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BEAR RIVER CASINO  
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8  
9 **BEFORE THE**  
10 **DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL**  
11 **OF THE STATE OF CALIFORNIA**

12 IN THE MATTER OF THE ACCUSATION ) FILE NO. 47-423392  
AGAINST: )  
13 Bear River Casino ) REG. NO. 08070211  
11 Bear Paws Way )  
14 Loleta, CA 95551-9684 )  
15 ) **RESPONDENT BEAR RIVER**  
ON-SALE GENERAL PUBLIC EATING PLACE ) **CASINO'S POST-HEARING BRIEF**  
16 LICENSE )  
17 )  
18 \_\_\_\_\_ )

19 **INTRODUCTION**

20 SHHA's (not the Department's) accusation against the Bear River Casino ("Bear River") is  
21 before the ALJ on remand from the Appeals Board ". . . for such further and additional proceedings  
22 as may be necessary and appropriate in the ALJ's sole discretion." On remand (which vacated the  
23 Department's June 15, 2009 decision, precluding that decision from constituting "law of the case"),  
24 the Department must resolve four issues: 1) Has Bear River violated Condition #8<sup>1</sup> of its Type 47  
25 license? 2) If so, what penalty, if any, would be appropriate? 3) Should Condition #8 be deleted  
26

27 <sup>1</sup> "The licensee shall modify the entrance from Singley Road to Bear River Drive so that public vehicular ingress  
28 and egress is available only to and from the south on Singley Road. The modified entrance or a separate entrance shall  
provide access to the premises from the north on Singley Road for emergency vehicles only."

1 from the license because literal compliance never has been legally possible and has proven physically  
2 impracticable and unduly burdensome on the tribal community and other members of the public? and  
3 4) If Condition #8 is to retained, should diligent and timely implementation of a plan acceptable to  
4 Humboldt County to modify the intersection of Singley Hill Road and Bear River Drive ("the  
5 Intersection"), be deemed adequate compliance with Condition #8?

6 As explained below, SHHA has not met its burden of proving that Bear River has violated  
7 Condition #8; even if it has, no penalty should be imposed; Condition #8 should be deleted from  
8 Bear River's license; and if Condition #8 is to be retained, modification of the Intersection as  
9 approved by Humboldt County should be deemed adequate compliance with Condition #8, and Bear  
10 River should be given two years after obtaining the required permits to implement the plan.

#### 11 ARGUMENT

##### 12 I. BEAR RIVER HAS NOT BEEN PROVEN TO HAVE VIOLATED CONDITION #8.

13 This proceeding involves an accusation, not a petition for issuance of a license. Thus, SHHA  
14 has the burden of proving by a preponderance of the evidence that Bear River has violated Condition  
15 #8, and that a penalty is needed as a deterrent and to assure future compliance in order to protect the  
16 public. See [www.abc.ca.gov/legal/disciplinary\\_process](http://www.abc.ca.gov/legal/disciplinary_process).

17 Condition #8 was drafted by the Department's legal counsel, not by Bear River or SHHA. RT  
18 1 165:3-13. Because Bear River cannot reasonably be found in violation of an agreement or  
19 condition that never was possible to perform, *see, e.g.*, Civ. Code Sec. 3531, the Department must  
20 interpret Condition #8's meaning before determining whether Bear River has violated Condition #8  
21 and whether any penalty may be appropriate. SHHA claims that Condition #8 required Bear River to  
22 prevent all but emergency vehicles from either turning left from Singley Hill Road onto Bear River  
23 Drive or turning right from Bear River Drive onto Singley Hill Road as soon as the license issued.  
24 However, the only way to accomplish this would be to completely barricade Singley Hill Road – a  
25 public road under the jurisdiction of Humboldt County – just north of the Intersection,<sup>2</sup> an option that

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27 <sup>2</sup> On January 18, 2011, Bear River conducted a noticed public meeting to discuss its proposed plan and design for  
28 the intersection with community members, 15-20 of whom attended. The reaction of those members was that Bear River's  
plan was unacceptable because it did not totally prevent right turns onto or left turns from Singley Hill Road. *See, e.g.*,

