IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

05-15224

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

Plaintiff – Appellant,

vs.

SHINGLE SPRINGS BAND OF MIWOK INDIANS,

Intervenors – Defendants – Appellees,

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

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA THE HONORABLE GARLAND E. BURRELL, JR., Judge Presiding

APPELLANT'S OPENING BRIEF

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REGULATIONS

I. STATEMENT OF JURISDICTION

A. The Basis For The District Court's Jurisdiction.

The United States District Court for the Eastern District of California had jurisdiction pursuant to 28 U.S.C. section 1331, as an action arising under the laws of the United States. The District Court's jurisdiction over the declaratory and injunctive relief sought is authorized by 28 U.S.C. sections 2201-2202. Judicial review by the District Court of agency actions is authorized by 5 U.S.C. sections 702, 704, and 706. All challenged agency actions and determinations are final agency actions pursuant to the Administrative Procedures Act. These actions include federal recognition of tribal status and environmental review under federal law.

B. The Basis For Court Of Appeals Jurisdiction.

This Court has jurisdiction of this appeal due to entry of final judgment by the District Court on January 10, 2005, after issuance of Order on the parties' cross-motions for summary judgment. (Appellant's Excerpt No. "AE" 00973.) *American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 884 (9th Cir. 2003) (a "final" decision is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"); *Swint v. Chambers County Comm'n*, 514 U.S. 35, 42-43 (1995) (order re summary judgment is reviewable if the district court simultaneously enters final judgment in the case).

C. Filing Date Of Notice Of Appeal.

Plaintiff-Appellant County of El Dorado filed its Notice of Appeal on February 3, 2005. (AE 00974-00981.)

II. ISSUES PRESENTED

1. Did the District Court err in ruling that the six-year statute of limitation prescribed by U.S.C. section 2401(a) barred Plaintiff El Dorado County's challenges to federal agency approval of the tribal status of Intervenor Shingle Springs Band of Miwok Indians and Federal Agency approval of gaming by the Band.

2. Did the District Court err in holding that Federal Agency defendants, the Bureau of Indian Affairs ("BIS") and the National Indian Gaming Commission ("NIGC"), complied with the National Environmental Policy Act ("NEPA") and the Federal Clean Air Act ("CAA") in the environmental review of a proposed gaming resort and associated highway interchange construction in El Dorado County.

III. STATEMENT OF THE CASE

On August 21, 2002, Plaintiff El Dorado County ("County") filed its original complaint asserting that Defendants NIGC, Chairman of the NIGC, BIA, and Secretary of the Interior (collectively, "the Federal Defendants") violated NEPA in connection with a proposed hotel/casino and major highway interchange to be constructed adjacent to U.S. Highway 50. (AE 00001-00023, ¶¶ 59-92.) The

project proponent was the Shingle Springs Band of Miwok Indians ("the Band"). The Band's successful motion to intervene was not opposed by the County. (AE 00024.)

The District Court granted the County's Motion to Amend and the First Amended and Supplemental Complaint ("First Amended Complaint") was filed on March 3, 2003. (AE 00026-00067.) In the First Amended Complaint the County sought a declaratory finding that the Band may not organize under the Indian Reorganization Act of June 18, 1934, 73 P.L. 383 ("IRA") and that the Band's Articles of Association are not an Indian Constitution (twelfth claim). The County also challenged the federal recognition of the Band as an Indian tribe (thirteenth claim). Lastly, the County challenged the classification of the Shingle Springs Rancheria as "Indian lands" for purposes of the Indian Gaming Regulatory Act. (25 U.S.C. § 2701 *et seq.*) ("IGRA") (fourteenth claim). (AE 00056-00062, ¶¶ 139-166.)

The Band filed an Answer to the First Amended Complaint on June 19, 2003. (AE 00068-00104.) Federal Defendants filed no answer. On July 21, 2003, the Federal Defendants moved to dismiss claims twelve and thirteen of the First Amended Complaint. On the same day, the Band filed a motion for judgment on the pleadings seeking dismissal of the same claims on the same grounds – non-justifiable political question and statute of limitations. The Federal Defendants'

and Band's motions were granted, with leave to amend, by the District Court's October 29, 2003 Order wherein the Honorable Garland E. Burrell, Jr. found that the claims were barred by the statute of limitations. (AE 00161-00174.)

The County filed a Second Amended Complaint on November 18, 2003.[1] On that same day, the County filed a motion for reconsideration of the District Court's October 29, 2003 Order. In support of that motion, the County filed three declarations, Declaration of Thomas D. Cumpston, Declaration of William Miles Wirtz and Declaration of Michael V. Brady. (AE 00219-00758.) However, the County's motion was never heard as the District Court deemed it moot as a result of the filing of the County's Second Amended Complaint. (AE 00175-00230.)

Federal Defendants and the Band moved to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), Claims 13 and 14 of the Second Amended Complaint. Claim 13 alleged that the NIGC's 2002 approval of the development component of the hotel casino project violated the APA because it was based upon and applied the BIA's unlawful identification of the Band as an Indian tribe pursuant to the 1994 List Act. (AE 00205-00212, ¶¶ 139-161.) Claim 14 of the Second Amended Complaint alleged that the NIGC's 2002 approval of the development component of the hotel casino violated the APA because the Rancheria does not qualify as "Indian lands," and therefore is not a location

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1 The Second Amended Complaint did not replead the claim for relief relating to

suitable for gaming under IGRA. (AE 00212-00215, ¶¶ 162-177.) The District Court granted Defendants' motions to dismiss Claims 13 and 14 of the Second Amended Complaint, and, by Order entered on May 13, 2004, dismissed said claims with prejudice. (AE 00759-00780.)

The County filed a motion for reconsideration of the May 13, 2004 Order, again submitting the Declarations of Messrs. Cumpston and Wirtz. (AE 00781-00895.) By its June 17, 2003 Order, the District Court denied the County's motion for reconsideration and further denied the County motion to certify for interlocutory appeal. (AE 00896-00903.) The District Court's Order indicates, at footnote 2, that it considered the declarations submitted by the County in support of the motion for reconsideration. (AE 00898.)

The parties thereafter filed cross-motions for summary judgment as to the remaining claims for relief under NEPA and the CAA. By Order filed on January 10, 2005, the District Court denied the County's motion and granted Defendants' motion. (AE 00931-00972.) On that same date, final judgment was entered on behalf of Defendants. (AE 00973.) The County filed its Notice of Appeal on February 3, 2005. (AE 00974-00981.)

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the IRA.

IV. STATEMENT OF FACTS

A. Factual Allegations Related To Tribal Status.

The Second Amended Complaint filed by the County contains the following allegations related to challenging the Band's federal grant of tribal status.[2]

Through various appropriations statutes in the early 1900s, the U.S. Congress provided funds for the acquisition of land for "homeless California Indians." Those appropriations were intended to benefit groups of individual Indians rather than organized tribes. Pursuant to this Congressional direction, Department of Indian Affairs (predecessor to the current BIA), Special Indian Agent John Terrell in 1916 conducted a census of Indians then living in Sutter and Sacramento Counties ("1916 Census"). The 1916 Census reported 34 individuals, some of whom were of Native American ancestry and some of Hawaiian ancestry. The individuals lived in the towns of Verona and Nicolaus as well as Sacramento.

These 34 individuals neither identified themselves nor conducted their collective affairs as an Indian tribe. The record shows that these 34 individuals had no knowledge of one another outside of their given family groups and the efforts of Special Agent Terrell.

Special Agent Terrell recommended that the Department of Indian Affairs purchase the Rancheria for these "landless" Indians identified in the 1916 Census.

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2 This Court is respectfully requested to judicially notice, pursuant to Federal Rule of Evidence 201(b), Plaintiff's Second Amended Complaint filed in this

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

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

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

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

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action on November 18, 2003.

In 1970, the BIA contacted the descendants of 34 individuals from the 1916 Census ("Descendants") for the purpose of formulating a distribution plan for the Rancheria.

Discussions concerning the fate of the Rancheria occurred over the next few years. In 1974, the Descendants refused the distribution plan that was proposed by the BIA. Instead, the Descendants chose to retain the Rancheria as a group. On June 19, 1976, sixteen of the Descendants voted to establish the Articles of Association and By-Laws for the "Shingle Springs Band" under California Corporations Code, § 21000 et seq.

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

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

In September 1978, the BIA published in the Federal Register regulations intended to establish a procedure for acknowledging that certain Indian tribes exist as tribes ("Federal Acknowledgment Regulations"). The current version of the Acknowledgment Regulations is found in 25 C.F.R. Part 83. As of the effective date of the Acknowledgement Regulations, October 2, 1978, the Band had not

been formally acknowledged by the federal government, nor had any member of the Band set up permanent residence at the Rancheria.

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

Later the next year, in 1980, the first member of the Band moved onto the Rancheria. This relocation occurred sixty years after the Rancheria was first purchased and set aside for use by the so-called Sacramento-Verona Band.

In 1981, the BIA updated the Administrative List and included, for the first time, the "Shingle Springs Band of Miwok Indians, Shingle Springs Rancheria (Verona Tract), California," although neither the Band, the Rancheria nor the federal government had ever complied with the Federal Acknowledgement Regulations.

In 1994, the Congress passed the List Act, (25 U.S.C. §§ 479a and 479a-1) which provided, for the first time, statutory authority for the BIA to publish a list of federally recognized Indian groups. The first list by BIA in compliance with the List Act was published on February 16, 1995 ("Statutory List"). The Band was

identified on the Statutory List. The only basis for the Band's appearance on the Statutory List was its prior appearance on the Administrative List.

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

The Band then secured new financial backing and floated a proposal for a casino and hotel about a mile from the Rancheria, on properties adjoining U.S.

Highway 50's south border. The Tribe and its new backers ultimately abandoned this proposal, however, in favor of the current Casino Project.

B. Factual Allegations Related To Environmental Review.

The Band proposes to construct a large Nevada-style gaming resort on the Rancheria serviced by a single purpose interchange to be constructed on Highway 50.[3] Though the Rancheria can be seen from U.S. Highway 50, there is no direct commercial ingress or egress. (AE 01381-01382.) Currently the only road access to the Rancheria is a series of one-lane roads through the "Grassy Run" neighborhood. (AE 01381-01382.) The Grassy Run roads are private roads, and easements granting access to the Rancheria over these roads allow only residential traffic; commercial traffic, such as deliveries, may use the roads only by prior consent, and under limited circumstances. (AE 01326.)

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3 While the County will comply with Ninth Circuit Rule 30-1 (Excerpts of Record), it must be pointed out that this component of this appeal seeks appellate review of the District Court's review of the Federal Defendants' compliance with federal environmental laws under the Administrative Procedures Act, 5 U.S.C. §§ 701-706 ("APA"). The judicial review of the agency actions that are challenged in this case is based on the entire agency administrative record. *Florida Power & Light Co. v. Lorian,* 470 U.S. 729, 743-44 (1985). As with the trial court, this Court is not called upon to resolve any issues of fact, but instead to determine, as a matter of law, considering the evidence contained in the administrative record, whether the challenged federal agency decisions may be upheld und the "arbitrary and capricious" standard of review. *City & County of San Francisco v. United States*, 130 F.3d 873, 876 (9th Cir. 1997).

