,800,000-gallon wastewater storage tank; a 200,000-gallon freshwater storage tank; and a six- to seven-acre effluent disposal field. These aspects of the project will require the grading of 227,000 cubic yards of earth.

42. With a projected 1,500 employees and a total square footage of 381,250, the Casino Project would be the largest single commercial development in the history of El Dorado

County.

43. The interchange that will allow employees and patrons to access the casino requires more than a half-mile of roadwork on U.S. Highway 50 and includes a "fly-over" structure, a highway undercrossing, four on- and off-ramps ranging from 1,000 to 1,400 feet in length, and an additional east-bound lane on U.S. Highway 50. According to the NIGC Draft EA's traffic assumptions, the interchange will be used for 9,918 car trips per typical weekday, and 14,600 car trips on Saturdays. Even taking these assumptions as accurate, and assuming Sunday trip generation equal to a weekday, this converts to approximately 3,800,000 car trips per year.

44. The casino will be built on severe slopes ranging up to 50%. The five-story hotel structure will be 60 feet tall. The casino structure will reach as high as 115 feet above grade. The NIGC Draft EA identifies no existing structures taller than two stories within five miles east and two miles west of the Rancheria along U.S. Highway 50.

45. The Casino will generate 8,850 pounds (4.425 tons) of garbage per day. It will generate 132,600 gallons of wastewater per day on average, with peak days as high as 200,250 gallons. Because no sewer service is available, this wastewater is proposed to be treated and disposed of onsite. Dewatered "biosolids" will be trucked past the Casino periodically and disposed of somewhere else. The NIGC Draft EA proposes that some of the resulting wastewater be recycled in toilets and landscaping. The remainder, as much as 98,000 gallons of effluent per day, will be spread on the land at the Rancheria and expected to percolate into the underlying groundwater. The NIGC EA concludes that 6 to 7 acres of effluent disposal area will be sufficient to absorb these daily doses of effluent, rain or shine.

C. <u>The Draft EA for the Development Component</u>

46. The BIA caused the NIGC Draft EA to be prepared and released in January 2001. The project was described as BIA placing a single land parcel into trust and NIGC approving the Casino's Development and Management Contract. Although the NIGC Draft EA describes the interchange as "another component of this project," the NIGC Final EA deletes this statement. In any event, neither the NIGC Draft EA nor NIGC Final EA properly analyzes the interchange

as an essential element of the project. Furthermore, the Casino itself is treated as a *consequence* of the project analyzed in the NIGC Draft EA, not as an integral element of the project itself.

47. The County's experts within its Planning Department reviewed the NIGC Draft EA's analysis of planning and land-use related issues. The County's experts within its Department of Transportation reviewed its traffic analysis. The County retained a firm of expert consultants, Sierra Research, to review the NIGC Draft EA's air quality analysis. The County's experts within its Environmental Management Department reviewed its wastewater analysis. The County submitted a lengthy comment letter to BIA, with numerous attachments, on March 14, 2002.

48. In its project description, the NIGC Draft EA lacks all necessary detail regarding the Casino. It provides no site plan for the Casino other than a conceptual illustration. It offers no floor plans or other detailed drawings, no landscape plan, no grading plan, no drainage plan, no lighting plan, no signage plan, and no tree removal and retention plan – nothing but a single preliminary elevation drawing. No details are provided on the access road between the interchange and the Casino, on the proposed five-story parking structure, or on the surface parking. The NIGC Draft EA is ambiguous regarding the height of the hotel and casino structures.

49. Much of the information in the NIGC Draft EA's description of the affected environment is inaccurate or outdated; other needed information is omitted entirely. Population, housing, income, and employment data regarding El Dorado County do not utilize 2000 census data or voluminous materials developed by the County in its current General Plan adoption process. Nor were relevant General Plan policies and County budget documents consulted to develop the NIGC Draft EA's public service level criteria. The County's standards for noise and lighting were ignored.

50. The NIGC Draft EA's traffic analysis utilizes an outdated version of the Highway Capacity Manual. It narrowly restricts the geographic scope of its analysis, omitting analysis of impacts on County roads and along U.S. Highway 50 more than two miles west and five miles east of the site. It attempts to estimate trip rates by examining other casinos that are one-fourth

to one-sixteenth the Casino's size, arbitrarily rejecting comparably sized casinos in Reno, Los Vegas, and San Diego County. It rejects industry standard methods of estimating the in/out splits in trip generation rates. Its selection of Saturday evenings as the peak trip generation period lacks any evidentiary support and contradicts available evidence. It reduces standard trip generation estimates for the hotel portion of the Casino and overall arbitrarily, by 75% and 40% respectively, based upon optimistic and undocumented assumptions about co-use and diverted through trips. It ignores trips generated by related support functions, such as the proposed event hall, restaurants, and facilities operation and maintenance. It utilizes inconsistent and understated growth rates in trips over time. It fails to include the traffic study's appendices.

51. If a project the size and scope of the Casino was under County jurisdiction, it would be determined to have traffic impacts sufficient to warrant a levy of $3,106,383 in traffic impact mitigation fees *in addition to* the interchange improvements. The NIGC Draft EA, however, concludes that the Casino would create no significant traffic impacts.

52. The NIGC Draft EA's air quality analysis centers around the air quality impacts of increased traffic, yet its trip rate assumptions are inconsistent with those of the traffic analysis. The air quality analysis uses trip rate assumptions that are *one-half to one fourth* of the assumptions employed in the traffic analysis. If the two analyses were consistent, the Casino's daily emissions of air pollutants would be nearly twice those stated in the NIGC Draft EA. The NIGC Draft EA fails to state the threshold employed for determining the significance of the emissions. If the County Air Pollution Control District's thresholds were used, as they should have been, emissions of three pollutants – oxides of nitrogen, volatile organic compounds, and particulate matter (dust) – would all have exceeded the significance thresholds. The analysis ignores emissions from stationary sources associated with the project, and its analysis of cumulative impacts is deficient.