1 Bear River pursued until it was rejected by State and County law enforcement and public safety  
2 agencies. *See, e.g.*, RT 1 69:3-25, 70:16-20.<sup>3</sup> Because SHHA's interpretation of Condition #8 would  
3 have required Bear River to do the impossible, the Department should give Condition #8 a more  
4 reasonable construction: *i.e.*, Bear River was and is obligated only to make diligent and reasonable  
5 efforts to develop and implement a legally and practicably feasible plan to discourage Casino-related  
6 traffic from using Singley Hill Road north of the Intersection, without simultaneously subjecting the  
7 tribal community and other non-Casino users of the road to undue hardship or creating risks to public  
8 safety in emergencies.

9 Condition #8 does not specify a time for completion of Intersection modifications. Thus,  
10 because Bear River still needs a permit from the County, Condition #8 must be interpreted as giving  
11 Bear River a reasonable amount of time to obtain all required permits and thereafter implement the  
12 permitted plan, all with due diligence.

13 The proper standard by which Bear River's compliance with Condition #8 should be  
14 measured is not whether or the Intersection is modified, but whether, "in light of the particular facts  
15 of [the] case, [Bear River] may be found to have behaved so passively with regard to its affirmative  
16 duty . . . that a violation is established." *See, e.g., CMPB Friends, Inc. v. Alcoholic Beverage*  
17 *Control Appeals Bd.* (2nd. Dist. 2002) 100 Cal.App.4th 1250, 122 Cal.Rptr.2d 914. Judged by that  
18 standard, the undisputed evidence in the record of both the April 29, 2009 and May 19, 2011  
19 hearings supports only one conclusion: Bear River actively and in good faith has done everything in  
20 its power to obtain the permits needed to modify the Intersection and develop and implement an  
21 effective plan for doing so, but continues to be thwarted by other permitting agencies. Since the  
22 2009 hearing, Bear River has succeeded in removing the Bureau of Indian Affairs as an obstacle to  
23 changes to Bear River Drive . RT 2 175-13-25, 176:1-25, 177-1-16; Exhibit G. Bear River had made  
24 other substantial and (at least until the BIA intervened) successful efforts to deter public ingress from  
25 and egress to north Singley Hill Road by, *inter alia*, installing physical barriers at the corner of

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26  
27 May 19, 2011 hearing transcript ("RT 2") 184-187; Exhibit H.

28 <sup>3</sup> The transcript of the April 29, 2009 hearing will be referred to as "RT 1".

1 Singley Hill Road and Bear River Drive, and posting signage prohibiting turns. RT 1 64-68; prior  
2 ALJ Factual Finding #7. Bear River's proposal to close Singley Hill Road from the north was vetoed  
3 by other agencies; prior ALJ Factual Finding #9. Since the BIA required removal of barriers from  
4 Bear River Drive, Bear River has worked continuously and diligently with Humboldt County,  
5 CalTrans and other government agencies to take every measure within Bear River's control to  
6 discourage traffic on the northern portion of Singley Hill Road including, *inter alia*, installing speed  
7 bumps on Singley Hill Road (removed because the SHHA's members did not support permanent  
8 installation) (RT 1 75:22-25, 76:1-35, 77:1-7), erecting signs at the Intersection prohibiting  
9 northbound right turns by exiting vehicles and left turns by southbound entering vehicles (RT 1 76,  
10 93), and erecting freeway signage directing traffic to the Highway 101 exit at the southern end of  
11 Singley Hill Road. (RT 1 77-78.)

12 As shown in the May 19, 2011 hearing, Bear River has developed a sophisticated plan and  
13 design (Exhibit B) that, if approved by the County and thereafter implemented, effectively would  
14 prevent all but the very smallest vehicles from turning north from Bear River Drive onto Singley Hill  
15 Road, and also would discourage drivers from turning left onto Bear River Drive (although such  
16 drivers, not yet having visited the Casino, could not create any hazard related to Bear River's  
17 license).

