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, MONTE DEER, in his Capacity as Chairman of the National Indian Gaming Commission, NATIONAL INDIAN GAMING COMMISSION, and BUREAU OF INDIAN AFFAIRS, Defendants. SHINGLE SPRINGS BAND OF MIWOK INDIANS, Intervenor.	CV. S-02-1818 GEB DAD ORDER

Pending are cross-motions for summary judgment on the validity of environmental reviews by the Bureau of Indian Affairs ("BIA") and the National Indian Gaming Commission ("NIGC"). Plaintiff El Dorado County argues the reviews violate the National Environmental Policy Act ("NEPA") and the Federal Clean Air Act ("CAA"), and that therefore the agencies' Findings of No Significant Impact ("FONSI") should be set aside.

For the reasons stated below, Plaintiff's motion is denied and Defendants' and Intervenor-Defendant's (collectively "Defendants") motions are granted.

I. BACKGROUND

A. Overview of Relevant Statutes

1. NEPA

> NEPA is a procedural statute that does not "mandate particular results, but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." Cuddy Mtn. [v. Alexander], 303 F.3d [1059,] 1070 [(9th Cir. 2004)] (internal quotation marks omitted). The Act mandates that an [Environmental Impact Statement ("EIS")] be prepared for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). As a preliminary step, the agency may prepare an Environmental Assessment ("EA") to determine whether the environmental impact of the proposed action is significant enough to warrant an EIS. Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 730 (9th Cir. 2001); see 40 C.F.R. § 1508.9. If the EA establishes that the agency's action "may have a significant effect upon the environment" then an EIS must be prepared. Nat'l Parks, 241 F.3d at 730.

High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 639-40 (9th Cir. 2004).

The EA is a more limited review document; it is "a concise public document. . . that serves to [b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact." 40 C.F.R. § 1508.9(a)(1). If an EA reveals no significant impacts will result from the proposed action, the agency must then prepare a FONSI. Id. §§ 1501.4(e), 1508.13. The FONSI "briefly present[s] the reasons why an action . . . will not have a significant effect on the human environment . . . ." Id. § 1508.13.

2. Clean Air Act

> The CAA requires [the Environmental Protection Agency ("EPA")] to establish air quality standards for certain pollutants. . . . Each state, in turn, is required to adopt and submit for EPA approval a State Implementation Plan ("SIP") for each pollutant. 42 U.S.C. § 7410(a)(1). Each state is divided into "air quality control regions," which are classified as "attainment" or "nonattainment" with respect to each pollutant for which there exists an air quality standard. Id. § 7407. SIPs must contain emissions limitations and other measures designed to bring "nonattainment" regions into attainment. Id. § 7410(a)(2).

Public Citizen v. Department of Transp., 316 F.3d 1002, 1029 (9th Cir. 2003).

The CAA prescribes: "No department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a state] implementation plan." 42 U.S.C. § 7506(c)(1). "[The] safeguards [set forth in the statute] prevent the Federal Government from interfering with the States' abilities to comply with the CAA's requirements." Department of Transp. v. Public Citizen, 541 U.S. 752, ___, 124 S. Ct. 2204, 2210 (2004).

B. Factual and Procedural Background

The Shingle Springs Band of Miwok Indians ("the Tribe") is a federally-recognized Indian tribe whose reservation, the Shingle Springs Rancheria ("Rancheria"), is located in El Dorado County ("County"). (Admin. R. at 8774.) The only access to the Rancheria is via private roads through the Grassy Run neighborhood, and that access is mainly limited to residential traffic. (Admin. R. at 8775.) "The access . . . can only be used for commercial deliveries between the hours of 9 a.m. and 2:30 p.m. during weekdays, with fines for

violating these time restrictions." (Admin. R. at 8776.) The access restriction to the Rancheria impedes the Tribe's ability to engage in economic activity. (Admin. R. at 8775.) The Rancheria "is effectively landlocked for economic purposes." (Admin. R. at 8775.)

"The tribe . . . desires a viable revenue base to fund governmental programs and decrease their dependence on Federal and State funding, [and] the opportunity to more fully utilize the Rancheria site for specific Tribal interests." (Admin. R. at 8775.) To both achieve greater access to the Rancheria and develop a viable revenue base, the Tribe proposed construction of a hotel and gaming facility on its reservation, and an interchange and access road connecting the reservation to US Highway 50 in El Dorado County. (Admin. R. at 8775.)

The Tribe desires the opportunity to engage in gaming activities since this should allow the Tribe to develop an economic base under the Indian Gaming Regulatory Act ("IGRA") (25 U.S.C. § 2701 et seq). The Tribe has already executed a tribal/state compact with the State of California under IGRA. (Admin. R. at 10254-316.) The Tribe also submitted a request to the NIGC for approval of a management agreement with Lakes, Kean-Argovitz Resorts-Shingle Springs ("LKARSS") for the construction and operation of a hotel and Class III gaming facility on the Tribe's reservation. (Admin. R. at 515.)

The Tribe originally proposed that the BIA place five acres of land into federal trust for the Tribe. (Admin. R. at 1023, 1028.) This proposal entailed building a casino and hotel on the existing Rancheria, an access road on five acres of trust property, and an interchange for traffic to access the Rancheria via Highway 50. (Admin. R. at 1028.) Since the BIA "is the Federal Agency . . .

charged with reviewing and approving applications . . . to take land into Federal trust status and approve contracts . . . involving Native American lands," it assumed the status of "lead agency over the Tribe's proposed actions." (Admin. R. at 1023.)

The BIA concluded the environmental effects of this proposed federal action had to be evaluated under NEPA. (Admin. R. at 1023, 1028.) Under the supervision of the NIGC and the BIA, an environmental consulting firm retained by the Tribe prepared and submitted a draft EA that evaluated the potential effects of the BIA's placement of five Rancheria acres into federal trust status for the Tribe and the NIGC's approval of the gaming management contract.[1] (Admin. R. at 1016-159.) In response to comments received on the draft EA, the agencies identified a number of areas meriting further, detailed analysis and commissioned additional technical studies. The agencies narrowed the project definition by eliminating the BIA's proposed federal action of placing five acres into federal trust (Admin. R. at 1237-38) because the BIA concluded it could accomplish the Tribe's objective by

> (1) executi[ng] an Encroachment Agreement with [the California Department of Transportation ("CalTrans")] for the planning, design, construction, operation and maintenance of the proposed interchange and connection to Honpie Road; (2) [acquiring] a right-of-way in the name of the United States over a 5.6 acre parcel owned by the Tribe to provide for connecting access to the Reservation; and (3) designat[ing] the interchange as part of the [federal Indian Reservation Road ("IRR")] system.

(Admin. R. at 8687, 14699-765.)

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[1] "The NIGC is the Federal Agency that is charged with regulatory gaming on Native American lands . . . ." (Admin. R. at 1023.)

After receiving a letter from CalTrans in which it stated that the interchange would have to be a separate action under the California Environmental Quality Act ("CEQA"), "with CalTrans as the Lead Agency" (Admin. R. at 12374-75), the NIGC and the BIA narrowed the "proposed action" in the EA to the approval of the gaming management contract.[2] (Admin. R. at 1337.) Since CalTrans needed to approve the interchange and the BIA was the Federal Agency responsible for executing an encroachment agreement with CalTrans, acquiring a right-of-way in the name of the United States, and designating the interchange and access road as part of the IRR system, it was decided that CalTrans and the BIA would become joint lead agencies for the interchange project. (Admin. R. at 1238-39.)