53. The NIGC Draft EA's analysis of wastewater disposal impacts concludes that all surplus wastewater can be disposed of by percolation into the area's shallow soils. Specifically, the NIGC Draft EA concludes that an average of nearly 100,000 gallons of water daily can be absorbed by an area of four acres, rain or shine, 365 days per year. That conclusion is reached in

part by assuming that infiltration rates for these soils will exceed rates published by the federal Soil Conservation Service. The Central Valley Regional Water Quality Control Board responded to the NIGC Draft EA's wastewater disposal plan as follows: "Board staff is very concerned that the on-site conditions and limited disposal area is [sic] not adequate to ensure that wastewater will not resurface. The application rate per acre is very high and difficult to justify." Also, the underlying groundwater into which the wastewater will flow supplies numerous nearby residences with their drinking water. Further, the efficacy of the proposed wastewater treatment method prior to disposal is unproven. The NIGC Draft EA provides no backup plan or holding capacity in the event of an outage or emergency. There is no plan to obtain the National Pollutant Discharge Elimination System permit that the federal Clean Water Act would require in the event wastewater does run off.

54. The NIGC Draft EA provides no report analyzing the hydrological and hydraulic parameters of surface drainage from the Casino.

55. The NIGC Draft EA provides no detailed topography or preliminary drainage plans to support its conclusion that the planned 227,000 cubic yards of earth cutting and filling will have no significant environmental effects. Nor does the NIGC Draft EA provide a visual impacts analysis or visual simulations to substantiate its conclusion that the Casino will have no adverse visual impacts. Further, the visual impacts analysis that was prepared does not consider the grading and vegetation removal that will occur during construction. Similarly, the NIGC Draft EA's socioeconomic analysis fails to provide relevant baseline information. Without this information, the NIGC Draft EA's conclusions on this subject are unsubstantiated.

56. The NIGC Draft EA concludes that the Casino will not cause an adverse land-use impact, despite its location amid low-density residential uses and infrastructure.

57. Regarding water supply, the NIGC Draft EA simply asserts, without any supporting facts, that an adequate water supply and infrastructure exists to support the Casino's full water demands, including fire suppression. The only available facts specifically contradict this last conclusion – the Casino site has only a three-inch water connection, which is physically incapable of providing the flows needed for fire suppression. Further, the public water service

to the Rancheria was specifically limited to residential use at the time it was first extended.

58. The NIGC Draft EA's analysis of noise impacts fails to consider noise generated on-site and from traffic on the elevated interchange. It concludes, without analysis, that topography will prevent on-site sound from carrying to the adjoining residential neighborhoods.

59. The NIGC Draft EA fails to disclose or analyze potential impacts from the storage and use of hazardous materials on-site, such as propane, freon, carbon dioxide, cleaning products, pesticides, fertilizers, liquid oxygen, and diesel fuel.

60. The NIGC Draft EA's analysis of indirect and cumulative impacts fails to consider adverse socioeconomic and public services impacts, choosing instead to regard the former as inherently positive, and the latter as nonexistent. Indirect and cumulative adverse socioeconomic impacts can arise from the blighting effects of this massive commercial development in the midst of a rural residential zone. Indirect and cumulative adverse public services impacts, including police, fire, and medical will arise from the increase and concentration of human activity at the Casino site, and may arise from the introduction of gambling to the community. Although these issues are the focus of intense public concern and controversy, the NIGC Draft EA fails to address them.

The Final EA and FONSI for the Development Component

61. The County received no response to its comments on the NIGC Draft EA from BIA or NIGC during the remainder of 2001. On January 29, 2002, the County held an informational workshop on Indian gaming law. Representatives of both BIA and NIGC participated as expert panelists. The workshop was general in nature and not intended to deal with issues related to the Casino. Near the end of the workshop, however, in response to a question from the County's Director of Environmental Management, a BIA representative revealed for the first time that the NIGC had *already completed a final EA in December 2001, and that NIGC Chairman Deer had signed a FONSI on January 22.*

62. The County immediately obtained copies of these documents. The NIGC Final EA consists of a revision of the NIGC Draft EA; a slim volume summarizing and responding to comments by the County and others on the NIGC Draft EA; and 20 appendices. The appendices

include hundreds of pages of new material, such as: a new water, wastewater and reclamation study that substituted a completely new analysis and proposed wastewater treatment technology for the one proposed in the NIGC Draft EA; a drainage study and grading map prepared in July 2001; an archaeological inventory survey prepared in September 2001; a completely revised traffic operations analysis prepared in August 2001; and a so-called "natural environment study," labeled "preliminary" and prepared in August 2001, that dealt with various biological and habitat issues.

63. The NIGC Final EA also belatedly discloses that both the project description and the lead agency identified in the NIGC Draft EA had been fundamentally changed. The NIGC Final EA describes the project as merely the NIGC's approval of the Casino's Development and Management Contract; without proper notice, the NIGC had quietly become the lead agency for environmental review. The Casino development is characterized and analyzed only as a "foreseeable consequence" of the Contract; to the extent it is analyzed at all in the NIGC Final EA, the interchange is described as "[a] related but separate action."

64. The new information and studies in the responses to comments and appendices purport to address many of the most glaring and commented-upon deficiencies of the NIGC Draft EA. Rather than acknowledging and correcting those deficiencies, however, much of this new matter consists of further justifications of the NIGC Draft EA's analyses, or lack thereof.

65. The new materials also include significant amounts of newly disclosed information and newly performed studies on the key issues of traffic impacts, wastewater, grading, drainage, water supply, biology, and aesthetics. None of these studies were made available for public review or comment prior to the release of the NIGC Final EA. Despite having made substantive comments on the NIGC Draft EA, the County was not made aware of the existence of either the NIGC Final EA or the new material until after the NIGC adopted the NIGC FONSI. The NIGC did not recirculate the EA in Draft form to allow public review and comment of the fundamental changes it had wrought in the project description, lead agency, and substantive environmental analysis.

66. Nearly a third of the response to comments volume accompanying the NIGC Final

EA is devoted to traffic issues. An appendix provides a new and expanded traffic study. Despite its bulk, this new material does not redress the defects in trip generation assumptions, analysis of traffic impacts on County roads, peak hour assumptions and "passer-by capture" identified in the County's comments on the NIGC Draft EA. The failure to recirculate the NIGC Draft EA or make this new information available for public review and comment precluded the County and the public from providing timely and meaningful analysis or critique of these issues.

67. The NIGC Final EA and an appendix disclose that the NIGC had abandoned the prior proposed wastewater treatment and disposal system in favor of a completely new treatment system and a substantially revised disposal regime. The feasibility of the new treatment system is unsubstantiated and uncertain. The proposed disposal regime expands the percolation area from four to six or seven acres, which remains grossly inadequate for the daily average disposal of 98,000 gallons of wastewater, particularly in wet weather. The County is informed and believes that Defendants have obtained and suppressed technical studies that establish the percolation area's inadequacy. The failure to recirculate the NIGC Draft EA or make this new information available for public review and comment precluded the County and the public from providing timely and meaningful analysis or critique of these issues.

