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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

COUNTY OF EL DORADO, Plaintiff and Appellant, v. DEPARTMENT OF TRANSPORTATION et al., Defendants and Respondent; LAKES ENTERTAINMENT, INC., Real Party in Interest and Respondent; SHINGLE SPRINGS BAND OF MIWOK INDIANS, et al., Interveners and Respondents.	C046372, C048141 (Super. Ct. No. 03CS00003)

VOICES FOR RURAL LIVING et al., Plaintiffs and Appellants, v. DEPARTMENT OF TRANSPORTATION, Defendant and Appellant; SHINGLE SPRINGS BAND OF MIWOK INDIANS et al., Interveners and Appellants.	(Super. Ct. No. 03CS00018

APPEAL from a judgment of the Superior Court of Sacramento County, Lloyd G. Connelly, Judge. Affirmed in part and reversed in part.

Louis B. Green, County Counsel, Edward L. Knapp, Assistant County Counsel; The Diepenbrock Law Firm, Diepenbrock Harrison, Mark D. Harrison, Michael V. Brady, Andrea A. Matarazzo and Michael E. Vinding for Plaintiff, Appellant and Respondent County of El Dorado.

Law Offices of Stephan C. Volker, Stephan C. Volker and Joshua A.H. Harris for Plaintiff, Appellant and Respondent Voices for Rural Living and Shingle Springs Neighbors for Quality Living.

Sonnenschein Nath & Rosenthal, Nicholas C. Yost, Paula M. Yost and Kathleen Boergers; Brigit S. Barnes & Associates, Brigit S. Barnes and Karin E. Schwab; Clement, Fitzpatrick & Kenworthy and Anthony Cohen for Intervener and Appellant Shingle Springs Band of Miwok Indians and Real Party in Interest and Appellant Lakes Entertainment, Inc.

Morrison & Foerster, Michael H. Zischke, Donna R. Black, David C. Levy and R. Chad Hales for Defendant and Appellant Department of Transportation.

Morrison & Foerster, Michael H. Zischke, Donna R. Black and David E. Levy; Sonnenschein Nath & Rosenthal, Nicholas C. Yost and Paula M. Yost for Defendant and Respondent Department of Transportation, Intervener and Respondent Shingle Springs Band of Miwok Indians and Real Party in Interest and Respondent Lakes Entertainment, Inc.

Brigit S. Barnes & Associates, Brigit S. Barnes and Karin E. Schwab for Intervener and Respondent Shingle Springs

Band of Miwok Indians and Real Party in Interest and Respondent Lakes Entertainment, Inc.

Clement, Fitzpatrick & Kenworthy and Anthony Cohen for Intervener and Respondent Shingle Springs Band of Miwok Indians.

The Shingle Springs Band of Miwok Indians (the Tribe) is a federally recognized tribe consisting of 334 individuals, 18 of whom reside on the Tribe's 160-acre rancheria (the Rancheria) located in El Dorado County, a short distance from Highway 50, but without a vehicle interchange nearby. In 2000, California voters approved a change to the state Constitution that granted groups of Native Americans such as the Tribe a monopoly to operate and financially benefit from Nevada-style casino gaming in the state. (Cal. Const., art 4, § 19 (f).)

Seeking to fully realize the benefits of its constitutional prerogative, the Tribe has proposed the construction of a casino and hotel complex and adjacent parking structure on its Rancheria, and a freeway interchange on nontribal property connecting the Rancheria directly to Highway 50. The size of the proposed development is vast in comparison to other development in the county and region. The 381,500 square-foot casino and hotel alone exceeds the size of Sacramento's Convention Center, and the 3,000-vehicle parking facility will accommodate far more vehicles than the parking facility at the El Dorado County Fairgrounds.

Our role here is not to address questions concerning the wisdom, policy implications, or economics of allowing Nevada-style gaming on Indian land in California. This state's voters have already done so. What we have been asked by the parties to

resolve is whether sufficient information has been disclosed about the project for decisionmakers and the public to understand the potential environmental impacts of constructing the interchange. We conclude that while much of the necessary information has been properly disclosed, there remain two required categories of information that have yet to be adequately set forth in the environmental impact report (EIR): one concerns the project's potential impact on air quality, and the other concerns the impact of an alternative smaller casino and hotel.

This action under the California Environmental Quality Act involves two appeals, which we have consolidated.[1] In the first appeal, the appellants challenge an EIR that the Department of Transportation (Caltrans) used to approve the freeway interchange project on U.S. Highway 50.

Appellant County of El Dorado (County) challenges the EIR's air quality analysis. We agree with County that, by analyzing the project's traffic-based air quality impacts exclusively in the context of a regional transportation conformity approach, the EIR failed to provide adequate information regarding the project's individual air quality impacts. To be sufficient, the EIR will have to disclose and analyze what the interchange/hotel-casino's specific traffic-based ROG and NOx emissions (or estimates) are, what their contributions to the

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[1] Public Resources Code section 21000 et seq. (CEQA).

regional emissions budgets are, and whether these emissions and contributions are significant (for example, in comparison to other existing or planned projects within the transportation conformity analysis).

Appellants Voices for Rural Living and Shingle Springs Neighbors for Quality Living (Voices) challenge the EIR on numerous other grounds, including project segmentation, environmental impacts, alternatives, and public input. We agree with Voices' challenge regarding the EIR's failure to consider the alternative of a smaller casino and hotel. The EIR must consider and analyze the alternative, or alternatives, of a smaller hotel and casino complex.

In the second appeal, Caltrans, the Tribe, and Lakes Entertainment appeal from an order finding that Caltrans' return to the peremptory writ of mandate was inadequate on the issue of whether the transportation conformity approach met the state air quality standard for ozone. We agree with these parties that we are precluded from considering this issue because County and Voices failed to exhaust their administrative remedies regarding it.

BACKGROUND

The Tribe and its reservation, the Shingle Springs Rancheria, are federally recognized; the reservation is held in trust by the Bureau of Indian Affairs (BIA) for the Tribe's benefit. (25 U.S.C. § 479a-1.)

The U.S. Highway 50 interchange project will provide the Tribe with direct access to its property, which is close to Highway 50.

The Tribe is paying for the cost of the interchange. The proposed interchange design, a "flyover" (fly over the highway) design to provide access to the Rancheria while minimizing other development, will be built entirely within Caltrans' Highway 50 right-of-way and a five-acre parcel leading up to the Rancheria; County has no jurisdiction within the boundaries of the proposed interchange.

According to County, the hotel and casino complex will be one of the largest commercial developments in the county, both in size and traffic generation. The complex will occupy 44 acres of the 160-acre Rancheria, employ around 1,500 persons, and include a 238,500 square-foot casino, a five-level, 250-room, 143,000 square-foot hotel, and parking to accommodate 3,000 cars (including a five-level parking structure).

Caltrans approved the interchange project based on a final "Environmental Impact Report [EIR]/Environmental Assessment [EA]." This is a joint document prepared pursuant to CEQA and the National Environmental Policy Act (NEPA) (42 U.S.C. § 4321 et seq.). (See Cal. Code Regs., tit. 14, §§ 15170, 15222, 15226 [requiring or encouraging preparation of joint CEQA/NEPA documents]; the CEQA Guidelines (tit. 14, Cal. Code Regs., § 15000 et seq.), binding on all state agencies, are regulatory guidelines that implement CEQA--*Citizens of Goleta Valley v.*

Board of Supervisors (1990) 52 Cal.3d 553, 564, fn. 3 (*Citizens of Goleta Valley*).)

The National Indian Gaming Commission (NIGC), working with the BIA, drafted the EA portion of the final EIR/EA; this portion focused on the on-reservation and related impacts of the proposed hotel and casino project. Caltrans and the BIA then prepared the final EIR/EA for the interchange project, with Caltrans acting as the lead agency for the CEQA analysis and the BIA acting as the lead agency for the NEPA analysis.

The EA imposed mitigation measures on the hotel and casino project covering soil erosion, water resources, air quality, biological resources, noise and visual resources. In light of these measures, the hotel and casino project was found to have no significant impact. This meant that an environmental impact statement for the hotel and casino under NEPA was not required.

Caltrans and the BIA subsequently approved the final EIR/EA as to the interchange project. In the final EIR, Caltrans used a three-step approach. First, Caltrans independently analyzed and incorporated the EA; using that information, Caltrans generally analyzed the environmental impacts of the hotel and casino as indirect impacts of the interchange project. Then Caltrans took the analysis to a second level. Caltrans analyzed the interchange and hotel/casino together as to the traffic-related noise, air quality and transportation impacts; this is because Caltrans acknowledged that "the casino development [would] comprise nearly all of the traffic volumes for the interchange." Finally, Caltrans prepared its own analyses

regarding growth-inducing impacts and cumulative impacts of the interchange and hotel/casino. After imposing various mitigation measures, Caltrans concluded the interchange would not result in any significant and unavoidable adverse impacts to the environment.