18 Bear River's last legal obstacle is obtaining an encroachment permit from Humboldt County.  
19 Although the project will involve disturbing only about 2,400 square feet of County roadside (RT 2  
20 57:10-25, 58:1-25, 59:1), the County now is requiring Bear River to prepare an initial study that will  
21 add 6-8 months to the approval process, or much longer if a lawsuit were to challenge the County's  
22 approval of the permit. RT 2, 57:8-20.<sup>4</sup> Bear River is prepared to fulfill the County's permit  
23 requirements, once it knows whether modification of the Intersection actually will be required,  
24 and/or whether the Department will accept implementation of whatever plan the County may  
25 approve as fulfillment of Bear River's obligations under Condition #8.

26 Condition #8 actually is a solution to a non-existent problem, and thus there would be no  
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28 <sup>4</sup> References to this transcript will be to "RT 2." References to the 2009 hearing will be to "RT 1."

1 harm to the public welfare or morals from construing Condition #8 as giving Bear River as much  
2 time to complete modifying the Intersection as needed to obtain the required permits and implement  
3 a plan acceptable to Humboldt County and other relevant government agencies. Even with the  
4 presence of the Casino, Singley Hill Road currently has an "A" level of service, meaning that traffic  
5 is free-flowing (RT 2 34:14-25, 35:1-15), and traffic volume on Singley Hill Road north of the  
6 Rancheria entrance would have to increase to about 400 vehicles per day for the level of service to  
7 decline to "B". RT 2 35:9-12.

8 Before the Casino opened, about 167 vehicles per day used Singley Hill Road north of the  
9 Intersection. RT 2 30:17-22. After the Casino opened in 2005, the County found that traffic volume  
10 on Singley Hill Road north of the Intersection had increased to about 204 vehicles per day. RT 2  
11 31:1-2. The County obtained similar results in 2008. RT 2 31:9-11.

12 The undisputed evidence adduced in the May 19, 2011 hearing shows that even without  
13 changes to the Intersection, current traffic levels north of the Intersection remain far below Singley  
14 Hill Road's rated safe capacity. Bear River conducted vehicle counts at the Intersection on  
15 February 4, 5, 17-20 and March 30-April 5, 2011. These data were collected by making continuous  
16 video recordings of all traffic entering and leaving the Rancheria on those dates for the 24 hours  
17 starting at 4:00 p.m. and ending at 4:00 p.m. the next day, and then having Gaming Commission  
18 surveillance staff actually count each vehicle and note whether each vehicle came from or went to  
19 the Casino or elsewhere on the Rancheria. RT 2 120:7-25, 121:1-1-8. These counts showed that  
20 most vehicles turning right onto Singley Hill Road between 7:00 a.m. and 7:00 p.m. came from the  
21 convenience store or the residential portion of the Rancheria; that there was a significant reduction in  
22 traffic turning right between 10:00 p.m. and 5:00 a.m. (when the Casino closes); and in some hours  
23 no cars at all turned right. RT 2 122:6-24.

24 For the 24 hours starting at 4:00 p.m. on February 4, 2011 and ending on February 5, 2011, a  
25 total of 95 vehicles turned right onto Singley Hill Road; in that same period, 2,074 turned left from  
26 Bear River Drive. RT 2 126:14-21. For the same period February 17-18, 2011, 110 vehicles turned  
27 right onto Singley Hill Road; 1,885 vehicles turned left. RT 2 126:25, 127:1-4. For the same period  
28 on February 18-19, 99 vehicles turned right; 1,745 turned left. RT 2 127:7-9. For the same period

1 on February 19-20, 85 vehicles turned right; 1,701 turned left. RT 2 129:7-11. Vehicles that went  
2 straight across to Brenard Road were not counted. RT 2 128:22-23; *See also*, Exhibit E. Moreover,  
3 Casino customer counts do not necessarily correlate to traffic counts because of vehicles driven by  
4 employees, residents, vendors and convenience store customers. RT 2 152-159; Exhibit F. In short,  
5 contemporary traffic counts show that the volume of traffic turning north onto Singley Hill Road has  
6 not changed significantly from before the Casino opened in 2005.