68. An appendix to the NIGC Final EA provides two diagrams purporting to constitute a grading plan for the Casino project. This, the only grading information provided anywhere in the NIGC Final EA, is insufficient to enable a proper understanding of the 227,000 cubic yards of grading proposed, or the impacts of that grading. Another appendix provides a brief drainage report that concludes that there will be no increases in storm flow downstream of the Casino site. The failure to recirculate the NIGC Draft EA or make this new information available for public review and comment precluded the County and the public from providing timely and meaningful analysis or critique of these issues.

69. The NIGC Final EA substantially changes the NIGC Draft EA's plan for water supply and adds a second scenario for water – trucking it in at a rate of 100,000 gallons per day. Under the first, revised scenario, the Casino will rely on recycled wastewater for toilets,

landscaping, and fire safety to bring down the project's overall demand, and will require a 200,000-gallon potable water storage tank to allow supply to keep pace with peak demands. Under the second scenario, trucks hauling 4,000 gallons of water per trip will arrive and depart the Casino 25 times each day. According to an appendix, the trucks will be dispatched from a water supply in the next county to the south, about 30 miles away. The secondary impacts of truck delivery of water are not addressed. The failure to recirculate the NIGC Draft EA or make this new information available for public review and comment precluded the County and the public from providing timely and meaningful analysis or critique of these issues.

70. An appendix to the NIGC Final EA provides a preliminary "natural environment study" that purports to address impacts to plants, wildlife, and habitat. The failure to recirculate the NIGC Draft EA or make this new information available for public review and comment precluded the County and the public from providing timely and meaningful analysis or critique of these issues.

71. Another appendix to the NIGC Final EA provides diagrams and photos purporting to address visual impact issues, which are discussed in the NIGC Final EA. The photos do not include markers or simulations of the Casino structures, and thus do not establish the presence or absence of impacts. The NIGC Final EA's conclusion of no impact relies upon statements like "the intervening vegetation would also add significant visual buffering" and "the fact that the proposed facility will be seen outside of the Rancheria does not result in a significant visual effect" as its support. Further, the failure to recirculate the NIGC Draft EA or make this new information available for public review and comment precluded the County and the public from providing timely and meaningful analysis or critique of these issues.

72. NIGC Chairman Deer signed the NIGC FONSI on January 21, 2002. The NIGC FONSI was not circulated for public review and comment prior to its execution. Indeed, the County was not even informed of the NIGC Final EA and the FONSI until they were *faits accompli*. Based exclusively upon the analysis of the NIGC Final EA, the NIGC FONSI concludes that the Casino's impact on the quality of the human environment is "minor," its socioeconomic impact is "beneficial" both to the Band and to the County, and that there are no

significant unmitigated impacts on public health and safety, traffic, water quality, or air quality. The NIGC FONSI states that it is expressly made contingent upon the construction of the interchange; however, the mere signing of an agreement for interchange design and construction, not the construction of the interchange itself, is all the NIGC FONSI requires. The NIGC FONSI concludes that NEPA does not require the preparation of an Environmental Impact Statement ("EIS") for the Development Component.

The EAs and FONSI for the Interchange Component

73. After completing the first task to making the Casino Project a reality, the Development Component, the BIA and the Band turned their attention toward completing the second necessary piece, the Interchange Component.

74. The BIA released the BIA Draft EA for the Interchange Project on May 6, 2002. The BIA Draft EA expressly concerned itself only with the Interchange Component and not the then-recently approved Development Component. The BIA Draft EA plainly states, "[T]he hotel and gaming project is not considered an element of this project description . . .." While the BIA Draft EA purports to analyze the impacts of Development Component, it does so by "incorporating by reference and tiering from the NIGC EA and FONSI" in lieu of conducting the required cumulative impact analysis. This decision is particularly egregious as the BIA Draft EA readily acknowledged the Development Component is an "immediate plan for development."

75. Several commenters to the BIA Draft EA noted the strained logic in treating the Development Component as a totally separate project with only "indirect" impacts. The BIA reiterated the same position in the BIA Final EA even though BIA acknowledged also that the sole purpose of the Interchange Project is to provide vehicular access to the Rancheria.

76. Several commenters also noted that the BIA Draft EA for the Interchange Project should discuss the cumulative impact from the Development Component. The BIA Final EA and BIA FONSI dismissed this concern by asserting, without any support in fact or law, that the impacts from the Development Component were "fundamentally different in kind and type" from the impacts from the Interchange and could therefore not be "cumulative or additive."

77. The BIA Draft EA for the Interchange Component also "tiered" off the prior NIGC EA for the Development Component even though BIA vigorously argued that the two projects were not connected under NEPA. Consequently, BIA's tiering of the prior NIGC EA resulted in its use of the same deficient traffic and air impacts analyses described above concerning the NIGC EA.

78. The BIA Draft EA was also circulated for public comment lacking key supporting technical studies and reports concerning transportation/circulation, noise and vibration, cultural resources, water quality, and hazardous materials. BIA's failure to provide all relevant supporting material effectively frustrated the public review process that is a fundamental policy goal of NEPA.

79. The BIA Final EA was adopted by the BIA on December 3, 2002 through the issuance of the BIA FONSI. The BIA FONSI was signed by the Assistant Secretary of the Interior for Indian Affairs, thus constituting a final agency action under BIA regulations that is ripe for judicial review in accordance with the APA.

FIRST CLAIM FOR RELIEF

Violation of NEPA for Improperly Segmented Environmental Review

80. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 79, above.

81. NEPA and its regulations forbid the segmentation of environmental review. That is, federal agencies may not chop or segment a proposed major federal action into smaller pieces to avoid the application of NEPA, or to avoid a more detailed assessment of the environmental effects of the overall action. Here, Defendants have impermissibly segmented their environmental review of the Casino Project, a major federal action under NEPA, by preparing two separate EAs.

82. The NIGC Draft EA does not properly analyze the Interchange Component as part of the project subject to review. Although initially the NIGC Draft EA properly acknowledges the Interchange Component as a "component" of the project, it then fails to analyze the Interchange Component as such, instead referring the reader to a future, then-unwritten

Environmental Impact Report that the California Department of Transportation was expected to prepare.

83. The Development Component and Interchange Component are connected actions within the meaning of NEPA. It is undisputed that the Casino cannot exist unless the Interchange Component is approved.