County and Voices filed petitions for writ of mandate challenging the adequacy of the final EIR/EA under CEQA. (The appeals here involve CEQA challenges to the EIR drafted by Caltrans; County also filed a federal action against the NIGC and the BIA regarding the EA for the hotel and casino project.)[2] The trial court consolidated the petitions and denied them in all respects, save one. The petitions were granted on the issue of whether the EIR's regional transportation conformity approach to analyzing traffic-based air quality impacts met the state air quality standard for ozone.

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[2] We grant Caltrans' requests in case Nos. C046372 and C048141 for judicial notice of the trial court's January 10, 2005, decision in that federal action (*El Dorado County v. Gale Norton* et al. (E.D. Cal. case No. CV. S-02-1818 GEB DAD). (Evid. Code, §§ 452, 459.) We deny all the other requests for judicial notice, all of which were made in C048141: these include Caltrans' request regarding the El Dorado County Air Pollution Control District CEQA Guide; the Tribe's request regarding the general conformity guidance booklet from the EPA; and the Tribe's request of January 25, 2005 (covering Auburn Indian history report and restoration act, transportation conformity reference guide, various other orders in the federal trial court action listed above, an EIR on another interchange project, and the legislative history of the California Clean Air Act).

DISCUSSION

1. *Standard Of Review*

In reviewing CEQA issues on appeal, we determine, independently from the trial court, whether the relevant agency prejudicially abused its discretion either by failing to comply with legal procedures or by making a decision unsupported by substantial evidence. (*Citizens of Goleta Valley, supra,* 52 Cal.3d at p. 564; *Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 911-912.)

Here, we review the adequacy of an EIR. An EIR carries out CEQA's purpose of protecting California's environmental quality by identifying the significant environmental impacts of a proposed project, the ways those impacts can be mitigated or avoided, and the alternatives to the project. (*Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1026 (*Village Laguna*); *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 106-107 (*Communities for a Better Environment*).)

"'[T]he EIR is the heart of CEQA' and the integrity of the process is dependent on [its] adequacy . . . . '"An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. . ." [Citations.] . . .' . . . [¶] . . . [¶] . . . A prejudicial abuse of discretion occurs '"if the failure to include relevant

information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."'" (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1355 (*Berkeley Jets*).) "Thus, [a] reviewing court '"does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document."'" (*Citizens of Goleta Valley, supra,* 52 Cal.3d at p. 564.)

2. *Analysis Of Air Quality Impacts*

The subject of air quality comprises two basic issues in these consolidated appeals. The first issue involves a challenge to the method that was used to analyze the project's traffic-based air quality impacts involving ozone--the transportation conformity determination. The second issue comprises the whole of the second appeal, and involves the transportation conformity determination's relationship to the attainment of the state ozone standard. We discuss these in turn.

A. *Transportation Conformity Determination*

In determining that the interchange and hotel/casino would not have a significant traffic-based air quality impact regarding certain ozone precursors at issue, the EIR relied exclusively on a regional transportation conformity determination. County contends that, through this exclusive reliance, the EIR failed to disclose and analyze, as required by CEQA, the traffic-based ozone precursor emissions (reactive organic gases--ROG, and nitrogen oxide--NOx) that would be

specifically generated by the operation of the interchange/hotel-casino. We agree with County. (As noted, in its air quality analysis, the EIR analyzed the interchange together with the hotel/casino. In discussing this issue, our concern is with the traffic-related emissions resulting from the interchange's operation (i.e., use) as opposed to its construction; a *general* conformity approach was employed for construction-related emissions and is not at issue here.)

A brief background is in order. The federal Clean Air Act requires the adoption of health-based federal air quality standards for certain air pollutants (including, as relevant here, the two ozone precursors at issue), and requires that states adopt regional-based state implementation plans (SIPs) to attain those standards. (42 U.S.C. §§ 7409, 7410.) The relevant SIP here notes that the Sacramento region, in which the interchange is located, is a "severe" ozone nonattainment region. The Sacramento nonattainment-ozone region comprises all of Sacramento and Yolo Counties, portions of Solano and Sutter Counties, and all of El Dorado and Placer Counties, except for the Lake Tahoe Air Basin.

The federal Clean Air Act requires that federally approved transportation projects located in nonattainment regions, such as the interchange project, must conform to "mobile source emissions budgets" (i.e., traffic-based emissions standards) established in the SIP. (See 42 U.S.C. § 7506.) For the Sacramento nonattainment-ozone region, the "mobile source emissions budgets" for the ozone precursors ROG and NOx, as set

forth in the SIP, are 31.32 tons per day for ROG and 61.35 tons per day for NOx (these are the maximum allowable emission standards for the region).

In the EIR, Caltrans concluded that the interchange/hotel-casino project would not have a significant impact on air quality regarding ROG and NOx because the project's operation was in conformity with the regional "mobile source emissions budgets" set forth in the SIP.

County contends that this regional air quality analysis improperly fails to disclose and analyze the specific traffic-based ROG and NOx emissions from the interchange and hotel/casino project. We agree.

In the EIR, Caltrans noted that the air quality analysis *was* done at a "project level," stating, "[t]his project-level transportation conformity determination compares forecasts of regional air pollutants to thresholds, sometimes referred to as 'emissions budgets.'" Caltrans later elaborated in the EIR: "The general approach used in conducting the transportation air quality conformity analysis was to develop forecasts of regional mobile source emission levels, including emissions associated with the [interchange and hotel/casino] project, and compare these emission levels to previously[]established thresholds. The thresholds, referred to as 'emissions budgets,' were established during development of the Sacramento area's SIP. The [interchange and hotel/casino] project's conformity with the SIP is demonstrated when the forecasted emission levels [which are based on the project and all other existing and planned

transportation projects in the region], are found to be within the emissions budgets." Under this approach, the forecasted regional mobile source emissions level for 2005 for ROG was 29 tons per day (which conforms to the SIP's mobile source emissions budget of 31.32 tons per day), and the forecasted regional mobile source emissions level for NOx was 56.82 tons per day (which conforms to the SIP's mobile source emissions budget of 61.35 tons per day). In effect, the EIR established the regional conformity emissions budgets of the SIP as the sole threshold (i.e., indicator) of significant traffic-based air quality impact for the interchange and hotel/casino.

There is a clear problem in relying *exclusively* on this regional transportation conformity approach to analyze the interchange and hotel/casino's specific traffic-based impacts involving the ozone precursors ROG and NOx. The regional conformity approach does not tell us what the *interchange/hotel-casino project is specifically contributing* in terms of ROG and NOx transportation emissions. The "forecasts of regional mobile source emission levels" in this regional conformity approach comprise the ROG and NOx emissions from *all* existing and planned transportation projects, *including* the interchange/hotel-casino project, *in the Sacramento nonattainment-ozone region*. In other words, these regional "forecasts" are a combination of the interchange/hotel-casino's traffic-based ROG and NOx emissions *and* the ROG and NOx emissions from all other existing and planned transportation projects in the Sacramento nonattainment region. These regional "forecasts" are then compared to the

nonattainment region's "mobile source emissions budgets" for ROG and NOx in the SIP to see if the forecasts conform to the budgets; if they do, the conclusion is that there is no significant impact.

In this way, the specific traffic-based ROG and NOx emissions of the interchange/hotel-casino are known (or have been estimated) but are never disclosed. We know that the traffic-based ROG and NOx emissions from the interchange/hotel-casino, when added to those from all other existing and planned transportation projects in the Sacramento nonattainment-ozone region, do not exceed the corresponding regional mobile source emission budgets for the SIP attainment plan. But we have no idea (1) what the interchange/hotel-casino's specific traffic-based ROG and NOx emissions (or estimates) are; (2) what their specific contributions to the emissions budgets are; and (3) whether these emissions and contributions are significant (one example of this may be how these emissions and contributions compare to a range of samples from the other transportation projects in the region that make up the transportation conformity analysis). This is no small moment, given the enormous size and scope of the interchange/hotel-casino project as detailed by the impressive figures noted above in the Background section (the project will be one of the largest commercial developments in El Dorado County in terms of size and traffic generation). Using the EIR's own estimates, the interchange/hotel-casino project is expected to generate approximately 2.8 to 3.5 million vehicle trips per year.

Failure to disclose and analyze the interchange/hotel-casino's known (or estimated) traffic-based ROG and NOx impacts renders the EIR inadequate, incomplete, and insufficient as an informational document for the decisionmakers and the public. (*Berkeley Jets, supra,* 91 Cal.App.4th at p. 1355.) In short, the regional transportation conformity approach provides part of the traffic-based air quality analysis, but not the whole of it, as Caltrans maintains.

