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15 **UNITED STATES DISTRICT COURT**
16 **EASTERN DISTRICT OF CALIFORNIA**
17 **SACRAMENTO DIVISION**

18 UNITED AUBURN INDIAN
19 COMMUNITY OF THE AUBURN
20 RANCHERIA

21 Plaintiff.

22 vs.

22 KENNETH LEE SALAZAR, et al
23 Defendants, and
24 THE ESTOM YUMEKA MAIDU TRIBE
25 OF THE ENTERPRISE RANCHERIA,
26 CALIFORNIA,

27 Intervenor Defendant.

CASE NO. 12-CV-03021-TLN-AC
(Consolidated Cases)

**INTERVENOR-DEFENDANT'S
SECOND 60-DAY NOTICE OF
CONSTRUCTION ACTIVITIES**

1 CITIZENS FOR A BETTER WAY, et al.
2 Plaintiffs.

3 vs.

4 UNITED STATES DEPARTMENT OF
5 INTERIOR, et al.,

6 Defendants, and

7 THE ESTOM YUMEKA MAIDU TRIBE
8 OF THE ENTERPRISE RANCHERIA,
9 CALIFORNIA,

Intervenor Defendant.

10 CACHIL DEHE BAND OF WINTUN
11 INDIANS OF THE COLUSA INDIAN
12 COMMUNITY, a federally recognized
13 Indian Tribe,

Plaintiff,

13 vs.

14 S.M.R. JEWELL, Secretary of the Interior,
15 et al.,

16 Defendants, and

17 THE ESTOM YUMEKA MAIDU TRIBE
18 OF THE ENTERPRISE RANCHERIA,
19 CALIFORNIA,

Intervenor Defendant.

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1 Pursuant to the Court's March 4, 2013 Stipulation and Order Governing Further
2 Proceedings (ECF 69), as modified on July 14, 2015 (ECF 161), Intervenor-Defendant the
3 Estom Yumeka Maidu Tribe of the Enterprise Rancheria, California (the "Tribe" or
4 "Enterprise") respectfully submits this Second 60-Day Notice of Construction Activities with
5 respect to construction of a gaming facility on land held in trust for the Tribe near Olivehurst,
6 California (the "Yuba Site").

7 In its first 60-Day Notice of Construction Activities (ECF 157, filed June 15, 2015), the
8 Tribe explained its plans to construct a small, temporary Class II gaming facility at the Yuba
9 Site. Plaintiffs did not seek to enjoin construction of the facility described in the June 15 Notice.

10 The Tribe subsequently obtained conditional financing for pre-construction activities,
11 and it now anticipates securing permanent financing in the fall of 2015. As explained below, the
12 terms of the financing would allow the Tribe to proceed toward development of a permanent
13 facility that is larger than the structure described in the Tribe's June 15 Notice (though much
14 smaller than the gaming facility approved for the Yuba Site by the United States Department of
15 the Interior).

16 Accordingly, and consistent with the Stipulation and Order Governing Further
17 Proceedings, the Tribe now files this Second 60-Day Notice of Construction to update the Court
18 and all Parties with respect to its construction plans for a Class II gaming facility.

19 **I. BRIEF SUMMARY OF RELEVANT BACKGROUND**

20 **A. The Tribe**

21 In 1965, the United States transferred the Tribe's only usable reservation land to the State
22 of California for the State's construction of Oroville Dam. The United States provided a small
23 reimbursement to four tribal members, but never offered compensation or replacement land to
24 the Tribe or to the remainder of the Tribe's membership. This taking left the Tribe without the
25 land base necessary for housing, economic development, or any real prospect for self-
26 sufficiency. As a result, the Tribe's 900 members have had few educational opportunities, suffer
27
28

1 high rates of unemployment and poverty, and are disproportionately dependent on state and
2 federal assistance programs.

3 **B. The Approved Project**

4 To remedy this situation, the United States Department of the Interior and the Bureau of
5 Indian Affairs (together, "Interior") have (i) acquired the Yuba Site in trust for the Tribe
6 pursuant to the Indian Reorganization Act ("IRA") and (ii) approved the Tribe's proposal to
7 develop a casino and resort project at the Yuba Site (the "Approved Project") pursuant to the
8 Indian Gaming Regulatory Act ("IGRA").