7 The undisputed evidence in the record shows that Bear River's current plan, if approved by  
8 the County, would virtually eliminate all Rancheria-related traffic north of the Intersection by  
9 making turning right onto Singley Hill Road extremely difficult (and likely would result in damage  
10 to the undercarriage of most cars). RT 2 85:1-5, 116:15-25, 117:1-4, 17. However, the proposed  
11 modifications also would prevent Rancheria residents from turning right to take their children to  
12 elementary school, RT 2 135:11-13, prevent a school bus serving the Tish-Non housing project from  
13 turning left from Brenard Road for the same purpose, RT 2 90:7-20; Exh. D, and would significantly  
14 increase the time needed to evacuate the area in an emergency. RT 2 100:3-21.

15 It is painfully obvious that the SHHA's real complaint is not that Bear River hasn't closed  
16 Singley Hill Road north of the Casino, but that the Casino – and possibly the Rancheria as well –  
17 exists at all. Having done all that Bear River clearly has done and is doing in its ongoing effort to  
18 obtain the permits needed to modify the Intersection, Bear River cannot reasonably be found to have  
19 behaved so passively with regard to its affirmative duty to fulfill Condition #8 that a violation has  
20 been established, and as long as those efforts continue (or Bear River is relieved of the obligation to  
21 do so), Bear River should be deemed to be in compliance with Condition #8. Thus, the accusation  
22 should be dismissed as unproven.<sup>5</sup>

23 **II. EVEN IF A VIOLATION OF CONDITION #8 HAS BEEN PROVEN, NO PENALTY**  
24 **SHOULD BE IMPOSED.**

25 "The department shall have the power, *in its discretion*, to deny,  
26 suspend or revoke any specific alcoholic beverages license if it shall  
determine for good cause that the granting or continuance of such

27 <sup>5</sup> The Appeals Board remanded in part to "provide an early opportunity for the Department to confirm that appella  
28 had complied, *or substantially complied*, with the obligation of condition 8, and to be current with appellant's progress while  
the Department once again has jurisdiction. \*\*\*" November 23, 2010 Appeals Board Order.

1 license would be contrary to public welfare or morals, or that a person  
2 seeking or holding a license has violated any law prohibiting conduct  
involving moral turpitude." [Emph. Added].

3 Cal. Const., art. XX, § 22, subd. (d), quoted in *People v. Schlimbach* (2nd. Dist. 2011) 193  
4 Cal.App.4th 1132, 122 Cal.Rptr.3d 804.

5 In its original decision, now vacated, the Department opined that, "It does not seem fair to  
6 punish Respondent's license because of the inaction of the Bureau of Indian Affairs." Nonetheless,  
7 the Department determined that because Bear River had accepted Condition #8 and that the original  
8 protestants had given up their right to a full hearing on their protest, Bear River's license should be  
9 revoked if the required modifications to the intersection have not been completed within two years.

10 As previously noted, the purpose of a penalty is not to punish the licensee, but to deter future  
11 misconduct and protect the public. In this case, there is no future misconduct to deter, because Bear  
12 River has ". . . been through hell with this Condition #8[,]" (RT 2 94:4-11), only to be thwarted by  
13 one governmental obstacle after another. Simply put, because there has been no misconduct, there  
14 is nothing to deter, and imposing a penalty would not remove any of the obstacles that have  
15 confronted and continue to confront Bear River.