The situation here is similar to that in *Berkeley Jets.* There the court found an EIR deficient in addressing the nighttime noise impacts to residential neighborhoods from an airport expansion project. The EIR established a 65-CNEL (Community Noise Equivalent Level) as the sole threshold for significant noise exposure and identified which houses would be significantly affected. (*Berkeley Jets, supra,* 91 Cal.App.4th at pp. 1373-1374, 1378, 1381.) Any increase in noise under this 65-CNEL threshold was excluded from analysis in the EIR. (*Id.* at p. 1373.) The court rejected this approach, explaining that the airport expansion project could increase a community's nighttime noise level to 64.9 CNEL, and under the sole criterion of the 65-CNEL threshold, this increase would not create a significant impact for purposes of CEQA. (*Id.* at p. 1381.) The flaw in this approach was its failure to provide, in addition to the 65-threshold analysis, the most fundamental information about the project's noise impacts, including the existing ambient noise levels, the number and frequency of additional nighttime flights, and their effect on ambient noise levels and

sleep. (*Berkeley Jets, supra,* 91 Cal.App.4th at pp. 1381-1382.) Similarly, here, by establishing the regional transportation conformity emissions budgets of the SIP as the sole threshold of significance, the EIR failed to disclose and analyze the most fundamental information about the interchange/hotel-casino's traffic-based air quality impacts involving ROG and NOx, *including what those impacts specifically are and how much of the regional emissions budgets they constitute.*

Another way to look at this is through the prism of impacts that an EIR must assess for a given project. An EIR must evaluate a project's significant (1) direct impacts to the environment (those caused by the project and occurring at the same time and place); (2) reasonably foreseeable indirect impacts (those caused by the project but later in time or farther removed in distance); and (3) cumulative impacts (the project's incremental impact when added to other related projects). (CEQA Guidelines, §§ 15358, 15355, 15126.2.) As we shall explain, here the EIR in effect used only a cumulative impact air quality analysis to evaluate project-specific impacts.

A regional transportation conformity approach based on an SIP may provide a sufficient analysis of cumulative impacts. This is because a cumulative impact analysis examines the incremental impact of a project when added to other closely related existing and reasonably foreseeable projects. (CEQA Guidelines, § 15355, subd. (b); Pub. Resources Code, § 21083, subd. (b)(2).) And a lead agency may determine that a project's

cumulative impact is insignificant if the project will comply with a previously approved plan that is specifically designed to reduce the cumulative problem within the geographic area in which the project is located (such as an air quality plan; here, the SIP). (CEQA Guidelines, § 15064, subd. (h)(3).) (This dispenses with County's contention that the transportation conformity determination failed to analyze properly the cumulative impacts of the interchange operation regarding the ozone precursors.)

However, as County points out, a cumulative or regional impact analysis cannot be used to trivialize or mask project-specific impacts. (See *Communities for a Better Environment, supra,* 103 Cal.App.4th at p. 118; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718.) That is what happened here. The regional-based cumulative impact analysis afforded by the transportation conformity determination was deemed the *complete* traffic-based air quality analysis for the ROG and NOx ozone precursors; this improperly dispensed with the disclosure and analysis of the interchange/hotel-casino project's specific traffic-based ROG and NOx emissions and contributions.

Caltrans argues that County's challenge to the regional transportation conformity approach is nothing more than an improper challenge to Caltrans' discretion to choose the methodology by which to evaluate air quality impacts. (See *Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 412.) In support of this argument, Caltrans cites to Appendix G

of the CEQA Guidelines. Section III of the Sample Questions contained in Appendix G sets forth a framework by which EIRs can analyze air quality impacts. As relevant under section III of Appendix G, Caltrans argues, the regional conformity approach aligns with applicable air quality plans and standards, and does not result in any cumulatively considerable net increase of any criteria pollutant for which the project region is in nonattainment (including ozone precursors). (CEQA Guidelines, Appen. G, § III, subds. a), b), c).) Caltrans also argues that the regional conformity approach is well-suited to the transient nature of transportation emissions and the regional nature of the ozone problem.

There is a problem with Caltrans' methodology argument. While a lead agency has discretion to choose the method to evaluate environmental impacts, the method chosen must provide an adequate analysis. This is illustrated by *Berkeley Jets*, where the court rejected the use of the 65-CNEL threshold "[m]ethodology" as the "[s]ole [i]ndicator" of significant effects from noise. (*Berkeley Jets, supra,* 91 Cal.App.4th at pp. 1377, 1381-1382.) Similarly, as we have seen, the regional transportation conformity approach fails as the sole indicator of significant effects from ROG and NOx. That approach fails to disclose and analyze what the interchange/hotel-casino project is specifically contributing in terms of those traffic-based ozone precursors. In gambling parlance, what does the interchange bring to the table? We do not know, but the EIR should be telling us.

County raises three methodology issues of its own. First, it claims the emissions model used for the regional transportation conformity approach, the EMFAC7F, was outdated in its car-fleet mix (too few SUVs). Substantial evidence shows, however, that this model was appropriate and current for use in that approach when the EIR was drafted. The appropriateness of using the EMFAC7F model to determine the project's specific traffic-based emissions and contributions of ROG and NOx can be considered on remand.

Second, County claims that, instead of the regional transportation conformity approach, the EIR should have used the thresholds of significance for project air quality impacts set forth in the CEQA guide from the El Dorado County Air Pollution Control District (the District CEQA Guide). This matter can be considered on remand when the project's specific traffic-based emissions and contributions of ROG and NOx are disclosed and analyzed. We are in no position to determine the applicability of the District CEQA Guide on the issue of these specific items.

And third, County challenges Caltrans' disavowal of the URBEMIS emissions results, which County claims were the only project-specific air quality results noted in the EIR. This matter can also be considered on remand where the focus will be on a project-specific disclosure and analysis of ROG and NOx.[3]

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[3] To show it had not relied exclusively on the regional transportation conformity approach, Caltrans claimed at oral argument that a chart based on the URBEMIS results showed that Caltrans had examined and disclosed the project's specific air

B. The Second Appeal (C048141)--Transportation Conformity Determination and the State Ozone Standard

In the second appeal in this matter, which we have consolidated with the first, Caltrans, the Tribe and Lakes Entertainment have appealed from an order rejecting Caltrans' further return to the writ of mandate. (See *Barrett v. Stanislaus County Employees Retirement Assn.* (1987) 189 Cal.App.3d 1593, 1601, fn. 4 (*Barrett*) [such an order is appealable].) The substantive issue in this appeal is whether the regional transportation conformity determination, which, as discussed above, relied on federal air quality standards regarding ozone, accounted for the ozone precursors ROG and NOx in the context of attaining the more stringent state ozone standard. As we shall explain, we are foreclosed from reviewing this substantive issue on procedural grounds: we agree with Caltrans and the Tribe that the County and Voices failed to exhaust their administrative remedies on this point.

In its ruling on the writ of mandate, the trial court stated: "In one important respect, the transportation conformity determination for the . . . interchange[/hotel-casino project] may not have provided an adequate method for determining the significance of the [project's operational] air quality impacts under CEQA. . . . [¶] . . . [¶] [T]his matter must be remanded to Caltrans for clarification of whether the

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quality impacts. However, Caltrans may not simultaneously rely upon and disavow these results simply to suit different purposes.

mobile source ROG and NOx emissions budgets for the Sacramento nonattainment area [as set forth in the SIP] constitute levels of ROG and NOx that permit attainment of the state ozone standard"; if not, CEQA would require further analysis as to the state ozone standard.

The federal Clean Air Act's ambient air quality standard for ozone is 0.12 parts per million (ppm). California's Clean Air Act imposes a more stringent standard of 0.09 ppm. However, while the federal act imposes specific attainment dates for severe nonattainment areas to achieve the federal standard, the California act requires that its standard be achieved "by the earliest practicable date." (42 U.S.C. § 7511, subd. (a); Health & Saf. Code, §§ 40910, 40913, subd. (a).)

Largely based on this federal-quantitative/state-qualitative distinction as to attainment specificity, Caltrans explained in returns to the writ that the transportation conformity determination qualitatively demonstrated that the state standard was being achieved; however, a quantitative demonstration for the state standard was not feasible.

The trial court was skeptical of Caltrans' explanation, reasoning that numerical data existed that could be correlated with the state quantitative standard of 0.09 ppm. In an order, the court concluded that Caltrans' return did not satisfy the requirements of the writ. Caltrans (as well as the Tribe and Lakes Entertainment; collectively for this section of the discussion, Caltrans) then appealed this order.