84. Further, the Interchange Component does not have independent utility from the Casino Project. The County is informed and believes that the private funding for the Interchange Component is based solely upon the expectation that a Casino will be built at the Rancheria.

85. Thus, the Interchange Component and the Development Component are connected actions under NEPA and must be analyzed in the same environmental document. By analyzing these two connected actions in two separate EAs, the NIGC and BIA have acted to improperly segment environmental review of a major federal action, thus violating NEPA.

SECOND CLAIM FOR RELIEF

Violation of NEPA for Failure to Prepare an EIS for the Casino Project

86. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 85, above.

87. NEPA and its implementing regulations require all federal agencies to prepare an EIS for every major federal action that would significantly affect the quality of the human environment. Collectively and individually, the NIGC's approval of the Development Component, the construction and operation of the Casino, and BIA's approval of the Interchange Component are major federal actions that meet this criterion. Moreover, they are connected actions under NEPA. Consequently, the BIA and/or the NIGC are required to prepare an EIS for approval of the entire Casino Project as it constitutes a major federal action under NEPA.

88. Collectively, the Development Component, the Casino, and the Interchange Component that will provide vehicular access to the Casino, will have significant adverse effects on traffic, air quality, water quality, water supply, the provision of public services, and

other adverse environmental impacts. For the most part, these impacts have not even been acknowledged in the EAs and FONSIs for the two components of the Casino Project. Analyses of the acknowledged impacts frequently relied on inaccurate, outdated, and incomplete information. The mitigation measures proposed in the EAs and adopted in the FONSIs for the few identified impacts do not mitigate these adverse impacts to a level of insignificance, and no mitigation is even proposed for the many adverse impacts that the EAs' analyses ignore.

89. In assessing the significance of the action and its environmental effects for purposes of determining whether to prepare an EIS, NEPA and its regulations require federal agencies to take into account "context," such as the unique characteristics of the geographic area in question. Had Defendants taken this factor into account, including but not limited to the poor, shallow soils available for wastewater disposal by percolation, Defendants would have been obliged to prepare an EIS for the Casino Project.

90. In assessing the significance of the action and its environmental effects for purposes of determining whether to prepare an EIS, NEPA and its regulations also require federal agencies to take into account the degree to which the project's effects are likely to be highly controversial. The Casino Project is among the most controversial development proposals ever advanced in El Dorado County's 150-year history; as the County's comments exemplify, most of that controversy centers around the project's likely adverse environmental effects. Had Defendants taken this factor into account, Defendants would have been obliged to prepare an EIS for the Casino Project.

91. In assessing the significance of the action and its environmental effects for purposes of determining whether to prepare an EIS, NEPA and its regulations also require federal agencies to take into account the cumulative effects of the Casino Project in combination with other past, present, and reasonably foreseeable future actions, regardless of what agency undertakes those other actions. Had Defendants properly taken this factor into account, and in particular the consequential impacts of constructing, staffing, and operating a development project of this size and character, Defendants would have been obliged to prepare an EIS for the Casino Project.

92. NEPA and its regulations require the preparation of an EIS whenever substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor, even if the impact is not proven or certain to occur. The County and others who commented on the EAs raised such substantial questions, thereby obliging Defendants to prepare an EIS for the Casino Project.

93. NEPA requires Defendants to take a hard look at the environmental consequences of a federal project. Defendants failed to comply with this standard by declining to prepare an EIS that fully discloses and evaluates all relevant and potentially significant adverse environmental impacts and effects of the entire Casino Project.

THIRD CLAIM FOR RELIEF

Violation of NEPA for Failure to Prepare an EIS for Either Component of the Casino Project

94. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 93, above.

95. Assuming, *arguendo*, that the Casino Project was properly segmented into two independent projects, the failure by BIA and NIGC to prepare an EIS for either project violates NEPA because it thwarts attempts to conduct the necessary hard look at both projects.

96. The need for at least one EIS is demonstrated by the BIA and NIGC's attempt to "tier" off the NIGC EA. "Tiering" pursuant to NEPA is used when a proposed project consists of a subset of a larger project that has already been subject to environmental review. An EIS is used to analyze the wider-ranging and more general environmental impacts of the larger program or policy project. After receiving approval for the large-scale policy or program project, implementation of the smaller site-specific projects rely in part upon the general analysis provided in the programmatic EIS. Thus, the environmental document for the smaller project "tiers" off the analysis for the larger project.

97. The regulations implementing NEPA provide that tiering is only appropriate when the first tier document is an EIS. In other words, one may not tier off an EA, which was done in this case. It is undisputed that the purported "first tier" NEPA document consisted of an EA.

Further, it is undisputed that both BIA and NIGC intended for the NIGC EA to serve as the first tier for the subsequent BIA EA. This blatantly violates NEPA.

98. Further, the first tier project must, by definition, consist of a larger project that encompasses all of the smaller projects that will receive the second tier review. Here, however, the NIGC EA expressly carved out from the project description the Interchange Component. Instead, the NIGC Final EA describes the Interchange as a "closely related project." This express distinction between the purported first and second tier projects precludes the lawful use of tiering.

99. The NIGC and BIA could have properly used tiering for the Casino Project. However, this would have required NIGC to prepare a full EIS for the Development Component that expressly included the Interchange as a subset of the overall Casino Project. Failing this, the BIA's purported use of tiering violates NEPA.

100. Of course, even the failure to prepare an EIS for the Development Component would not have been fatal to the Casino Project if the deficiencies had been cured in the subsequent analysis of the Interchange Component. This could have been accomplished by preparing an EIS for the Interchange Project that included an analysis of the cumulative impacts of the Interchange and the Development Components. However, this did not occur because an EA was also prepared for the Interchange Component. What is more, the BIA EA expressly carved out any significant analysis of the Development Component, dismissing those environmental impacts as being "fully addressed" in the prior environmental document.

101. In short, the use of the two EAs accomplished exactly that which is expressly proscribed by NEPA: each EA took an impermissibly narrow view of the scope of impacts from its respective project with neither EA taking any responsibility for conducting the necessary cumulative impacts analysis. The use of an EIS for either component of the Casino Project would have prevented this result.

FOURTH CLAIM FOR RELIEF

Violation of NEPA for Faulty Project Description in Development Component

102. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through

101, above.

103. NEPA and its regulations require a complete, consistent, and accurate project description throughout environmental review. Here, the project description was not complete because various elements of the project were excluded from its description and from proper environmental review.