16 Likewise, no penalty is needed to protect the public. The record is clear that traffic of any  
17 kind on Singley Hill Road north of the Casino already is extremely light, and there is absolutely no  
18 evidence that the service of alcoholic beverages at the Casino during the five years that the Casino  
19 has been open has resulted in any Casino-related DUI arrests or accidents on Singley Hill Road  
20 north of the Intersection.<sup>6</sup>

21 Moreover, as the Department's 2009 decision noted, revoking Bear River's license as a  
22 penalty actually would remove any incentive for Bear River to make any effort to reduce traffic on  
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24 <sup>6</sup> At the May 19, 2011 hearing, SHHA failed to produce evidence establishing DUI arrests or alcohol-related  
25 accidents on Singley Hill Road north of the Intersection. In any event, a mere arrest cannot be the basis for a presumption  
26 of guilt. *See, e.g., People v. Lachman* (1972) 23 Cal.App.3d 1094, 100 Cal.Rptr. 710. Evidence that two mailboxes had been  
27 vandalized over the past five years (one mailbox apparently was hit twice) did not link these isolated incidents to the Casino  
28 generally or the service of alcoholic beverages at the Casino in particular. RT 2 221-227. Likewise, the uncorroborated  
testimony of a clearly disgruntled – and patently non-credible– ex-employee of the Casino concerning her own and a few  
others' violations of Bear River's policies failed to establish any threat to the public that would be mitigated by imposing a  
penalty on Bear River for not yet having completed modifications to the Intersection, even assuming that such modifications  
still should be required. RT 2.

1 the northern portion of Singley Hill Road, thus actually making the penalty sought by SHHA  
2 counterproductive.

3 Given that Bear River has done everything in its power to comply with Condition #8, that  
4 Bear River's legal inability to interdict the minimal amount of traffic that uses the northern portion  
5 of Singley Hill Road for any purpose has not resulted in any harm whatsoever to the public safety,  
6 welfare or morals, that the SHHA actually would be placed at a disadvantage were Bear River's  
7 license to be revoked and that imposition of a penalty would not render Bear River any more able to  
8 comply with Condition #8 than it has already, Bear River should not be penalized for not yet having  
9 completed an impossible task.

10 **III. BECAUSE LITERAL COMPLIANCE WITH CONDITION #8 NEVER WAS**  
11 **LEGALLY POSSIBLE AND HAS PROVEN TO BE PHYSICALLY**  
12 **IMPRACTICABLE, AND WOULD IMPOSE AN UNDUE BURDEN ON THE**  
13 **ENTIRE TRIBAL COMMUNITY AND THE GENERAL PUBLIC WITHOUT**  
14 **CONFERRING ANY SIGNIFICANT BENEFIT UPON THE SHHA, CONDITION #8**  
15 **SHOULD BE ELIMINATED ALTOGETHER**

16 The record is clear that relieving Bear River of the obligation to comply with Condition #8  
17 would not expose the SHHA to any hardship whatsoever, because traffic on Singley Hill Road north  
18 of the Intersection already is minimal, and drivers turning left onto Bear River Drive will not yet  
19 have consumed alcoholic beverages at the Casino. On the other hand, the undisputed evidence  
20 shows that requiring compliance with Condition #8, even by implementing the plan in Exhibit B,  
21 would impose enormous and disproportionate hardships on the entire tribal community, including  
22 not only Bear River's tribal members and governmental and casino employees, but also school bus  
23 drivers, emergency vehicles, visitors, vendors and patrons of Bear River's convenience store/gas  
24 station.

25 The only access to and from the Casino, Rancheria residences, community center and  
26 convenience store/gas station is via Bear River Drive, and Bear River Drive's only outlet is Singley  
27 Hill Road. RT 2 134:11-25, 135:1-21. Numerous tribal members and governmental employees  
28 must go between tribal residences and facilities served by Bear River Drive and the Tish-Non  
administrative building on Singley Hill Road north of the Intersection, now a .2-mile round trip. As  
just one example, tribal employee April Florio testified that she must make between four and eight



1 such round trips daily, five days per week, fifty weeks per year. RT 2 183:2-18. If she could not  
2 turn right onto Singley Hill Road and left onto Bear River Drive, she would have to turn left onto  
3 Singley Hill Road, drive to the bottom of the hill past the freeway, turn around in an unsafe location  
4 (RT 2 61:13-18,) and then come back north past Bear River Drive, a total round trip of more than a  
5 mile. 109:1-25, 11:1-13. At five miles per day, she would be forced to drive 1,250 miles per year,  
6 an extra 1,000 miles.