The NIGC then became the lead agency for the hotel and casino project. (Admin. R. at 1318.) "As a cooperating agency, the BIA took an active role in the development of the draft hotel and casino Environmental Assessment ["casino EA"], Final Environmental Assessment, and Responses and Comments." (Admin. R. at 8689.)

The casino EA documented the planning process and analyzed impacts of the proposed hotel and casino project. The agencies consulted several state and federal environmental regulatory agencies, commissioned numerous technical studies, and sought input from the public. (Admin. R. at 517-18.) The casino EA indicated there would be no significant unmitigated impacts on public health and safety, archaeological resources, endangered species or their critical

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[2] A foreseeable consequence of NIGC approval of the gaming management contract "would be the construction and operation of a hotel and casino complex." (Admin. R. at 1337.)

habitat, wetlands, water quality, air quality, or traffic. (Admin. R. at 1317-485.)

In January 2001, the draft casino EA was completed and made available to the public for ninety days. More than 200 comments were received and the agencies prepared and released responses to those comments. (Admin. R. at 1234-316.) The final casino EA was prepared after consideration of the comments received. (Admin. R. at 1317-485.)

The NIGC issued a FONSI in January 2002, contingent upon the implementation of mitigation measures that would reduce potentially significant adverse impacts of the project to a point of insignificance. (Admin. R. at 515-16, 1465-74.) The FONSI was also contingent upon the provision of direct access to the Rancheria from US Highway 50. (Admin. R. at 515-16.) This contingency would "be deemed satisfied when CALTRANS and the BIA execute the Cooperative Agreement concerning the design and construction of the interchange." (Admin. R. at 515-16.) The FONSI and a copy of the responses to the public comments were then distributed to all commenting persons and agencies.

The BIA and CalTrans then prepared a joint Environmental Impact Report and Environmental Assessment ("interchange EIR/EA") for the interchange project. The BIA and CalTrans consulted numerous state and federal agencies for input, commissioned technical studies evaluating various impacts, and sought and received public comments. (Admin. R. at 2962-63.) The interchange EIR/EA evaluated the consequences of the project on land use consistency and compatibility, geology and soils, transportation/circulation, air quality, noise, biological resources, visual resources, hazardous materials, water

quality, drainage, cultural resources, and socioeconomic effects. (Admin. R. at 8707-9906.) The interchange EIR/EA also incorporated by reference the casino EA (Admin. R. at 2974, 8726-27, 8690) and tiered to the casino EA. (Admin. R. at 8736, 8690.)

There was a thirty day comment period before the preparation of the interchange EIR/EA. (Admin. R. at 9067-71.) The interchange EIR/EA was released for public comment on May 6, 2002. (Admin. R. at 8687.) A public comment hearing was held on May 30, 2002. (Admin. R. at 8687.) Comments were received on the design and location of the proposed interchange, the relationship of the interchange EIR/EA to the earlier casino EA, and the segmentation into two projects. (Admin. R. at 8690.) CalTrans and the BIA evaluated and responded to the comments received. (Admin. R. at 8187-685.) The BIA then determined that with appropriate mitigation the proposed federal actions would not significantly affect the quality of the human environment and issued a FONSI contingent upon the implementation of the mitigation measures. (Admin. R. at 2981, 8688.)

II. ANALYSIS

A. National Environmental Policy Act

1. Standard of Review

A court should "set aside [an agency's] actions, findings, or conclusions if they are 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.'" Ocean Advocates v. United States Army Corps of Eng'rs, 361 F.3d 1108, 1118 (9th Cir. 2004) (quoting the Administrative Procedure Act at 5 U.S.C. § 706(2)(A)). "Courts apply a 'rule of reason' standard in reviewing the adequacy of a NEPA document." Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Management, 387 F.3d 989, 992 (9th Cir. 2004) (citing

Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001)). "Under this standard, we ask 'whether an [environmental document] contains a reasonably thorough discussion of the significant aspects of the probable environmental consequences.'" Churchill County, 276 F.3d at 1071 (citation omitted).

"The court must defer to an agency conclusion that is 'fully informed and well-considered,' but need not rubber stamp a 'clear error of judgment.'" Anderson v. Evans, 371 F.3d 475, 486 (9th Cir. 2004) (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211 (9th Cir. 1998)). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs. Thus the pertinent question for the Court is not whether [it] would have arrived at the same decision as that of the agency but merely whether the agency's decision was an informed one." Australians for Animals v. Evans, 301 F. Supp. 2d 1114, 1120 (N.D. Cal. 2004).

"District courts are not empowered to substitute their own judgment for that of the government agency." Id. at 1122 (quoting Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1114 (9th Cir. 2000)). The Court's "task in reviewing NEPA claims is simply to 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." Cold Mountain v. Garber, 375 F.3d 884, 893 (9th Cir. 2004) (quoting Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985).

Further, when considering "an agency's actions under NEPA . . . courts must also be mindful to defer to agency expertise, particularly with respect to scientific matters within the purview of the agency." Klamath-Siskiyou Wildlands Ctr., 387 F.3d at 993. "When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

Plaintiff argues the issuance of FONSIs by the NIGC and the BIA, based upon the analyses in the EAs, was arbitrary and capricious. Plaintiff argues the decision to segment review into two separate environmental assessments was unjustified and violated NEPA. Plaintiff also argues each EA failed to adequately consider the environmental impacts on traffic, air quality, and water quality; and that the consideration of alternative projects and the cumulative impacts of the projects was inadequate. Plaintiff also contends the agencies violated NEPA's procedural requirements.

Defendants counter the environmental review satisfies NEPA; and that the EAs and FONSIs should be upheld.

2. Did the agencies violate NEPA by preparing two separate environmental assessments instead of one EIS?

"Although federal agencies have considerable discretion to define the scope of NEPA review, some actions must be considered together to prevent an agency from 'dividing a project into multiple "actions," each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" Earth Island Inst. v. United States Forest Serv., 351 F.3d

1291, 1305 (9th Cir. 2003) (quoting Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir. 1985)).

According to the Council on Environmental Quality ("CEQ") guidelines, connected actions and cumulative actions must be considered together in the same environmental impact statement. 40 C.F.R. § 1508.25(a)(1),(2). Although 40 C.F.R. § 1508.25 expressly applies to an EIS, the regulation also applies to an EA. Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1118 (9th Cir. 2000).

Actions are connected if they "(1) automatically trigger other actions which may require environmental impact statements; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; or (3) are interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). The Ninth Circuit applies "an 'independent utility' test to determine whether multiple actions are connected so as to require an agency to consider them in a single NEPA review." Native Ecosystems Council v. Dombeck, 304 F.3d 886, 894 (9th Cir. 2002). "Where each of two projects would have taken place with or without the other, each has 'independent utility' and the two are not considered connected actions." Id.

Plaintiff argues the casino project and interchange project are connected, so they should not have been segmented for NEPA review. (Pl.'s Mem. Supp. Summ. J. at 17.) Plaintiff contends the casino cannot, and will not, proceed without the creation of the interchange since it would provide visitors access to the casino. Plaintiff also contends the interchange cannot proceed without the casino since the money required to fund construction of the interchange would be

available only if the casino development is approved. (Pl.'s Mem. Supp. Summ. J. at 17.)

Intervenor argues the interchange project has independent utility from the casino project since the Tribe needs access to the Rancheria even if the casino is not developed; and the interchange would provide that access. (Intervenor's Mem. Supp. Summ. J. at 53, 54.) In essence, Intervenor contends the two projects are complementary actions with independent utility and therefore the projects are not connected. But, the casino project would not be developed absent the interchange, so it is connected to the interchange project. See Thomas, 753 F.2d at 758, 759 (where the Ninth Circuit held that the construction of a logging road and the contemplated timber sales were "connected actions" since "the road would not be built but for the contemplated timber sales.").

