

Indian Gaming Act and NEPA Irreconcilable, Ninth Circuit Rules

The Ninth Circuit has held that the National Indian Gaming Commission's approval of a tribal gaming ordinance does not require review under the National Environmental Policy Act because there is an irreconcilable conflict between NEPA and the Indian Gaming Regulatory Act. *Jamul Action Committee v. Chaudhuri*, No. 15-16021 (9th Cir., June 9, 2016). The Indian Gaming Regulatory Act provides that before an Indian tribe can conduct gaming on its land, the tribe must first enact a gaming ordinance that describes how the tribe will operate its gaming facilities. The ordinance must then be approved by the Gaming Commission. The Jamul Indian Village (Tribe), a federally recognized Indian tribe in California, enacted a gaming ordinance and obtained Gaming Commission approval, which was challenged for failure to comply with NEPA. The Ninth Circuit began its analysis by identifying "two circumstances where an agency need not complete an EIS even in the presence of a major federal action and despite an absence of express statutory exemption": (1) where doing so would create an irreconcilable conflict with the substantive statute at issue; and (2) where a substantive statute displaces NEPA's procedural requirements. This case, the court concluded, fell into the first category because the Act requires that the Gaming Commission to approve or disapprove a gaming ordinance no later than 90 days after the tribe submits the ordinance, and if it does not approve or disapprove within that time, the ordinance is deemed approved by operation of law. This short time period, the court concluded, was insufficient to accommodate the demands of NEPA review. In reaching this conclusion, the court first acknowledged that it has been generally reluctant to find a statutory conflict between NEPA and other federal statutes in order not to undermine Congress' intent that the NEPA apply broadly. There can be no irreconcilable conflict, for example, when a deadline is imposed by the agency rather than by Congress or when "the triggering act for a short statutory time table" is under the agency's control. An irreconcilable conflict occurs only where Congress has determined the period within which the agency must act and the event that triggers the beginning of the period. The deadline for approval of a gaming ordinance is imposed by Congress, not the Gaming Commission. Moreover, the event that triggers the 90-day period under which the Commission must act is a tribe's submission of the ordinance, an event over which the Commission has no control. After determining that the Act was potentially irreconcilable with NEPA, the court further determined that it would be impossible for the Gaming Commission to prepare an EIS within the Act's required timeframe. Under previous Ninth Circuit precedent, the court assumed that it takes an agency at least one year to prepare an environmental impact statement. Not standing on precedent alone, however, the court calculated the environmental review timeline based on both statutory and regulatory requirements and concluded that "assuming it takes no time to respond to the public's views on scope and implementation, prepare a draft EIS, and incorporate public comments into the final EIS, the shortest time frame in which NIGC could prepare an EIS would be one hundred and twenty days." This, the court held, gave rise to a clear and irreconcilable conflict between the mandatory agency deadline imposed by Congress and NEPA.

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