The Casino complex would occupy 44 acres (AE 01326) of the 160-acre Rancheria. (AE 01488.) The resort would include a 238,500 square-foot casino (AE 01485); a 250-room, 140,000 square-foot hotel (AE 01334); a parking structure and parking lots for 3,000 vehicles (AE 01334); a wastewater treatment plant featuring a 1,800,000-gallon wastewater storage reservoir (AE 01330); a 200,000-gallon freshwater storage tank (AE 01342); and a six- to seven-acre effluent disposal field (AE 01709). The proposed development will require grading of approximately 227,000 cubic yards of earth. (AE 01491b.) With a projected 1,500 employees (AE 01334) and a total square footage of 381,250 (AE 01482), the Casino Project would be the largest single commercial development in the history of El Dorado County. (AE 02317.)

The proposed freeway interchange that will allow employees and patrons to access the casino requires more than a half-mile of roadwork on U.S. Highway 50 and includes a "flyover" overcrossing structure, a highway undercrossing, four on- and off-ramps ranging from 1,000 to 1,400 feet in length, and an additional east-bound lane on U.S. Highway 50. (AE 01312-01421; AE 02281-02282.) According to the NIGC's traffic assumptions, the interchange will be used for 9,918 additional car trips per typical weekday (AE 01412) and 14,600 additional car trips on Saturdays (AE 01413). If these assumptions are accurate, and

assuming Sunday trip generation equal to a weekday, this converts to approximately 3,800,000 additional car trips per year.

The casino will be built on steep slopes ranging up to 50 percent. (AE 01353). The casino structure will reach as high as 115 feet above grade. (AE 01492). The NIGC's Draft EA identifies no existing structures taller than two stories within five miles east and two miles west of the Rancheria along U.S. Highway 50. (AE 01394-01395.)

The casino will generate 8,850 pounds (4.425 tons) of garbage per day. (AE 01426.) The casino will generate 132,600 gallons of wastewater per day on average (AE 01698), with peak days as high as 200,250 gallons. (AE 01699.) Because no sewer service is available, wastewater is proposed to be treated and disposed onsite. (AE 01401, 01339, 01340.) Dewatered "biosolids" would be trucked from the casino periodically and disposed of somewhere else. (AE 01424.) Some of the resulting wastewater would be recycled in toilets and landscaping. (AE 01340.) The remaining wastewater – as much as 98,000 gallons of effluent per day (AE 01702) – is to be spread on the land at the Rancheria and is expected to percolate into the underlying groundwater. (AE 01342.) The Band estimates that 6- to 7-acres of effluent disposal area will be sufficient to absorb these daily deposits of effluent, year-round, rain or shine. (AE 01709.)

1. The NIGC's NEPA Review For the Casino.

The NIGC's Draft Environmental Assessment ("Draft EA") for the casino development component was released to the public in January of 2001. (AE 01086-01229.) The project was described as BIA placing a single land parcel into trust and NIGC approving the Casino's Development and Management Contract. (AE 01093.) The Draft EA contains the following summary description of the "Proposed Action": "The Proposed Action consists of 4 main components: (1) Land Trust Action, (2) Management Contract, (3) hotel/casino development and (4) construction of new interchange." (AE 01106.)

Over two hundred and thirty comments were received during public review of the Draft EA (AE 01320) and substantial changes were made in the Final Environmental Assessment ("Final EA"). The Final EA consists of: (i) a revision of the Draft EA (AE 0131-01481); (ii) a slim volume summarizing and responding to comments by the County and others on the Draft EA (AE 01482-01573); and (iii) 20 appendices composed of hundreds of pages of new and revised data that were never provided for public review and comment. (AE 01583-02273.)

The Final EA contains numerous discrepancies, manifested initially in the document's introduction; for example, the Final EA disclosed that the lead agency identified in the Draft EA – the BIA (AE 01086) – was changed, without any notice, to the NIGC in the Final EA. (AE 01313-01322.) Similarly, although the

Draft EA described the freeway interchange as "another component of this project" (AE 01098), the Final EA deleted this statement and instead indicated that "[i]t should be noted that the interchange is not a project that would be approved under the proposed action." (AE 01437.) The Final EA noted that "[i]t is assumed that the main access to the hotel and casino complex would be the new interchange currently being considered by Caltrans and BIA." (AE 01334.)

The Final EA (AE 01339) and its supporting "Appendix E" (AE 01690-01759) disclosed for the first time that the NIGC abandoned the prior proposed wastewater treatment and disposal system (a "Nitro-Raptor" system described at AE 01108-1109) in favor of a completely different treatment system (an "immersed membrane bioreactor" ("MBR") system) and a substantially modified disposal system. (AE 01339.) The Final EA indicated that the new MBR system was a last-minute change in the project to "respond to the issues raised by the RWQCB, El Dorado County and other concerned responders to the DEA as it related to the 'Nitro-Reactor' system that was proposed in the original DEA." (AE 01586-01710.) The new information in the Final EA was not circulated for public review and comment.

With regard to water supply, the Draft EA stated that [w]ater delivery for the proposed hotel/casino complex would be provided by the Shingle Springs Tribal Utility District (TUD)" by means of a three-inch water meter. (AE 01109.)

The Final EA substantially changed the Draft EA's plan for water supply, incorporating the installation and use of a 200,000-gallon water storage tank. (AE 01342.) The Final EA also added a second scenario for water supply – trucking it in at a rate of 100,000 gallons per day. (AE 01343.) Under the first revised scenario outlined in the Final EA, the casino would rely on recycled wastewater for toilets, landscaping, and fire safety to bring down the project's overall demand for water. (AE 01340, 01343.) The 200,000-gallon potable water storage tank would be incorporated into the plan in order to allow supply to keep pace with peak demands. (AE 01342.) Under the second revised scenario outlined in the Final EA, trucks hauling 4,000 gallons of water per trip would arrive and depart the casino 25 times each day. (AE 01343.) Trucks hauling water would be dispatched from a water supplier in Stockton, California, over 30 miles away. (AE 01343.) Secondary impacts from the truck delivery of water were not analyzed. (AE 01342-01343.)

Beside a "no action alternative" (AE 01347), the Final EA addressed only one other alternative, a "reduced intensity alternative." (AE 01348.) The reduced intensity alternative consisted of "a shopping center on the same land as identified for the hotel/casino complex under the Proposed Action." (AE 01348.) No other alternative, such as a smaller casino or any other revenue generating land use, was evaluated. (AE 01347-01348.)

Both the Draft and Final EAs indicated that the reduced intensity alternative would substantially reduce economic benefits to the Band because construction of the interchange (to paid for by the Band) "will cost approximately 15 million dollars," ostensibly making the shopping center alternative financially infeasible. (AE 01123,01350.) The proposed casino resort is expected to generate at least $180.5 million in annual gaming revenues (excluding poker, keno, sports betting, and bingo) by its third year of operation. (AE 01085.)

NIGC Chairman Deer approved the Final EA and signed the associated "Finding of No Significant Impact," or "FONSI," on January 22, 2002 (AE 00983).[4] In so doing, the NIGC concluded that the Casino Project's impact on the quality of the human environment is "minor," its socioeconomic impact is "beneficial" both to the Band and to the County, and that no significant unmitigated impacts could result with regard to public health and safety, land use compatibility, traffic, air quality, water quality, aesthetics, biological resources, or any other environmental factor. (AE 00983.) The NIGC further concluded that no EIS would be prepared to evaluate the project's impacts pursuant to NEPA. (AE 00983.)

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4 The NIGC's FONSI was not circulated for public review and comment prior to its execution. (AE 00982-00983.)

2. The BIA's NEPA Review.

The BIA released its Draft EA for the Interchange Project, the second major federal action necessary for approval of the Casino Project, in May of 2002. (AE 00274.) The Draft EA addressed only the Interchange Component and not the resort Development Component. (AE 00276.) Instead, the BIA stated that it considered the impacts of the Development Component by incorporating by reference and "tiering" from the NIGC's EA. (AE 02277-02278.) The BIA's Draft EA does not include a substantive cumulative impact analysis of both project components in combination, even though the document acknowledges that the Development Component is an "immediate plan for development." (AE 02275.)

The BIA received many comments objecting to the treatment of the resort Development Component as a separate project from the Interchange Component. (AE 02407-02832.) A number of commenters noted that, at a minimum, the Draft EA for the interchange should discuss the cumulative impacts of the proposed action in combination with the resort Development Component. (AE 02407-02832.) In response to these comments, the Final EA and FONSI asserted that the impacts associated with the Development Component are "fundamentally different in kind and type" from the impacts resulting from the proposed interchange, and therefore could not be "cumulative or additive to each other." (AE 02360.)

V. SUMMARY OF ARGUMENT

The County's claim for relief challenging the Band's tribal status is not barred by the statute of limitations. Under *Wind River Mining Corporation v. United States*, 946 F.2d 710 (9th Cir. 1991) and its progeny, a challenge to tribal status is considered a substantive challenge to *ultra vires* agency action. As such, the statute of limitations started running on the claim once the agency decision was applied to the County in such a way that it was harmed. In the instant case, that harm occurred when legal gambling became probable, which was at the earliest, January 22, 2002 when the NIGC FONSI was issued.

The BIA and NIGC violated NEPA by (1) separately reviewing and approving two connected actions (the Development Component and the Interchange Component) that together comprise the proposed Casino Project; and (2) relying on two faulty Environmental Assessments ("EAs") and failing to prepare an Environmental Impact Statement ("EIS") before acting on the proposal. 42 U.S.C. § 4321 et seq. Based on the EAs and the supporting documents upon which they are founded, the agencies could not reasonably conclude that the Casino Project will not have any significant adverse effect on the environment. These agencies also were required, in reviewing the proposed action, to demonstrate "conformity" with federal and state air quality standards under the Clean Air Act. 42 U.S.C. § 7506(c)(1). The BIA and NIGC violated this

requirement by framing their conformity evaluation in a manner that deliberately understated project emissions and thus ignored the environmental damage that the Casino Project will cause.

VI. STANDARD OF REVIEW

A. The District Court's Dismissal Under FRCP 12(b)(6) Is Reviewed *De Novo* on Appeal.

An order granting a motion to dismiss pursuant to FRCP 12(b)(6) is reviewed *de novo* by the appellate court. *Madison v. Graham*, 316 F.3d 867, 869 (9th Cir. 2002). On a motion to dismiss, allegations of material fact are taken as true and are construed in the light most favorable to the nonmoving party. *Ventura Mobilehome Communities Owners Association v. City of San Buenaventura,* (2004) 371 F.3d 1046, 1050.