Defendants argue, however, that the agencies' preparation of two environmental review documents did not violate NEPA. (Intervenor's Mem. Supp. Summ. J. at 50-53; Fed. Def.'s Mem. Supp. Summ. J. at 24-35.) Defendants argue jurisdictional considerations required the preparation of two EAs, contending that the federal government had exclusive jurisdiction over the casino project and shared jurisdiction with CalTrans over the interchange project. (Intervenor's Mem. Supp. Summ. J. at 46-50; Fed. Def.'s Mem. Supp. Summ. J. at 22-24.) NEPA requires federal agencies to "cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and comparable State and local requirements." 40 C.F.R. § 1506.2(c). Defendants argue "[t]he agencies structured the review process in a way that was efficient, commonsensical and

sensitive to jurisdictional limitations. . . ."[3] (Intervenor's Mem. Opp. Pl.'s Mot. for Summ. J. at 31.) The agencies concluded it would be most practical to prepare two EAs in order to effectively coordinate with CalTrans. See generally Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Management, 387 F.3d 989, 992 (9th Cir. 2004)(stating that "through the NEPA process, federal agencies must 'carefully consider[] detailed information concerning significant environmental impacts,' but they are 'not require[d] to do the impractical.'") (citations omitted). Defendants also note "nothing in the record suggests that the agency *intended* to segment review to minimize cumulative impact analysis." Earth Island Inst., 351 F.3d at 1305 (quoting Churchill County v. Norton, 276 F.3d 1060, 1079-80 (9th Cir. 2001)); see also Fed. Def.'s Mem. Supp. Summ. J. at 21-27.

Defendants contend notwithstanding their use of two EAs "the two projects were considered together in a single document: the Interchange EIR/EA incorporates the Casino EA by reference and considers the full impact of both projects as a whole." (Fed. Def.'s Mem. Supp. Summ. J. at 22; see also Admin. R. at 8690, 8726, 8735-36, 9009.) Plaintiff counters Defendants' position should be rejected because the agencies impermissibly relied on tiering and incorporation by reference when evaluating cumulative impacts in the interchange EIR/EA. (Pl.'s Mem. Supp. Summ. J. at 35-36; Pl.'s Reply Mem. Supp. Summ. J. at 30-31.) Plaintiff contends tiering is only permissible to an EIS. Plaintiff further argues by tiering and incorporating by

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[3] The state court, considering the interchange environmental impact report under the CEQA, commented on CalTrans's jurisdiction as follows: "CalTrans lacked authority to include the hotel and casino in the interchange project for purposes of CEQA review." See Exh. C to Intervenor-Def.'s Request for Judicial Notice filed Aug. 18, 2004 ("Exh. C"), at 4.

reference, neither agency evaluated the impacts of the casino and interchange projects together, resulting in insufficient analysis.

According to 40 C.F.R. § 1502.20, "[a]gencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review." 40 C.F.R. § 1502.20. In addition, 40 C.F.R. § 1502.21 prescribes "[a]gencies shall incorporate material into an environmental impact statement by reference when the effect will be to cut down on bulk without impeding agency and public review of the action." Id. § 1502.21. Furthermore, the CEQ specifically addressed tiering to another EA:

> The CEQ regulations specifically address the question of adoption only in terms of preparing EIS's. However, the objectives that underlie this portion of the regulations--i.e., reducing delays and eliminating duplication--apply with equal force to the issue of adopting other environmental documents. Consequently, the Council encourages agencies to put in place a mechanism for adopting environmental assessments prepared by other agencies. Under such procedures the agency could adopt the environmental assessment and prepare a Finding of No Significant Impact based on that assessment.

34 Fed. Reg. at 34,265-34,266.

Although the projects are connected, the agencies did not violate NEPA by evaluating the projects in two EAs: the interchange EIR/EA incorporated the casino EA by reference and considered the full impacts of both the casino and the interchange.

3. Did the agencies violate NEPA by failing to prepare an EIS for either component?

"[A]n EIS *must* be prepared if 'substantial questions are raised as to whether a project . . . *may* cause significant degradation of some human environmental factor.'" Idaho Sporting Cong. v. Thomas,

137 F.3d 1146, 1149 (9th Cir. 1998) (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir. 1992)). To trigger an EIS requirement, a "plaintiff need not show that significant effects *will in fact occur*," but must raise "substantial questions whether a project may have a significant effect" on the environment. Ocean Advocates v. United States Army Corps of Eng'rs, 361 F.3d 1108, 1124 (9th Cir. 2004) (quoting Greenpeace Action, 14 F.3d at 1332). An agency "must put forth a 'convincing statement of reasons' that explain why the project will impact the environment no more than insignificantly. This account proves crucial to evaluating whether the [agency] took the requisite 'hard look' at the potential impact of the [project]." Ocean Advocates, 361 F.3d at 1124 (quoting Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)).

"In considering the severity of the potential environmental impact, a reviewing agency may consider up to ten factors that help inform the 'significance' of a project." Ocean Advocates, 361 F.3d at 1124 (referring to the ten factors listed in 40 C.F.R. § 1508.27).[4]

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[4] 40 C.F.R. § 1508.27 states:
"Significantly" as used in NEPA requires considerations of both context and intensity:
(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.
(b) Intensity. This refers to the severity of impact. Responsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action. The following should be considered in

(continued...)

"[O]ne of these factors may be sufficient to require preparation of an EIS in appropriate circumstances." Id. at 1125 (quoting National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001)).

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[4](...continued)

evaluating intensity:

(1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.

(2) The degree to which the proposed action affects public health or safety.

(3) Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.

(4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

(5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.

(6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.

(7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. § 1508.27.

Plaintiff contends the agencies acted arbitrarily and capriciously by understating project impacts on air quality, traffic, and water quality, and the cumulative impacts of the projects. Plaintiff argues an EIS was therefore required. Defendants disagree.

a. Air quality

Plaintiff argues the projects will result in significant adverse air quality impacts. (Pl.'s Mem. Supp. Summ. J. at 23-27; Pl.'s Reply Mem. Supp. Summ. J. at 14-23.) Defendants respond the agencies appropriately concluded the projects would not create a significant impact on air quality. (Intervenor's Mem. Supp. Summ. J. at 37; Fed. Def.'s Mem. Opp. Pl.'s Summ. J. at 19-21.)

Plaintiff argues the effects on air quality are significant because they are highly controversial, and the "degree to which the effects on the quality of the human environment are likely to be highly controversial" is one factor listed in 40 C.F.R. § 1508.27.[5] 40 C.F.R. § 1508.27(b)(4); see also Pl.'s Mem. Supp. Summ. J. at 24. Plaintiff contends there were numerous comments on the EAs suggesting concern over air quality, including the County's comments on the draft casino EA, indicating there is public controversy sufficient to make the impact significant enough to require an EIS. (Pl.'s Mem. Supp. Summ. J. at 23-27.) Plaintiff also notes that expert technical information and public comments dispute the accuracy and reliability of the agency's methodology regarding the trip length used by the agencies.[6]

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[5] Plaintiff argues the entire project, not just the impact on air quality, was controversial. (Pl.'s Mem. Supp. Summ. J. at 28.)