On appeal, Caltrans contends that the issue here--whether the regional transportation conformity determination discussed above (i.e., whether the project's conformity with the regional mobile source emissions budgets for ROG and NOx in the SIP) constitutes levels of ROG and NOx that permit attainment of the state ozone standard--is an issue that was never raised in the administrative proceedings. Instead, the issue was first raised by the trial court in its ruling on the writ petition. Consequently, the argument goes, County and Voices failed to exhaust their administrative remedies regarding this issue and we are foreclosed from reviewing it. We agree.

To obtain judicial review of an agency's alleged violations of CEQA, an aggrieved party must first exhaust its administrative remedies by presenting, orally or in writing, its specific objections to the agency decisions in question. (Pub. Resources Code, § 21177, subd. (a); *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894 (*Resource Defense Fund*); *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197-1198 (*Coalition for Student Action*); Remy et al., Guide to the California Environmental Quality Act (10th ed. 1999) pp. 578-579 (hereafter Remy, CEQA Guide).) The purpose of the exhaustion doctrine is to ensure that public agencies have a chance to respond to articulated factual issues and legal theories before their actions are subjected to judicial review. (Remy, CEQA Guide, *supra,* at p. 579.) "If the doctrine did not exist, parties disputing the wisdom of agency actions would often refrain, for

purposes of political or litigation strategy, from revealing their alleged grievances to agency decisionmakers; and many disputes that could be resolved at the agency level would needlessly burden the courts." (*Ibid*.)

Although a plaintiff need not have *personally* raised the issue (so long as he or she objected to the project on some basis in the administrative proceedings), "the exact issue raised in the lawsuit must have been presented to the administrative agency so that [the agency] will have had an opportunity to act and render the litigation unnecessary." (*Resource Defense Fund, supra,* 191 Cal.App.3d at p. 894; Pub. Resources Code, § 21177, subds. (a), (b).) If any party seeks judicial relief without having first exhausted its administrative remedies, the court must deny relief for lack of jurisdiction. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 292-293; Remy, CEQA Guide, *supra,* at p. 579.) The exhaustion doctrine is jurisdictional at least insofar as a court "does not have the discretion to refuse to apply the doctrine in cases where it applies." (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1216; *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1990) 220 Cal.App.3d 280, 285-286; see also *Hood v. Hacienda La Puente Unified School Dist.* (1998) 65 Cal.App.4th 435, 440-441 (*Hood*).)

The *closest* that anyone came in the EIR administrative proceedings to raising the substantive issue that County and Voices seek judicial review of--i.e., whether the regional

transportation conformity determination encompasses levels of ROG and NOx that permit attainment of the state ozone standard--came in the following comments, which we quote in our own arrangement:

"Because the EIR/EA improperly uses federal conformity criteria for CEQA purposes, it does not contain an actual CEQA-compliant air quality impact analysis. . . . Instead, the EIR/EA should use the thresholds of significance [for determining significant environmental impact] adopted by the El Dorado County Air Pollution Control District . . . in its . . . 'District CEQA Guide' . . . . The Guide contains specific, user-friendly methodologies for examining project-specific impacts of emissions of ROG and NOx, CO [carbon monoxide], PM_{10} [particulate matter], visibility, and other pollutants for which state and federal ambient air quality standards exist. . . . Under the District CEQA Guide, the following criteria would be applicable:

"ROG and NOx 82 lbs/day

"CO State and Federal Ambient Air Quality Standards

"PM_{10} State and Federal Ambient Air Quality Standards

"The ROG and NOx criteria are equivalent to 15 tons/year, and are considerably more stringent than the VOC and NOx [general] conformity thresholds of 25 tons/year. The EIR/EA therefore underestimates the significance of ROG and NOx air quality impacts. This is an important shortcoming because the project is located in a federal and state nonattainment area for

ozone, and ROG and NOx are the two direct precursors in the formation of ground level ozone."

These comments do not mention the state ozone standard of 0.09 ppm (although the draft EIR, at which these comments were directed, did), or any state ozone standard for that matter. More importantly, the comments do not raise any issue regarding the transportation conformity determination and the attainment of the state ozone standard. The comments are couched in the context of the Air Pollution Control District's standards (District CEQA Guide) and the EIR's *general* conformity analysis (an analysis which must be distinguished from the EIR's transportation conformity analysis; the EIR's general conformity analysis covered nontransportation-related air quality impacts, for example, construction-related exhaust emissions for the project's construction). The two ozone elements listed in these comments, ROG and NOx, do not even refer to "[s]tate . . . ambient air quality standards" (as do the other two non-ozone pollutants listed), but refer only to the standard of the District CEQA Guide (82 lbs./day; a standard that Caltrans maintains applies only to stationary air pollution sources rather than mobile sources).

We conclude that the doctrine of administrative exhaustion precludes us from considering the issue of whether the transportation conformity determination encompassed levels of ROG and NOx that permitted attainment of the state ozone standard. This "exact issue" was not raised in the administrative proceedings. (*Resource Defense Fund, supra,*

191 Cal.App.3d at p. 894.) However strict or loose this "exact issue" phrasing is to be construed, that standard of failure to exhaust was met here. (See *Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal.App.4th 1442, 1446-1450; Remy, CEQA Guide, *supra,* at pp. 584-586 [discussing that decision]; *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 176-177 [less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding because the parties in administrative proceedings are generally not represented by counsel].) The transportation conformity issue here lends itself readily to the "exact issue" standard. This conformity issue encompasses the application of a distinct, numerical, statutory air quality standard (the state ambient air quality standard for ozone of 0.09 ppm) to a distinct, widely known analytical approach for determining air quality impacts (the transportation conformity approach). (See *Coalition for Student Action, supra,* 153 Cal.App.3d at p. 1198 ["'technical deficiencies'" are quite amenable to the exhaustion doctrine].) There was no reason that this exact issue could not have been raised in the administrative proceedings; failure to do so precludes its tender in court.

Not so fast, argue County and Voices. They raise three points they claim counter our conclusion. We take these in turn.

First, County points to comments it made in the administrative proceedings before the BIA and NIGC involving

the EA. These comments are attached as an appendix to the EIR. In those comments, County (1) noted that it (as a jurisdiction) "violates the state and federal ambient air quality standard for the criteria pollutant ozone"; (2) stated that the air quality discussion should indicate adoption and compliance "with standards no less stringent than federal and state air quality standards"; and (3) noted that it "is classified as nonattainment for ozone . . .; therefore, the impact of this operation on long-term attainment status should be determined." However, although the EIR incorporated the EA, these comments were made in a different administrative proceeding to a different lead agency on a different environmental document and concerned a different air quality analytical method (County concedes these comments were made in the context of a general conformity analysis rather than the transportation conformity approach to traffic-based air quality impacts the EIR employed).

Second, County contends that Caltrans untimely raised the exhaustion argument. Several courts have concluded (this one apparently not among them) that the failure to exhaust an administrative remedy is a jurisdictional issue that may be raised at any time. (See *Hood, supra,* 65 Cal.App.4th at p. 441, and cases cited therein.) In any event, it was the trial court's writ ruling that first raised the issue of whether the transportation conformity determination permitted attainment of the state ozone standard. Caltrans attempted to answer this issue in returns to the writ, the trial court deemed these answers insufficient in an order on the return, and Caltrans

appealed from that order (raising the exhaustion issue). This was timely. And it was proper. (*Barrett, supra,* 189 Cal.App.3d at p. 1601, fn. 4 [as stated previously, an order finding inadequate a respondent's return to peremptory writ of mandate is appealable].) This also dispenses with County's claim that Caltrans is improperly appealing from the trial court's original writ rulings rather than the subsequent order on the return. Nor did Caltrans invite any error. Caltrans did not invite the trial court to find the transportation conformity determination insufficient.

And last, County quotes a response from Caltrans to an air quality comment made during the EIR proceedings. Caltrans responded that it "applies its own guidelines uniformly across the state in order to ensure conformity with the SIP and with national and state air quality standards," and that "conformity with federal and state requirements is the important analytical question, and thus . . . state guidelines should direct this analysis." Two quick points are in order. One, these are comments from *Caltrans*, not from County or Voices. Two, Caltrans made these comments in explaining in part why it did not use the air quality standards set forth in the *local* Air Pollution District CEQA Guide.

3. *Segmenting Environmental Review*

Voices contends that Caltrans improperly segmented its environmental review of the interchange from that of the hotel and casino. This resulted in separate reviews that insufficiently accounted for the environmental effects of

the whole project. We disagree. First we discuss the legal sufficiency of the EIR's approach in reviewing the interchange and the hotel/casino. Then we tackle Voice's contentions regarding the EIR's alleged failure to address specific *combined* impacts of the interchange and the hotel/casino.