B. The District Court's Order Following Parties' Cross-Motions For Summary Judgment Is Reviewed *De Novo* On Appeal.

A trial court's order on cross-motions for summary judgment is generally reviewed *de novo*. *Lovell v. Chandler*, 303 F.3d 1039, 1052 (9th Cir. 2002); *American Civil Liberties Union of Nev. v. City of Los Vegas*, 333 F.3d 1092, 1097 (9th Cir. 2003) (*de novo* review of rulings on cross-motions for summary judgment). The appellate court must determine whether, viewing the evidence in the light most favorable to the non-moving party, there are any genuine issues of material fact and whether the District Court correctly applied the relevant

substantive law. *Ventura Packers, Inc. v. F/N Valdez v. Rosenbaum*, 302 F.3d 1039, 1043 (9th Cir. 2002).

This Court does not defer to the lower court's ruling, but independently considers the matter anew, as if no decision had been rendered by the trial court. *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d 967, 970 (9th Cir. 2003) ("no form of appellate deference is acceptable").

VII. ARGUMENT – STATUTE OF LIMITATIONS

Title 28 U.S.C. § 2401(a) provides a six-year statute of limit for actions brought under the Administrative Procedures Act. That provision states, "Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." Under *Wind River, supra*, 946 F.2d 710, accrual of a substantive claim occurs when the agency act is applied by the federal government to the challenger. In two separate Orders, the District Court found the County's claims under the APA were time barred. Both rulings were erroneous under *Wind River* but for different reasons. In the first (October 29, 2003) Order (AE 00161-00174), the court held that a third party, i.e. the Band, could unilaterally trigger accrual of the statute of limitation. This holding has no support in *Wind River* or the cases following it. On reconsideration, the District Court held that *Wind River* did not apply at all but that the statute was triggered once the County had mere constructive notice that the

agency decision might be applied to it. This is simply wrong and again finds no support in the cases following and explaining *Wind River*.

We describe first the correct application of the law under *Wind River* and its progeny to the facts of the County's claim. We then use the arguments made by the Band and the federal government below to further explain *Wind River* principles. Lastly, we explain where the District Court's rulings ran afoul of *Wind River* and why the District Court's May 13, 2004 ruling must be reversed.

A. The County's Challenge to the Band's Tribal Status is Timely Under *Wind River*.

This Court's holding in *Wind River* authorizes a substantive challenge to a prior administrative act where there is a subsequent application of the act to the eventual challenger. Here, the *ultra vires* act giving rise to the County's challenge is the federal government's listing of the Shingle Springs Band as a federally recognized tribe in the 1980's and subsequent thereto. In *Wind River,* it was a mining company challenging the Bureau of Land Management's earlier decision to designate a parcel of land as "Wilderness Study Area." In *Oppenheim v. Campbell,* 571 F.2d 660 (D.C. Cir. 1978), it was a veteran challenging a 30-year old Civil Service Commission decision that adversely affected his present retirement benefits. In *Artichoke Joe's California Grand Casino v. Norton*, 278 F. Supp. 2d 1174 (E.D. Cal. 2003) (*Artichoke Joe's*), it was a group of card rooms challenging the tribal status of the proponents of the ill-fated San Pablo Casino.

In *Artichoke Joe's* Judge David F. Levi of the Eastern District of California applied *Wind River* to a claim involving a purported tribe (the Lytton Band of Pomo Indians) claiming to have been recognized by way of a federally approved settlement in 1991:

> Defendants assert that plaintiffs' challenge to Lytton's tribal status is barred by the six-year statute of limitations for claims against the United States. See 28 U.S.C. § 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."). Defendants argue that because it has been more than six years since the Scotts Valley stipulation was reached and Lytton was first listed in the Federal Register as a recognized tribe, plaintiffs' claim is time barred. Plaintiffs agree that § 2401 applies, but argue that under *Wind River Mining Corp. v. U.S.*, 946 F.2d 710 (9th Cir. 1991), their claim is not barred.
>
> The rule in *Wind River* provides that notwithstanding the six-year statute of limitations, substantive challenges to agency action can be made up to six years from the date the action was applied to the challenger. *Id.* at 715-16. The rationale of the *Wind River* decision is equally applicable to this action: "The government should not be permitted to avoid . . . challenges to its actions, even if *ultra vires*, simply because the agency took the action long before anyone discovered the true state of affairs." *Id.* at 715.
>
> Plaintiffs' claim concerning recognition of Lytton as a tribe is a substantive challenge to the Secretary's recognition decision. Further, when the Secretary [of Interior] made the decision to settle the Scotts Valley case and grant Lytton federal recognition in 1991, plaintiffs could have had no idea that Lytton's tribal status would affect them. . . . Lytton's previous home land was in Sonoma County, and there was no indication in the Scotts Valley settlement that Lytton would seek to conduct tribal gaming in San Pablo. Even if they had known of the Scotts Valley stipulation and wanted to challenge it at the time, they would not have had standing to do so. The only group with an interest in challenging the Secretary's

> recognition decision was the intervenor Alexander Valley landowners and the stipulation effectively removed any interest or incentive the landowners had in challenging the Secretary's decision by forbidding gaming by the Lyttons in Sonoma County. Thus, there was no one with standing to challenge the recognition decision at the time it was made. For these reasons, the statute of limitations did not start running on plaintiffs' tribal status claim until IGRA gaming in San Pablo by the Lyttons became probable. It follows that plaintiffs' claim is not barred by the six-year statute of limitations.

Ibid. at 1182-83.

The holding in *Artichoke Joe's* anticipated the circumstances in which El Dorado County found itself in 1996. The Band sought to open and operate a casino on the Rancheria without the necessary approvals from the NIGC or a tribal gaming compact with the State of California. The NIGC and the United States Attorney took prompt action to close the casino within ten days of its opening in early November 1996. While the casino opened, again illegally, for a few days early 1997, on April 25, 1997 in litigation initiated by the Band itself[5] Judge David F. Levi of the Eastern District ruled that the Grassy Run Roads were private and thus commercial access to the casino was prohibited. This was followed by a preliminary injunction against all commercial/public traffic to the Rancheria by way of the only access (i.e. Grassy Run roads).

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5 *Shingle Springs Rancheria v. Grassy Run Community Services Dist., et al.*, (U.S.D.C. Eastern Dist. of Cal., Case No. Civ-S-96-1414 EJG/PAN, consolidated with No. Civ-S-96-1234 DFL/JFM, filed 08/01/96).

As with the Alexander Valley landowners in *Artichoke Joe's,* El Dorado County's incentive to challenge tribal status in 1996 and 1997 was removed by action of the NIGC, the United States Attorney and a federal court judge. As with the San Pablo card room owners in *Artichoke Joe's*, El Dorado County could not have maintained a challenge to tribal status in 1996 and 1997. In 1996, there was no final agency action applying the tribal recognition decision to the County as *Wind River* requires. As noted in *Trafalgar Capital Associates, Inc. v. Cuomo*, 159 F.3d 21, 35 (1st Cir. 1998), "in general a cause of action against an administrative agency 'first accrues' within the meaning of § 2401(a) as soon as . . . the person challenging the agency action can institute and maintain a suit in court." *Spannaus v. DOJ*, 824 F.2d 52, 56 (D.C. Cir. 1987). Under the Administrative Procedures Act, the injured party can maintain a suit once the agency has issued a "final agency action." 5 U.S.C. § 704; *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997); *Dunn-McCampbell Royalty Interest v. National Park Serv.*, 112 F.3d 1283, 128 (5th Cir. 1997) ("an 'as applied' challenge must rest on final agency action under the APA"). There was no final agency action under the APA in 1996 and 1997 applying the tribal recognition decision to the County. There was only a concerted federal enforcement effort against the Band.

A party adversely affected by a final agency action must have both knowledge of the wrong and a "reasonable probability of successfully

prosecuting" its claim against the government. *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588 (9th Cir. 1990) (*citing United States v. One 1961 Red Chevrolet Impala*, 457 F.2d 1353, 1358 (5th Cir. 1972) ("The right to sue is hollow indeed until the right to succeed accompanies")); *see also Acri v. International Ass'n of Machinists*, 781 F.2d 1393, 1396 (9th Cir. 1986), *cert. denied*, 479 U.S. 816. Article III of the Constitution dictates that federal courts may only adjudicate actual "cases" or "controversies." *Allen v. Wright*, 468 U.S. 737, 750 (1984). The case-or-controversy requirement of Article III applies with equal force to actions for declaratory judgments as it does to actions seeking traditional coercive relief. *Foster v. Center Township of LaPorte County*, 798 F.2d 237, 242 (7th Cir. 1986). Thus, to demonstrate standing for a declaratory judgment, the County would have had to allege that it had sustained, or was in immediate danger of sustaining, a direct injury as a result of the Class III gaming facility that had been shut down by NIGC order and landlocked by federal court order. Furthermore, "the alleged harm must be *actual or imminent,* not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (emphasis added). Until there was access to the Rancheria and Class III gaming was legalized, any injury to the County was conjectural.

Even if these fundamental obstacles did not exist, the County was also barred from bringing such action by court order. On September 24, 1996 and

again on November 21, 1996, Judge Levi stayed the *Grassy Run* litigation until further order of the Court.[6] Even if it had standing to sue the federal government while it was enforcing the law in the County's favor, the County ran the risk of incurring sanctions were it to file a third party action bringing in the BIA to challenge tribal recognition in 1996.

At no time herein has the County had any way to perfect its standing to challenge the underlying tribal recognition decision. The federal acknowledgement regulations do not provide an administrative mechanism for third parties to challenge federal recognition.[7] In other words, the County found itself in the same situation as the tribe in *Utu Utu Gwaitu Paiute Tribe of the Benton Paiute Reservation v. Department of the Interior*, 766 F. Supp. 842 (E.D. Cal. 1991), which was aggrieved by a regulation interpreting the Equal Access to

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6 The County had been named as a third party defendant in the Grassy Run litigation on October of 1996 but was never served. The Supreme Court has held that, "one becomes a party officially, and is required to take action in that capacity only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend." *Murphy Bros v. Michetti Pipe Stringing, Inc.*, 526 US 350, 344 (1999). The County made a general appearance in the case on December 18, 1997, a time well within the six-year statute of limitations.

7 The BIA's review process is only started by a "letter of intent" filed by "any Indian group." 25 C.F.R. § 83.4. Only after the initiation of the review process are other parties allowed to comment or submit information regarding tribal status. *See* 25 C.F.R. § 83.10(i). Interested parties are also allowed to challenge a decision by the BIA to acknowledge an Indian tribe 90 days of the BIA publish its decision in the Federal Register. *See* 25 C.F.R. § 83.11(a). Strictly speaking, this is a "request for reconsideration" that is

Justice Act but never had an earlier opportunity to challenge it because the tribe lacked standing. As Judge William B. Shubb of the Eastern District of California noted "The tribe was therefore required to wait for the right circumstances to come along." *Ibid.* at 847.

In the instant case, the County had to wait until there was an actual application of the earlier tribal recognition decision it before it could file suit. The federal government had not taken any action applying the earlier tribal recognition decision to the County, a requirement under *Wind River*. To the contrary, the NIGC and the United States Attorney were actively moving to shut down the illegal casino.