[6] Plaintiff seeks to admit the declaration of its own expert, Robert G. Dulla, to demonstrate the air quality analysis performed by (continued...)

Defendants counter that Plaintiff's objections, which consist just of criticism of the project itself, do not make the project highly controversial for purposes of this factor. City of Carmel-By-The-Sea v. United States Department of Transp., 123 F.3d 1142, 1151 (9th Cir. 1997); Wetlands Action Network, 222 F.3d at 1122. Defendants contend this factor concerns criticism constituting a legitimate dispute over the effects of the project, and does not embody expressions of dislike of the very existence of the project.

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[6](...continued)
the agencies was inadequate. The general rule is review is limited to the Administrative Record, but the court will make exceptions to the general rule:

> 1. If necessary to determine whether the agency has considered all relevant factors and has explained its decision; 2. When the agency has relied on documents not in the record; or 3. When supplementing the record is necessary to explain technical terms or complex subject matter.

Southwest Ctr. for Biological Diversity v. United States Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996).

"Because it is not the Court's job to resolve disagreements among various scientists as to methodology, the Court will not consider the declarations to the extent they seek to simply advocate a better or different methodology for assessing environmental impacts already analyzed in a reasonable manner by defendants." Border Power Plant Working Group v. Department of Energy, 260 F. Supp. 2d 997, 1012 (S.D. Cal. 2003). "Neither may post-decisional documents be used to object to or support the federal actions for the first time." Id.

The Dulla Declaration is inadmissible because the Declaration is offered to advocate a better methodology for assessing the air quality impacts of the casino and interchange projects; specifically, by arguing the agencies did not adequately calculate trip lengths. The agencies did, however, consider the impact of the projects on air quality and have adequately explained their decisions. Furthermore, Plaintiff has not indicated one of the exceptions renders the Dulla Declaration admissible.

However, assuming arguendo that the Declaration is admissible, the Declaration is unnecessary for two reasons. First, the Declaration states the opinion of Plaintiff's expert, and since the agencies' experts concluded the trip length they used in the air quality analysis was reasonable and they explained that conclusion, we should defer to the opinion of the agencies' experts. Second, Plaintiff can still argue the trip length used in the agencies' air quality analysis was inadequate because public comments in the Administrative Record raised the issue.

"Opposition and a high degree of controversy . . . are not synonymous." Town of Orangetown v. Gorsuch, 718 F.2d 29, 39 (2d Cir. 1983). Thus, just because the projects have generated a considerable degree of controversy does not necessarily mean the opposition to the projects equates with "the term 'highly controversial' as found in 40 C.F.R. § 1508.27(b)(4). . . ." Id. "To hold otherwise 'would require an impact statement whenever a threshold determination dispensing with one is likely to face a court challenge [and would] surrender the determination to opponents of a federal action, no matter whether [the project is] major or not, nor how insignificant its environmental effects might be.'" Id. (quoting Hanly v. Kleindienst, 472 F.2d 823, 830 (2d Cir. 1972)). See also Cold Mountain v. Garber, 375 F.3d 884, 893 (9th Cir. 2004) (stating that "the existence of opposition does not automatically render a project controversial."); Foundation for N. Am. Wild Sheep v. United States Dep't of Agric., 681 F.2d 1172, 1182 (9th Cir. 1982) (stating that a project is controversial when "a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use.").

A federal action is "controversial if a substantial dispute exists as to [its] size, nature, or effect." Greenpeace Action v. Franklin, 14 F.3d 1324, 1333 (9th Cir. 1992). In Foundation for North American Wild Sheep, the court held significant scientific debate as to an important matter constituted the sort of controversy that would justify preparing an EIS. 681 F.2d 1172, 1182 (9th Cir. 1982).

When a plaintiff shows a substantial dispute exists about the size, nature, or effect of the action or that substantial questions exist on whether the action will cause significant

degradation of some human environmental factor, "NEPA then places the burden on the agency to come forward with a 'well-reasoned [or convincing] explanation' demonstrating why those responses disputing the EA's conclusions 'do not suffice to create a public controversy based on potential environmental consequences.'" National Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 736 (9th Cir. 2001) (quoting LaFlamme v. FERC, 852 F.2d 389, 401 (9th Cir. 1988)). "A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI casts serious doubt upon the reasonableness of an agency's conclusions." National Parks & Conservation Ass'n, 241 F.3d at 736.

The agencies commissioned studies on the effect the projects would have on the environment. "Although a court should not take sides in a battle of the experts, it must decide whether the agency considered conflicting expert testimony in preparing its FONSI, and whether the agency's methodology indicates that it took a hard look at the proposed action by reasonably and fully informing itself of the appropriate facts." Id. at 736 n.14. "Where there is conflict in the data, or the evidence supports several conflicting opinions, the agency may rely upon the opinion of its expert." Id. at 736 n.17 (quoting Wetlands Action Network, 222 F.3d at 1121). "'[W]hen the record reveals that an agency based a finding of no significant impact upon relevant and substantial data, the fact that the record also contains evidence supporting a different scientific opinion does not render the agency's decision arbitrary and capricious.'" Anderson v. Evans, 371 F.3d 475, 489 (9th Cir. 2004) (quoting Wetlands Action Network v. United States Army Corps of Eng'rs, 222 F.3d 1105, 1120-21 (9th Cir. 2000)).

The agencies adequately considered the impact on air quality and were not arbitrary or capricious in concluding the projects would not have a significant effect on air quality. The agencies responded to numerous comments received by providing well-reasoned explanations for their conclusions. (Admin. R. at 1234-316, 8187-685.) The agencies' experts prepared extensive analyses supporting the conclusion that there would be no significant impact on air quality.[7]

Plaintiff also argues an EIS should have been prepared since the projects have cumulatively significant impacts. See 40 C.F.R. § 1508.27(b)(7). However, the EAs did consider cumulative impacts. See infra Part II.A.3.d.

Further, Plaintiff contends the general conformity analysis required by the Clean Air Act was inaccurate because it underestimated trip lengths, and the exclusion of operational vehicle emissions makes the EAs incomplete. However, the agencies prepared the conformity analysis required by the CAA and correctly concluded that the actions did not violate the CAA. See infra Part II.B.

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[7] The state court reached a similar conclusion regarding the interchange EIR:

> [T]he regional focus of the transportation conformity determination did not minimize or conceal the individual and cumulative impacts of the Rancheria interchange on air quality. By considering the emissions resulting from operation of the interchange in combination with emissions from existing and planned transportation facilities in the Sacramento nonattainment area, the conformity determination provided the approach and context necessary for assessing whether the interchange's emissions were significant. . . .

Exh. C at 11. "[I]nformed decisionmaking and informed public participation was permitted by and took place on the basis of the information presented about the conformity determination in the EIR process. . . ." Exh. C at 14. "[T]he court must defer to CalTrans' choice of the best methodology available when the conformity determination was done." Exh. C at 15.