104. The project description in the NIGC Draft EA originally included taking into trust the property between the Rancheria and Highway 50 as well as NIGC's approval of the Casino's Development and Management Contract. The NIGC Final EA, however, redefines the project down to merely the approval of the Casino's Development and Management contract, thus dropping the proposal to take the property between the Rancheria and U.S. Highway 50 into trust. Both the Draft and Final EAs relegate the construction and operation of the Casino to the status of a "consequence" of the narrow project description.

105. The project description was also incomplete because, as previously alleged, it lacked all detail necessary to properly analyze the project's impacts. Most significantly, the project description was incomplete because neither the terms nor the text of the Casino's Development and Management Contract, which was first a component and later supposedly the entirety of the Development Component, have ever been disclosed to the public. The project description was not consistent because of the changes between the NIGC Draft and Final EA, and it was not consistent or accurate because each of these documents is internally inconsistent or ambiguous on key details such as the presence or absence of an event/convention center, the height of buildings, proposed water supply, and proposed wastewater treatment and disposal methods.

106. Defendants violated NEPA by relying on a faulty project description that was incomplete, inconsistent, and inaccurate. NEPA required a single EIS that analyzed all aspects of a project that was completely, consistently, and accurately described.

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FIFTH CLAIM FOR RELIEF

Violation of NEPA for Inadequate Consideration of Alternatives in the EA for the Development Component

107. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 106, above.

108. NEPA and its regulations require the analysis of a reasonable range of alternatives to a proposed action, that can reasonably achieve the need the proposed action is intended to address. Although the discussion of alternatives need not be exhaustive, it must be sufficient to describe the alternatives and to assess their probable environmental impacts.

109. The NIGC Draft and Final EAs fail to meet these requirements. They consider only two alternatives: No Action, and a so-called "Reduced Intensity" alternative consisting of a 104,000 square foot shopping mall with 347 parking stalls. The discussion of the alternatives, their environmental impacts, and whether they could achieve the objectives that drive the Casino barely exceeds two pages. The most obvious alternative – a Casino of reduced scale – was not considered. Nor was any alternative road access to a Casino of any scale considered – even though sufficient land for an alternative frontage road has been assembled in the hands of a single landowner, and the BIA has the power to acquire land by eminent domain. No alternative site for the Casino was considered, either. (One alternative site was briefly discussed but summarily eliminated from consideration.) Thus, neither the range of alternatives considered nor the extent of the alternative analysis met NEPA's requirements.

110. Defendants violated NEPA by failing to provide a legally adequate analysis of alternatives to the Casino in its EAs for the Development Component.

SIXTH CLAIM FOR RELIEF

Violation of NEPA for Failure to Involve The County and Public in Preparation and Review of the Final EA for the Development Component

111. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 110, above.

112. NEPA and its regulations require the lead agency for environmental analysis to involve other interested and expert government agencies whenever practicable, to the maximum extent possible. The County had demonstrated its interest and expertise regarding the Casino proposal through its March 2001 comments on the NIGC Draft EA and otherwise. Although it was practicable for Defendants to involve the County in the development of the NIGC Final EA in the ensuing nine months after the County submitted its NIGC Draft EA comments, Defendants did not do so. The County was not consulted in the preparation of responses to its comments. Nor was the County allowed to review the numerous other reports and studies that were authored between March and December 2001. The NIGC Final EA was not made available to the County for review and comment either before its December 2001 release, or between then and the January 21, 2002 approval of the NIGC FONSI.

113. NEPA is intended to inform agencies and the general public alike as to the environmental consequences of a proposed federal action, and to encourage meaningful public participation in the development of that environmental information. NEPA and its regulations therefore require that the public be involved in the development and review of NEPA documents to the extent practicable, and to the maximum extent possible. Numerous citizens groups and private individuals demonstrated their concerns with the Casino's environmental review, as well as their technical expertise in the subjects at hand, in comments on the NIGC Draft EA and otherwise. Like the County, the general public was afforded no opportunity to review or comment on the NIGC Final EA either before or after its completion.

114. Defendants violated NEPA by failing to involve the County and public in the preparation and review of the NIGC Final EA.

SEVENTH CLAIM FOR RELIEF

Violation of NEPA for Failure to Circulate for Public Review the FONSI for the Development Component

115. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 114, above.

116. NEPA and its regulations require a lead agency to make a proposed FONSI

available for public review at least 30 days before the lead agency makes its final determination, when *any* of the following circumstances are present: the proposed action is a borderline case for which it can reasonably be argued that an EIS should be prepared; the proposed action is unusual, new, or precedent-setting; the proposed action is scientifically or publicly controversial; or the proposed action is similar to one that normally requires an EIS.

117. Although only one of the foregoing conditions need be met to trigger a mandatory 30-day public review of a proposed FONSI, all are present in this instance. The physical size and scope of the project, its anomalous location amid rural residential neighborhoods, the numerous unresolved public health and safety and environmental issues that dogged the prior casino venture, and the extensive comments by the County and others in response to the NIGC Draft EA all support a reasonable argument that an EIS is required. The Casino is highly unusual, new, and precedent-setting: nothing of its scale or type has ever been built in El Dorado County, and few existing Indian casinos in California – or conventional casinos in Nevada, for that matter – even approach the size of this development proposal. The Casino Project is among the most controversial developments in the County's history – and the County's history is replete with development controversies. A 381,000 square-foot, high-rise casino-hotel complex, housing 250 rooms and 3,000 car stalls, requiring a quarter-million cubic yards of dirt to be graded, without sewer service, surrounded by rural ranchettes, and featuring the construction of an entirely new freeway interchange, is manifestly the sort of project that would normally require an EIS.

118. Defendants violated NEPA by not circulating the proposed NIGC FONSI for at least a 30-day public review prior to adopting it.

EIGHTH CLAIM FOR RELIEF

Violation of NEPA for Improper Change in Designated Lead Agency for the Development Component

119. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 118, above.

120. NEPA and its regulations require the designation of a single lead agency for

environmental review. The concept of a single lead agency, serving as the hub for all environmental analysis and public review and comment, is so essential that NEPA and its regulations even prescribe mechanisms for resolving disputes over which agency has lead status.

121. Without appropriate notice, the BIA and NIGC exchanged the lead agency and cooperating agency roles in the Casino's midst of environmental review, creating administrative and analytical inconsistency and frustrating public review and comment.