A. *Segmentation--Legal Sufficiency*

An EIR must consider a project's significant direct, indirect and cumulative impacts to the environment. (Pub. Resources Code, §§ 21061, 21100, 21065, 21083; see *Communities for a Better Environment, supra,* 103 Cal.App.4th at p. 114; CEQA Guidelines, §§ 15126.2, 15355, 15358.) "Where an individual project is a necessary precedent for action on a larger project, . . . with significant environmental effect, an EIR must address itself to the scope of the larger project." (CEQA Guidelines, § 15165.) And an EIR must include an analysis of the environmental effects of other action if that action (1) is a reasonably foreseeable consequence of the initial project, and (2) will likely change the scope or nature of the initial project or its environmental effects. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396 (*Laurel Heights*).)

The hotel and casino development is an indirect, clearly foreseeable consequence of the interchange that will change the scope and nature of the interchange's environmental effects. The interchange is a necessary precedent for the hotel and casino development. As such, the EIR must address itself to the

scope of that development. The question is whether the EIR has properly done so in a legal sense.

In answering this question, we must first briefly summarize Caltrans' legal authority over the hotel and casino development. Pursuant to the federal Indian Gaming Regulatory Act of 1988, authority over tribal gaming is exclusively federal; the only power the states have over this enterprise is a limited, delegated power to enter into tribal-state gaming compacts. (18 U.S.C. §§ 1166-1168; 25 U.S.C. § 2701 et seq.) California and the Tribe have entered into such a compact. (Gov. Code, § 12012.25, subd. (a)(44).) Here, the federal agency with authority to permit the proposed casino on the Rancheria, the NIGC, prepared and adopted an EA for the hotel and casino development, with mitigation measures, pursuant to the federal environmental quality law, NEPA; furthermore, the Tribe, under its compact with California, must make good faith efforts to mitigate any and all off-reservation environmental impacts. And, "[i]n deference to tribal sovereignty, neither the execution of a tribal-state gaming compact nor the on-reservation impacts of compliance with the terms of a tribal-state gaming compact shall be deemed to constitute a project for purposes of [CEQA]." (Gov. Code, § 12012.25, subd. (g).)

Pursuant to these jurisdictional limitations, Caltrans was foreclosed from preparing its own fully enforceable EIR concerning the hotel and casino. The on-reservation impacts of that development were properly the subject of federal environmental review. As we shall explain, Caltrans struck an

acceptable balance in the EIR between these jurisdictional limitations and the requirements of CEQA. The EIR did not improperly segment review of the interchange and the hotel/casino complex so as to shortchange environmental review of the whole development.

Direct environmental impacts are caused by the project and occur at the same time and place. (CEQA Guidelines, § 15358, subd. (a)(1).) Indirect environmental impacts are caused by the project and are later in time or farther removed in distance, but are still reasonably foreseeable. (*Id.,* subd. (a)(2).)

The environmental impacts from the hotel and casino generally fall within the definition of indirect impacts, and that is how Caltrans generally analyzed those impacts in the EIR. The EIR's project description is properly framed along these lines as well, stating: "[T]he proposed Shingle Springs Interchange Project . . . consists of the construction, operation and maintenance of an interchange in El Dorado County, California[,] to serve the existing Shingle Springs Rancheria . . . . The new interchange will provide open access to the Rancheria so that the property can be developed with uses consistent with the Tribe's Land Use Plan. The immediate plan for development on the Rancheria is a hotel and casino project that will be located in the southwestern portion of the Rancheria." (See *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193 [an accurate project description is essential for an informative and legally sufficient EIR]; Pub. Resources Code, § 21065

["'Project' means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ."].) (This also dispenses with Voice's contention that Caltrans improperly described the project in the EIR.)

After independently examining the NIGC's EA for the casino and hotel, Caltrans incorporated the EA into the EIR and eventually approved the environmental document as a joint EIR/EA with the BIA; BIA acted as the lead agency for NEPA review and Caltrans acted as the lead agency for CEQA review. Using the EA as a basis, Caltrans included a chapter in the EIR analyzing the environmental effects of the hotel and casino as indirect effects of the interchange. This chapter covered topography, geology, soils, seismicity, surface water and drainage, flooding, groundwater, water quality, air quality, biological resources, cultural resources, socioeconomic conditions, transportation, land use, public services, noise, hazardous materials, and visual resources.

Caltrans then took this analytical approach a step further for what it deemed the most pronounced impacts (principally off-reservation) from the interchange *and* the hotel/casino together. These impacts were likened to direct impacts. In the EIR, Caltrans analyzed the traffic-related transportation, noise, and air quality impacts of the interchange combined with the proposed hotel and casino as if they were a single project. The EIR's discussion of these impacts spanned nearly 80 pages, or almost a quarter, of the EIR's text.

Finally, the EIR devoted a separate chapter to analyzing the growth-inducing impacts of the interchange together with the hotel and casino, and another chapter to analyzing the cumulative impacts of the interchange that accounted for the casino and hotel.

Thus, the EIR evaluated generally the environmental impacts of the hotel and casino as indirect effects of the interchange project. The EIR analyzed specifically the most pronounced impacts (principally off-reservation) resulting from the interchange and the hotel/casino together (traffic-related transportation, noise and air quality impacts) as if those impacts were direct effects of the interchange combined with the hotel/casino. And the EIR examined the growth-inducing and cumulative impacts of the interchange and the hotel/casino. In this way, Caltrans' EIR properly considered the indirect, the direct, and the cumulative impacts of the interchange and hotel/casino. As the trial court noted, this "minimized the risk attendant upon project segmentation: a full assessment of the combined and cumulative environmental effects of the interchange and the hotel and casino was prepared and made available to inform decisionmaking and public participation in the project approval process."

Finally, the situation here is not like those presented in decisions that have found improper segmentation, such as *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151 and *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994)

27 Cal.App.4th 713. In *Citizens Assn. for Sensible Development*, the lead agency approved a proposed shopping center by dividing two related portions of the project--a general plan amendment and a tentative tract map approval--into two projects. The lead agency then environmentally reviewed the "two projects" separately and adopted separate negative declarations (no EIR required) for each. (*Citizens Assn. for Sensible Development, supra,* 172 Cal.App.3d at pp. 165-166.) In *San Joaquin Raptor*, the EIR for a residential development that also required a sewer system expansion contained no analysis of their combined environmental effects, either as two severable projects or as one project. For example, the EIR stated the development project would consume only 11 acres of prime farmland, never mentioning that the sewer expansion would take another 12 acres of such farmland. (*San Joaquin Raptor, supra,* 27 Cal.App.4th at p. 733.)

We conclude that Caltrans did not improperly segment the review of the interchange from that of the hotel and casino under CEQA law. We now turn to more factual-based segmentation issues.

B. *Segmentation--Specific "Combined" Impacts*

i. Water quality

Voices contends the EIR failed to address the combined increase in drainage-related impervious surfaces from both the casino/hotel and the interchange. We disagree.

The EIR, relying on the EA, notes that the casino and hotel will create 29 acres of impervious surfaces. The drainage and

water quality impacts from these surfaces, states the EIR, will be reduced to less than significant effects from the following mitigation measures imposed in the EA: an on-site detention basin; 100-year-storm surface drainage pipes; and a series of oil/grease/sediment traps. The interchange itself, states the EIR, will add only 2.27 acres of impervious surface and 1.75 acres of other altered surfaces (slopes, fill areas, graded swales, etc.). The EIR concludes that the interchange will present no cumulative drainage impacts in light of existing culverts and specified drainage mitigation measures. The EIR in this respect stands in contrast to the one described just above in *San Joaquin Raptor.*

Voices also claims the EIR failed to address the impacts of a potential failure of the wastewater treatment system. But Caltrans, in its responses to EIR comments, explained why (too speculative).

We conclude the EIR adequately addresses these water quality contentions from the perspective of the interchange and the hotel and casino.

ii. *Soil erosion*

Voices argues that the EIR never considered the grading impacts of the casino and hotel. That is not true. The soils portion of the EIR was based on a "Geology, Soils and Seismicity Technical Study" that analyzed casino and hotel grading as an indirect effect of the interchange. The EIR itself stated, relying on this technical study: "Appendix G of the Final EA contains the geographic extent of grading proposed by the hotel

and casino project. . . . The [EA] concluded that the hotel and casino would result in a less-than-significant effect [regarding soils] given the fact that development will occur on relatively non-expansive soils; will comply with [the applicable] Grading, Erosion and Sediment Control Ordinance [and with the Uniform Building Code]; and will follow the construction specifications found in Appendix G of the Final EA."

Voices also claims the EIR failed to address the grading impacts of the casino and hotel together with the interchange. The grading impacts of the casino and hotel, as just noted, were set forth in the EA, which was incorporated into and discussed in the EIR. As also noted, those impacts were deemed less than significant given certain conditions and requirements. The EIR further noted that the grading and soil erosion impacts from the much smaller interchange portion encompassed essentially the construction of the interchange's proposed on- and off-ramps. And those impacts were reduced to less than significant pursuant to certain required standards (grading ordinances, building codes, Caltrans' standards). This is sufficient analysis for EIR informational purposes.

iii. *Hazardous materials*

Voices asserts that the EIR's finding that the project site contains serpentine rock which may release asbestos (if crushed) cannot be squared with the incorporated EA's finding (stated in the EIR) that the project site contains no hazardous materials "contamination."