Plaintiff contends the impact of the interchange project is significant since it threatens violations of state law. (Pl.'s Mem. Supp. Summ. J. at 26-27.) Plaintiff argues that a recent state court ruling addressing violations of CEQA is relevant to this federal action since 40 C.F.R. § 1508.27(b)(10) states that one of the factors in determining significance is "whether the action threatens a violation of . . . State, or local law or requirements imposed for the protection of the environment." (Pl.'s Mem. Supp. Summ. J. at 26.) The state court held that CalTrans failed to analyze whether the traffic levels generated from the interchange project would result in emissions that exceed state ozone standards. See Exh. A to Pl.'s Request for Judicial Notice filed Aug. 18, 2004 ("Exh. A"). Pursuant to the conformity requirement in the CAA, a federal agency may not approve a transportation project unless the project conforms to the state implementation plan ("SIP") adopted pursuant to the federal CAA. 42 U.S.C. § 7506(c). The state court stated that "the [federal transportation] conformity determination [in the EIR for the interchange] cannot serve as a threshold of significance under CEQA to establish that the interchange's air quality impacts would be insignificant with respect to attainment of the state ozone standard." Exh. A at 6. The state court also stated, however, that the "federal conformity determination, establishing that operational emissions of [the] interchange would not cause [exceedance] of [the] SIP emissions budgets, could appropriately be used to assess significance of [the] interchange's air quality impacts on [the] attainment of [the] national ozone standard." Exh. A at 6. The adequacy of the agencies' conformity determination under the federal CAA (see infra Part II.B) is not undermined by the failure to analyze emissions from the project

under state ozone standards. Nor does the state court ruling make the impact of the interchange project significant under NEPA since the interchange project will not go forward unless CEQA and the California Clean Air Act are satisfied.

The agencies did not violate NEPA in deciding the projects would not create a significant impact on air quality.

b. Traffic

Plaintiff argues the projects will result in significant adverse effects related to increased traffic. (Pl.'s Mem. Supp. Summ. J. at 19-23; Pl.'s Reply Mem. Supp. Summ. J. at 12-14.) Plaintiff argues the draft casino EA evaluated traffic impacts using an outdated version of the Highway Capacity Manual, narrowly restricted the geographic scope of its analysis, and estimated trip rates by examining other, much smaller, casinos. (Pl.'s Mem. Supp. Summ. J. at 19.) Plaintiff further argues the agencies made assumptions about co-use and diverted trips which led them to reduce trip generation estimates to unreasonable amounts; ignored trips generated by related support functions; used inconsistent and understated growth rates in trips over time; and failed to include the traffic study's appendices. (Pl.'s Mem. Supp. Summ. J. at 20.)

Plaintiff notes there were numerous comments on the traffic analysis in the draft casino EA. (Pl.'s Mem. Supp. Summ. J. at 20.) Plaintiff acknowledges the traffic analysis was revised and appended to the final casino EA, but Plaintiff argues many of the commented-upon deficiencies were not corrected, including Plaintiff's comments on the defects in trip generation assumptions, analysis of traffic impacts on County roads, peak hour assumptions, and passer-by capture

rates. (Pl.'s Mem. Supp. Summ. J. at 20; see also Admin. R. at 7199-200.)

Defendants argue the agencies' findings that the projects will not substantially affect traffic were not arbitrary and capricious. (Intervenor's Mem. Supp. Summ. J. at 24-29, 33-35; Fed. Def.'s Mem. Opp. Pl.'s Summ. J. at 14-19.) Defendants contend the EAs fully evaluated the impacts on traffic and correctly concluded that there would be no significant impact because of certain mitigation measures, including the creation of an auxiliary lane. (Intervenor's Mem. Supp. Summ. J. at 25, 33-35; Fed. Def.'s Mem. Supp. Summ. J. at 20; see also Admin. R. at 8695-701, 8791-991.)

The NIGC retained a traffic consultant who prepared studies evaluating the potential traffic impacts of the proposed casino and hotel. (Admin. R. at 716-91, 3695-884, 4997-5185.) The studies evaluated whether a gaming facility projected to draw an average of 9918 vehicle trips per day would significantly affect the flow of traffic on surrounding roads and concluded it would not, under existing and cumulative conditions, because of certain identified mitigation, including the creation of an auxiliary lane that would facilitate exiting traffic near the interchange. (Admin. R. at 4997-5185, 1273-98.) The study evaluated impacts during peak driving hours and the peak gambling month under both existing and cumulative conditions. (Admin. R. at 3743-844.) The study calculated the trip generation rate by relying on data secured from five Indian-owned casinos in California and a marketing study prepared to predict

revenues for the casino.[8] The trip generation rates and capture rates used were based on extensive research conducted by a licensed traffic engineer. (Admin. R. at 3729-37, 1273-86.)

The BIA initially intended to rely on the traffic study done for the casino EA, but instead expanded the scope of the study. (Admin. R. at 6342-436.) The BIA analyzed the potential impacts of the interchange project on transportation and circulation and questioned whether and how the various design alternatives would affect the flow of traffic at the interchange, on Highway 50, and on surrounding roads. (Admin. R. at 5914-6105.)

Plaintiff disagrees with the methodology used by the agencies. However, the agencies are entitled to rely on the methodologies and conclusions of their experts. Because the agencies' decisions that there would be no significant impact on traffic were not arbitrary or capricious, their decisions did not violate NEPA.

c. Water Quality

Plaintiff argues the casino project will result in significant adverse effects on water quality. (Pl.'s Mem. Supp. Summ.

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[8] According to the traffic report, the casino project would generate a total of 9,918 trips on a typical weekday and 14,600 trips on a weekend day. Therefore, an average daily estimate of 11,256 (based on five weekdays and two weekend days) generated during the peak month was used in the analysis. Then, a 38.8% reduction was applied, which would lead to 6,889 trips generated. Concern was expressed about this reduction in some of the comments.

The 38.8% reduction is based on the fact that the casino will capture pass-by trips (for example, those who stop at the casino when they were passing by anyway) and diverted trips that would otherwise end in Reno or Tahoe (for example, those who go to the casino instead of Reno or Tahoe). These account for the 38.8% reduction because those trips would still occur even without the casino project. Based on the emissions that are emitted into the air basin in which the project is located, the traffic consultant determined the average length of trips to the casino would be five to nineteen miles.

J. at 27-28; Pl.'s Reply Mem. Supp. Summ. J. at 24-26.) Plaintiff notes the Central Valley Regional Water Quality Control Board commented on the draft casino EA and expressed concerns that the on-site conditions and limited disposal area are not adequate to ensure that wastewater will not resurface. (Pl.'s Mem. Supp. Summ. J. at 27; see also Admin. R. at 7215.) Plaintiff also notes the underlying groundwater into which the wastewater will flow supplies numerous nearby residences with drinking water, and the efficacy of the proposed wastewater treatment method prior to disposal is unproven. (Pl.'s Mem. Supp. Summ. J. at 27.)

Plaintiff acknowledged the NIGC said in the final casino EA that it abandoned the prior system and proposed a new wastewater treatment and disposal system, but Plaintiff argues the new system is both uncertain and inadequate and the final casino EA failed to indicate that the concerns and suggestions had been addressed. (Pl.'s Mem. Supp. Summ. J. at 28.)

Defendants argue the agencies' decision that the casino and interchange project will not substantially affect water quality was not arbitrary and capricious. (Intervenor's Mem. Supp. Summ. J. at 20; Fed. Def.'s Mem. Opp. Pl.'s Summ. J. at 21-22.)

The NIGC evaluated the Tribe's proposed wastewater treatment facility and the use of an immersed membrane bioreactor ("MBR") system for wastewater treatment and found the system meets state and federal water quality standards. (Admin. R. at 4825-94, 1343-44, 1405.) The casino EA evaluated potential effects on water quality caused by construction and operation of the casino, hotel, and interchange. It considered two potential sources of water delivery from the El Dorado Irrigation District via the existing water mains and a three-inch

meter, and delivery via water truck from an off-site source. (Admin. R. at 1426-27.) The expert consultants examined and tested the soils on the Rancheria and concluded the MBR system would pose no significant impacts to underlying groundwater. (Admin. R. at 1305-11.)