Under *Wind River* as interpreted by the District Court in *Artichoke Joe's* El Dorado County's claim did not accrue, "until IGRA [Indian Gaming Regulatory Act] gaming . . became probable." *Artichoke Joe's,* 278 F. Supp. 2d. at 1183. In the instant case, IGRA gaming became probable once the federal government issued the first FONSI in January 2002. The County's challenge accrued at that point and no sooner.

B. The Band and Federal Defendants' Original Arguments Were Legally Inconsistent and, Under *Wind River,* Wrong.

Up until the September 8, 2003 hearing on the first Rule 12 motions, the Band and Federal Defendants agreed that the County's tribal status claim was

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filed with the BIA.

premature. Federal Defendants sought and obtained court orders continuing the matter based upon stipulations five times, always claiming the matter was not ripe. Defendants even obtained *ex parte* relief on the basis that the matter was not ripe, asserting to the court that: "Until the Interior Department makes a decision on whether to approve an amended cooperative agreement, the Federal Defendants maintain that Plaintiff lacks standing to raise the claims contained in Plaintiff's Complaint which, in any event, are not yet ripe for adjudication and do not identify a final agency action reviewable under the Administrative Procedure Act, 5 U.S.C. § 701 et seq." Federal Defendants' Motion for Ex Parte Extension of Time, June 17, 2003, at p. 2, line 17. (AE 00067a-d.)

A claim cannot be both unripe (i.e. premature) and untimely because the statute of limitations does not even begin to accrue until a claim becomes ripe. *Whittle v. Local 641, Int'l Board. of Teamsters,* 56 F.3d 487, 489 (3rd Cir. 1995) ("For limitation of actions, a cause accrues when it is sufficiently ripe that one can maintain suit on it"); accord *Ghartey v. St. John's Queens Hosp.,* 869 F.2d 160, 163 (2d Cir. 1989); *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 121 (3rd Cir. 1993).

In light of the foregoing inconsistency, the statute of limitations arguments made by the Federal Defendants and the Band were muted. Federal Defendants, in a footnote, said that the six-year statute of limitations ran from the 1979 listing and

that the County's challenge was "in tension" with the tribal compact entered into by the Band and the State of California in 2000.[8] The Band made two arguments - that the statute ran from any of a number of earlier listings, or the statute ran from 1996 when the County became, "aware of the Tribe's *actual operation of the casino in derogation of County land use jurisdiction and state law gaming regulatory jurisdiction*" (emphasis in original).[9]

The arguments that the statute of limitations was triggered by earlier listings in the federal register are wrong under *Wind River* and all of its progeny. With a substantive challenge the date of the original *ultra vires* act is immaterial, the statute accrues on the date of federal agency application to the eventual challenger. *Utu Utu, supra*, 766 F. Supp. at 846. The Band's argument that the statute accrued when its illegal casino operation was shut down by two branches of the federal government also ignores the absence of agency application against the County which is what *Wind River* requires. There was no such action in 1996 or 1997.

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8 "Federal Defendants Notice of Motion and Motion for Partial Dismissal of Plaintiff's Amended and Supplemental Complaint," p. 13, n. 9. (AE 00105-00122.)

9 "Shingle Springs Band of Miwok Indians' Notice of Motion and Motion for Judgment on the Pleadings as to Twelfth and Thirteenth Claims and Motion to Strike Twelfth Claim: Memorandum of Points and Authorities in Support of Motion," p. 17. (AE 00123-00160.)

C. In Its October 29, 2003 Order the District Court Erred and Misapplied *Wind River* By Holding That a Third Party's Illegal Conduct Could Trigger the Statute of Limitations.

The District Court focused not on agency application but, rather, upon notice concepts of accrual. The District Court found that the County was put on notice in 1996 by Band activities, i.e. that the Band was acting in a sovereign capacity to construct and operate a casino on the Rancheria when the County was added as a third party defendant to the Grassy Run lawsuit instituted by the Band.

> The Band's recognition in 1979 was therefore "applied" to the County when it suffered detrimental effects arising from construction and operation of the first casino.

[10/29/03 Order 11:10-13.] (AE 00161-00174.)

The District Court's ruling was simply wrong. *Wind River* and its progeny require *agency application* of an agency decision, not third party application of an agency decision. No published case has ever held that someone other than the federal government can trigger the statute of limitations under 24 U.S.C. section 2401(a) and every one of the cases that follow *Wind River* is to the contrary.[10]

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10 For a representative sampling of the *Wind River* progeny, *see Macklin v. United States*, 300 F.3d 814, 821 (7th Cir. 2002) (IRS recordation of federal tax lien on real property); *Arizona v. Norton*, 7 Fed. Appx. 739, 740 (9th Cir. 2001) (Department of Interior issuance of plan for wild horse management); *Instituto De Educacion Universal Corp. v. United States Dep't of Educ.*, 209 F.3d 18, 21 (1st Cir. 2000) (Department of Education audit of a private educational institution); *Cedars-Sinai Med. Ctr. v. Shalala,* 177 F.3d 1126, 1129 (9th Cir. 1998) (Department of Health and Human Services amendment of Medicare Manual); *Trafalgar Capital Assocs. v. Cuomo*, 159 F.3d 21, 34-

From a policy standpoint, the ruling rewarded the Band's illegal activity, encouraged illogical activity out of the County and allows third parties to trigger the accrual of a federal statute of limitations. Such a position would require the County to sue a federal agency over the bad acts of one its charges at the very time the federal agency was using all of its enforcement powers against the bad actor to stop the illegal activity.

The rule articulated by the *Artichoke Joe's* court was the correct application of *Wind River*. Until Class III gaming on the Rancheria became "probable," and the County could successfully maintain a legal challenge, the County's claim to challenge tribal recognition did not accrue. Legal gaming was not probable in 1996 due to at least three factors. First, the federal government was actively working to shut the illegal casino down. Second, there was no tribal gaming compact with the state at that time. Lastly, the District Court in the *Grassy Run* case was about to, and early in 1997 did, rule that the roads leading to the Rancheria were private, thus ruling out any further operation of the casino.

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35 (1st Cir. 1998) (HUD subsidy calculations); *Cedars-Sinai Med. Ctr. v. Shalala,* 125 F.3d 765, 769 (7th Cir. 1997); *Sierra Club v. Slater*, 120 F.3d 623, 630-631 (6th Cir. 1997) (final agency action approving EIS); *Dunn-McCampbell Royalty Interest v. National Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) (application of federal mining regulations); *Nesovic v. United States*, 71 F.3d 776, 779 (9th Cir. 1995) (IRS recording of federal tax lien on real property); *Air India v. Brien*, 261 F. Supp. 2d 134, 139 (E.D.N.Y. 2003) (promulgation of INS regulations); *Missouri ex rel. Nixon v. Sec'y of the Interior*, 158 F. Supp. 2d 984, 988 (W.D. Mo. 2001) (U.S. Fish and Wildlife Service designation of critical habitat).

D. In its May 13, 2004 Order the District Court Compounded Its Error By Finding that *Wind River* was Inapplicable, and that Federal Enforcement Against A Third Party Triggered the Statute of Limitations as to the County.

After the County filed it Second Amended Complaint Defendants again moved to dismiss on statute of limitations grounds. Federal Defendants and the Band adopted as their own the District Court's view that *Wind River* applied, that the statute of limitation could be triggered by a third party's actions (even illegal actions) and that it was triggered here in 1996 by the Band.[11] The County argued, consistent with its pled allegations, that its right to challenge the federal tribal recognition of the Band accrued when the NIGC approved the development component of the new proposed casino in 2002, and not when the Band took action.

In its May 13, 2004 Order the District Court completely changed the basis for its holding that the County's claim accrued in 1996. Now instead of the Band's illegal activity triggering the statute of limitations, it was the federal government's enforcement actions in response that caused the County's claim to accrue:

> Upon the County becoming aware of the United States Attorney's public announcement of its intention to exert federal authority over the Band and the NIGC's exercise of federal regulatory jurisdiction

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11 Federal Defendants' Memorandum In Support of Motion for Partial Dismissal of Plaintiffs' Second Amended and Supplemental Complaint, pp. 7-12. (AE 00105-00122.)

> over the Band, the County should have known or discovered that the federal Executive Branch was at that time recognizing the Band as an Indian Tribe and the Rancheria as Indian Land. [citation omitted.] The federal authority asserted by the United States Attorney and the NIGC over the Band and the Rancheria was sufficient to "mark[] consummation of the [federal] decision making process" through which the Band was recognized as an Indian Tribe and the Rancheria as Indian Lands, and thus a clear point at which the County's claims accrued.

[5/13/04 Order 16:5-19.]) (AE 00759-00780.)

The problem with this holding is the same as the District Court's first ruling – it is the illegal activity of a third party that is causing the accrual of a different party's claim for relief. It does not make a difference if it is the act of the Band or the act of the federal government enforcing against the Band as judicial review is in the control of the beneficiary of *ultra vires* act (the Band in the District Court's first formulation) or the actor itself (the federal government in the District Court's second formulation). *Wind River* states that a substantive challenge must be brought "within six years of the agency's *application of that decision to the specific challenger*." *Wind River*, 946 F.2d at 716. In other words, *Wind River* requires more than notice of activity by others, it requires application to the specific challenger. For the District Court to hold otherwise was clear error.

The District Court tried to distance itself from *Wind River*, going so far as to say it was inapplicable:

> *Wind River* is inapplicable here, since the doctrine is applicable only to situations where "an agency applies a regulation to a defendant in

> an enforcement proceeding," or where a party "petition[s] the agency to amend or rescind the regulation, [and] then seeks judicial review of the agency's denial . . ." *Environmental Prot. Info. Ctr.*, 266 F. Supp. 2d at 1120.

[5/13/04 Order 17:5-10.] (AE 00759-00780.)

Not only did this holding come as a surprise to the parties, all of whom agreed that *Wind River* applied,[12] but it was not really accurate. The only way the District Court could find that the statute of limitation accrued in 1996 was to find that the claim was a substantive challenge under *Wind River*. If the District Court truly believed *Wind River* did not apply, it would have held that the statute accrued much earlier in connection with one of the many listings in the Federal Register.

In any event, the District Court's reliance on *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 266 F. Supp. 2d 1101 (N.D. Cal. 2003) (*"EPIC"*) was wholly misplaced. The District Court misread *EPIC* for the proposition that *Wind River* is "inapplicable when an agency has not initiated enforcement proceedings or denied a petition to amend or rescind a regulation." The District Court ignored the fact that *EPIC* noted that "the challenger need not be a defendant in a court proceeding, but may bring a court action against the agency to review the administrative proceeding in which the agency applied the rule." *Ibid.* (*citing*

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12 In the May 13th Order, despite the County and the Federal Defendants' attorney's concurrence at the February 9, 2004 hearing before Judge Burrell on Defendants' motion to dismiss, where the attorney for the Federal Defendants conceded that "I think that *Wind River* does, in fact, supply the

Commonwealth Edison Co. v. NRC, 830 F.2d 610, 613 (7th Cir. 1987)). A more recent case from the Northern District of California states the rule correctly. In *American Motorcycle Association Dist. 37 v. Norton*, 2004 U.S. Dist. LEXIS 15662 (N.D. Cal. August 3, 2004), the court noted:

> The Court is persuaded that plaintiff's claim is a substantive challenge to the Service's definition of "adverse modification" [the regulation at issue was promulgated in 1986], which accrued when the Service issued its biological opinion on June 17, 2002, and it rejects defendants' arguments that "as-applied" challenges may only be brought by defendants in enforcement proceedings or regulated entities. Thus, the Center's claim is not time-barred.