7 She is not alone: approximately 40 people live on the Rancheria lands accessed via Bear  
8 River Drive (RT 2 165:9-11); five people work in the Tish-Non administrative building (RT 2  
9 11:14); 27-30 of Bear River's sixty governmental employees also travel between the main tribal  
10 office and the Tish-Non administrative building daily (RT 2 169:9-18); and various tribal elders and  
11 other members also make frequent trips between the two facilities. If only 25 tribal government  
12 employees each were to make one trip per workday for fifty weeks per year, modification of the  
13 intersection as proposed would force those governmental employees to drive an aggregate 6,250  
14 miles per year. Because many tribal employees actually make several round trips per day, the actual  
15 number of extra miles driven just by employees – not counting tribal members and/or residents,  
16 visitors and vendors to the Rancheria community – would be many times greater.

17 No reason in law, logic or justice exists for effectively barring residents of Bear River's trust  
18 lands from using Singley Hill Road north of the Intersection. The only way to avoid this result  
19 would be to delete Condition #8 from Bear River's license.

20 **IV. IF CONDITION #8 IS TO BE RETAINED AT ALL, THE DEPARTMENT SHOULD**  
21 **ACCEPT IMPLEMENTATION OF BEAR RIVER'S PLAN AS FULL**  
22 **COMPLIANCE WITH CONDITION #8 AND ALLOW ADEQUATE TIME FOR**  
23 **PERMITTING AND COMPLETION.**

24 Because full closure of Singley Hill Road north of Bear River Drive is legally impossible;  
25 because Bear River's plan as depicted in Exhibit B would eliminate virtually all right turns from  
26 Bear River Drive onto Singley Hill Road; and because drivers turning left onto Bear River Drive  
27 would not yet have consumed alcoholic beverages at the Casino, implementation of Exhibit B  
28 would accomplish everything that Condition #8 reasonably can be interpreted as requiring, and  
more than that to which SHHA is entitled. Therefore, if Condition #8 is to remain in Bear River's

1 license at all (it should not), the Department should deem implementation of Exhibit B to be full  
2 compliance with Condition #8. SHHA's last-minute offer to accept Exhibit B as full compliance if  
3 Bear River also agrees to build and staff a guard shack at the Intersection would add nothing to what  
4 Exhibit B already would accomplish, but in addition to adding several thousand dollars in  
5 construction costs (including extension of utilities), would increase Bear River's personnel costs by  
6 tens of thousands of dollars annually in perpetuity. Moreover, because Bear River has been  
7 prevented from inquiring into SHHA's actual membership, there is no way to determine who would  
8 be bound by any such agreement.

9 At this time, there is no way to predict how long the permitting process will take,  
10 particularly given that any permit would be open to judicial challenge. Therefore, Bear River  
11 should be given two years from the date it has obtained all necessary permits in which to complete  
12 modification of the intersection.

### 13 CONCLUSION

14 For all of the reasons set forth above, the accusation should be dismissed as unproven. If a  
15 violation is found, no penalty should be imposed because there is no misconduct to be deterred and  
16 no need to protect the public. Because requiring continued compliance with Condition #8 would  
17 result in undue financial and other hardships on the tribal community and others without mitigating  
18 any hazards or conferring any legitimate benefit on SHHA, Condition #8 should be deleted from the  
19 license altogether, but if the Department insists on retaining Condition #8, Bear River's  
20 modification of the Intersection as proposed in Exhibit B should be accepted as full compliance  
21 with Condition #8, and Bear River should be allowed two years from the date it obtains the  
22 necessary permits in which to complete that modification.

23  
24 Dated: July 22, 2011

Respectfully submitted,

25  
26 By: 

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FORMAN & ASSOCIATES  
Attorneys for Bear River Casino