9 Interior made those decisions on the basis of a careful, decade-long environmental
10 review process conducted pursuant to the National Environmental Policy Act ("NEPA"). The
11 NEPA process was memorialized in an Environmental Impact Statement ("EIS") that included
12 nearly 500 pages of environmental analysis and an additional 2,888 pages of expert technical
13 reports. The EIS addressed a range of reasonable development alternatives, including the
14 Approved Project, a Reduced Intensity Alternative, and others. The EIS found that neither the
15 Approved Project nor the Reduced Intensity Alternative, as mitigated, would significantly
16 impact the environment.

17 **C. Prior Preliminary Injunctive Relief Proceedings**

18 In December, 2012 and January, 2013, Plaintiffs sought preliminary injunctive relief
19 barring all construction at the Yuba Site. Tribal Chairwoman Glenda Nelson submitted a
20 Declaration stating that construction was not imminent and committing the Tribe to provide at
21 least 30 days' notice before beginning any construction activities. *See* Declaration of Glenda
22 Nelson in Support of Motion to Intervene (ECF 13-3) at 5.

23 The Court's March 4, 2013 Stipulation and Order Governing Further Proceedings took
24 Plaintiffs' preliminary injunction motions off calendar, extended the Tribe's 30-day notice period
25 to 60 days, and specified procedures and deadlines for any future requests for preliminary
26 injunctive relief. *See* Stipulation and Order Governing Further Proceedings (ECF 69) at 2.

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1 **D. Class III Gaming Compact Negotiations**

2 IGRA divides casino gaming into three Classes: Class I gaming refers to social or
3 traditional games played for prizes of minimal value; Class II gaming generally consists of
4 bingo, pull-tabs, and other similar games; and Class III gaming includes all other gaming
5 activities, such as casino games (blackjack, baccarat, etc.) and slot machines. *See* 25 U.S.C. §
6 2703(6)-(8).

7 One of the important regulatory distinctions between Class II gaming and Class III
8 gaming concerns the role of gaming compacts.

9 Class II gaming activities may lawfully be conducted on any "Indian Lands," and do not
10 require a gaming compact. 25 U.S.C. §§ 2710(a)-(c). The Yuba Site is held in trust for the
11 Tribe by the United States, and therefore meets the definition of "Indian Lands." *See* 25 U.S.C.
12 § 2703(4). Thus, the Tribe can engage in Class II gaming on the Yuba Site without any further
13 IGRA approvals.

14 In contrast, Class III gaming activities may only be conducted pursuant to a gaming
15 compact. 25 U.S.C. § 2710(d)(1)(C). Specifically, IGRA requires that all tribes seeking to
16 conduct Class III gaming "request the State in which [tribal] lands are located to enter into
17 negotiations for the purpose of entering into a Tribal-State compact governing the conduct of
18 gaming activities." 25 U.S.C. § 2710(d)(3)(A). States must enter and conduct such negotiations
19 in good faith. 25 U.S.C. § 2710(d)(7)(A). A state's failure to negotiate in good faith triggers
20 certain dispute-resolution processes pursuant to which a Class III gaming compact may be
21 prescribed, after a period of several months, by a mediator or by the Secretary of the Interior.
22 *See* 25 U.S.C. § 2710(d)(7)(B).

23 The Approved Project authorizes (but does not require) the Tribe to pursue Class III
24 gaming. To that end, the Tribe and the Governor of California successfully negotiated and
25 executed a Class III gaming compact in August, 2012. The compact was then transmitted to the
26 California Legislature for ratification. The Legislature took no action: It failed to ratify the
27 compact, to identify concerns about the compact, or to propose new compact terms that would
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1 allow the Tribe and the Governor to address any such concerns. As a result, the Tribe is not
2 presently authorized to engage in Class III gaming on the Yuba Site.

3 On August 20, 2014, the Tribe filed suit against the State of California for failing to
4 negotiate in good faith. That case (No. 2:14-cv-01939-TLN-CKD) is currently pending before
5 the Court.

6 **E. Prior 60-Day Notice**

7 On June 15, 2015, the Tribe filed a 60-Day Notice of Construction Activities (ECF 157)
8 informing the Parties and the Court of the Tribe's plans to develop a small, temporary Class II
9 gaming facility at the Yuba Site. The June 15 Notice explained that (i) the above-described
10 compact dispute would likely delay full build-out of the Approved Project for Class III gaming;
11 (ii) the delay would impose substantial additional costs on the Tribe and prevent the Tribe and
12 the surrounding community from realizing the benefits of the Approved Project; and (iii) in an
13 effort to mitigate those harms, the Tribe planned to initiate construction of a small, temporary
14 Class II gaming facility at the Yuba Site.