The BIA analyzed the impact of the interchange project on water quality and the impacts of the casino project on water quality by incorporating the casino EA by reference. (Admin. R. at 8954-68.) The interchange EIR/EA considered the potential effects of highway water runoff on groundwater and nearby creeks. (Admin. R. at 8969-91.) The BIA concluded construction of the interchange would not affect water quality since certain permitting requirements impose preventative measures during construction and prohibit the discharge of waste that causes pollution. (Admin. R. at 8965-68.)

The agencies adequately considered the impact on water quality and were not arbitrary or capricious in concluding the projects would not have a significant effect on water quality.

d. Cumulative Impact

Plaintiff argues the agencies violated NEPA by failing to consider the cumulative impacts of the two projects together. (Pl.'s Mem. Supp. Summ. J. at 33-35; Pl.'s Reply Mem. Supp. Summ. J. at 26-28.) "EAs . . . must in some circumstances include an analysis of the cumulative impacts of a project." Native Ecosystems Council v. Dombeck, 304 F.3d 886, 895 (9th Cir. 2002). "NEPA always requires that an environmental analysis for a single project consider the cumulative impacts of that project together with 'past, present and reasonably foreseeable future actions.'" Id. at 894-95. "An EA may be deficient if it fails to include a cumulative impact analysis or to

tier to an EIS that reflects such an analysis." Id. at 895-96; Kern v. United States Bureau of Land Management, 284 F.3d 1062, 1076 (9th Cir. 2002).

"'Cumulative impact' is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. . . . Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.[9] "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts." Id. § 1508.27(b)(7).

Plaintiff argues the BIA failed to consider the cumulative impacts associated with the proposed freeway interchange, and instead impermissibly incorporated the final casino EA by reference. Plaintiff also argues even if it was okay to incorporate by reference, the analysis was deficient because the incorporated information does not adequately consider cumulative impacts. Plaintiff contends the interchange EIR/EA merely assembled the information from projects on an individual basis and did not analyze the collective impacts from the projects. (Pl.'s Mem. Supp. Summ. J. at 34-35.) Defendants counter the interchange EIR/EA adequately considered cumulative impacts. (Intervenor's Mem. Supp. Summ. J. at 38-40; Fed. Def.'s Mem. Opp. Pl.'s Summ. J. at 28-31.)

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[9] Cumulative impact regulations only expressly apply to an EIS, but they also apply to an EA. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998).

The NIGC and the BIA adequately considered cumulative impacts of the projects. (Admin. R. at 8816-94, 8997-9005, 1455-64.) Both agencies examined all relevant factors and determined that the projects, analyzed separately and together, would not result in significant environmental impacts.

The casino EA considered the effects of the interchange and the interchange EIR/EA incorporated the casino EA by reference for the purpose of conducting a comprehensive NEPA review. The NIGC's FONSI was subject to veto by the BIA if the BIA found unmitigated significant impacts while conducting its own analysis.[10]

Both agencies made informed decisions in issuing FONSIs for the projects and the decisions were not arbitrary or capricious. The NIGC consulted several state and federal environmental regulatory agencies, commissioned or conducted several technical studies, and actively sought input from the public and local governments in order to make its evaluation that no EIS was necessary. The BIA and CalTrans consulted numerous state and federal environmental regulatory agencies for input, commissioned or conducted several technical studies evaluating various potential impacts, and sought and received comments from the public and local governments.

4. Did the agencies violate NEPA by failing to adequately evaluate project alternatives?

Plaintiff argues the agencies failed to adequately consider project alternatives. (Pl.'s Mem. Supp. Summ. J. at 29-32; Pl.'s Reply Mem. Supp. Summ. J. at 28-30.) Plaintiff argues "by breaking

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[10] Plaintiff also argued the NIGC did not consider the impacts of an expansion of the hotel and casino complex to include an events or convention center, but since this is not in the agency's plans, this is not reasonably foreseeable and did not need to be considered.

down the proposed action into component parts, the agencies created a framework through which they could reject a smaller casino or alternative income generating land use out of hand, claiming the need for enhanced revenue in order to pay for a costly highway interchange." (Pl.'s Mem. Supp. Summ. J. at 30-31.) Plaintiff contends the BIA "presented the Interchange Component as a stand-alone project that was needed with or without the Casino Component, in order to limit consideration of alternatives to interchange design issues." (Pl.'s Mem. Supp. Summ. J. at 31.) Plaintiff argues there are many possible alternatives that could achieve the purpose of the proposed actions (viable economic development for the Tribe), yet the casino EA considered only two alternatives, and the interchange EIR/EA considered only three virtually identical alternatives.[11] (Pl.'s Mem. Supp. Summ. J. at 32.)

Defendants rejoin both the casino EA and the interchange EIR/EA considered a reasonable range of alternatives. (Intervenor's Mem. Supp. Summ. J. at 30-32, 41-42; Fed. Def.'s Mem. Supp. Summ. J. at 35.)

Agencies must "rigorously explore and objectively evaluate all reasonable alternatives" in an EIS. 40 C.F.R. § 1502.14(a); Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974). However, only a "brief discussion" of alternatives is required in an EA. 40 C.F.R. § 1508.9(b). "The 'touchstone for our inquiry is whether an [environmental document's] selection and discussion of

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[11] Plaintiff argues the interchange EIR/EA states that the interchange "is needed with or without the proposed hotel and casino project" but, the casino EA said that a smaller casino was not a feasible alternative because of the need to be able to pay for the interchange.

alternatives fosters informed decision-making and informed public participation.'" Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 575 (9th Cir. 1998) (quoting City of Angoon v. Hodel, 803 F.2d 1016, 1020 (9th Cir. 1986)). "An agency is required to examine only those alternatives necessary to permit a reasoned choice." Morongo Band of Mission Indians, 161 F.3d at 575 (quoting Association of Pub. Agency Customers v. Bonneville Power Admin., 126 F.3d 1158, 1185 (9th Cir. 1997)). "The range of alternatives that must be considered need not extend beyond those reasonably related to the purposes of the project." Akiak Native Community v. United States Postal Serv., 213 F.3d 1140, 1148 (9th Cir. 2000) (quoting Trout Unlimited, 509 F.2d at 1286).

Both agencies adequately evaluated project alternatives. Here, the purpose of the proposed actions is to "improve the tribal economy by providing a sustained and viable economic base." (Admin. R. at 1331.) Therefore, the agencies only needed to consider alternatives that are reasonably feasible and related to the purpose of the project. The agencies' consideration of the Tribe's specific goals (including its desire to take advantage of the unique opportunities provided by the Indian Gaming Regulatory Act) in determining the range of alternatives was not arbitrary or capricious.

Furthermore, Plaintiff did not offer any reasonably feasible alternatives that the agencies failed to consider. See Morongo Band of Mission Indians, 161 F.3d at 576. Since Plaintiff did not propose alternatives that the agencies failed to consider, it "forfeited any objection to the EA[s] on the ground that [they] failed adequately to discuss potential alternatives to the proposed action." Department of

Transp. v. Public Citizen, 541 U.S. 752, ___, 124 S. Ct. 2204, 2214 (2004).

The casino EA considered a no action alternative, the preferred alternative (the casino/hotel), a reduced intensity alternative (a shopping center on the Rancheria), and an off-site alternative (a hotel/casino south of Highway 50). (Admin. R. at 1349-55.) The casino EA ultimately rejected the no action alternative because it did not achieve the purpose of the project. (Admin. R. at 1351-52.) The shopping center alternative was considered and then rejected because it would be financially infeasible and, therefore, would not achieve the purpose of the project. (Admin. R. at 1444-53, 1354-55.) Finally, the off-site alternative was rejected because it would not achieve the purpose of the project and would lead to additional environmental impacts. (Admin. R. at 1351.)