Ibid. at *23. *See also Northwest Environmental Advocates v. United States*, 2005 U.S. Dist. LEXIS 5373, *24-25 (N.D. Cal. March 30, 2005). The District Court also ignored the fact that the *Artichoke Joe's* court had already ruled that *Wind River* applied in a setting where the plaintiff there was neither a defendant in an enforcement proceeding or a regulated entity.

In the instant case, as in *Utu Utu, supra*, 766 F. Supp. 842, the County had no administrative remedy with which to perfect standing. It could not petition for rescission of the original listing so it had to wait until the *ultra vires* act was applied to it in 2002, i.e. when legal Class III IGRA gaming became probable.

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analysis" (Reporter's Transcript [11:23-24]).

E. Assuming, as the District Court Ruled, that a Claim Accrued in 1996, the Claim was Extinguished by the Cessation of Operation of the Illegal Casino in December of 1997. Under *Wind River* the Claim Re-accrued in 2002.

After the first illegal casino was shut down in 1997, the detrimental impacts to the County were extinguished and any potential claim, environmental or going to the issue of tribal status of the tribe became moot and non-justicable as a matter of law. There was no case or controversy justifying the County's pursuit of judicial relief. It is a basic tenet of law that a federal court had no authority to issue an opinion upon a moot question. *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 990 (9th Cir. 1999). Thus, even if the County had filed an action against BIA after the 1996 casino operations commenced, the closure of the gaming facility in 1997 would have rendered the issue moot. "A case becomes moot when interim relief or events have deprived the court of the ability to redress the party's injuries." *United States v. Alder Creek Water Co.*, 823 F.2d 343, 345 (9th Cir. 1987).

After the events of 1997 culminating in the closure of the first casino, is was entirely speculative that the County would ever be harmed by a future gaming at the Rancheria. District Court Judge David F. Levi had enjoined the Band and the Rancheria from using the private Grassy Run Road "in aid of any of the activities of any casino, any commercial facility, or any other non-residential/non-

governmental facility on the Rancheria."[13] This is significant in that "relief from another tribunal can moot an action." *Sea-Land Service, Inc. v. International Longshoremen's and Warehousemen's Union*, 939 F.2d 866, 870 (9th Cir. 1991) (*citing Enrico's, Inc. v. Rice*, 730 F.2d 1250, 1253-54 (9th Cir. 1984)). While it is true that voluntary cessation of allegedly illegal conduct does not necessarily deprive a court of power to grant relief (*Enrico's, Inc., supra*, 730 F.2d at 1253), "'legally compelled' cessation of such conduct is not 'voluntary' for purposes of this exception to the mootness doctrine." *Ibid.*

The six-year statute of limitations was re-triggered by the new proposal for Class III gaming at the Rancheria. The *Wind River* court was mindful of the possibility that its holding could lead to the statute of limitations continually being re-triggered. It noted:

> We do not believe that our holding will "render the limitation on challenges to agency orders we adopted in *Penfold* meaningless," . . . Within the narrow scope of challenges to agency decisions that we permit, there are still impediments to repeated attacks upon an agency action. The challenge must be brought within six years of the agency's application of the disputed decision to the challenger. As in this case, principles of *res judicata* will likely bar further challenges to the agency decision once the claimant's first challenge is resolved.

Wind River, 946 F.2d at 715 (citations omitted).

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13 December 9, 1997 Ruling by Judge Levi in the Grassy Run litigation. Cumpston Declaration, at ¶ 107. (AE 00891a-f.)

In the case of the Single Springs Band of Miwok Indians, once there is a final determination whether the Band is in fact federally recognized it is unlikely that there will be any subsequent challenges.

VIII. ARGUMENT – VIOLATIONS OF FEDERAL ENVIRONMENTAL LAWS

In its Order of January 10, 2005, the District Court correctly concluded that the Development Component and the Interchange Component of the proposed Casino Project are "connected actions," but erred in excusing the NIGC and BIA from the procedural duties and substantive analytical requirements that necessarily flow from such a conclusion. The District Court gave only cursory consideration to the agencies' actions pursuant to the Clean Air Act and stated, without explanation, that the agencies' conclusions were not arbitrary and capricious.

The District Court's determinations are reviewed *de novo*. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 992 (9th Cir. 2004). The appellate court reviews the case from the same position as the district court and is not bound by the lower court's conclusions. *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). "[T]he task is to ensure that the agency has taken a 'hard look' at the potential environmental consequences of the proposed action." *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 993 (9th Cir. 2004). The Court must not "rubber stamp" agency actions that are "inconsistent with a statutory mandate or that

frustrate the congressional policy underlying a statute." *Ocean Advocates v. United States Army Corps of Eng'rs*, 361 F.3d 1108, 1118 (9th Cir. 2004).

In this case, neither the NIGC nor the BIA, nor the two combined, prepared an environmental document that satisfies either the letter or the spirit of NEPA.

A. The Agencies Understated Project Impacts and Violated NEPA by Segmenting the Environmental Review of the Casino Project.

At issue in this case is whether the federal agencies properly concluded that the Casino Project will not *significantly* affect the human environment, such that no EIS was required. 43 U.S.C. § 4332(2)(C); 40 C.F.R. § 1501.4. The concept of "significance" is defined in the NEPA regulations in terms of both context and intensity of impact. 40 C.F.R. § 1508.27. In assessing the "intensity" or "severity" of the impact, "[r]esponsible officials must bear in mind that more than one agency may make decisions about partial aspects of a major action." *Ibid.* Thus, "in evaluating intensity," the agency must consider "[w]hether 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*." 40 C.F.R. § 1508.27(b)(7) (emphasis added).

The agencies violated this principle by attempting to break down the "Development" and "Interchange" components of the Casino Project and review

them in two partially overlapping, but vitally inconsistent EAs. (AE 00982-00983; 02356-02376; 40 C.F.R. § 1508.27(b)(7)). The agencies violated NEPA because their approach was deliberately crafted to avoid disclosure of significant environmental effects of the project – as well as to avoid due consideration of mitigation measures and alternatives – "by breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7).

NEPA's regulations are designed to prevent segmentation by requiring that environmental documents evaluate "connected" as well as "cumulative" actions. 40 C.F.R. § 1508.25. "Connected actions," meaning those that are closely related, must be discussed in the same environmental document. 40 C.F.R. § 1508.25(a)(1). In this case, the record shows (and the District Court correctly concluded) that the Development Component and Interchange Component of the project are connected actions within the meaning of NEPA. (AE 01334.) The casino cannot operate unless the interchange is constructed. (AE 02392.) The $18 million required to fund construction of the interchange is available only if the casino is approved. (AE 01350.) The interchange and casino development are connected actions that must be analyzed in the same environmental document *because neither would move forward but for the other. Thomas v. Peterson,* 753 F.2d 754, 758-760 (9th Cir. 1988).

Segmented environmental review is not harmless error, because it results in a distorted and misleading disclosure of what is or is not the "proposed action"; it precludes an integrated analysis and leads to the agencies' failure to take the requisite "hard look" at the environmental impacts of the entire project; and it improperly narrows the range of alternatives considered to address project impacts. *Western Radio Services Company, Inc. v. Glickman*, 123 F.3d 1189, 1194 (9th Cir. 1997); *see City of Sausalito v. O'Neill*, 386 F.3d 1186, 1207 (9th Cir. 2004) (a NEPA document is inadequate unless its "form, content and preparation" foster both informed decisionmaking and public participation). This Court has plainly stated its "firm rejection of agency attempts to bypass NEPA's protection by illegally segmenting projects in order to avoid consideration of an entire action's effects on the environment." *Ibid.*

B. The Agencies' Defenses Attempting to Justify Segmented Review Are Contradictory and Legally Insupportable.

The agencies conceded, and the District Court agreed, that the actions of the NIGC and BIA are "connected." The agencies argued that it is "obvious" that "jurisdictional limitations *required* the preparation of two Environmental Assessments," while simultaneously maintaining it is equally "obvious" that "both documents considered the impacts of the two projects in any event." These defenses are inherently contradictory and fail on both counts.

First, the entire framework of multi-agency NEPA review recognizes that often no single agency (or sovereign entity, since tribal interests often may be at stake in relation to a proposed major federal action) has jurisdiction over the entire proposal. *See*, e.g., 40 C.F.R. §§ 1501.5, 1501.6; *Westlands Water Dist. v. Norton*, 376 F.3d 853, 864 (9th Cir. 2004). This matter presents nothing unusual in that regard, and the agencies' attempt to rely on "jurisdictional limitations" of the California Department of Transportation ("Caltrans") as a prohibition against preparing a single document to consider their connected actions violates NEPA. 40 C.F.R. § 1508.25(a)(1).

The agencies apparently concede that their reliance on "jurisdictional limitations" to justify segmented environmental review is misplaced; they repudiated that reliance by arguing that the agencies evaluated the impacts of *both* projects in the two documents. The agencies thus contend that jurisdictional limitations required two documents, at the same time asserting that the BIA's EA for the Interchange Component fully "incorporated and adopted" the NIGC's EA for the Development Component. Both contentions cannot be correct; if the agencies were prohibited from reviewing these connected actions in a single document at the outset due to Caltrans' "jurisdictional limitations," then the agencies could not also fully "incorporate and adopt" the NIGC's EA into the BIA's EA without running afoul of such a prohibition. According to the agencies,

they evaluated both projects in both documents, notwithstanding their simultaneous contention that Caltrans' "jurisdictional limitations" prevented them from doing so. The agencies effectively acknowledge that Caltrans' "jurisdictional limitations" are immaterial for purposes of determining the scope of the federal agencies' NEPA review, yet offer no other explanation as to why impacts of their connected actions could not be reviewed in one document.

C. The Agencies Must Prepare an EIS Because the Casino Project May Cause Significant Adverse Effects Related to Increased Traffic.