This assertion fails for two reasons. First, as a matter of semantics, "contamination" is the state of being contaminated, a condition the project site is not in. Second, and more importantly, the EIR and the incorporated EA both recognize this asbestos potential from serpentine rock and impose measures to reduce these potential effects to less than significant.

iv. *Noise*

Voices raises three contentions as to noise.

First, Voices contends the EIR's noise analysis did not include the casino and hotel. The EIR states that the existing noise environment is dominated by Highway 50 traffic, so the EIR analyzed the traffic-related noise effects of the interchange and the hotel/casino without a distinction being made between them (since the casino development will comprise nearly all of the interchange's traffic volume). The EIR concludes that the increases in traffic noise levels will be 1 to 4 dBA higher than present peak hour traffic noise levels, and these increases are less than the threshold for a substantial noise increase, which is set at 12 dBA. The EIR also notes from the incorporated EA that the hotel and casino will generate relatively minor nontraffic noise that has been mitigated to insignificance through siting and shielding requirements, design specifications, and construction standards.

Second, Voices challenges the EIR's methodology for the noise analysis. Voices argues that the analysis ignores all but four of the noise modeling site locations, as well as shifts

in traffic volumes and levels of service. But Voices concedes in its brief that the EIR's noise assessment measured four locations near the interchange and predicted noise levels at 10 potential receivers nearby. This methodology seems appropriate for analyzing the noise from the interchange and the hotel/casino in a traffic-dominated noise environment. (See *Greenebaum, supra,* 153 Cal.App.3d at pp. 412-413 [agency discretion to choose methodology].)

Finally, Voices complains that the EIR failed to identify noise standards from County's General Plan. Only standards from "applicable" general plans need be discussed in an EIR, and Voices does not seriously dispute Caltrans' claim that the general plan standards are inapplicable here. (CEQA Guidelines, § 15125, subd. (d).) Moreover, Voices does not challenge the threshold of significance used by the EIR--the 12 dBA threshold.

v. *Aesthetics*

Voices contends the EIR failed to address the visual impacts of the interchange and the hotel/casino together, as well as the issue of light pollution.

The EIR addresses the visual impacts of the interchange and the hotel/casino. These two basic structures occupy distinct visual settings that do not lend themselves to collective visual analysis; the interchange is on a freeway and the casino development is located behind, and nestled into, an existing wooded hillside away from the freeway.

As for light pollution, the Tribe, as a matter of comity, has obligated itself to have the hotel and casino conform to the

relevant County ordinances regarding outdoor lighting, including County Ordinance No. 17.14.170. Through this conformance, the character of the night sky should be minimally impacted, and even then for only a few hundred feet with the range of the hotel/casino lighting.

vi. *Biological resources*

Voices claims that the EIR addresses the impacts of the interchange on biological resources without considering such impacts from the much larger disturbance (nearly 10-fold) of the hotel and casino. We disagree.

The EIR, relying on the EA, discussed the impacts to biological resources from the hotel and casino. The topics covered included wetlands/jurisdictional waters, special status species, and nesting raptors. The EIR noted the mitigation measures for these resources. The EIR also discussed the impacts to biological resources from the interchange. As noted in the EA, a Natural Environment Study covering biological resources was developed for Caltrans' consideration in reviewing the interchange project. In the EIR, Caltrans adopted the mitigation measures recommended in this study; these mitigation measures were consistent with those in the incorporated EA.

vii. *Growth-inducing impacts*

Voices complains that the EIR ignored the combined development pressures of the interchange and the hotel/casino. Voices claims the EIR ignored the casino's placement into a rural-residential setting, downplayed the potential for additional nearby commercial development with its attendant

socioeconomic effects, failed to account for the impacts from 1,500 casino employees, and failed to consider the socioeconomic impacts on South Lake Tahoe. We disagree.

The EIR devotes a chapter, albeit a small one, to growth-inducing impacts from the interchange together with the hotel/casino. In that chapter, the EIR acknowledges that the interchange site is located in a rural, large-parcel residential area nine miles west of Placerville. The chapter continues. The interchange is being constructed for a single purpose: to provide unrestricted access to the Rancheria, which in turn will allow development of a hotel and casino complex. The interchange is designed to provide access only to and from the Rancheria, without any engineering way to "ramp off" to neighboring communities. Off-Rancheria development will not be facilitated by the interchange. Growth-inducing impacts from the hotel and casino comprise a growth in jobs (1,500 employees) and possibly in housing demand. The EIR details the area's sufficient capacity to handle this demand. The EIR also addresses the socioeconomic character of the surrounding area, including South Lake Tahoe, concluding that the project will not affect or impede planned economic growth (which County will still control), divide any neighborhoods, disrupt community cohesion, or displace any people or housing.

4. Interchange-Specific Impacts

Voices claims the EIR inadequately analyzed what Voices has termed "interchange-specific" impacts. These comprise traffic, growth-inducing, and air quality impacts. We have previously

resolved the issues that Voices raises concerning the growth-inducing and air quality impacts.

As for traffic impacts, Voices raises two points.

First, Voices claims the EIR understated the number of car trips generated by the interchange (and thus the hotel/casino), allowing Caltrans to conclude that the project's air emissions would fall "just below" de minimis thresholds (i.e., the regional "emissions budgets" discussed above in the air quality conformity analysis). We note initially that this claim rests on a faulty premise. As discussed above in our section on Analysis Of Air Quality Impacts (§ 2), it was not simply the interchange project's air emissions that fell within the regional emissions budgets (thresholds) for ROG and NOx, it was the interchange project *combined with* all other existing and planned transportation projects in the Sacramento region that did so. The interchange project's specific air emissions regarding ROG and NOx were never disclosed and analyzed, but must be, as we have concluded.

Caltrans has adequately defended its method of determining the trip generation rates. Caltrans used two approaches: an Urban Systems Marketing Study and an analysis of trip generation characteristics at five northern California Indian gaming casinos. The trip generation figures derived from these two approaches were then validated by trip generation studies involving Indian hotel-casinos in San Diego County and Minnesota, and by two studies using information from a well-recognized reference entity on this subject, the Institute of

Transportation Engineers. This choice of method was within Caltrans' discretion, so long as it provided an adequate analysis. (*Greenebaum, supra,* 153 Cal.App.3d at pp. 412-413.) The adequacy of this choice and analysis is perhaps best illustrated by the fact that both Voices and County, throughout their briefs, rely on Caltrans' trip generation estimates for the interchange of between 2.8 and 3.5 million trips (annually) to support their arguments.

Second, Voices is mistaken that the EIR erroneously omitted analysis of potential cumulative impacts on local roads and Highway 50 more than two miles west and five miles east of the interchange site. At County's request, the final EIR evaluated all local roads and Highway 50 in the County along which the project is predicted to increase existing traffic volumes by two percent or more. Nor did the EIR, as Voices asserts, ignore the project's impacts to already highly congested segments of Highway 50 near the Sacramento/El Dorado county line. The EIR projected the future cumulative daily traffic volumes for the Highway 50 segment between the county line and El Dorado Hills Boulevard/Latrobe Road for the year 2022, noted that this segment was anticipated to operate at a deficient level of service (LOS) of "F" without the project, and also noted that the project would increase this projected daily volume by 3.1 percent. The EIR considered this increase to be a significant impact that could be mitigated to less than significant through the following mitigation measure: pursuant to section 10.8 of the Tribal-State Compact (covering

off-reservation impacts), the Tribe will contribute a fair share contribution to future master planned improvements for this highway segment as identified by Caltrans and County.

5. *Environmental Setting*

Voices contends the EIR inadequately described the environmental setting as to certain aspects involving traffic, noise, biological resources, and water quality. We disagree.

"An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time . . . environmental analysis is commenced, from both a local and regional perspective. *This environmental setting* will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." (CEQA Guidelines, § 15125, subd. (a), italics added.)

As for traffic, Voices first claims that the EIR failed to specifically identify the freeway segments presently operating at a low LOS. The EIR's environmental setting discussion for traffic and its traffic analysis does specify the existing LOS's for relevant freeway segments (Highway 50 in the vicinity of the interchange, locally and regionally), and these LOS's are, at worst, at "D" (the lower LOS of "E" is still considered acceptable). Voices also complains that the EIR ignored segments of Highway 50 that are already projected to operate at LOS "F" without the project. That is not true. The EIR identifies the one segment of Highway 50 projected to operate at LOS "F" in 2022 with or without the project (county line to El

Dorado Hill Boulevard/Latrobe Road), and specifies the projected increase in the daily volume of traffic for this segment from the project (3.1 percent), as well as a mitigation measure to alleviate this problem (tribal fair share contribution).