122. Defendants violated NEPA by making an improper change in the designated lead agency for environmental review of the Development Component.

NINTH CLAIM FOR RELIEF

Violation of NEPA for Inadequate Cumulative Impact Analysis for Interchange Component

123. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 122, above.

124. NEPA requires lead agencies to analyze the cumulative impact from a proposed project. According to the regulations implementing NEPA, a "cumulative impact" is "the impact on the environment which results form the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7. Furthermore, "cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id.*

125. Thus, even though a single project may have only minor impacts when considered in isolation, that same project may create significant impacts when considered in connection with other projects. Requiring a cumulative impact analysis allows the public and the decision-maker to be informed of the full impacts from a proposed project.

126. Instead of conducting the requisite cumulative impact analysis, BIA "incorporated by reference" the impacts from the Development Component. According to BIA, this is an appropriate substitute for conducting a cumulative impact analysis.

127. Incorporation by reference is simply a means of reducing paperwork. NEPA's guidelines make this point: "Agencies shall reduce excessive paperwork by . . . incorporating by reference." 40 C.F.R. § 1500.4. Defendant BIA attempts to twist this mechanism for reducing photocopying costs into a substitute for substantive analysis of environmental impacts. This is not allowed under NEPA.

128. The materials purportedly incorporated by reference do not satisfy BIA's requirement to analyze cumulative impacts. BIA asserted in its FONSI that it incorporated by reference the "environmental analysis of the hotel and casino." However, as explained above, a cumulative impact is not the impact from just a single project but rather the collective impact from two or more projects. Therefore, simply describing the impacts from the Development Component - also in isolation- does not constitute a cumulative impacts analysis. By definition, a cumulative impact analysis is never accomplished by discussing individual projects in isolation. Because Defendant BIA incorporated by reference instead of substantively addressing cumulative impacts, the BIA EA for the Interchange Component fails to comply with NEPA.

TENTH CLAIM FOR RELIEF

Violation of NEPA for Improper Tiering in Interchange Component

129. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 128, above.

130. Defendant BIA violated NEPA by tiering from the NIGC EA.

131. Tiering is expressly allowed, in fact, encouraged by NEPA's implementing regulations. 40 C.F.R. § 1502.20. However, NEPA's regulations allow tiering only from an EIS. Tiering from an EA is not allowed. The NEPA regulations provide in relevant part:

> Whenever a broad ***environmental statement*** has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy (such as a site specific action) the subsequent ***statement or environmental assessment*** need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.

40 C.F.R. § 1502.20 (emphasis added).

NEPA's regulations are unmistakable in requiring an EIS as the first tier document. By contrast, the subsequent tiers may be either an EIS or EA.

132. It is undisputed that the BIA used as its first tier document the NIGC EA. The revised BIA FONSI for the Interchange Project establishes this fact in no uncertain terms: "The EIS/EA [for the Interchange Component] also tiers upon the NIGC EA."

133. Because the BIA EA tiered from an EA instead of an EIS, the BIA EA is fatally deficient under NEPA.

ELEVENTH CLAIM FOR RELIEF

Violation of NEPA for Failure to Make Relevant Supporting Documents Available for Public Review

134. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 133, above.

135. Pursuant to NEPA the court must "ensure that the procedure followed by [the agency] resulted in a reasoned analysis of the evidence before it, and that the [agency] made the evidence available to all concerned." *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir. 1985). Here, however, BIA withheld from its circulation of the BIA Draft EA critical supporting documents and reports that were necessary to proper analysis of the assumptions and conclusions in the BIA Draft EA.

136. For whatever reason, many of these documents were compiled in a second appendix to the BIA Draft EA that was not circulated with the BIA Draft EA. This uncirculated appendix contained reports on key issues including but not limited to air quality, water quality, transportation/circulation and hazardous materials.

137. Not only was this second appendix not circulated with the BIA Draft EA, the table of contents for the BIA Draft EA do not refer to the technical studies in the second appendix. Far from having the second appendix "circulated with the environmental impact statement or be readily available on request," it appears that BIA actively sought to shield these technical documents and reports from public scrutiny. 40 C.F.R. § 1502.18(d).

138. Thus, BIA's failure to publicly circulate all relevant supporting material effectively frustrated the public review process that is a fundamental policy goal of NEPA. It also indicates an attempt to "swe[ep] stubborn problems or serious criticism under the rug." *Oregon Natural Resources Council v. Lowe*, 109 F.3d 521, 526-27 (9th Cir. 1997).

TWELFTH CLAIM FOR RELIEF

Declaratory Relief that the Band's Articles of Association are not an Indian Constitution Pursuant to the IRA

139. The IRA was passed by the United States Congress in 1934 as a means of redressing the detrimental effects on Indian tribes from the federal government's prior policy of allotting Indian lands to individual Indians. The IRA allowed existing Indian tribes to reorganize by adopting a Constitution. Adopting a Constitution conveyed specific and enumerated powers to an Indian tribe including the power to prevent conveyance of Indian lands to non-Indians, the power to hire legal counsel, and the power to negotiation with federal, state and local governments.

140. The right to reorganize created by the IRA, by its express terms and as interpreted by federal courts, is extended only to two classifications: (i) Indian tribes that were in existence on January 1, 1934 or (ii) descendants of such Indian tribes living on Indian reservations. IRA benefits were not extended to individual Indians. Nor was the IRA extended to groups of Indians that organized after 1934.

141. The right to organize pursuant to the IRA does not extend to the Band. The Band was not an Indian tribe in existence on January 1, 1934. None of the original persons from the 1916 Census were living on the Rancheria in 1934. Moreover, none of the Descendants were living on an Indian reservation either when the IRA was effective on January 1, 1934 or when they adopted the Band's Articles of Association in 1976. Lastly, the 1916 Census that serves as the basis for membership in the Band included some persons who were not of Indian ancestry but rather of native Hawaiian ancestry.

142. The law is settled that Articles of Association are not the same as an Indian Constitution. *Pit River Home and Agricultural Cooperative Ass'n v. U.S.*, 30 F.3d 1088, (9th

Cir. 1994). In *Pit River*, the Ninth Circuit stated:

> Although, as the Association points out, the Assistant Secretary did approve the Association's original and amended Articles and By-laws, the approval was in the context of approving the Association's capacity to accept the Revocable Assignment of occupancy rights in the Ranch. Nothing indicates the Assistant Secretary intended to approve the Articles and By-laws as the constitution of a federally recognized tribe.