The NIGC's Draft EA purports to evaluate potential traffic impacts using an outdated version of the Highway Capacity Manual (AE 01574), and it narrowly restricts the geographic scope of its analysis, omitting analysis of impacts on County roads and along U.S. Highway 50 more than two miles west and five miles east of the site. (AE 01179-00184; s*ee Lands Council, supra*, 395 F.3d at 1031 (outdated technical information prevents an accurate assessment of impacts.)) It attempts to estimate trip rates by examining other casinos that are one-fourth to one-sixteenth the Casino Project's size, arbitrarily rejecting comparably sized casinos in Reno, Los Vegas, and San Diego County. (*Ibid.*; *see also* AE 02292; 02296; 01575.) The discussion in the NIGC's Draft EA rejects industry standard methods of estimating the in/out splits in trip generation rates, and its selection of Saturday evenings as the peak trip generation period lacks any evidentiary support and contradicts available evidence. (AE 01576; 01577; 02292-02297.) It

arbitrarily reduces standard trip generation estimates for the hotel portion of the resort and for the Development Component overall by 75% and 40% respectively, based upon optimistic and undocumented assumptions about co-use and "diverted" through trips. (AE 01578; 01579; 02294.) The EA ignores trips generated by related support functions such as restaurants, and facilities operation and maintenance. *Ibid.* It utilizes inconsistent and understated growth rates in trips over time, and fails to include the traffic study's appendices. (AE 02295.)

Comments on the NIGC's Draft EA highlighted its many deficiencies, and demonstrated that because the Casino Project may cause significant adverse effects related to traffic, preparation of an EIS is required. (*See*, e.g., AE 01482; 01573; 02292-02297.)

The NIGC's Final EA consists of revisions to the NIGC's Draft EA (AE 01313-01481), a slim volume summarizing and responding to comments on the NIGC Draft EA (AE 01583-02273), and 20 appendices (AE 01583-02273.) The appendices include hundreds of pages of new material, including a wholesale revision to the traffic operations analysis prepared in August 2001. (AE 01583-02273.) The traffic analysis contained in the NIGC Draft EA (AE 01179-01184) was substantially revised, and the NIGC's Final EA contains an overhauled discussion of "Resource Use Patterns" section discussing present traffic baselines, the effect on trip generation from the Casino Project, and an analysis of freeway

interchange design impact on traffic patterns using information contained in a revised Appendix K. (AE 01412-01422.)

Despite the bulk of new information related to traffic included in the NIGC's Final EA and its significantly expanded "Appendix K," however, the agencies failed to address substantial questions as to whether the proposed actions may have a significant effect on the environment due to increased traffic. The record contains no evidence, other than the agencies' own self-serving conclusions, that any of the commenters' concerns and suggestions were successfully addressed and/or incorporated into the Final EA. Specifically, the Final EA and new appendix fail to fix the defects in trip generation assumptions, the analysis of traffic impacts on County roads, peak-hour assumptions and "passer-by capture" identified in the County's comments on the NIGC's Draft EA. (AE 02292-02296.) Rather than acknowledging and correcting those deficiencies, much of the new material consists of attempts to justify the Draft EA's analyses, or lack thereof. The federal agencies' own pronouncement that the additional information in the Final EA resolved all outstanding issues "alone should not be deemed to put to rest any controversy." *Surfrider Foundation v. Dalton*, 989 F. Supp. 1309, 1323 (S.D. Cal. 1998), *aff'd*, 196 F.3d 1097 (9th Cir. 1999). If the agencies' own conclusions "precluded a finding of controversy, then the 'highly

controversial' intensity factor would not add anything to NEPA analysis, rendering 40 C.F.R. § 1508.27(b)(4) a 'nullity.'" *Ibid.*

Nor were any of these studies made available for public review or comment prior to the release of the NIGC's Final EA. The failure to recirculate the NIGC Draft EA or make this new information available for public review and comment violates NEPA because it precluded the public from providing timely and meaningful input on these issues. *Lands Council, supra*, 395 F.3d at 1032 (NEPA requires complete disclosure of scientific methodology and potential problems and deficiencies); 40 C.F.R. §§ 1503.1, 1506.6; 40 C.F.R. § 1500.1(b). The NEPA Guidelines direct agencies to "insure the professional integrity, including scientific integrity" of the discussions and analyses in a NEPA environmental review document. 40 C.F.R. § 1502.24. "This direction includes a requirement that methodologies and scientific sources be disclosed" for public review. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1213 (9th Cir. 2004).

D. The Agencies Must Prepare an EIS Because the Casino Project May Cause Significant Air Quality Impacts.

Numerous defects and omissions in the agencies' traffic-related air quality analysis invalidate their conclusions of "insignificance" regarding the Casino Project's potential traffic-related air quality impacts. For example, the agencies fail to properly identify the assumptions used in the air quality analysis regarding trip length, fleet composition, and other inputs to the URBEMIS7G emission

model, and underestimate total vehicle emissions related to the proposed actions. (AE 01171-01175; 02297.)

A comparison of the NIGC Draft EA's air quality analysis and the new information contained in the Final EA discloses numerous analytical gaps and anomalies. The Draft EA contains a mere two pages of air quality analysis (AE 01174-01175) concluding with the statement that the "Proposed Action" will "not result in an increase in emission greater than 25 tons per year . . . which is the applicable 'de minimis' threshold, and therefore, the Bureau of Indian Affairs would not be required to make a conformity determination for this alternative under the general conformity rule." (AE 01175.) These two pages of air quality information were presented in a vacuum, with none of the detail or information regarding assumptions and methodology that were reasonably necessary to allow for informed public participation. As discussed in detail below, review of the new information set forth in the Final EA revealed that the agencies' analysis violates the Clean Air Act by improperly calculating project emissions relative to the "de minimis" threshold and is insupportable.

Furthermore, the agencies must prepare an EIS to evaluate the impacts of their proposed actions because the traffic-related air quality impacts of those actions are highly controversial in the sense that experts disagree as to their nature and extent. 40 C.F.R. § 1508.27; Declaration of Robert G. Dulla ("Dulla

Declaration), ¶¶ 1-10. (AE 00904-00913.) Such disagreement relates, for example, to the agencies' assumptions regarding trip generation rates, which not only are insupportably low but also are internally inconsistent. (AE 02297.) If the agencies used consistent assumptions in its analyses of traffic and air quality, then the project's daily emissions would be nearly twice as much as stated in the EA. (AE 02297.) Likewise, the agencies manipulated their assumptions regarding "capture rates" for vehicles that would otherwise be passing by the project location along Highway 50 in order to reduce the project's emissions totals and avoid disclosure of significant air quality impacts (and thereby avoid consideration of mitigation measures and alternatives). (AE 01084a,b; 02184; 02292; 02297.) Again, the agencies' "capture rate" assumptions not only lack scientific support as NEPA requires (40 C.F.R. § 1502.24), but also are internally inconsistent and vary in the Draft EA from eight percent (8%) (AE 01084b) to forty percent (40%) (AE 02184).

In the Final EA, the agencies attempted to reconcile the 8% capture rate identified in the marketing study with the aggressive 40% figure used in the traffic study. (AE 01288.) The Final EA morphed the figure from 8% of *total traffic* on Highway 50 (as described in the marketing study) into a *percentage of gamers* – only those vehicles traveling on Highway 50 to South Lake Tahoe's casinos. *Ibid.* Using this rationale, the 8% figure is normalized to equal 20% of total traffic on

Highway 50. *Ibid.* Even accepting this rationale, however, there remains a 100% discrepancy between the agencies' own figures (20% as opposed to 40% capture rate) on a critical traffic issue. To bring the capture rate closer to their target (because any capture rate less than about 30% would exceed the 25 tons per year de minimis threshold and result in a significant air quality impact) the agencies took the normalized marketing study number (20%) and added percentages of unknown origin to it, to come up with a capture rate of 38.8%. (AE 01289.) The Final EA expresses the factual basis for its shell game as follows: "Although close scrutiny may result in reasonable questions regarding the nature of each trip type, overlap, etc., it is believed that the analysis reasonably represents the manner in which trips would be generated and distributed as a whole." *Ibid.* Such a rationale hardly resolves the substantial questions raised (by the agencies' own documents as well as by public comments) on this point.

Indeed, the inherent lack of scientific integrity in the agencies' EAs is controversial in and of itself and raises substantial questions regarding the project's impacts such that preparation of an EIS is required. 40 C.F.R. § 1508.27(b)(4) and (b)(5). This controversy is heightened, moreover, by technical information submitted by experts who identified the gaps and anomalies in the agencies' methodology. (AE 02292-02997; 02688-02690.) Rather than preparing an EIS as NEPA therefore prescribes, the agencies impermissibly

attempted to resolve these substantial questions regarding project impacts outside the public eye in the Final EA, which was never subject to public scrutiny until the agencies' actions were a *fait accompli*. The Ninth Circuit rejected such tactics in *Lands Council*, *supra*, 395 F.3d at 1031. In that case, the agency's "heavy reliance" on methods that made inadequate disclosure of relevant variables was improper, and the Court found that "this withholding of information violated NEPA, which requires upfront disclosures of relevant shortcomings or data in the models." *Ibid.*; *see also* 40 C.F.R. § 1502.22.

The agencies' NEPA violations are highlighted by rulings in a companion Sacramento County Superior Court case regarding enforcement of the California Environmental Quality Act ("CEQA") to require Caltrans to properly review air quality issues related to the Interchange Component of the Casino Project. In that case, Judge Lloyd G. Connelly ruled that the agencies' analysis fails to address state air quality standards. Judge Connelly explained that, "the absence of such analysis implies that interchange operations would *not* permit attainment of the state standard" (italics in original), and ordered Caltrans to prepare a proper environmental analysis to ascertain the impacts on state air quality standards. *See* Order on Further Return, September 7, 2004. (AE 00918-00926.) This is a NEPA issue as well as a CEQA issue. The CEQA regulations require preparation of an EIS to evaluate any action that "threatens a violation of a Federal, State or local

law or requirements imposed for the protection of the environment." 40 C.F.R. § 1508.27. Indeed, the Final EA makes the California state ozone standard an issue, by explicitly listing it as an applicable standard. (AE 01365-01366, Final EA at pp. 3-13 and 3-14.) The state court has already determined that the agencies made no adequate evaluation of whether the Casino Project will violate the state standard. Because there has been no analysis under CEQA, there has necessarily been no analysis under NEPA as regards state ambient air quality standards.

Even without the benefit of Judge Connelly's rulings, the record makes clear that the agencies have manipulated the air quality analysis for the Casino Project in such a way that there has been no "hard look" at air quality impacts.

1. The Agencies' General Conformity Analysis Violates EPA Regulations and Subverts NEPA's Goal of Full Public Disclosure.

The record demonstrates that the general conformity analysis in the NIGC's Final EA failed to account for emissions from vehicle travel throughout the entire Sacramento ozone nonattainment area, in direct contravention of EPA regulations.[14] The NIGC's analysis segmented the Sacramento ozone nonattainment area and then only looked at emissions from travel in a portion of El Dorado County, a subset of the nonattainment area. Thus, shorter vehicle trips (5-19 miles in length) were used to generate emissions estimates instead of the

14 This point is made based on information presented in the Final EA, and thus stands as valid whether or not the Dulla Declaration, submitted to further

longer trip lengths needed to represent actual travel from the Bay Area and Sacramento to the proposed project. The result was a substantial underestimation of emissions that led NIGC incorrectly to conclude that emissions associated with the hotel/casino would fall below the general conformity significance thresholds of 25 tons/year for volatile organic compounds (VOC) and oxides of nitrogen (NOx). The NIGC thus avoided doing a full general conformity analysis (and identifying measures to mitigate all air quality impacts).

a. The Agencies Cannot Save the General Conformity Analysis By Repudiating It.