As for noise, Voices claims the EIR's discussion of environmental setting for noise focused only on locations near the interchange, avoiding other segments of the county road network that would also suffer noise impacts. The concept of environmental setting describes the physical environmental conditions "in the *vicinity* of the project." (CEQA Guidelines, § 15125, subd. (a), italics added.) According to the EIR, the "existing noise environment is dominated by traffic on Highway 50." The EIR assessed existing noise levels by measuring traffic noise at four locations and predicting (extrapolating) such noise at 10 others. Many of these predicted noise levels were at residential locations--that is, sensitive noise receptors some distance from the interchange and casino complex. Furthermore, the traffic to and from the interchange/hotel-casino will almost wholly use the interchange and Highway 50, rather than local roads.

As for biological resources, Voices maintains the EIR did not discuss the wildlife or habitats that might be affected by the project but that currently exist outside the project's boundaries. We are unsure what Voices is asserting here in the context of environmental setting. In its discussion of the environmental setting regarding biological resources, the EIR discusses the various habitats of the project site and immediate

area (oak woodlands/chaparral, annual grasslands, riparian) and the wildlife that use these habitats. The wildlife and habitats currently existing in the vicinity of the project site are essentially the same as those at the project site. The EIR adequately sets the setting.

Finally, as for water quality, Voices contends the EIR failed to address the *current* water quality conditions of the project site's *intermittent* drainages or nearby creeks. The emphasized words demonstrate the contradictory nature of Voices' contention. Not surprisingly, the EIR states that no water quality data exist for the intermittent and ephemeral drainages and creeks on the project site. In its environmental setting discussion on water quality, the EIR does describe the types of pollution comprising highway storm runoff, their average runoff concentrations, and their primary sources.

6. *Project Alternatives*

Voices contends the EIR failed to consider a reasonable range of alternatives. The EIR considered the required "no project" alternative, along with some alternative interchange designs. (See CEQA Guidelines, § 15126.6, subd. (e)(1).) Voices claims the EIR should have considered another location for the interchange, another design for it, another access route such as a frontage road from an existing interchange, and the development of a smaller hotel and casino that does not require the extent of access provided by the interchange. We find merit in Voices' last claim.

An EIR must consider a range of reasonable alternatives to the project which (1) meet most of the project's basic objectives; (2) avoid or substantially lessen one or more of the project's significant environmental effects; and (3) may be "'feasibly accomplished in a successful manner'" considering the economic, environmental, legal, social and technological factors involved. (*Citizens of Goleta Valley, supra,* 52 Cal.3d at p. 566; *Laurel Heights, supra,* 47 Cal.3d at p. 400; CEQA Guidelines, §§ 15126.6, subds. (a), (c), 15364.) The range of alternatives that must be discussed and their level of analysis are subject to a "rule of reason." (*Laurel Heights, supra,* 47 Cal.3d at p. 407; CEQA Guidelines, § 15126.6, subd. (f).) "'Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned.'" (*Village Laguna, supra,* 134 Cal.App.3d at p. 1029, quoting *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 910.) Nevertheless, as our state high court has stated, "[t]he core of an EIR is the mitigation and alternatives sections." (*Citizens of Goleta Valley, supra,* 52 Cal.3d at p. 564.) Finally, an EIR should briefly explain why any alternatives were rejected as infeasible. (CEQA Guidelines, § 15126.6, subd. (c).)

As for the issue of another location, the alternatives procedure worked as envisioned. Placing the hotel and casino south of Highway 50 or entirely away from the site were rejected

because a northern placement served the project’s basic goal of providing direct access to the Rancheria for economic development purposes, while offering numerous environmental advantages (reduced noise, traffic, air, visual and growth-inducing impacts).

As for the issue of interchange design, the EIR analyzed a “diamond” interchange design and two related variations as alternatives to the “flyover” design chosen. Voices is concerned about the “unsightly” flyover design, but the architectural renderings of the flyover, compared to the diamond, provide substantial evidence supporting Caltrans’ decision to adopt the flyover proposal as aesthetically superior. Moreover, the diamond option presented growth-inducing impacts--from potential future connections--that the flyover proposal did not.

As for the issue of frontage road access from existing interchanges, the EIR properly explained why this alternative was infeasible. (See CEQA Guidelines, § 15126.6, subd. (c).) The EIR explained that this alternative would require the acquisition of existing private properties, including residential properties, owned by project opponents; this presented a difficult condemnation process.

That brings us to the alternative of a smaller hotel and casino. As presently envisioned, the hotel and casino complex would occupy 44 acres of the 160-acre Rancheria, employ about 1,500 persons, and include a 238,500 square-foot casino, a five-level, 250-room, 143,000 square-foot hotel, and parking to

accommodate 3,000 cars (including a five-level parking structure). Neither the EIR, nor the EA that the EIR incorporated, considered the alternative of a smaller hotel and casino. The EIR did not even touch on this issue. The EA's only "reduced intensity alternative" consisted of a 104,000 square-foot shopping center, with 347 parking stalls; this alternative was rejected as financially unable to meet the interchange costs necessary to develop the Rancheria economically.

In its briefing, Caltrans claims the EIR did not have to consider the smaller hotel-casino alternative, explaining in total: "The casino is not part of this project [i.e., interchange] and Caltrans does not have any jurisdiction over the Tribe or its on-reservation activities. CEQA defines 'feasible' as 'capable of being accomplished in a successful manner . . . taking into account . . . legal [. . .] factors.' [(]CEQA Guideline[s, §] 15364.[)] Infeasible alternatives should not be analyzed. [Citations.] Caltrans cannot legally prevent the Tribe from developing a casino, so that is not a 'feasible' alternative under CEQA, and it should not be analyzed."

Caltrans cannot rely solely on this legal blanket to insulate itself from considering the alternative of a smaller hotel and casino. In considering whether an EIR had discussed a legally acceptable range of alternatives to a proposed coastal resort hotel, our state Supreme Court explained in *Citizens of Goleta Valley* that "jurisdictional borders are simply a factor

to be taken into account and do not establish an ironclad limit on the scope of reasonable alternatives. . . . [I]t is clear that the [lead agency] did not reject [the outside-jurisdiction alternative] solely because [that alternative] was no longer within the [agency's] planning jurisdiction; [it was] also shown that the site was not feasible because it had soil erosion [and size] problems . . . . We also recognize that many large-scale projects may call for the approval of one or more local agencies; we do not mean to suggest that the only discussion of alternatives required in an EIR would be those relating to the particular decisions that each local agency is empowered to take." (*Citizens of Goleta Valley, supra,* 52 Cal.3d at p. 575, fn. 7.) In short, alternatives may not be rejected for consideration "*merely* because" they are beyond an agency's authority. (Bass et al., CEQA Deskbook (2d ed. 1999) p. 112, italics added; see also *Environmental Defense Fund, Inc. v. Corps of Engineers* (5th Cir. 1974) 492 F.2d 1123, 1135 [construing NEPA's provision on alternatives as *not* limiting an agency to considering only those alternatives that the agency can adopt or put into effect or are within its regulatory control].)

Caltrans' bald assertion, for purposes of considering size alternatives, that the hotel and casino is not part of the interchange project ignores the position Caltrans took with respect to the segmentation issue discussed above. There, Caltrans reasonably recognized that the hotel/casino and the interchange were essentially one and the same regarding their

impacts on traffic, air quality and noise, and Caltrans also properly examined the other environmental impacts from the hotel/casino as indirect, reasonably foreseeable effects of the interchange. It is a simple fact that the development of the hotel and casino is effectively foreclosed without the direct access provided by the interchange. As the court in *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325 noted in a related context, construction of a road and sewer project on undeveloped land "cannot be considered in isolation from the development it presages." (*Id.* at p. 1336.) The "sole reason to construct the road and sewer project is to provide a catalyst for further development in the immediate area"; consequently, the EIR had to evaluate the forms and extent of the most probable future development resulting from the road and sewer project. (*Id.* at pp. 1337-1338.)