Id. at 1095.

143. An actual case or controversy has therefore arisen from the Commissioner's conditional approval of the Band's Articles of Association with respect to:

(i) whether the Band's Articles of Association constitute an Indian tribal Constitution, either pursuant to the IRA or otherwise;

(ii) whether the right to reorganize pursuant to the IRA extends to the Band and authorizes the Commissioner to approve a tribal Constitution for the Band.

144. Plaintiff therefore seeks a declaratory judgment that:

(i) the Band's Articles of Association adopted in 1976 do not constitute an Indian tribal Constitution; and

(ii) the right to organize created by the IRA does not extend to the Band.

THIRTEENTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act for Unlawful Approval of Gaming by a Non Indian tribe

145. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 144, above.

146. In response to the United State Supreme Court's decision in *California v. Cabazon Band of Mission Indians,* which held that California's criminal laws on gaming would be treated as regulations rather than penal laws and therefore were not enforceable on Indian reservations, Congress on October 17, 1988 passed the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.* Passed after lengthy debate and deliberation, IGRA struck a careful balance between the rights of Indian tribes to conduct gaming operations on Indian lands in order to gain self-sufficiency, the rights of states and local communities to limit and regulate the proliferation

of gaming in order to protect against threats to the environment public health and safety, and the rights of competing businesses and charities.

147. IGRA classifies gaming into three categories subject to varying levels of regulation. Class I games, which include traditional games, are subject only to regulation by an Indian tribe itself. 25 U.S.C. §§ 2703(6), 2710(a)(1). Class II games, which include, *inter alia,* certain electronic gaming devices that resemble slot machines as well as non-banked card games and bingo games not subject to state limitations on prize amounts, are subject to IGRA regulations. 25 U.S.C. §§ 2703(7), 2710(a)(2). Class III games include all other games, particularly Nevada-style games such as blackjack and slot machines, which, in addition to being subject to the IGRA regulations applicable to Class II gaming, are only allowed if conducted pursuant to a compact entered into by the Indian tribe and the state and approved by the Secretary of the BIA. 25 U.S.C. §§2703(8), 2710(d).

148. Federal courts have consistently held that Indian tribes enjoy the right to conduct gaming only because Indian tribes -- as opposed to Individual Indians -- possess a sovereign status that preexisted the development of the United States. *See generally Rice v. Cayetano,* 528 U.S. 495, 518 (2000). Thus, a tribe can only be recognized and accorded sovereign rights where there has already been a distinct, continuous, autonomous and long established independent Indian community under one leadership. *Golden Hill Paugusset Tribe of Indians v. Weicker,* 39 F.3d 51, 59 (2nd Cir. 1994). Further, the U.S. Supreme Court has drawn a clear distinction between Indian tribes and native Hawaiians. *See Rice v. Cayetano,* 528 U.S. 495 (2000).

149. IGRA only allows federally-recognized Indian groups to conduct Nevada-style gaming. 25 U.S.C. § 2703(5). Indian tribes are currently recognized by the federal government in one of three ways: (1) an act of Congress; (2) a decision by a United States court; (3) by the BIA pursuant to administrative procedures set forth in the Acknowledgment Regulations. The Band has not been recognized by the federal government in any of these three ways.

150. In order to receive federal recognition pursuant to the Acknowledgment Regulations, a petitioning group of Indians must satisfy the "Mandatory Criteria" including the

following:

(i) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900;

(ii) A predominant portion of the petitioner comprises a distinct community and has existed as a community from historical times until the present;

(iii) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present;

(iv) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures;

(v) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical tribes that combined and functioned as a single autonomous political entity;

(vi) The membership of the petitioning group is composes principally of persons who are not members of any acknowledged North American Indian tribe;

(vii) Neither the petitioner nor its members are subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.

83 C.F.R. § 83.7.

151. The Band has not satisfied the above Mandatory Criteria for federal recognition under the Acknowledgment Regulations.

152. The Acknowledgment Regulations include a "grandfathering" provision that allows a petitioning Indian group to avoid complying with the Mandatory Criteria if the petitioning group had received unambiguous federal acknowledgment before the effective date of the Acknowledgment Regulations. 25 C.F.R. Part 83. However, the grandfathering provision does not apply to the Band because the Band never received such unequivocal federal recognition before October 2, 1978, the effective date of the Acknowledgment Regulations. The conditional approval of the Band's Articles of Association by the Commissioner of Indian

Affairs in 1976 was not an act of federal recognition of the Band. On information and belief there is no other affirmative act of approval by the BIA that can justify the Band's presence on the Statutory List.

153. To the extent the Band received acknowledgment pursuant to some other unknown federal process, such process was not appropriately adopted pursuant to the APA and constitutes an underground regulation.

154. Because the Band never received federal recognition by act of Congress, court decision or the BIA through its Acknowledgment Regulations, the BIA unlawfully included the Band on its Administrative Lists and Statutory Lists. This violates U.S.C. section 706(2) because it is arbitrary, capricious and contrary to law, in that no Act of Congress authorizes such decision.

155. The NIGC's approval of the Development Component for the Casino Project is based upon and applies the BIA's unlawful identification of the Band as an Indian tribe pursuant to the List Act. The NIGC has no authority under IGRA to approve a casino development and management contract for an entity that is not a federally recognized Indian tribe. Therefore, NIGC's approval of the Development Component violates U.S.C. section 706(2) because it is arbitrary, capricious and contrary to law, in that no Act of Congress authorizes such decision.

FOURTEENTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act for Improper Use of Non-Indian Lands for Gaming

156. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 155, above.

157. Under IGRA, Class II and Class III gaming may only be conducted on "Indian lands." 25 U.S.C. § 2702.

158. The term "Indian lands" is defined to mean (i) lands within an Indian reservation, (ii) lands as to which title is held in trust by the United States for tribes or individual Indians, or (iii) land which are held by tribes or individual Indians subject to restrictions by the United States against alienation and over which tribes exercise governmental power. 25 U.S.C.

§ 2703(4).

159. The Rancheria is not an Indian reservation and in fact was purchased after the date that Congress prohibited the creation of any further reservations. 43 U.S.C. § 150. Therefore, the Rancheria does not fit within option (i) above. Further, title to the Rancheria is not held by the Band. Therefore, option (iii) above does not apply.