In the District Court proceedings, the Band attempted to avoid this issue by repudiating the agencies' air quality analysis altogether. The Band claimed that the NIGC had no obligation to even include operational vehicular emissions within its general conformity analysis.

The analysis in question is at pages 4-7 thru 4-10 of the NIGC's Final EA (AE 01403-01406), with technical details in Appendix O (AE 02381-02186). The inclusion of vehicle trip emissions is clear and explicit. NIGC determined the number and length (miles traveled) of vehicle trips associated with operation of the hotel/casino and, by using the URBEMIS model, the emissions associated with those trips. This was the approach that NIGC selected to demonstrate that general conformity thresholds were not exceeded and to comply with EPA's general

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explain this technical issue, is admitted and considered by the Court.

conformity regulations. The same approach was used in the Draft EA that was presented to the public, and upon which comments were submitted.

Having selected this approach in both its Draft and Final EAs, NIGC was bound to do it correctly. The NIGC may not present the public patently misleading vehicle trip emission calculations and then, when confronted, pretend it never happened. The Band's improbable request to exclude operational vehicle emissions would have a further unacceptable consequence: it would render the Final EA *per se* incomplete and inadequate under NEPA, because there would no longer be an air quality analysis of *all* project-related air emissions. Recognizing its NEPA obligation to present a comprehensive analysis, the Final EA states in the introduction:

> This FEA addresses the environmental effects of the operation of the proposed interchange as described above. This is not to say that the interchange is a component of the Proposed Action being considered by the NIGC. However, *this closely related project is being considered within the FEA so that all potential environmental effects are considered within one analysis.*"

AE 01331 (NIGC's Final EA, p. 1-12) (emphasis added).

As presented in Appendix O to the Final EA, the operational vehicle emissions for VOC and NOx are 20.71 tons/year and 17.18 tons/year, respectively. (AE 02200.) Other area source emissions account for only 1.8 and 0.8 tons/year of VOC and NOx, respectively. (AE 02186, Area Source Emissions.) Simple math shows that the Band is asking the Court to ignore 90% of NIGC's air analysis and

focus on the remainder in assessing whether NIGC provided full disclosure to the public by taking the requisite "hard look" at "*all* potential environmental effects" as NEPA requires.

b. The NIGC Was Obligated to Perform a General Conformity Analysis That Included Operational Vehicular Emissions.

As noted above, the NIGC committed to address the effects of operation of the interchange as well as the hotel/casino in the introduction to its Final EA. (AE 01331.) Section 4.1.3 selected the "general conformity rule" to assess the significance of the air quality impacts of the hotel/casino project under NEPA. (AE 01403.) No mention is made of transportation conformity in the Final EA. The only procedures available to assess the air quality impacts of the project were those specified in 40 C.F.R. Part 93, pertaining to general conformity.

Under the procedures for evaluating general conformity, the sponsoring federal agency must look not only at "direct" emissions of the federal action, but also "indirect" emissions. The EPA rule states that "[f]or Federal actions not covered by paragraph (a) of this section [i.e. non-transportation projects], 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 exceed [the applicable thresholds]." 40 C.F.R. § 93.153(b) (italics added). Indirect emissions are defined as:

> those emissions of a criteria pollutant or its precursor 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.

40 C.F.R. § 93.152.

The EPA's conformity guidance makes it clear that indirect emissions include operational vehicle emissions from a project after it has been completed. For example, the EPA guidance lists emissions from employee trips from new office facilities and trips to and from a ski area by skiing commuters as examples of indirect emissions. EPA Guidance, p. 14. The ski facility example is particularly applicable, since like gaming it is a voluntary, recreational activity engaged in by the public. (In this case, the "control" test for counting indirect emissions can also be met because NIGC can limit emissions by imposing conditions on its approval that will reduce travel, such as employee ride-sharing requirements, use of buses or van pools by gaming patrons, etc.)

Under general conformity, examining operational vehicle emissions is mandatory. In its arguments below, the Band attempted to avoid this conclusion by arguing that the FONSI issued pursuant to the NIGC's Final EA was "contingent" on a transportation conformity analysis being done in the BIA's EA for the interchange. The FONSI reveals, however, that it was "contingent upon the provision of direct access to the Shingle Springs Rancheria from US Interstate

50 via a dedicated interchange off US 50" (AE 00983) and not on completion of a transportation conformity analysis. Similarly, the FONSI states that "[t]his contingency shall be deemed satisfied when CALTRANS and the BIA execute the Cooperative Agreement concerning the design and construction of the interchange." *Ibid.* No indication is made that the contingency will be satisfied when a transportation conformity analysis is performed, and the NIGC's Final EA itself contains no commitment to perform a transportation conformity analysis.

Faced with the facts of NIGC's general conformity analysis, the Band tried in the lower court proceedings to rewrite the administrative record to fill gaps and exclude embarrassments. When the Band attempted the same stratagem in state court, Judge Connelly quite correctly pointed out that such changes needed to be aired in a public setting as required under CEQA. Order on Further Return, September 7, 2004. This Court should reach the same conclusion under NEPA. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989, 996 (9th Cir. 2004) ("NEPA requires that the public receive the underlying environmental data from which [an agency] expert derived her opinion").

E. The Agencies Must Prepare an EIS Because the Casino Project May Cause Significant Adverse Effects Related to Water Quality.

The NIGC's Draft EA concludes that all surplus wastewater can be disposed of by percolation into the area's shallow soils. (AE 01109, 01185-01186.) The NIGC's Draft EA concludes that an average of nearly 100,000 gallons of water

daily can be absorbed by an area of four acres, rain or shine, 365 days per year. *Ibid.* That conclusion is reached in part by assuming that infiltration rates for these soils will exceed rates published by the federal Soil Conservation Service. (AE 02297-02298; 02304.) The Regional Water Quality Control Board ("RWQCB") responded to the Draft EA's wastewater disposal plan as follows: "Board staff is very concerned that the on-site conditions and limited disposal area is [sic] not adequate to ensure that wastewater will not resurface. The application rate per acre is very high and difficult to justify." (AE 02304; *see* AE 02302-02305.) Also, the underlying groundwater into which the wastewater will flow supplies numerous nearby residences with their drinking water. (AE 02298, 02316.) Further, the efficacy of the proposed wastewater treatment method prior to disposal is unproven. (AE 02303-02305; 02298.) The NIGC's Draft EA provides no backup plan or holding capacity in the event of an outage or emergency, and there is no plan to obtain the National Pollutant Discharge Elimination System permit that the federal Clean Water Act would require in the event wastewater does run off. (AE 02297-02298; 02303-02305.) Ultimately, the RWQCB recommended further study. (AE 02304.)

Rather than properly study the issue, however, the NIGC's Final EA and an appendix disclose that the NIGC abandoned the prior proposed wastewater treatment and disposal system in favor of a completely new treatment system and a

substantially revised disposal regime. (AE 01339-01342; 01423; 01690-01759.) The feasibility of the new treatment system is unsubstantiated and uncertain. The proposed disposal regime expands the percolation area from four to six or seven acres, which remains grossly inadequate for the daily average disposal of 98,000 gallons of wastewater, particularly in wet weather. (AE 01709.)

The record contains no indication that any of the commenters' concerns and suggestions were successfully addressed or incorporated into the Final EA. In particular, the record contains no evidence that the concerns of the RWQCB were addressed. In reality, the RWQCB's concerns regarding the Draft EA went unaddressed in the Final EA (specifically, the soil and percolation tests performed in November 2000 and attached in Appendix C (AE 0098-00994) to the Draft EA are identical to those incorporated in Appendix E (AE 01750-01759) to the Final EA). The NIGC's general reference to the RWQCB's permitting process for other projects (including the United Auburn Rancheria (AE 01340) and the Veijas Casino in San Diego County (AE 01339)) is irrelevant to the environmental issues raised regarding this particular proposal in this location. (AE 01301.) The agencies' contention that they resolved all substantial questions regarding project impacts because they received no critical comments on the NIGC's Final EA is specious, because the agencies afforded *no opportunity* for public review and comment on that document. Substantial questions regarding significant project

impacts, including serious concerns raised by regulatory experts, were swept under the rug with a FONSI.[15]

F. The Agencies' Failure to Properly Evaluate Cumulative Impacts Violates NEPA.

A "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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7; *see also Lands Council*, *supra*, 395 F.3d 1019. Although a single project may have only minor impacts when considered in isolation, that same project may create significant impacts when considered in connection with other projects. Where "several actions have a cumulative . . . environmental effect, this consequence must be considered in an EIS." *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990). To comply with NEPA:

> The cumulative impact analysis must be more than perfunctory; it must provide a 'useful analysis of the cumulative impacts of past, present, and future projects.' Finally, cumulative impact analysis must be timely. It is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now.

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15 *After* pronouncing, without public review or comment, that the RWQCB's concerns had been satisfied and adopting FONSIs, the agencies backfilled their record with vague, post-hoc correspondence with the RWQCB. (AR 17099.)

Kern v. BLM, 284 F.3d 1062, 1066 (9th Cir. 2002); *see also Klamath-Siskiyou Wildlands,* 387 F.3d at 993-994 ("Although each of the EAs contains a section of more than a dozen pages under the heading 'Cumulative Effects,' a close read reveals that those sections do not adequately discuss the subject").

In the matter at hand, the BIA did not actually provide an analysis of cumulative impacts associated with the proposed freeway interchange, and instead attempted to satisfy this requirement through "incorporation by reference" of the NIGC's Final EA. (AE 02360, 02394.) NEPA prohibits this tactic. *Natural Resources Defense Council v. Duvall*, 777 F. Supp. 1533 (E.D. Cal. 1991); *Klamath-Siskiyou, supra*, 387 F.3d at 993-998 (discussing tiering, incorporation by reference, and the need for meaningful, quantified analysis of cumulative impacts). While the NEPA guidelines state, in the context of preparing an EIS, that "[a]gencies shall reduce excessive paperwork by . . . incorporating by reference," the BIA misappropriated this time and cost management device as a surrogate for conducting a substantive analysis of environmental impacts in its EA. 40 C.F.R. § 1500.4. The BIA's document simply drew the conclusions from the NIGC's document and pasted them, verbatim, into a chapter of its own. (AE 02402.)

Even if incorporation by reference in the BIA's EA was not procedurally improper, it is substantively deficient, because the information purportedly

incorporated by reference into the BIA's Final EA falls far short of satisfying the agency's obligation to analyze cumulative impacts. (AE 02360, 02394.) According to the BIA's FONSI, the agency incorporated by reference the "environmental analysis of the hotel and casino." (AE 02360.) Under NEPA, however, a cumulative impact assessment must do more than assemble information from projects on an individual basis; it must *analyze the collective impact from two or more projects in combination.* 40 C.F.R. § 1508.7; *City of Tenakee Springs*, *supra*, 915 F.2d at p. 1312. Because the BIA's EA attempted to incorporate by reference only general information from other past, present, and reasonably foreseeable future actions rather than substantively addressing cumulative impacts, the BIA's EA violates NEPA.