Finally, Caltrans' feasibility reasoning with respect to size alternatives is couched exclusively in terms of preventing the Tribe from developing a casino *at all*. The reasonable alternative at issue here is simply a *smaller* hotel and casino.[4]

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[4] At oral argument, Caltrans claimed that a discussion of the alternative of a smaller hotel-casino project was not warranted in the EIR because that project had no significant environmental effects. The hotel-casino had no significant environmental effects only because the EA had imposed various mitigation measures upon it. In this respect, the point of an EIR, as an informational document, is to discuss mitigation measures *and* reasonable alternatives to the project so a *fully informed* decision can be made regarding the alleviation of the project's environmental impacts. (See *Village Laguna, supra,* 134 Cal.App.3d at p. 1029 [what is required in an EIR is "'the

Pursuant to the rule of reason, then, the alternative of a smaller hotel and casino falls within the range of reasonable alternatives to warrant consideration and discussion in the EIR. As noted, neither the EIR nor the incorporated EA mention, let alone discuss, this alternative. In the context of large development projects, the relevant cases on this topic state that "what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned" (*Village Laguna, supra,* 134 Cal.App.3d at p. 1029); the discussion of alternatives must "represent enough of a variation to allow informed decisionmaking" (*Mann v. Community Redevelopment Agency* (1991) 233 Cal.App.3d 1143, 1151 (*Mann*); in short, the discussion must be "'sufficient to satisfy the informational goal of CEQA[]'" (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 714 (*Sequoyah*).)

All three of these decisions, in applying these legal standards to the facts before them, found that their respective EIRs had adequately discussed alternatives. In *Village Laguna*, the proposed project was the development of 20,000 dwelling units; the EIR analyzed alternative developments of 7,500, 10,000 and 25,000 units. (*Village Laguna, supra,* 134 Cal.App.3d at p. 1028.) In *Mann*, the EIR analyzed a large commercial project's alternatives that consisted of an office/food court

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production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned'"].)

project, a research and development project, and an increased retail square footage project; the office/food court project was similar in scope and function to another alternative that was claimed should have been included in the EIR. (*Mann, supra,* 233 Cal.App.3d at pp. 1147, 1149.) And in *Sequoyah*, the proposed project was a 46-unit development; the EIR analyzed alternative developments of 36, 45 and 63 units. (*Sequoyah, supra,* 23 Cal.App.4th at pp. 709-710.)

In contrast to *Village Laguna, Mann,* and *Sequoyah,* the EIR and the incorporated EA make no mention of a smaller hotel and casino. The only mention of a different-sized project is found in the EA, its so-called "reduced intensity alternative." But that alternative is a shopping center on tribal land that is about one-quarter the size of the proposed hotel and casino. We conclude that the discussion of alternatives in the EIR, including the incorporated EA, does not "represent enough of a variation to allow informed decisionmaking" (*Mann, supra,* 233 Cal.App.3d at p. 1151); and there has not been "'the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned'" (*Village Laguna, supra,* 134 Cal.App.3d at p. 1029). The EIR must consider and discuss the alternative(s) of a smaller hotel and casino complex.

7. *Consistency With An Adopted General Plan*

Briefly, Voices contends that the EIR failed to examine the interchange and casino project's consistency with an adopted general plan, and relied on an invalid plan. We disagree.

The foundation for this argument is that the 1996 County General Plan referenced by the EIR was invalidated pursuant to a trial court judgment for failing to specify impacts that planned residential growth would have on traffic, water supplies, and a rural quality of life.

As for the consistency point, an EIR "shall discuss any inconsistencies between the proposed project and *applicable* general plans." (CEQA Guidelines, § 15125, subd. (d), italics added.) To the extent the County's 1996 General Plan has been invalidated, it is inapplicable. Furthermore, the interchange/hotel-casino project is located entirely on tribal, federal and state land and is consistent with the applicable land use plans and controls--the Tribe's land use plan and the Highway 50 right-of-way plan for transportation facilities and maintenance.

As for the issue about relying on an invalid general plan, Voices points to two references in the EIR of the 1996 County General Plan: one involving the cumulative development setting (partly based on development anticipated under that general plan); and one involving the model used for the cumulative traffic volumes (the model established in that general plan). The EIR also noted in the cumulative setting context that this general plan was being revised and that the revisions to date

did not include any substantial changes in relevant land use designations. As to these two references, the EIR was consistent with the best available general plan information, and Voices has not substantively disputed those references.

Nor is the situation here like that in *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, upon which Voices relies. In *County of Amador,* this court concluded that an ambitious water program to address significant population growth (and the program's accompanying EIR) could not be approved before a general plan addressing that growth had been adopted; to do otherwise would place "the proverbial cart before the horse." (*Id.* at pp. 940, 949-950.) Here the interchange/hotel-casino project does not depend on the fundamental "'charter for future development'" as envisioned in a county general plan, as was the situation in *County of Amador.* (See *id.* at p. 949.) We deal with an interchange/hotel-casino project that is entirely on noncounty property, almost wholly on tribal land, and in line with applicable land use plans.

8. *Public Participation*

Voices claims that Caltrans inadequately responded to public comments, inadequately provided notice of public meetings, and inadequately made available certain documents for public review.

As for the issue of responses to public comments, we note generally that the public's comments and Caltrans' responses to those comments--involving just the final EIR/EA--total over

400 pages of administrative record, and these responses are quite detailed.

Voices' more specific point on the issue of responses involves the subject of segmenting the interchange and the casino, as discussed above. Voices claims that Caltrans refused to respond to comments on the casino's impacts. Evidence showed that a Caltrans representative apparently stated at a project meeting that Caltrans did not want to respond to comments regarding on-site land use. Nevertheless, as discussed above, Caltrans, in the EIR, evaluated generally the environmental effects of the hotel and casino as indirect effects of the interchange project; analyzed specifically the most pronounced effects resulting from a combination of the interchange and the hotel/casino (traffic-related transportation, noise, air quality) as if those effects were direct effects of the project taken as a whole; and examined the growth-inducing and cumulative impacts of the interchange and the hotel/casino. In this way, the EIR covered the indirect, the direct, and the cumulative impacts of the interchange and hotel/casino. Caltrans explained this approach in its responses to comments and responded specifically to its analysis of these impacts.

As for the issue of inadequately noticing public meetings on the project, the scores of detailed public comments received on the project belie this claim. For example, in the spring of 2001, Caltrans held a series of three well-publicized public workshops as part of the process that actually developed the proposed project. The number of people attending these

workshops totaled about 340 (although many people may have attended more than one workshop), and the number of comment cards received totaled 110. The administrative record shows that Caltrans complied with the EIR procedure governing public review and comment on the EIR. This procedure included noticed public hearings on the project at which the public could comment in person, or after which the public could comment in writing. To the extent Voices complains about the public participation process involving the drafting of the EA, that is a matter to be addressed in the corresponding federal lawsuit concerning the EA.

Finally, as for the issue of specific documents unavailable for review, Voices centers its claim on one document--the Urban Systems Marketing Study. This study evaluated the number of car trips that would have continued on to South Lake Tahoe but for the Tribe's casino. This study can be made available for public review when Caltrans discloses and analyzes the project-specific ROG and NOx levels and air quality impacts from the interchange and hotel/casino.

Voices also claims that Caltrans violated CEQA by placing the EIR's incorporated documents in a nonproject county--Sacramento--thereby thwarting public review. (See CEQA Guidelines, § 15150, subd. (b) ["The EIR . . . shall state where the incorporated documents will be available for inspection. At a minimum, the incorporated document shall be made available to the public in an office of the lead agency in the county where the project would be carried out or in one or

more public buildings such as county offices or public libraries if the lead agency does not have an office in the county"].) The record appears to be in conflict on this point. In the EIR, Caltrans stated that an incorporated traffic study could be reviewed at the Caltrans District 3 office in Sacramento; nothing was said about review in El Dorado County. In a response to a public comment, Caltrans stated that all of the incorporated technical studies (including traffic) were available for review at its office and also at two public libraries within El Dorado County. We simply remind Caltrans of its duty regarding public access to incorporated documents, as set forth in CEQA Guidelines section 15150, subdivision (b).

DISPOSITION

In appeal No. C046372, the judgment is reversed to the extent it upholds the adequacy of the EIR in the following two respects: first, the analysis of the traffic-based air quality impacts from the ozone precursors ROG and NOx to the extent that analysis is based exclusively on the regional transportation conformity approach; and second, the analysis of alternatives that failed to evaluate the alternative of a smaller casino and hotel complex. To be sufficient, the EIR will have to disclose and analyze what the interchange/hotel-casino's specific traffic-based ROG and NOx emissions (or estimates) are, what their contributions to the regional emissions budgets are, and whether these emissions and contributions are significant (for example, in comparison to other existing or planned projects

within the transportation conformity analysis). The EIR must also consider and analyze the alternative, or alternatives, of a smaller hotel and casino complex. The matter is remanded to the trial court for it to issue a peremptory writ of mandate consistent with this disposition.

In appeal No. C048141, the order on further return and that portion of the judgment relating to that order--i.e., whether the regional transportation conformity approach encompassed the attainment of the state ozone standard--are reversed and the peremptory writ of mandate is discharged.

In all other respects, the judgment is affirmed.

Each party shall pay its own costs on appeal.

DAVIS, J.

We concur:

BLEASE, Acting P.J.

HULL, J.