160. On information and belief, the Band claims that it is entitled to conduct Class II and Class III gaming on the Rancheria because it is land "held in trust by the United State for the benefit of any Indian tribe or individual . . . ." 25 U.S.C. § 2703(4)(B). However, the Rancheria does not fit within this definition of the term "Indian lands." Therefore, Class II and III gaming may not lawfully occur at the Rancheria.

161. Title to the Rancheria is held by the "United States of America, for the use and occupancy of the Sacramento-Verona Band of Homeless Indians."

162. This form of title to the Rancheria is not equivalent to title held "in trust." Therefore, the Rancheria is not considered "Indian lands" for purposes of IGRA.

163. This issue has already been squarely considered and decided by the Department of the Interior. In a Memorandum dated August 1, 1960, the Solicitor for the Department of Interior advised the Commissioner of Indian Affairs concerning the status of title to various rancherias in California. The Solicitor noted, "It has been suggested that the United State can not dispose of this property . . . because it held the property in trust for specific bands, who had a vested interest therein." After reviewing the history of the BIA's rancheria program in California as well as the title to several rancherias, the Solicitor responded to this position by stating, "These references do not connote a trust in which the United States holds merely a legal title, with equitable ownership elsewhere, as in the case of Indian lands generally . . . ." The Solicitor concluded the opinion by stating, "In conclusion, the Rancheria properties belong to the United States, in law and equity; the disposition of these Rancheria properties has been properly undertaken by Congress . . . ."

164. Pursuant to this recognition that the Rancheria is not held in trust, the BIA on several occasions attempted to sell the Rancheria in the 1960s. The sale was not executed only

because the BIA could not obtain a minimum market-value bid for the property.

165. What is more, title to the Rancheria is held for the use and occupancy of the Sacramento-Verona Band of Homeless Indians. The Rancheria is not held for the use and occupancy of the Shingle Springs Band of Miwok Indians. Even if the Rancheria was at one time held in trust, that trust status was extinguished along with the beneficiary of that trust, i.e. the purported Sacramento-Verona Band.

166. The NIGC's approval of the Development Component constitutes an implied necessary finding that the Rancheria falls within the definition of the term "Indian lands" pursuant to IGRA. Therefore, the NIGC's approval of the Development Component is an arbitrary and capricious agency action, is an abuse of discretion, and is contrary to law and to procedures required by law, and thus is in violation of 5 U.S.C. § 706.

FIFTEENTH CLAIM FOR RELIEF

Violation of the Clean Air Act - Failure to Demonstrate that the Casino Project Would be in Conformity with State Implementation Plan

167. Plaintiff hereby realleges and incorporates by this reference paragraphs 1 through 166 above.

168. The Federal Clean Air Act as amended in 1990 forbids the federal government and its agencies from engaging in, supporting in any way or providing financial assistance for, licensing, permitting or approving any activity which does not conform with California's state implementation plan ("SIP"). 42 U.S.C. § 7506(c)(1); also see U.S. EPA conformity regulations at 40 CFR Part 93. Under the Clean Air Act "conformity" is defined broadly to include actions that may increase the frequency or severity of any existing violation of any standard in any area of the State or delay timely attainment of any standard in any area of the State.

169. Under the Clean Air Act BIA and NIGC were obliged to affirmatively demonstrate that the Casino Project would not violate, but conform, with the SIP. Instead, BIA and NIGC violated both the substantive as well as procedural requirements of the Clean Air Act's conformity regulations. As a result BIA and NIGC failed to meet their legal obligations under

the Clean Air Act and EPA conformity regulations.

170. Substantive failures in this regard include improper segmentation of the project and the use of unrealistic trip generation rates, vehicle capture rates, hotel generation rates and outdated planning assumptions. BIA and NIGC also improperly relied upon outdated air quality models to conclude that this regionally significant project would produce only negligible air emissions and would not violate the SIP.

171. The County submitted extensive public comments to the federal agencies at every available opportunity regarding the above conclusions. On information and belief, BIA and NIGC did not respond, nor consider those comments as required by law.

172. In their environmental review BIA and NIGC impermissibly conflated the obligations imposed by NEPA with those imposed by the Clean Air Act. In so doing, and in failing to conduct a legally adequate conformity analysis under the Clean Air Act and EPA conformity regulations, BIA and NIGC acted arbitrarily and capriciously.

RELIEF REQUESTED

WHEREFORE, Plaintiff requests that this Court issue:

1. A judgment declaring that the Draft and Final EAs, the FONSI, and the approval of the Development Component by NIGC failed to comply with the requirements of NEPA and its regulations and are therefore invalid;

2. A judgment declaring that the Draft and Final EAs, the FONSI and the approval of the Interchange Component by BIA failed to comply with the requirements of NEPA and its regulations and are therefore invalid;

3. A judgment declaring that Defendants violated the APA by acting arbitrarily and capriciously, in an abuse of discretion, not in accordance with the law and/or without observance of procedures required by law;

4. A judgment and order setting aside the illegally adopted FONSIs for both the Development Component and Interchange Component;

5. A judgment and order suspending the approvals of the Development Component and the Interchange Component, pending the preparation, issuance, and completion of one or

more EISes that comply with NEPA and its regulations;

6. An order preliminarily and permanently enjoining Defendants, and each of them, from taking or authorizing any action pursuant to the Development Component or the Interchange Component pending the preparation, issuance, and completion of an EIS that complies fully with NEPA and its regulations;

7. For a declaratory judgment that the Band has not been organized pursuant to the IRA and cannot organize pursuant to its provisions;

8. A judgment declaring that BIA violated the APA by acting arbitrarily and capriciously, in an abuse of discretion, not in accordance with the law and/or without observance of procedures required by law by identifying the Band as a federally-recognized Indian tribe;

9. A judgment declaring that NIGC violated the APA by acting arbitrarily and capriciously, in an abuse of discretion, not in accordance with the law and/or without observance of procedures required by law by approving the Development Component even though the Rancheria is not "Indian lands" as defined by IGRA;

10. An order preliminarily and permanently enjoining the Band from conducting any Class II or III gaming unless and until the Band receives federal acknowledgment as an Indian tribe;

11. An order preliminarily and permanently enjoining the Band from conducting any Class II or Class III gaming unless and until the Rancheria has obtained the status of 'Indian lands';

12. A judgment and order for costs of suit herein, including reasonable attorneys' fees, pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 or other applicable authority; and

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13. Such other and further relief as the court deems just and proper.

Dated: 3.3, 2003

THE DIEPENBROCK LAW FIRM
A Professional Corporation

By: _____
Michael V. Brady, Esq.
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