G. The Federal Agencies Violated NEPA by Failing to Adequately Evaluate Project Alternatives.

NEPA requires the agencies to study appropriate alternatives to the proposed project. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9. The alternatives evaluation is "the heart" of the NEPA analysis. 40 C.F.R. § 1502.14. The extent of the range of reasonable alternatives to be considered depends on the nature of the proposal. *Presidio Golf Club v. National Park Service,* 155 F.3d 1153, 1160 (9th Cir. 1998). This NEPA principle is particularly important in the matter at hand, where the federal agencies have shifted and segmented their characterizations of the proposed actions not only to avoid a proper analysis of

project impacts, but also to unduly constrain the scope of analysis of alternatives. The NIGC's EA asserts, for example, that development of an extremely large and extraordinarily profitable casino resort is required because a smaller revenue-generating alternative could not pay the cost of constructing the requisite highway interchange. (AE 01350.) The BIA's EA states, however, that the highway interchange "is needed with or without the proposed hotel and casino project" and its environmental review is concerned exclusively with the competing interchange design alternatives. (AE 02378.) By breaking down the proposed actions 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 (AE 01350).[16] The BIA's EA, in turn, 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. (AE 02378.)

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16 Both the NIGC's Draft and Final EAs indicate that the "reduced intensity" alternative would substantially reduce economic benefits to the Band due to the fact that construction of the interchange (to paid for by the Band) "will cost approximately 15 million dollars," ostensibly making the shopping center alternative financially infeasible. (AE 01123, 01350.) It is incongruous, however, that a smaller casino alternative is not considered, particularly given projected revenues for the proposed Casino Project ($180.5 million in annual gaming revenues (excluding poker, keno, sports betting, and bingo). (AE 01085.)

The agencies' perfunctory consideration of alternatives satisfies none of NEPA's requirements, particularly given the very broad purpose of the proposed actions – to provide a viable means of economic development for residents of the Rancheria. (AE 01345-01352, NIGC's Final EA; AE 02380-02391, BIA's Final EA.) Alternative land uses that could achieve the goal of the proposed action could include a variety of commercial, industrial, recreational, professional, mixed use, or residential uses in a multitude of possible densities, intensities, and locations. Yet the federal agencies limited the scope of alternatives so severely that, other than the "no action" alternative, they considered only one "non-casino" option. (AE 01347-01348.)

The NIGC's Final EA briefly considers only two alternatives to the project: (1) the mandatory "no-action" alternative (40 C.F.R. § 1502.14(2)) (AE 01347); and (2) a "reduced-intensity" alternative whereby "an interchange would be constructed, and a shopping center developed on the same land as identified for the hotel/casino complex under the Proposed Action." (AE 01348.) Similarly, the BIA's Final EA lists only three alternatives: No Action; a "Flyover" interchange alternative (AE 02381); and a "Diamond" alternative (AE 02385). These "alternatives" are virtually indistinguishable from the proposed project set forth in the Final EA. (AE 02379.) No other alternative such as a smaller casino or any other revenue-generating land use with potentially less impact to the environment

is evaluated. (AE 02380-02391; 01345-01351.) A comparison of virtually identical alternatives is an empty exercise and does not fulfill the purpose of the alternatives analysis under NEPA.

H. Failure to Demonstrate that the Casino Project Would be in Conformity with the State Implementation Plan Violates the Clean Air Act.

The federal Clean Air Act prohibits federal agencies from approving any activity that does not conform with California's state implementation plan ("SIP"). 42 U.S.C. § 7506(c)(1); *see also* 40 C.F.R. Part 93 (U.S. EPA conformity regulations). Under the Clean Air Act, "conformity" is defined broadly to include actions that may increase the frequency or severity of any existing violation of any standard in any area of the state or delay timely attainment of any standard in any area of the state. In reviewing the proposed Casino Project, the BIA and NIGC were required to demonstrate "general conformity" with federal and state air quality standards. 42 U.S.C. § 7506(c)(1). In other words, they were obliged to affirmatively demonstrate that the Casino Project would not violate, but conform with, the SIP. (*Ibid.*; AE 01403.) This means that, as noted in the NIGC's Final EA, the federal agencies must demonstrate that emissions resulting from their proposed actions do not exceed the "de minimis" thresholds established in the Clean Air Act's general conformity rule:

> Under the Federal Clean Air Act Amendments of 1990, federal agencies must make a determination of conformity with the applicable State Implementation Plan ["SIP"] before taking any

> action on a Proposed Action. In 1993, [the Environmental Protection Agency ("EPA")] published a rule (referred herein as the "general conformity rule") that indicates how most federal agencies[] are to determine whether a conformity determination is required, and if so, how to make such a determination. (EPA, 1993.) The rule establishes "de minimis" thresholds that are used to determine whether a conformity determination is required. De minimis thresholds apply only to the pollutants for which the area is non-attainment. If the emissions increase due to a Proposed Action would exceed the applicable de minimis thresholds, then the rule establishes specific criteria through which a federal agency must demonstrate that the Proposed Action would conform to the SIP, despite the greater-than-de-minimis increase in emissions. In this case the applicable non-attainment pollutant is ozone and the applicable SIP is [the] *Sacramento Area Regional Ozone Attainment Plan*; and the applicable de minimis thresholds, based on the current "severe" non-attainment classification of El Dorado County (and the rest of the Sacramento Valley Area Air Quality Maintenance Area) are 25 tons per year for VOC emissions and 25 tons per year for NOx emissions.

AE 01403. The federal agencies' proposed actions would be undertaken in the Sacramento federal ozone non-attainment area. El Dorado County is only a portion of the Sacramento federal ozone non-attainment area, which also includes all of Sacramento and Yolo Counties and portions of Placer, Sutter, and Solano Counties. Dulla Declaration, ¶¶ 3-5. (AE 00906-00909.) The applicable de minimis threshold is 25 tons per year for VOC and NOx emissions. (AE 01403.)

The EPA's general conformity regulations require that all pollutants emitted within the nonattainment area that will result from the proposed federal action must be evaluated against the de minimis thresholds. 40 C.F.R. § 93.153(b). Specifically, section 93.153(b) states:

> For Federal actions not covered by paragraph (a) of this section, a conformity determination is required for each pollutant where the total of direct and indirect emissions in a nonattainment area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section.

40 C.F.R. § 93.153(b). The Final EA's emissions analysis failed to comply with this requirement and estimated emissions that will result from the proposed action only within a *portion* of the non-attainment area. In reviewing the Casino Project, the agencies improperly narrowed the scope of their analysis by evaluating "*only those emissions that are emitted into the air basin in which the project is located.*" (AE 01405 (emphasis added).) Although *80%* of the trips generated by the Casino Project are expected to come from Sacramento or the San Francisco Bay Area, the agencies' conformity analysis accounted only for trips within the Mountain County Air Basin – which would include emissions from only 20% of project-related trips. (AE 01405.) As a result, the agencies manipulated the factors used to calculate emissions of ozone precursors (pollutants for which the area is in non-attainment). The level of these emissions is deliberately understated to support the Final EA's conclusion that emissions from the Casino Project do not exceed the general conformity "de minimis" thresholds.

Emission estimates presented in Appendix O of the Appendices to the Final EA (incorrectly referred to as Appendix H in the Final EA) show that aggregate emissions for transportation activity and area source emissions produced by the project (from the page titled "Summary of Emissions") are 22.56 and 17.97 tons per

year for VOC and NOx respectively. (AE 02186.) These values are shown to be below the 25 ton per year VOC and NOx thresholds applicable to the Sacramento federal ozone nonattainment area. The transportation component of these emissions (20.71 and 17.18 tons per year for VOC and NOx respectively) is based on the trip lengths that are representative of travel occurring only within the Mountain Counties Air Basin. Dulla Declaration, ¶ 6. According to the text in the Final EA, they are based on trip lengths of 5 – 19 miles, which does not account for trips originating in either Sacramento or the Bay area. Given that the emission totals are marginally below the 25-ton thresholds (particularly VOC), based on information disclosed for the first time in the Final EA, it is clear that if emissions from the trips originating in Sacramento and the Bay Area were included, the emissions expected to result from the proposed actions would substantially exceed the general conformity de minimis thresholds. Dulla Declaration, ¶ 6. (AE 00910.)

Of course, the agencies did not include these justifications for their numbers in the Draft EA, and afforded no opportunity for public comment on the Final EA. Air quality experts who reviewed the cryptic, two-page air quality analysis in the NIGC's Draft EA in light of the new data and information regarding assumptions and methodology in the Final EA found analytical anomalies in the agencies' modeling in several locations: Appendix J of the Draft EA[17]; the Final EA; the

17 AE 01071-01084 (Appendices, Shingle Springs Rancheria, 5-Acre Fee-Trust

response to comments for the EA[18] and the BIA's subsequent EA for the associated highway interchange.[19] Dulla Declaration, ¶ 7. (AE 00910-00911.) In short, the NIGC's Final EA revealed new information disclosing that the agencies' air quality analysis was prepared to achieve the overriding objective of producing emission estimates below the de minimis threshold; the only way to accomplish that objective was by not complying with the general conformity requirement to account for all project emissions emitted within the entire non-attainment area. Dulla Declaration, ¶ 10. Had a proper analysis been conducted using trip lengths representing project-related travel throughout the entire non-attainment area, and not just the El Dorado County portion of the non-attainment area, project emissions clearly would have exceeded the general conformity de minimis thresholds. *Ibid.* That result would have caused the Final EA to conclude that air pollution impacts from the project are significant (thus preventing the issuance of a FONSI), and would have triggered the requirements of a full conformity determination under EPA regulations (40 C.F.R. §§ 93.158, 93.159 and 93.160). Dulla Declaration, ¶ 10. (AE 00912-00913.) The agencies' strategy conceals

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Transfer Project and Hotel and Casino Project, El Dorado County, California, January 2001).

18 AE 01230-01312 (EA Summary Comments and Responses to Comments, Shingle Springs Rancheria, Hotel and Casino Project, El Dorado County, December 2001 (pages 27-28)).

19 AE 02353-02355 (URBEMIS 7G output presented in Appendix E of the Draft Environmental Impact Report/Environmental Assessment).

project emissions in an effort to avoid these requirements and violates the Clean Air Act as a matter of law. 40 C.F.R. § 93.153(b); 40 C.F.R. § 93.158 – 93.160.

IX. CONCLUSION

For the reasons set forth herein, the County respectfully requests that the District Court's ruling barring the County's challenge to the tribal status of Intervenor Shingle Springs Band of Miwok Indians and federal agency approval of gaming by the Band be reversed and that this matter be remanded to the District Court. Additionally, the County respectfully requests that this Court reverse the District Court and order the NIGC and BIA to comply with the procedural mandates of NEPA by preparing an EIS, with the full participation of local governments and the public, as is required by law, before any further action is taken with regard to the hotel casino and highway interchange project.

Dated: May 23, 2005

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