The interchange EIR/EA considered seven alternatives: four that were eliminated because they failed to achieve the project's purpose or they posed greater environmental impacts and three that it analyzed in detail. (Admin. R. at 8779-89.) Those three included a no action alternative, a flyover design (or modified trumpet) alternative, and a diamond design alternative. (Admin. R. at 8779-87.) The interchange EIR/EA ultimately selected the flyover design alternative because it was the alternative that the commenting public found to be aesthetically pleasing (Admin. R. at 3084), and the agencies considered to be environmentally superior. (Admin. R. at 8738-39.)

5. Did the Agencies Violate Other Mandatory NEPA Procedures?

Plaintiff argues the agencies violated several mandatory NEPA procedures. Plaintiff argues the agencies failed to involve the

County and the public in preparation and review of the final casino EA; the NIGC failed to circulate its FONSI for public review prior to adoption; the NIGC improperly shifted the description of the project and the lead agency responsible for its review; and the agencies failed to provide relevant supporting documents for public review.

Defendants argue the agencies fully complied with NEPA's procedural requirements. (Intervenor's Mem. Supp. Summ. J. at 55-66; Fed. Def.'s Mem. Supp. Summ. J. at 38-44.) Defendants argue the NIGC and the BIA involved the public and the County throughout the environmental review process. (Intervenor's Mem. Supp. Summ. J. at 56-58.)

a. Did the NIGC Fail to Involve the County and Public in Preparation and Review of the Final Casino EA?

Plaintiff argues the agencies failed to involve the County and the public in preparation and review of the final casino EA. (Pl.'s Mem. Supp. Summ. J. at 37-38.) NEPA requires agencies to involve the public "to the extent practicable" in preparing an EA. 40 C.F.R. § 1501.4(b). "'An EA need not conform to all the requirements of an EIS,' [but] this requirement does not mean that 40 C.F.R. [§§] 1501.4(b) and 1506.6 are without substance.'" Citizens for Better Forestry v. United States Dep't of Agric., 341 F.3d 961, 970 (9th Cir. 2003) (quoting Citizens Against Toxic Sprays, Inc. v. Clark, 720 F.2d 1475, 1480 (9th Cir. 1983)). These regulations have previously been interpreted "to mean that 'the public must be given an opportunity to comment on draft EAs and EISs.'" Citizens for Better Forestry, 341 F.3d at 970 (quoting Anderson v. Evans, 314 F.3d 1006, 1016 (9th Cir. 2002)). It is unclear exactly what level of public involvement is required, but a complete failure to involve or even inform the public

about an agency's preparation of an EA and a FONSI violates the regulations. Citizens for Better Forestry, 341 F.3d at 970. In Citizens for Better Forestry, the Ninth Circuit cited to a Second Circuit case which "held that § 1501.4 is satisfied when the agency 'conducted public hearings and received written comments on every draft environmental assessment [and] circulated for comment its Preliminary Analysis of the environmental assessment,' even though it did not circulate for public comment a follow-up independent analysis it prepared in response to public comments." Id. (quoting Town of Rye v. Skinner, 907 F.2d 23, 24 (2d Cir. 1990)).

Plaintiff argues the NIGC and the BIA did not involve the County and the public in the development of the final casino EA. (Pl.'s Mem. Supp. Summ. J. at 37.) Plaintiff argues the County was not consulted in the preparation of responses to its comments on the draft casino EA, nor was it allowed to review the numerous reports and studies that were authored between the draft EA and the final EA. (Pl.'s Mem. Supp. Summ. J. at 37.) Finally, Plaintiff argues the final casino EA was not made available to the County or the general public for review or comment before its December 2001 release or before the issuance of the NIGC's FONSI. (Pl.'s Mem. Supp. Summ. J. at 37-38.)

Defendants counter the agencies did not violate NEPA by not consulting the County or the public after comments were received to the draft casino EA or by not making the final casino EA available for comment. (Fed. Def.'s Mem. Supp. Summ. J. at 41.) Defendants contend the agencies more than met their duty of involving the public in the decision-making process by allowing for comment on the draft casino

EA, conducting public hearings on it, and responding to the comments received. (Fed. Def.'s Mem. Supp. Summ. J. at 41, 42.)

The agencies did not fail to adequately involve the County and the public in the preparation of the final casino EA. The County and the public were involved at many stages in the environmental review process. The NIGC responded to requests for copies, provided a sixty day comment period in connection with the draft casino EA, and otherwise actively solicited and received outside comments. A notice of preparation of the interchange EIR/EA was distributed and the BIA accepted comments for thirty days, circulated a draft EA for a forty-five day public comment period, held meetings, and held public hearings. "NEPA does not require an additional round of public comments every time an agency revises, supplements, or improves its analysis in response to the public comments on a [draft environmental document]." Midstates Coalition for Progress v. Surface Transp. Bd., 345 F.3d 520, 548 (8th Cir. 2004). Furthermore, after an agency receives comments on a draft environmental document, it is not uncommon for the agency to make changes to the final environmental document.[12] Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1118 (9th Cir. 2002).

b. Did the NIGC Fail to Circulate the Casino FONSI for Public Review Prior to Adoption?

Plaintiff argues the agencies violated NEPA by failing to circulate the NIGC's FONSI for public review prior to its adoption. (Pl.'s Mem. Supp. Summ. J. at 38-39.) If "[t]he proposed action is, or is closely similar to, one which normally requires the preparation

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[12] Furthermore, there is no requirement that the public be able to comment on a final EA.

of an environmental impact statement . . ., or [t]he nature of the proposed action is one without precedent," an agency must make its FONSI available to the public. 40 C.F.R. § 1501.4(e)(2). Plaintiff argues because of the size and scope of the casino project, the project is highly unusual and precedent-setting *and* is the type of project usually requiring preparation of an EIS. (Pl.'s Mem. Supp. Summ. J. at 38.)

Defendants reply the agencies were not required to circulate a draft FONSI for the casino project. (Intervenor's Mem. Supp. Summ. J. at 61-64; Fed. Def.'s Mem. Supp. Summ. J. at 42.) Defendants contend this approval action is not one which normally requires preparation of an EIS since the NIGC often reviews and approves gaming management contracts. (Intervenor's Mem. Supp. Summ. J. at 63; Fed. Def.'s Mem. Supp. Summ. J. at 42.) Defendants' position is consistent with the following statement in the NIGC's National Environmental Policy Act Procedures Manual: "The NIGC will require the preparation of an EA for any proposed action within the NIGC's jurisdiction that involves the construction or development of a gaming facility . . . ." (Admin. R. at 17125.)

Since neither of the circumstances requiring circulation of a FONSI apply, the agencies did not violate NEPA by failing to circulate the casino FONSI.

c. Did the NIGC Improperly Shift the Lead Agency and the Description of the Casino Project?

Plaintiff argues the agencies violated NEPA by shifting the description of the casino project and by changing the lead agency responsible for review of the casino project from the BIA to the NIGC. (Pl.'s Mem. Supp. Summ. J. at 39.) Defendants counter the narrowing

of the project description in the casino EA is consistent with NEPA's requirements. (Fed. Def.'s Mem. Supp. Summ. J. at 39.) Defendants argue altering the description of the project to modify the involved federal action did not affect the public's ability to scrutinize and comment on the proposed action since the public was aware that the proposed action was a casino and hotel complex regardless of the specific federal action involved. (Fed. Def.'s Mem. Supp. Summ. J. at 39.)