15 Plaintiffs did not seek to enjoin construction of the development identified in the Tribe's
16 June 15 Notice. Instead, they filed a Motion (ECF 159) requesting the Court to clarify that
17 Enterprise would provide Plaintiffs and the Court with at least 60 days notice prior to
18 commencing any activity that "goes beyond the scope of" the June 15 Notice. The Tribe agreed
19 to provide such notice and did not oppose Plaintiffs' request. On July 14, 2015, the Court
20 entered an Order (ECF 161) memorializing the requested clarification.

21 **F. Recent Developments**

22 With the resolution of matters arising from the June 15 Notice, the Tribe began looking
23 for the construction financing necessary to build a Class II gaming facility. In mid-August, the
24 Tribe was able to secure conditional financing for pre-construction activities. The Tribe now
25 anticipates securing permanent financing for a closing in the fall of 2015. The terms of the
26 financing would allow the Tribe to proceed toward the development of a permanent facility that
27 is larger than the facility described in the June 15 Notice. Accordingly, and consistent with the
28

1 Court's July 14 Order, the Tribe now files this Second 60-Day Notice of Construction.

2 **II. NOTICE OF CONSTRUCTION ACTIVITIES**

3 The Tribe plans to construct a permanent structure housing a casino at the Yuba Site (the
4 "Facility"). The Facility will include a Class II gaming floor, eating and drinking
5 establishments, office space, a meeting and conference room, employee areas, and "back-of-
6 house" facilities (*e.g.*, engineering, security, mechanical plant, electrical, information
7 technology).

8 In total, the Facility will be approximately 105,750 square feet. By way of comparison,
9 the Approved Project would cover 317,885 square feet and the Reduced Intensity Alternative
10 would cover 148,515 square feet.

11 Construction of the Facility will proceed in a manner similar to the Reduced Intensity
12 Alternative (though, as noted above, the Facility will be significantly smaller). The Facility will
13 be designed and implemented so as to avoid impacts to any portion of the Yuba Site identified as
14 garter snake habitat, a potential wetland, or within the 100-year flood plain. It will also comply
15 with all applicable mitigation measures set forth in Interior's EIS and ROD. An initial draft site
16 plan is attached for reference (*see* Exhibit 1).

17 **III. BRIEFING SCHEDULE**

18 The Court's March 4, 2013 Stipulation and Order Governing Further Proceedings
19 requires any Plaintiff seeking preliminary injunctive relief to file a motion within 15 days of
20 receiving this Notice.¹

21 To obtain a preliminary injunction, a Plaintiff "must establish that he is likely to succeed
22 on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that
23 the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter*
24 *v. Nat'l Res. Def. Council*, 555 U.S. 7, 20 (2008).

25 Unlike a typical case where a motion for preliminary injunctive relief precedes briefing
26 _____

27 ¹ The Court's July 14 Order clarifying the Stipulation and Order Governing Further Proceedings
28 does not alter this 15-day deadline.

1 of the merits, in this case the merits have already been fully briefed and submitted for the Court's
2 decision. Further briefing on Plaintiffs' likelihood of success on the merits would be redundant
3 and risks wasting the resources of the parties and the Court. With that consideration in mind, the
4 Tribe respectfully submits that the Court may wish to order that further briefing, if needed, be
5 limited to the remaining elements of the four-factor standard for preliminary injunctive relief:
6 the likelihood of irreparable harm, the balance of the equities, and the public interest.

7 The Tribe has separately communicated notice of its planned construction activities to
8 counsel for all parties in this matter (*see* Exhibit 2).

9
10 Dated: August 31, 2015

Respectfully Submitted,

11 DENTONS US LLP

12
13 By /s/ Matthew G. Adams
14 NICHOLAS C. YOST
15 MATTHEW G. ADAMS
16 JESSICA L. DUGGAN

17 Attorneys for Intervenor-Defendant
18 THE ESTOM YUMEKA MAIDU TRIBE OF
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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2015, true and correct copies of **INTERVENOR-DEFENDANT'S SECOND 60-DAY NOTICE OF CONSTRUCTION ACTIVITIES** were served electronically on all parties for which attorneys to be noticed have been designated, via the CM/ECF system for the U.S. District Court for the Eastern District of California.

Respectfully submitted,

Dated: August 31, 2015

DENTONS US LLP

By: /s/ Matthew Adams

MATTHEW G. ADAMS

Attorneys for Intervenor-Defendant
THE ESTOM YUMEKA MAIDU
TRIBE OF THE ENTERPRISE
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