It is permissible to change a project description after receiving comments. City of Carmel-By-The-Sea v. United States Dep't of Transp., 123 F.3d 1142, 1156 (9th Cir. 1997). "[T]he very purpose of a draft and the ensuing comment period is to elicit suggestions and criticisms to enhance the proposed project." Id.

Further, Defendants argue the agencies did not violate NEPA by changing the lead agency for the casino EA. (Intervenor's Mem. Supp. Summ. J. at 64-65; Fed. Def.'s Mem. Supp. Summ. J. at 43.) The NIGC became the lead agency for the casino EA after it was determined that the BIA would become a lead agency for the interchange EIR/EA and would work as a "cooperating agency" for the casino EA. The NIGC and the BIA worked together throughout the process. This change had no negative impact on the public's ability to review and comment on the EAs.

d. Did the Agencies Fail to Provide Relevant Supporting Documents for Public Review?

Plaintiff argues the agencies violated NEPA by failing to provide relevant supporting documents for public review. (Pl.'s Mem. Supp. Summ. J. at 39-40.) Plaintiff contends the BIA withheld from its circulation of the draft interchange EIR/EA critical supporting

documents and reports that were necessary to proper analysis of the EIR/EA's assumptions and conclusions. (Pl.'s Mem. Supp. Summ. J. at 39.)

Defendants rejoin the federal agencies were not required to attach technical studies to the interchange EIR/EA. (Intervenor's Mem. Supp. Summ. J. at 65-66; Fed. Def.'s Mem. Supp. Summ. J. at 43-44.) Further, the studies contained in the appendix were both available and accessible since they could be reviewed at two public libraries in El Dorado County and at the CalTrans and BIA offices.

"[I]t is well settled that supporting studies need not be physically attached to [an environmental document]. They only need be available and accessible." Trout Unlimited v. Morton, 509 F.2d 1276, 1284 (9th Cir. 1974). Since the studies were made available to the public, the agencies did not violate NEPA by failing to attach them to the EAs.

B. Clean Air Act

1. Standard of Review

> Review of agency action to determine its conformity with . . . the CAA . . . is governed by the judicial review provisions of the [Administrative Procedure Act] . . . . Under § 706 of the APA, the court must satisfy itself that the agency action was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." [The Ninth Circuit has] interpreted this statutory provision as requiring the agency to "articulate[ ] a rational connection between the facts found and the choice made."

Sierra Club v. United States EPA, 346 F.3d 955, 961 (9th Cir. 2003) (citations omitted). "[I]n considering an agency's explanation for its action, courts 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'" Id. (citation omitted).

2. Discussion

The Clean Air Act precludes federal agencies from approving projects in non-attainment areas without also considering whether the project will conform to the State Implementation Plan ("SIP"). 42 U.S.C. § 7506(c)(1). "Most federal actions affecting levels of pollutants in nonattainment regions require that the responsible agency conduct a 'conformity determination.'" Public Citizen v. Department of Transp., 316 F.3d 1002, 1029 (9th Cir. 2003). If transportation is involved, a federal agency must evaluate the project pursuant to regulations governing "transportation conformity." 40 C.F.R. §§ 93.100-93.129. Transportation projects must conform with mobile source emissions budgets established in the SIP. 42 U.S.C. § 7506(c)(2); 40 C.F.R. § 51, Subpart T.

> If the project is not related to transportation,
>
> Federal agencies must, in many circumstances, undertake a conformity determination with respect to a proposed action, to ensure that the action is consistent with § 7506(c)(1). See 40 CFR §§ 93.150(b), 93.153(a)-(b). However, an agency is exempt from the general conformity determination under the CAA if its action would not cause new emissions to exceed certain threshold emission rates set forth in § 93.153(b).

Department of Transp. v. Public Citizen, 541 U.S. 752, ___, 124 S. Ct. 2204, 2217 (2004). "EPA's rules provide that 'a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment or maintenance area caused by a Federal action would equal or exceed' the threshold levels established by the EPA." Id. (citing 40 C.F.R. § 93.153(b)). "Direct emissions means those emissions of a criteria pollutant or its precursors that are caused or initiated by the Federal action and occur at the same time and place as the action." 40 C.F.R. § 93.152.

"Indirect emissions" are

> those emissions of a criteria pollutant or its precursors that: (1) Are caused by the Federal action, but may occur later in time and/or may be further removed in distance from the action itself but are still reasonably foreseeable; and (2) The Federal agency can practicably control and will maintain control over due to a continuing program responsibility of the Federal agency.

Id.

Plaintiff argues the agencies failed to demonstrate the projects conform with the SIP; relied on an invalid air quality emissions model; failed to "affirmatively demonstrate" conformity and did not involve the public; and "impermissively conflat[ed]" the NEPA and CAA analyses of the air quality issue. (Pl.'s Mem. Supp. Summ. J. at 40-45.) Plaintiff argues the final EAs' emissions analyses were required to evaluate emissions within the ozone non-attainment area against the threshold emission rates set forth in § 93.153(b), but the final EAs did not consider indirect effects or operational vehicle emissions and only estimated emissions from the proposed action within a *portion* of the ozone non-attainment area. (Pl.'s Mem. Supp. Summ. J. at 41.) Plaintiff argues the agencies manipulated the conformity review by evaluating only those emissions that are emitted into the air basin in which the project is located. (Pl.'s Mem. Supp. Summ. J. at 41.) Plaintiff contends the trip lengths used to calculate vehicle emissions were substantially shorter than the length of actual trips that would be generated by the casino project. (Pl.'s Mem. Supp. Summ. J. at 41.) Plaintiff argues the emissions expected to result from the proposed actions would exceed the threshold emission rates

set forth in § 93.153(b).[13] (Pl.'s Mem. Supp. Summ. J. at 42.)

Defendants counter they did comply with the conformity requirements of the CAA, finding that both the casino and interchange projects would conform to California's SIP. (Intervenor's Mem. Supp. Summ. J. at 66-73; Fed. Def.'s Mem. Supp. Summ. J. at 44-47.)

The agencies complied with the conformity requirements of the CAA when they found that both the casino and interchange projects would conform to California's SIP. The NIGC complied with the general conformity requirement and the BIA complied with the general and transportation conformity requirements. The non-transportation aspects of the casino and interchange were reviewed under the general conformity regulations and the agencies' experts determined the casino and the construction-related emissions for the interchange fell under the threshold emission rates set forth in § 93.153(b). (Admin. R. at 1408-11, 1456, 5319-21, 8871-72.) The transportation aspects of the interchange were reviewed under the transportation conformity regulations and the agency experts determined they fell below the emissions budgets established in the SIP. (Admin. R. at 8875-77, 13011.) Since the agencies' conclusions were not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," the agencies did not violate the CAA.

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion for summary judgment is denied and the Federal Defendants' motion and Intervenor-Defendant's motion for summary judgment are granted. The Clerk of the

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[13] Plaintiff relies on the declaration of its expert, Robert G. Dulla, to support these arguments but that declaration is inadmissible since it is outside of the AR. See supra note 6.

Court shall enter judgment in favor of the Federal Defendants and Intervenor-Defendant and against the Plaintiff.

IT IS SO ORDERED.

DATED: January 10, 2005

/s/ Garland E. Burrell, Jr.
GARLAND E. BURRELL, JR.
United States District Judge